ORIGINAL

NOTICE OF APPEAL FROM THE OHIO BOARD OF TAX APPEALS

In the Supreme Court of Ohio

Navistar, Inc., f/k/a International Truck and Engine Corporation,	:	Case No. 14-0140
Appellant,	:	
v.	:	Appeal from the Ohio Board of Tax Appeals
Richard A. Levin, Tax Commissioner of Ohio,	:	
Appellee.	:	BTA Case No. 2010-575

FILED/RECEIVED BOARD OF TAX APPEALS 2014 JAN 27 PM 12:39

NOTICE OF APPEAL OF APPELLANT NAVISTAR, INC.

Maryann B. Gall (0011812)
COUNSEL OF RECORD
230 West Street, Suite 700
Columbus OH 43215
Telephone: (614) 947-5199
mbgall@mbgalltax.com

Laura A. Kulwicki (0039547)
Vorys, Sater, Seymour and Pease LLP
106 S. Main Street, Suite 1100
Akron, OH 44308
Telephone: (330) 208-1035
Facsimile: (330) 208-1060
lakulwicki@vorys.com

Steven L. Smiseck (0061615)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
Columbus, Ohio 43216-1008
Telephone: (614) 464-5438
Facsimile: (614) 719-4622
slsmiseck@vorys.com

Counsel for Appellant
Navistar, Inc.

Mike DeWine (0009181)
Attorney General of Ohio
Barton A. Hubbard (0023141)
Assistant Attorney General
Office of the Attorney General
Taxation Section, 25th Floor
Rhodes Tower
30 East Broad Street
Columbus, OH 43215
Telephone: (614) 466-2941
BHubbard@ag.state.oh.us

Counsel for Appellee
Tax Commissioner of Ohio

FILED
JAN 27 2014
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT NAVISTAR, INC.

Appellant Navistar, Inc., f/k/a/ International Truck and Engine Corporation ("Navistar") hereby gives notice of its appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from the Decision and Order ("Decision") of the Board of Tax Appeals ("Board"), journalized on December 31, 2013, in *Navistar, Inc. v. Richard A. Levin, Tax Commissioner of Ohio*, being BTA Case No. 2010-575. A true copy of the Decision being appealed is attached hereto and incorporated herein by reference.

INTRODUCTION

The Decision erroneously denies an Ohio manufacturer with over a century of tax compliance, tax payments and economic contribution to this state the benefit of a credit which the General Assembly provided for and clearly intended it to receive. Navistar has been manufacturing trucks at its plant in Springfield, Ohio since 1902, employing generations of Ohioans in the process. Through good economic times and bad, Navistar never turned its back on Ohio. Yet, the Board completely ignored the plain language of the statute, denying Navistar a credit to which it is lawfully entitled.

The statute at issue, R.C. 5751.53, grants longtime Ohio franchise taxpayers like Navistar a commercial activity tax ("CAT") credit for unused net operating loss carryforwards and other deferred tax assets ("NOLs") that would have otherwise been available to reduce Ohio franchise taxes, had the franchise tax not been replaced in 2005 by the CAT. Recognizing that the state's transition to the CAT would result in loss of the financial value of the NOLs that had been built up over time, the General Assembly established the CAT credit in R.C. 5751.53 for qualifying taxpayers with large NOLs to use against their future CAT liability.

There is no dispute that when Ohio's longstanding corporate franchise tax was being replaced by the CAT, the Commissioner worked with a coalition of Ohio manufacturers to respond to their concern about what would happen to the large amounts of NOLs that they had built up over many years, but which would now become worthless under the new CAT. The uncontroverted testimony established that the Commissioner worked closely with the manufacturers and came to an agreement on both the concept and the language of what became Ohio Revised Code 5751.53. At that time, the Commissioner prepared projections of the revenue impact resulting from the new CAT credit. The 20-year analysis prepared by the Commissioner budgeted for an amount that included a credit for Navistar.

The credit at issue is a $27 million credit to be taken over 20 years. However, the net result of the Decision is to deny Navistar <u>any credit at all.</u> The sole reason rests with the fact that Navistar subsequently restated its 2004 financial statements in December 2007 and as a result, changed the valuation allowance used to predict the value of the NOLs for financial reporting purposes. But this is irrelevant under the statute. Under the plain language of R.C. 5751.53, the valuation allowance that must be used to calculate the CAT credit is fixed by law to a "snapshot" point in time. There is no authority – either in the language of the statute, in the case law, or anywhere else in Ohio law – that allows the Commissioner to re-calculate the credit amount based on later changes to the valuation allowance.

The Board is bound to apply the statute exactly as it was written, and exactly as it was intended. Inasmuch as the Board failed to do this, its Decision denying Navistar its CAT credit must be set aside in its entirety.

Navistar complains of the following errors in the Decision:

1. The Decision is unreasonable and unlawful because Navistar proved that it satisfied each statutory element and all required formalities set forth in R.C. 5751.53, and thus cannot lawfully be denied the CAT credit for its unused NOLs as provided by law. As such, the Board's inquiry should have ceased.

   a. The sole basis for denying the credit was the change to Navistar's valuation allowance in the 2007 restatement financial statements. The uncontroverted evidence established that the valuation allowance that Navistar used to calculate its credit in the statutory report was that which was "on its books and records on the last day of its taxable year ended in 2004," as required by R.C. 5751.53. There is no statutory authority to use any other valuation allowance.

   b. The evidence established that the valuation allowance that Navistar used in the report was based on its "books, records and all other information" which it "maintains and uses to prepare and issue its financial statements in accordance with generally accepted accounting principles" (GAAP"), as required by R.C. 5751.53, The statute ties the financial statements to a date certain. Navistar used the valuation allowance that was reported in the certified 2004 financial statements that it filed with the U.S. Securities and Exchange Commission on February 15, 2005, which had been audited by its longtime outside auditors and certified as compliant with GAAP at that time.

c. The Decision is against the manifest weight of the evidence. As such, the Board erred in concluding that Navistar "failed to demonstrate that the audit, findings and adjustment made by the Tax Commissioner were either faulty or incorrect."

2. The Decision is unreasonable and unlawful because R.C. 5751.53 is clear on its face, yet the Board failed to properly apply R.C. 5751.53 as written.

a. The plain language of R.C. 5751.53 contains a clear statutory directive that the Board ignored. R.C. 5751.53(A)(6)(b) and (8) unambiguously states that the CAT credit must be calculated using the valuation allowance that was "shown on [Navistar's] books and records on the last day of its taxable year ending in 2004. . . . " As is universally the case with any statute of limitation, R.C. 5751.53 establishes a date certain with no exceptions. The Decision, which permitted the Commissioner to re-calculate Navistar's credit using the restated valuation allowance in the December 10, 2007 restatement, ignores the plain language of the statute and is therefore unreasonable and unlawful.

b. The Decision is unreasonable and unlawful because it ignores this Court's fundamental, black-letter principles of statutory construction; namely, that an unambiguous statute is to be applied, not interpreted. The Decision is erroneous and unlawful because it impermissibly enlarges the scope of the statute beyond its clear terms. *See, e.g. Roxane Laboratories, inc. v. Tracy* (1996) 75 Ohio St. 3d 125, 127; *Sears v. Weimer* (1944), 143 Ohio St. 312 at syllabus paragraph 5.

c. The Board erred as a matter of law because it applied the wrong statutory standard. Namely, the Board erred because it concluded that the Commissioner could adjust Navistar's credit using the subsequent December 2007 valuation allowance and not the valuation allowance that was "shown on its books and records on the last day of its taxable year ending in 2004," as required by R.C. 5751.53 (A)(6)(b). The Board therefore failed to apply the correct statutory language.

d. The Board erred by failing to apply the statutory language as a whole. The Decision is unreasonable and unlawful because it impermissibly expands the statutory deadlines and timeframes beyond those established by the General Assembly in R.C. 5751.53.

3. The Decision, interpreting R.C. 5751.53 to allow the Commissioner to adjust Navistar's credit amount using a valuation allowance that did not appear on Navistar's books and records until well beyond the statutory cut-off date, is erroneous because R.C. 5751.53 does not provide for any post-closing amendments to the valuation allowance. This was because the Commissioner calculated the tax impact of the credit at the time it was proposed and ultimately enacted. Accordingly, taxpayers were prohibited from amending on a year-to-year basis so that the state had budgetary certainty.

4. The Decision, which concluded that the Commissioner was not required to use the valuation allowance in Navistar's original financial statement because R.C. 5751.53(A)(10) requires that such statements be "prepare[d] and issued . . . in

accordance with generally accepted accounting principles," is erroneous as a matter of law.

a. At the statutory date, Navistar's books and records had been certified as compliant with Generally Accepted Accounting Principles ("GAAP"), and the valuation allowance that Navistar used to prepare the statutory report complied with GAAP at that time.

b. The Board's interpretation of R.C. 5751.53(A)(10) is incorrect as a matter of law.

c. The Board erred in relying on *Shook National Corp. v. Tracy* (Dec. 23, 1992), BTA No. 1990-X-1596, an unreported corporate franchise tax decision. The Board's 1992 decision in *Shook* is both factually and legally inapposite. The General Assembly adopted different standards for the CAT credit and thus *Shook* does not apply. There is no judicial authority addressing R.C. 5751.53 or valuation allowances for purposes of the CAT credit. Thus, this matter presents a case of first impression in Ohio.

5. The Decision is contrary to the General Assembly's legislative intent, which was to give a credit to those taxpayers that had a reasonable expectation of using the NOLs in the future because they had already valued the NOLs on their books before the credit was adopted.

6. The Decision is unreasonable and unlawful because the Commissioner's right to audit the credit, as set forth in R.C. 5751.53(D), does not include the right to look past the statutory deadline, substitute new accounting figures that were not on the books at the statutory reference point, and then deny the credit.

a. The Board erred as a matter of law in concluding that the Commissioner "is neither restricted with respect to the type nor timeframe of information which may be reviewed or considered as part of the audit undertaken, with the express authority granted him to adjust the amortizable amount in order to 'correct any errors found upon audit.'" (Decision at 6). R.C. 5751.53 contains clear deadlines beyond which neither the taxpayer nor the Commissioner may extend.

b. The Decision is contrary to law because there is no authority or mechanism under R.C. 5751.53 for the Commissioner to audit the "accuracy" of the valuation allowance amount itself.

7. The Board erred in concluding that Navistar "failed to demonstrate that the audit, findings and adjustment made by the Commissioner were either faulty or incorrect."

8. The Decision is contrary to the evidence. It is based on erroneous factual premises and is thus unreasonable and unlawful.

a. The Board erroneously concluded that the "result of restating its financial statements in accordance with generally accepted accounting principles served to reduce [Navistar's] net operating losses to zero." (Decision at 7). However, the uncontroverted evidence established that upon restatement, Navistar's losses grew significantly and as a result, its NOLs were larger than originally reported. If the Board's analysis is correct, then Navistar would be able to amend its CAT credit application to claim a larger credit.

b. The Decision is based on the erroneous premise that the restated valuation allowance eliminated Navistar's NOLs, and thus denying the CAT credit was necessary in order to "achieve a more accurate calculation of tax liability." (Decision at 7). The Board ignored the uncontroverted testimony that proved that the restated valuation allowance did not eliminate Navistar's NOLs or otherwise prevent the company from using them to reduce taxable income in any state or federal jurisdiction that allows it.

9. The Decision is contrary to R.C. 5751.53, as a matter of fact and a matter of law, because it is based on the erroneous premise that the restated valuation allowance was more "accurate" than the original valuation allowance used in Navistar's statutory credit report.

a. There is no accounting concept of "accuracy" as it relates to a valuation allowance, and there is nothing in the statute that requires the Commissioner or the taxpayer to use the "most accurate or up-to-date" valuation allowance, as the Commissioner's determination concludes. (Decision at 4). To the contrary, R.C. 5751.53(A)(6)(b) requires that the credit be calculated using the valuation allowance "that was "shown on [Navistar's] books and records on the last day of its taxable year ending in 2004. . . . " This statutory deadline is absolute.

b. The Decision is contrary to the evidence, which established that the original valuation allowance, in hindsight, proved to be a more "accurate" prediction than the valuation allowance in the restatement.

10. The Board erred as a matter of law in relying on a transmittal letter from a Navistar employee, and in failing to consider the full context of statements made in Navistar's subsequent filings with the U.S. Security and Exchange Commission. Neither Navistar nor the Commissioner has any authority to alter statutory requirements adopted by the General Assembly.

For all of the foregoing reasons, the Decision, upholding the Final Determination in which the Commissioner relied on the valuation allowance in Navistar's restated financial statements to reduce Navistar's credit to zero, is contrary to law as set forth in R.C. 5751.53. As a result, the Decision is unreasonable and unlawful and should be reversed. Navistar respectfully requests that final judgment be entered in its favor, affirming the full amortizable amount of the credit of $27,048,726 to be spread out over twenty years.

Respectfully submitted,

Maryann B. Gall /dh

Maryann B. Gall (0011812)
COUNSEL OF RECORD
230 West Street, Suite 700
Columbus OH 43215
Telephone: (614) 947-5199
mbgall@mbgalltax.com

Laura A. Kulwicki (0039547)
Vorys, Sater, Seymour and Pease LLP
106 S. Main Street, Suite 1100
Akron, OH 44308
Telephone: (330) 208-1035
Facsimile: (330) 208-1060
lakulwicki@vorys.com

Steven L. Smiseck (0061615)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
Columbus, Ohio 43216-1008
Telephone: (614) 464-5438
Facsimile: (614) 719-4622
slsmiseck@vorys.com

Counsel for Appellant
Navistar, Inc.

OHIO BOARD OF TAX APPEALS

Navistar, Inc.,[1]	)	CASE NO. 2010-575
Appellant,	)	(COMMERCIAL ACTIVITY TAX)
vs.	)	DECISION AND ORDER
Richard A. Levin, Tax Commissioner of Ohio,	)	
Appellee.	)	

APPEARANCES:

For the Appellant - Maryann B. Gall, Esq.[2]
230 West Street, Suite 700
Columbus, Ohio 43215

For the Appellee - Michael DeWine
Attorney General of Ohio
Barton A. Hubbard
Assistant Attorney General
State Office Tower-25th Floor
30 East Broad Street
Columbus, Ohio 43215

Entered DEC 31 2013

Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

Appellant appeals a decision of the Tax Commissioner in which he rejected appellant's claimed credit against its commercial activity tax ("CAT") liability beginning in tax year 2010. We consider this matter upon appellant's notice of appeal, the transcript certified by the commissioner pursuant to R.C. 5717.02, the record of the hearing convened before this board, and the written argument submitted on behalf of the parties.

---

[1] In its notice of appeal, appellant advised that it was formerly known as International Truck and Engine Company, having changed its name to Navistar, Inc. in 2008.

[2] Pursuant to Ohio Adm. Code 5717-1-03(C), notice is sent to lead counsel of record.

In considering an appeal taken from a final determination issued by the Tax Commissioner, it is appropriate to acknowledge certain fundamental aspects by which our review is to be conducted. "Absent a demonstration that the commissioner's findings are clearly unreasonable or unlawful, they are presumptively valid. Furthermore, it is error for the BTA to reverse the commissioner's determination when no competent and probative evidence is presented to show that the commissioner's determination is factually incorrect. ***" *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121, 124. (Citation omitted.) Accordingly, a taxpayer must rebut the aforementioned presumption and establish a clear right to the relief requested. As noted by the court in *Nusseibeh v. Zaino*, 98 Ohio St.3d 292, 2003-Ohio-855:

> "In *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213, 215, *** we stated that 'when an assessment is contested, the taxpayer has the burden "*** to show in what manner and to what extent ***" the commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect.' (Ellipses sic.) Id., quoting *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138, 141, ***." Id. at ¶10. (Parallel citations omitted.)

The present appeal involves the extent to which appellant may benefit from a credit applied against the CAT, a tax phased in by the Ohio General Assembly beginning in 2005 which, for many companies, served to replace the taxes imposed on personal property located and used in business in Ohio, see, generally, R.C. Chapter 5719, and the privilege of exercising a corporate franchise within the state. See, generally, R.C. 5733.01(G)(1) and (2). With respect to the former corporate franchise tax, businesses not having positive net income accumulated net operating losses which could be carried forward and deducted against future corporate franchise tax liability, recorded as a deferred tax asset on their financial statements.

Recognizing that the state's transition to the CAT would result in loss of the financial value of the net operating loss carry-forward, the General Assembly established a one-time CAT credit that allowed a percentage conversion of this corporate franchise net operating loss tax credit to serve as a credit against future CAT liability. In order to take advantage of this conversion credit, a qualifying taxpayer, i.e., one with $50 million in unused franchise net operating loss carryforward, was required to file a report prior to July 1, 2006 disclosing the value of its deferred tax assets as of its taxable year ending in 2004 which, with certain specific adjustments, was referred to as the "amortizable amount."[3] In allowing for this credit, the statute required that the amortizable amount be calculated using the taxpayer's books and records as reflected on the last day of its taxable year ending in 2004. See R.C. 5751.53(A)(6) and (8). R.C. 5751.53(A)(10) defines "books and records" to mean "the qualifying taxpayer's books, records, and all other information, all of which the qualifying taxpayer maintains and uses to prepare and issue its financial statements in accordance with generally accepted

---

[3] R.C. 5751.53(A)(9) defines "amortizable amount," as follows:

> "'Amortizable amount' means:
>
> "(a) If the qualifying taxpayer's other net deferred tax items apportioned to this state is equal to or greater than zero, eight per cent of the sum of the qualifying taxpayer's disallowed Ohio net operating loss carryforward and the qualifying taxpayer's other net deferred tax items apportioned to this state;
>
> "(b) If the amount of the qualifying taxpayer's other net deferred tax items apportioned to this state is less than zero and if the absolute value of the amount of qualifying taxpayer's other net deferred tax items apportioned to this state is less than the qualifying taxpayer's disallowed net operating loss, eight per cent of the difference between the qualifying taxpayer's disallowed net operating loss carryforward and the absolute value of the qualifying taxpayer's other net deferred tax items apportioned to this state;
>
> "(c) If the amount of the qualifying taxpayer's other net deferred tax items apportioned to this state is less than zero and if the absolute value of the amount of qualifying taxpayer's other net deferred tax items apportioned to this state is

accounting principles." Following submission of the aforementioned report, the Tax Commissioner was accorded until June 30, 2010 to "audit the accuracy of the amortizable amount available to each taxpayer that will claim the credit, and adjust the amortizable amount or, if appropriate, issue any assessment or final determination, as applicable, necessary to correct any errors found upon audit." R.C. 5751.53(D). Once approved, use of the credit is then spread out over a period extending from calendar years 2010 through 2030.

In this instance, appellant submitted the required report in June 2006 claiming an amortizable amount of $27,048,726 which was reviewed and ultimately reduced by the Tax Commissioner to zero due to appellant's subsequent restatement of its financial statements. The commissioner explained, in pertinent part, in his final determination as follows:

> "Information in the file indicates that the Navistar International Corporation, the parent of the taxpayer in this case, issued restated financial statements, Form 10-K/A, in December 2007. These restated financial statements revised the valuation allowance to one hundred percent as it relates to the taxpayer's disallowed Ohio net operating loss carryforwards and other net deferred tax items apportioned to Ohio that are reflected as net deferred tax assets in its restated financial statements with respect to its financial statements for years ending October 31, 2004 and October 31, 2005.
>
> "***
>
> "Under the above statutory language[, i.e., R.C. 5751.53(A)(10)], the taxpayer's revised financial statements are the best financial statements available pursuant to generally accepted accounting principles, and therefore should be used to determine if a credit is available. ***
>
> "In the instant case, when Navistar adjusted its financial statements via its revised Form 10-K/A, these revised financial statements became the most up-to-date and accurate financial statements for

Footnote contd.

equal to or greater than the qualifying taxpayer's disallowed net operating loss, zero."

> Navistar under generally accepted accounting principles, and Navistar was bound by these records ***. Although the taxpayer's representative argues for the use of the prior, superseded financial statements rather than the corrected and revised financial statements, Ohio law dictates that the corrected financial statements be used. The taxpayer's representative failed to show that the prior, superseded financial statements that it wishes to use are more accurate than the revised financial statements.
>
> "As stated above, the taxpayer, in its revised financial statements took a valuation allowance equal to one hundred percent of its disallowed Ohio net operating loss carryforwards and net deferred tax assets allocated to Ohio. As a result of this revision to the financial statements, there is no disallowed Ohio net operating loss carryforward for which to take the CAT credit against.
>
> "Therefore, pursuant to R.C. 5751.53(D), the Tax Commissioner hereby adjusts the amortizable amount, as defined in R.C. 5751.53(A)(9), in accordance with the audit conducted by the Tax Commissioner's agents, to zero." S.T. 1-3.

From this determination, appellant appealed to this board, arguing that its originally submitted amortizable amount should be accepted since it complied with the statutory conditions set forth in R.C. 5751.53. Appellant insists that the amounts which it was required to use in preparing its report and to calculate the amortizable amount were those which appeared on its books and records at the close of its taxable year ending in 2004 and that there existed no statutory provision for the commissioner to extend the deadline to which qualifying taxpayers were required to adhere in filing the required report. While not disputing that it restated its financial statements for its taxable year ending in 2004, appellant insists that since this was not completed until almost eighteen months after the required election, it properly complied with the statutory provisions and the commissioner is without authority to disallow its claimed credit based upon its restated financial statements.

We agree with appellant's general characterization of this appeal, i.e., "[w]hile the statutory formula and calculations themselves [involving the CAT and the credit which appellant claims entitlement to] are technical and detailed, the issue in this case is quite straightforward." Appellant's brief at 3. Both the appellant and the commissioner were required to adhere to certain statutory deadlines, i.e., the former to file the requisite report prior to July 1, 2006, and the latter to audit the accuracy of the amount of the credit claimed, absent agreed extension, and issue any assessment or final determination by June 30, 2010. However, contrary to appellant's position, the commissioner is neither restricted with respect to the type nor timeframe of information which may be reviewed or considered as part of the audit undertaken, with the express authority granted him to adjust the amortizable amount in order to "correct *any errors* found upon audit." (Emphasis added.)

It is uncontested appellant undertook a comprehensive restatement of its financial statements so that they were ultimately revised in accordance with generally accepted accounting principles. Although appellant insists that the commissioner acted improperly by considering and relying upon its later restated financial statements, at the time of its filing of its amortizable amount report with the Department of Taxation, appellant's assistant director of tax expressly disclosed that it was "currently undergoing a restatement of its financial statements for the years 2002, 2003, 2004 and 2005. We believe that changes will occur to the 2002, 2003 and 2004 financial statements as part of this examination which will impact the return and report that we are filing today."[4] Tax Commissioner's Ex. 6.

[4] While we acknowledge the commissioner's reference to the existence of litigation between appellant and the accounting firm previously involved in the audit of its financial returns, such litigation and the allegations made by appellant therein need not serve as the basis upon which we decide this matter given the grant

Consistent with the disclosure made to the commissioner, appellant likewise apprised the Securities and Exchange Commission of the errors in its previously filed financial statements. See Appellant's Form 10-K, Joint Ex. G, at 107.[5] The result of restating its financial statements in accordance with generally accepted accounting principles served to reduce appellant's net operating losses to zero which is consistent with the action taken by the commissioner.

Appellant's arguments that the Tax Commissioner is restricted in his consideration to only its original financial statements, despite the admitted inaccuracies contained therein, is in contradiction with R.C. 5751.53(A)(10) which requires that such statements be "prepare[d] and issue[d] *** *in accordance with generally accepted accounting principles*." (Emphasis added.) Further support for this reasoning exists in our decision in *Shook Natl. Corp. v. Tracy* (Dec. 23, 1992), BTA No. 1990-X-1596, unreported, wherein we rejected the commissioner's overly restrictive view that the taxpayer was bound by erroneous entries contained in its books, resulting from a misapplication of generally accepted accounting principles, because they had not been discovered and restated until several years subsequent to the tax year in issue. Despite this delay, in order to achieve a more accurate calculation of tax liability, we held that the taxpayer was entitled to use its amended books which had been corrected to comport with generally accepted accounting principles. We find

Footnote contd.

provided by R.C. 5751.53(D). We also reject as unfounded appellant's argument that the commissioner's witness, Professor Ray Stephens, be found unqualified to offer an expert opinion regarding the accounting issues involved herein.

[5] In its Form 10-K, appellant stated, in part: "In addition, in previously issued financial statements, we had established a partial valuation allowance with respect to our net U.S. and Canadian deferred tax assets. We reassessed our need for a valuation allowance and determined that *we did not apply FASB Statement No. 109 properly* and that a full valuation allowance should be established for net U.S. and Canadian deferred tax

the same to be true in this instance. Cf. *Natl. Tube Co. v. Peck* (1953), 159 Ohio St. 98; *SHV N. Am. Corp. v. Tracy* (1994), 70 Ohio St.3d 395.

In the present case, the Tax Commissioner properly exercised the authority granted him by R.C. 5751.53(D) to "audit the accuracy of the amortizable amount available to each taxpayer that will claim the credit, and adjust the amortizable amount or, if appropriate, issue any assessment or final determination, as applicable, necessary to correct any errors found upon audit." The "errors" in issue were those preliminarily identified by appellant, confirmed by its filing with of restated financial statements, and ultimately served as the basis for the adjustment to the amortizable amount effected by the commissioner. We are therefore unable to conclude that appellant has demonstrated that the audit, findings, and adjustment made by the Tax Commissioner were either faulty or incorrect. Accordingly, it is the decision of the Board of Tax Appeals that the Tax Commissioner's final determination must be, and hereby is, affirmed.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

A.J. Groeber, Board Secretary

Footnote contd.

assets based on the weight of positive and negative evidence, particularly our recent history of operating losses." Id. (Emphasis added.)

PROOF OF SERVICE UPON OHIO BOARD OF TAX APPEALS

This is to certify that the Notice of Appeal of Navistar, Inc., f/k/a/ International Truck and Engine Corporation, was filed with the Ohio Board of Tax Appeals, State Office Tower, 30 East Broad Street, 24th Floor, Columbus, Ohio as evidenced by its date stamp as set forth hereon.

Maryann B. Gall /lh -

Maryann B. Gall (0011812)
Counsel for Appellant
Navistar, Inc

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Notice of Appeal of Appellant Navistar, Inc. was sent by certified U.S. mail and via hand-delivery to Appellee Joseph W. Testa, Tax Commissioner of Ohio, 30 East Broad Street, 22nd Floor, Columbus, Ohio 43215; and to counsel of record for Appellee Tax Commissioner, The Honorable Mike DeWine, Attorney General of Ohio and Barton A. Hubbard, Assistant Attorney General, State of Ohio, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215--3428, on this 27th day of January, 2014.

Steven L. Smiseck

Steven L. Smiseck
One of the Attorneys for Appellant
Navistar, Inc