

ORIGINAL

AMENDED 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.

Case No. 14-1362

Appeal from the Ohio
Board of Tax Appeals

BTA Case No. 2012-2043

FILED
AUG 25 2014
BOARD OF TAX APPEALS
COLUMBUS, OHIO

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

Robert E. Tait (0020884) - Counsel of Record
Hilary J. Houston (0076846)
Steven L. Smiseck (0061615)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
PH: (614) 464-6341
Fax: (614) 719-4994
retait@vorys.com

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

Kevin L. Shoemaker (0017094)
Shoemaker & Howarth, LLP
471 East Broad Street, Suite 2001
Columbus, Ohio 43215
PH: (614) 469-0100
Fax: (614) 280-9675
tholloway@midohiolaw.com

*Counsel for Appellee, Teddy Wheeler
In his Capacity as Pike County Auditor*

FILED
AUG 25 2014
CLERK OF COURT
SUPREME COURT OF OHIO

Michael DeWine (009181)
Attorney General of Ohio
Daniel W. Fausey (0079928)
Office of the Attorney General
30 East Broad Street, 25th Floor
Columbus, Ohio 43215
PH: (614) 466-5967
Fax: (614) 466-8226
Daniel.Fausey@ohioattorneygeneral.gov

*Counsel for Appellee, Joseph Testa,
Ohio Tax Commissioner*

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 violates federal law in that it fails to adhere to the conditions the DOE requires for all PILOT payments, requirements that are based upon rules and regulations that are entitled to the full force of law and that, pursuant to the Supremacy Clause of the U.S. Constitution, pre-empt state law. U.S. Const., Art. VI, Cl. 2; 42 U.S.C. § 2208; DOE Order 2100.12A; R.C. 5715.45 and 5715.46.
5. 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.”
6. 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.
7. 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.
8. 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.

9. 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.
10. 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.
11. 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.
12. The BTA erred by failing to find that MMES/LMES' ownership of certain unrelated "records and files" does not qualify it as a "taxpayer" for Ohio's personal property tax. R.C. 5711.01(B).
13. 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.

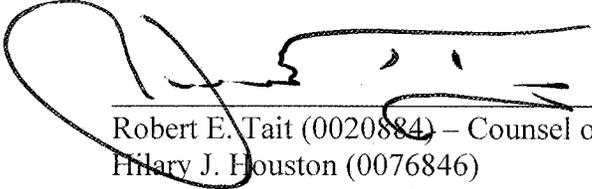
See R.C. 5711.18. Instead, the Assessment purportedly reflects the books and records of DOE, contrary to R.C. 5711.18.

14. 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.

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

16. The BTA erred in finding that the Final Determination was subject to an appeal to the Ohio Board of Tax Appeals under R.C. 5717.02. The cancellation of an assessment through a Final Determination is not subject to appeal. R.C. 5703.60(A)(2).

Respectfully submitted,

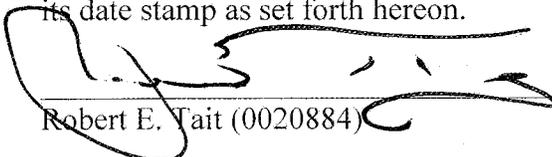


Robert E. Tait (0020884) – Counsel of Record
Hilary J. Houston (0076846)
Steven L. Smiseck (0061615)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
PH: (614) 464-6341
Fax (614) 719-4994
retait@vorys.com

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

PROOF OF SERVICE UPON OHIO BOARD OF TAX APPEALS

This is to certify that the Amended 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.

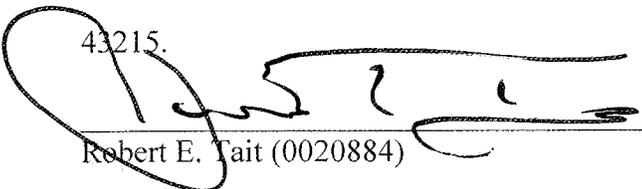

Robert E. Tait (0020884)

*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 25th day of August, 2014 a true copy of the foregoing Amended 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
Martin Marietta Energy Systems, Inc.,
a/k/a Lockheed Martin Energy Systems, Inc.*