

ORIGINAL

NOTICE OF APPEAL FROM THE OHIO BOARD OF TAX APPEALS

In the Supreme Court of Ohio

Teddy L. Wheeler,
In his Capacity of Pike County Auditor,

Appellee,

v.

Joseph W. Testa,
Tax Commissioner of Ohio,

Appellee,

And

Martin Marietta Energy Systems, Inc.,
a/k/a Lockheed Martin Energy Systems, Inc.

Appellant.

14-1362

Case No. _____

Appeal from the Ohio
Board of Tax Appeals

BTA Case No. 2012-2043

FILED/RECEIVED
BOARD OF TAX APPEALS
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NOTICE OF APPEAL OF APPELLANT MARTIN MARIETTA ENERGY SYSTEMS,
INC., a/k/a LOCKHEED MARTIN ENERGY SYSTEMS, INC.

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NOTICE OF APPEAL OF APPELLANT MARTIN MARIETTA ENERGY SYSTEMS, INC., a/k/a LOCKHEED MARTIN ENERGY SYSTEMS, INC.

Appellant, Martin Marietta Energy Systems, Inc., a/k/a Lockheed Martin Energy Systems, Inc. L.L. Bean, Inc. (“MMES/LMES”) 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 August 7, 2014, in *Teddy L. Wheeler in his Capacity as Pike County Auditor v. Joseph W. Testa, Tax Commissioner of Ohio*, et al., being BTA Case No. 2012-2043. A true copy of the Decision being appealed is attached hereto and incorporated by reference herein.

INTRODUCTION

In this case, the Pike County Auditor issued a Tangible Personal Property Tax Preliminary Assessment Certificate of Valuation for tax year 1993 for an amended value of \$158,512,000. The corresponding tax assessment was in the amount of \$23,244,789, including tax, penalty, and interest. MMES/LMES filed a testimony petition for reassessment, and upon review, the Tax Commissioner cancelled the assessment in its entirety. Upon appeal to the Ohio Board of Tax Appeals (“BTA”) the BTA affirmed the Tax Commissioner Final Determination, finding that Pike County and the Pike County Auditor were contractually foreclosed from making the assessment based upon an agreement between Pike County and the United States Department of Energy (“DOE”), which released the DOE and MMES/LMES from all potential tax liabilities, specifically personal property taxes, for various tax years including tax year 1993. As part of the compromise and settlement, Pike County received from the DOE certain payments known as payments-in-lieu-of-taxes (“PILOTs”), which Pike County accepted in full satisfaction

of any and all tax claims that could arguably be made against MMES/LMES. The BTA also found: 1) that MMES/LMES was not the “beneficial owner” of the property sought to be assessed; 2) that MMES/LMES could not be considered a “manufacturer” as contemplated by R.C. 5711.16, and therefore could not be assessed as a manufacturer; and 3) that the Pike County Auditor, as the Tax Commissioner’s deputy, did not issue the subject assessment within the ten-year limitation period provided by R.C. 5703.58. Although MMES/LMES does not contest the BTA’s decision with respect to any of its stated reasons for affirming the Commissioner, MMES/LMES raised before the BTA numerous dispositive legal and jurisdictional issues that should have been part of the BTA’s Decision.

ERRORS TO BE REVIEWED

MMES/LMES complains that the BTA acted unlawfully and unreasonably based upon the following errors in the Decision:

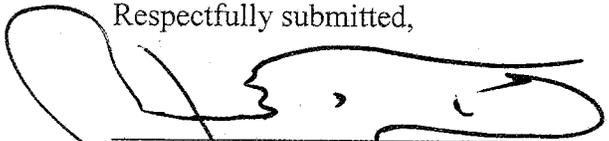
1. The BTA erred by failing to find that the underlying Assessment was issued in bad faith and that Pike County and the Pike County Auditor acted in bad faith in both their actions related to the PILOT agreements and in pursuing such an Assessment.
2. The BTA erred by failing to find that Pike County and the Pike County Auditor’s actions related to the Assessment were frivolous, for purposes of establishing a claim for redress under R.C. 5703.54.
3. The BTA erred by failing to order Pike County and the Pike County Auditor to reimburse MMES/LMES for all attorney fees and associated expenses related to MMES/LMES’ defense against the Assessment as a consequence of the frivolous and bad faith actions of Pike County and the Pike County Auditor.

4. The BTA erred by failing to find that the Assessment is void because the Auditor lacks the authority to issue assessments for property not listed in returns. See R.C. 5711.24, which provides in pertinent part that only “[t]he tax commissioner shall assess all taxable property, except property listed in returns which the county auditor is required to assess as his deputy, and shall list and assess all such property which is not returned for taxation ***.” See, also, R.C. 5711.11 and the “Guidelines for Filing Ohio Personal Property Tax Returns.”
5. The BTA erred by failing to find that the Assessment is contrary to the Tax Commissioner’s interpretation of Ohio law and binding instructions regarding the taxability of Government property for purposes of Ohio personal property tax. County Bulletin from Stanley J. Bowers, Tax Commissioner, No. 126, dated August 7, 1958.
6. The BTA erred by failing to find that the Assessment is contrary to the binding opinion of the Ohio Attorney General regarding the taxability of Government property for purposes of Ohio personal property tax. See 1958 Ohio Atty. Gen. Ops. 2471.
7. The BTA erred by failing to find that the Assessment is contrary the binding decision of the U.S. 6th Circuit Court of Appeals, finding that statutes similar to Ohio’s imposed an ad valorem tax rather than a privilege tax, precluding a government contractor’s liability for tangible personal property tax based upon its use of federally-owned property. See *Union Carbide Corp. v. Alexander* (1984), 679 S.W.2d 938, reviewing *U.S. v. Anderson County, Tenn.* (E.D. Tenn. 1983), 575 F.Supp. 574, affirmed (6th Circuit 1985), 761 F.2d 1169, cert. denied (1983), 474 U.S. 919, 106 S.Ct. 248, 88 L.Ed.2d 256.

8. The BTA erred by failing to find that the Assessment is barred by Ohio's long-standing tax policy treating as exempt the Government-owned personal property at issue. See, generally, *NLO, Inc. v. Limbach* (1993), 66 Ohio St.3d 389, *The Recording Devices, Inc. v. Bowers* (1963), 174 Ohio St. 518, and *Ormet Corp. v. Lindley* (1982), 69 Ohio St.2d 263.
9. The BTA erred by failing to find that the Assessment is contrary to the manifest intent of the General Assembly to not tax Government-owned tangible personal property under any circumstance. See R.C. 5705.61.
10. The BTA erred by failing to find that the Assessment erroneously considers property of the DOE to be used in business in Ohio. See R.C. 5701.08.
11. The BTA erred by failing to find that MMES/LMES' ownership of "records and files" does not qualify it as a "taxpayer" for Ohio's personal property tax. R.C. 5711.01(B).
12. The BTA erred by failing to find that the Assessment does not reflect the accounting books and records that MMES/LMES maintained in the ordinary course of its operations during the period in question, i.e., the period ending December 31, 1992, or thereafter. See R.C. 5711.18. Instead, the Assessment purportedly reflects the books and records of DOE, contrary to R.C. 5711.18.
13. The BTA erred by failing to find that the Assessment reflects an inaccurate computation of true values of personal property allegedly used in business in Ohio, and therefore allegedly taxable in Ohio. R.C. 5711.18.

14. The BTA erred by failing to apply by the doctrines of estoppel and laches as a bar to the Assessment.

Respectfully submitted,



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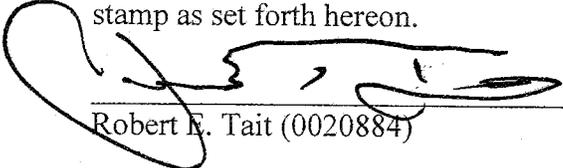
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*Legal Counsel for, Martin Marietta Energy Systems, Inc.,
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PROOF OF SERVICE UPON OHIO BOARD OF TAX APPEALS

This is to certify that the Notice of Appeal of Martin Marietta Energy Systems, Inc., a/k/a Lockheed Martin Energy Systems, Inc., 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.



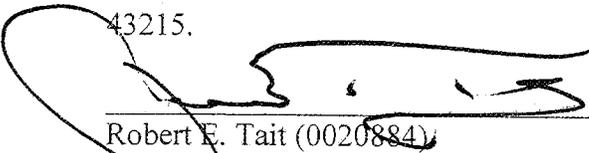
Robert E. Tait (0020884)

*Legal Counsel for Appellant
Martin Marietta Energy Systems, Inc.,
a/k/a Lockheed Martin Energy Systems, Inc.*

CERTIFICATE OF SERVICE

This is to certify that on this 8th day of August, 2014 a true copy of the foregoing Notice of Appeal of Appellant Martin Marietta Energy Systems, Inc., a/k/a Lockheed Martin Energy Systems, Inc., was sent by certified U.S. mail to Appellee Joseph W. Testa, Tax Commissioner of Ohio, 30 East Broad Street, 22nd Floor, Columbus, Ohio 43215; to counsel of record for Appellee Tax Commissioner, The Honorable Mike DeWine, Attorney General of Ohio and Daniel W. Fausey, Assistant Attorney General, State of Ohio, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3428; to Teddy L. Wheeler, Pike County Auditor, 230 Waverly Plaza, Suite 200, Waverly, Ohio 45690-1222; and to counsel for the Pike County Auditor, Kevin L. Shoemaker, Shoemaker & Howarth, LLP, 471 East Broad Street, Suite 2001, Columbus, Ohio

43215.



Robert E. Tait (0020884)

*Legal Counsel for Appellant
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a/k/a Lockheed Martin Energy Systems, Inc.*

OHIO BOARD OF TAX APPEALS

TEDDY L. WHEELER, IN HIS OFFICIAL
CAPACITY AS AUDITOR OF PIKE COUNTY,)
OHIO, (et. al.),)
Appellant(s),)
vs.)
JOSEPH W. TESTA, TAX COMMISSIONER OF)
OHIO, (et. al.),)
Appellee(s).

CASE NO(S). 2012-2043

(PERSONAL PROPERTY TAX)

DECISION AND ORDER

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Entered Thursday, August 7, 2014

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

This matter is considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above-named appellant ("Auditor") from a final determination of the Tax Commissioner wherein the commissioner cancelled the personal property tax assessment issued by appellant to appellee Martin Marietta Energy Systems, n/k/a Lockheed Martin Energy Systems, Inc. ("MM"), relating to tax year

1993. We make our determination based upon the notice of appeal, the statutory transcript ("S.T.") certified to this board by the Tax Commissioner, the record of this board's hearing ("H.R."), the parties' joint stipulations of fact ("Stip"), the depositions submitted in lieu of live testimony ("Dep."), and the written arguments of counsel.

There is a presumption that the findings of the Tax Commissioner are valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is therefore incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Kern v. Tracy* (1995), 72 Ohio St.3d 347; *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213. Where no competent and probative evidence is presented to this board by the appellant to show that the Tax Commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Kern*, supra; *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Alcan*, supra.

Through the notice of appeal, the Pike County Auditor contests the Tax Commissioner's cancellation of a personal property tax assessment issued by the auditor to MM based upon the value of tangible personal property located at the Portsmouth Gaseous Diffusion Plant ("PORTS"), a uranium enrichment plant. For the tax year in question, i.e., 1993, PORTS, and the equipment that is the subject of the instant assessment, were owned by the United States Department of Energy ("DOE"), "because of the extra hazardous nature of it that no contractor would build the facilities or have the capital investment for it." Nesteruk Dep. at 8-9; MM acted as the contract operator of PORTS that managed, operated and maintained the buildings and facilities at PORTS. Stip 1; Ex. 39.

Specifically, for tax year 1993, the Pike County Commissioners entered into an agreement with the DOE for payments in lieu of taxes ("PILOT agreement"). Such agreement, authorized under the Atomic Energy Act of 1946, i.e., 42 U.S.C. 2208, provided that "the County has requested financial assistance from DOE, and has stated that it will waive and release any claims for tax years 1992 through 1997 for taxes against DOE and its contractors on, with respect to, or measured by the value or use of Government-owned real and personal property." Auditor Ex. 20 at 1; MM Ex. 4 at 1. The agreement indicated that DOE's payment of \$175,546.83 would "constitute full satisfaction of any and all claims the County may have for taxes for tax years 1992 through 1997 against DOE and DOE's contractors, of any nature whatsoever, on, with respect to, or measured by the value or use of Government-owned real or personal property which is utilized in carrying on activities of DOE." Auditor Ex. 20 at 2; MM Ex. 4 at 2. Similar agreements were in effect for tax years 1952 through 1997. Stip 6. Thereafter, in December 2010, the auditor, although aware of the PILOT agreement in place for tax year 1993, issued a preliminary assessment certificate of valuation to MM for tax year 1993, resulting in a personal property delinquent tax liability of \$23,244,789. S.T. at 443-449. Upon MM's petition for reassessment, the commissioner took action, pursuant to R.C. 5711.31, to cancel such assessment issued by the auditor. For the reasons stated herein, we find that the subject assessment was properly cancelled.

At the outset, the auditor contends that the commissioner did not have the statutory authority to cancel the assessment in question. We disagree. Pursuant to R.C. 5703.05, generally, and R.C. 5711.31, more specifically, the commissioner could take whatever action was necessary to "correct" the assessment. Clearly, if the commissioner determines that an assessment has been issued by an auditor in error, the commissioner has the authority to cancel such assessment, i.e., to review the acts of his deputies, including county auditors as designated in R.C. 5711.11 and 5715.40, and take whatever action is necessary to correct any errors made, including cancellation.

Every taxpayer engaged in business in Ohio was required to annually file a personal property tax return with the county auditor of each county in which property used in the taxpayer's business was located. R.C. 5711.02. On that return, the taxpayer listed "all taxable property *** as to ownership or control, valuation, and taxing districts." R.C. 5711.03. A "taxpayer," was defined in R.C. 5711.01(B) as "any owner of taxable property *** and includes every person *** doing business in this state, or owning or having a beneficial interest in taxable personal property in this state ***."

Clearly, MM did not own the subject personal property, as title to it was retained by the DOE. MM also does not stand in the stead of an owner, by virtue of having a "beneficial interest" in the subject property, pursuant to R.C. 5711.01(B). In *Refreshment Service Co. v. Lindley* (1981), 67 Ohio St.2d 400, 403, the court "construe[d] the term 'beneficial interest' to include the interest of one who is in possession of all characteristics of ownership other than legal title of the taxable property. Such a definition prevents one from escaping the incidence of the personal property tax by transferring legal title to the taxable property while keeping the benefits of its ownership. The determination of whether a person has a 'beneficial interest' in an article of personal property requires an examination of the rights and privileges that person has in the property in question. If in fact this person is found to possess all the characteristics of ownership without having legal title to the property, then the person must be found to have a beneficial interest in the property and liable for any personal property tax assessed." Herein, all personal property at PORTS, including the uranium at the plant, was owned by the federal government and MM was not permitted to utilize any of it for its own purposes. The "DOE didn't want a comingling of contractor property, so it was excluded and none was provided." Nesteruk Dep. at 43. The property was physically "tagged" indicating it was owned by the federal government and records were maintained tracking its status. Unauthorized use of such equipment could have resulted in criminal penalties. Nesteruk Dep. at 18-21, 24; Donnelly Dep. at 11, 16, 18-19; Dayton Dep. at 11-12. The maintenance/repair/purchase of equipment was subject to DOE's approval, unless of such an insignificant, day-to-day nature that it was deemed unnecessary to obtain such consent. Dayton Dep. at 16; Donnelly Dep. at 30-32, 43.

Further, the DOE supervised, oversaw and controlled all operations of PORTS. Dayton Dep. at 17. Special clearances were required to be employed by PORTS. Donnelly Dep. at 11. "[H]ardly a week went by without DOE looking over our shoulders." Donnelly Dep. at 15. Language from the contract between MM and the DOE indicates that the DOE "directed" certain MM activities, while others were "subject to the control of DOE," and "[p]erformance of the work under *** [the] contract" was "subject to the technical direction of DOE *** Representatives." Donnelly Dep., Ex. A, at 11-12, 18. The DOE determined the specifications of production at PORTS. Donnelly Dep. at 17-18. MM primarily provided the skilled staff to work at PORTS. Nesteruk Dep. at 39. The DOE determined all of the sales/production necessary to meet customer needs, as MM did not participate in the marketing and sales efforts. Dayton Dep. at 13-14; Donnelly Dep. at 74. Accordingly, we conclude that MM did not have a "beneficial interest" in the subject personal property. While MM, of course, had its own business interests under the contract, those interests were limited by the terms of such contract which may have ceded the management of the day-to-day operations to MM, but retained the long term control over and authority for all decisions of any consequence in the DOE.

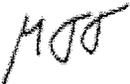
The auditor also contends that MM is subject to the personal property tax assessed by virtue of the provisions of R.C. 5711.16, as a manufacturer. That section specifically provides that "[a] person who purchases, receives, or holds personal property for the purpose of adding to its value by manufacturing, refining, rectifying, or combining different materials with a view of making a gain or profit by so doing is a manufacturer. *** A manufacturer shall also list all engines and machinery, and tools and implements, of every kind used, or designed to be used, in refining and manufacturing, and

owned or used by such manufacturer." The auditor cites *ATS Ohio, Inc. v. Tracy* (1996), 76 Ohio St.3d 297, in support of such proposition. In *ATS*, the court addressed ownership of "inventory in the process of manufacture." *Id.* at syllabus. In analyzing the provisions of R.C. 5711.16, the court held that "[t]he final sentence of the second paragraph states the rule for treatment of property other than inventory, including engines, machinery, tools, and implements on the tax return. Instead of taxing only the items of property from this category that are owned by the taxpayer, R.C. 5711.16 provides that tax must be paid on items from the category that are "owned or used by such manufacturer." *Id.* at 299-300. By virtue of MM's restricted relationship with the DOE and its personal property at PORTS, we conclude that MM is not a manufacturer, as contemplated by R.C. 5711.16, but that the DOE, who rendered ultimate control and supervision over PORTS, was the manufacturer. Therefore, MM was not properly assessed as a manufacturer.

In addition, beyond the foregoing, we find that the PILOT agreement, in effect for the tax year in question and actively negotiated by the auditor, himself, by its very terms, "preempted and foreclosed the Auditor's ability to issue any preliminary assessment certificate of valuation or accompanying assessment." *Comm. Reply Brief* at 1. Neither the commissioner nor this board has the statutory authority to void the PILOT agreement or alter or interpret its terms, and therefore, we conclude that the parties' have executed their obligations under the agreement, as written.

Finally, we question the propriety of the auditor's actions in assessing MM for tax year 1993, some seventeen years after the tax year in question. R.C. 5703.58 provides that no assessment shall be issued "after the expiration of ten years *** from the date the tax return or report was due when such amount was not reported and paid." The auditor, as the commissioner's designated deputy, pursuant to R.C. 5711.11 and 5715.40, issued the assessment in question, clearly outside of the ten year limitation.

Thus, based upon the foregoing, we have determined that the appellant auditor improperly assessed personal property tax against MM; MM did not own the personal property in question, nor was MM a manufacturer. Further, pursuant to the terms of a PILOT agreement, the county was precluded from assessing personal property tax against MM for the year in question. As such, we have determined that the commissioner appropriately cancelled the assessment in question. Accordingly, based upon our conclusions, we need not address any other contentions raised by the parties hereto. The final determination of the commissioner is hereby affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Mr. Johrendt		
Mr. Harbarger		

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