

ORIGINAL

# In the Supreme Court of Ohio

Navistar, Inc., f/k/a International Truck  
and Engine Corporation,

Appellant,

v.

Richard A. Levin,  
Tax Commissioner of Ohio,

Appellee.

Case No. 2014-0140

Appeal from the Ohio  
Board of Tax Appeals

BTA Case No. 2010-575

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## MERIT BRIEF OF APPELLANT NAVISTAR, INC.

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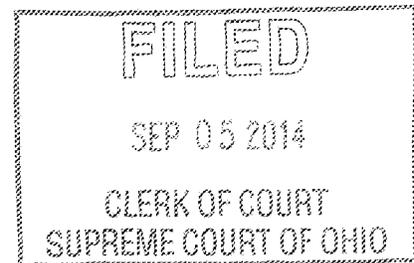
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**TABLE OF CONTENTS**

	PAGE
INTRODUCTION AND STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS .....	2
A.    Navistar’s Business .....	2
B.    Background .....	3
C.    The CAT credit was created by agreement among Ohio manufacturers, the Tax Commissioner and the General Assembly .....	4
D.    The CAT credit was a one-time only calculation as of the end of a manufacturer’s fiscal year.....	4
E.    Navistar’s CAT credit claim was timely filed .....	5
F.    The Tax Commissioner denied Navistar’s credit based on events occurring after the statutory deadline .....	6
G.    Navistar’s restatement effective December 2007 .....	7
H.    The valuation allowance did not eliminate Navistar’s NOLs. For accounting purposes only, it altered the forecasted future use of those NOLs.....	8
ARGUMENT.....	9

**PROPOSITION OF LAW No. 1:** R.C. 5751.53 expressly requires that the CAT credit be based upon Navistar’s books and records existing as of 2004 year-end as reflected in its report due by the filing deadline of June 30, 2006. The BTA erred as a matter of law by allowing the Tax Commissioner to rely upon the December 2007 restatement. The Tax Commissioner’s actions contradict the provisions of R.C. 5751.53 and are not authorized by the General Assembly..... 9

- A.    The plain language of R.C. 5751.53 establishes a “date certain” for calculating the CAT credit..... 10
  - i.    The CAT credit was to be calculated based upon financial information booked as of the end of fiscal year 2004..... 10
  - ii.   The CAT credit was to be based upon the report filed on or before June 30, 2006..... 10
  - iii.  The statutory directives must be applied as written..... 11

B.	Acting without statutory authorization, the Tax Commissioner artificially expanded the scope of his review to include financial statements not in existence as of the date specified.....	12
C.	The BTA’s decision to allow the Tax Commissioner to enlarge his review authority conflicts with its own precedent.....	15
	<b><u>PROPOSITION OF LAW NO. 2:</u></b> The BTA’s decision unlawfully fails to give effect to the entire statute. The decision is therefore not consistent with the statutory provisions.....	16
A.	The Tax Commissioner’s audit authority must be read consistent with the statutory deadlines.....	16
B.	The Tax Commissioner’s claimed audit authority is inconsistent with his own reading of the statutory deadlines.....	17
C.	The BTA’s decision and the Tax Commissioner’s claimed authority are inconsistent with the finality sought by R.C. 5751.53.....	19
	CONCLUSION.....	21
	CERTIFICATE OF SERVICE.....	22

## TABLE OF AUTHORITIES

	PAGE
<b><u>CASES</u></b>	
<i>Aluminum Co. of America v. Evatt</i> (Jan. 27, 1942), BTA No. 851, 35 Ohio L.Abs. 351 .....	15, 16
<i>Apex Powder Corp. v. Peck</i> , 162 Ohio St. 189 (1954) .....	13
<i>Bosher v. Euclid Tax Bd. of Review</i> , 99 Ohio St.3d 330, 2003-Ohio-3886 .....	11, 17
<i>Case Leasing &amp; Rental, Inc. v. Tracy</i> (June 30, 1998), BTA No. 1996-T-956 .....	15
<i>Cleveland Elec. Illum. Co. v. Cleveland</i> (1988), 37 Ohio St. 3d 50 .....	13
<i>Columbia Gas Transmission Corp. v. Levin</i> (2008), 117 Ohio St. 3d 122 .....	11
<i>Holiday Inns v. Limbach</i> (1990), 48 Ohio St. 3d 34 .....	13
<i>Provident Bank v. Wood</i> (1973), 36 Ohio St.2d 101 .....	11
<i>Richard v. Market Exchange Bank Co.</i> (1910), 81 Ohio St. 348 .....	17
<i>Roxane Laboratories, Inc. v. Tracy</i> , 75 Ohio St.3d 125 (1996) .....	11
<i>Sears v. Weimer</i> (1944), 143 Ohio St. 312 .....	11
<i>Slingluff v. Weaver</i> , 66 Ohio St. 621 (1902) .....	1, 13
<i>State ex rel. Foster v. Evatt</i> , 144 Ohio St. 65 (1944) .....	1, 13
<i>State ex rel. Lorain v. Stewart</i> , 87 Ohio St.3d 150 (1999) .....	13, 16
<i>State ex rel. Taraloca Land Co. v. Fawley</i> , 70 Ohio St.3d 441(1944) .....	13
<i>State of Ohio v. Krego</i> , 70 Ohio Misc. 14 (1981) .....	15
<i>State v. Moore</i> (1994), 99 Ohio App.3d 748, appeal dismissed, 72 Ohio St.3d 1526 .....	11
<i>Taber v. Ohio Dept. of Human Serv.</i> , 125 Ohio App.3d 742 (1998) .....	17
<i>Van Meter v. PUCO</i> , 165 Ohio St. 391 (1956) .....	13
<b><u>STATUTES</u></b>	
Ohio Adm. Code 5703-29-11(A) .....	7
R.C. 1.47 .....	16

R.C. 5751.02 ..... 3

R.C. 5751.53 ..... passim

R.C. 5751.53(A)..... 5

R.C. 5751.53(A)(6)..... 5

R.C. 5751.53(A)(6)(b) ..... 5, 10, 11

R.C. 5751.53(D)..... passim

**APPENDIX**

Navistar’s Date-Stamped Notice of Appeal to the Ohio Supreme Court ..... 1-21

BTA Decision and Order: *Navistar, Inc. v. Levin*,(Dec. 31, 2013), BTA No. 2010-575 ..... 22-29

R.C. 5751.53 ..... 30-34

Ohio Adm. Code 5703-29-11 ..... 35-36

*Aluminum Co. of America v. Evatt*, 35 Ohio L.Abs. 351 (1942)..... 37-end

## INTRODUCTION AND STATEMENT OF THE CASE

For more than a century, this Honorable Court has declared with a singular voice that the statutes of the General Assembly are to be applied as written; and, no agent of the state may add to, enlarge, supply, expand, extend, or improve the provisions of a statute to artificially alter the scope of his or her authority, or to otherwise meet a situation the General Assembly has not provided for. *Slingluff v. Weaver*, 66 Ohio St. 621 (1902); *State ex rel. Foster v. Evatt*, 144 Ohio St. 65 (1944), at paragraph 8 of the syllabus. Through this appeal, Navistar now must ask the Court to confirm and reiterate these fundamental principles.

The solitary issue that Navistar requests this Court to consider is whether the Tax Commissioner may ignore the date specified by the General Assembly as the date on which amounts are to be certified for purposes of calculating the Commercial Activity Tax (“CAT”) credit. R.C. 5751.53 sets forth a credit for net operating loss (“NOL”) carryforwards and other deferred tax assets in excess of \$50 million. The credit is based upon the accumulated carryforwards on the taxpayer’s books and records as of its taxable year ended 2004, which for Navistar was October 31, 2004. Per R.C. 5751.53, The Tax Commissioner required corporate taxpayers to file a simple form to claim the CAT credit. This form was to be filed no later than June 30, 2006. R.C. 5751.53(D).

Navistar claimed the CAT credit, meeting all procedural and substantive requirements by filing its report and all supporting documentation by the June 30, 2006 deadline. However, upon review, the Tax Commissioner denied Navistar’s CAT credit in its entirety. The Tax Commissioner based his determination upon financial statements not in existence as of the June 30, 2006 deadline. Navistar appealed to the Ohio Board of Tax Appeals (“BTA”), asserting that the Commissioner exceeded the scope of his authority to review Navistar’s CAT credit

report by ignoring the General Assembly's provision that the tax credit was to be based upon existing 2004 year-end information filed on or before June 30, 2006. The BTA affirmed the Tax Commissioner. The BTA reasoned that the Tax Commissioner "is neither restricted with respect to the type nor timeframe of information which may be reviewed or considered as part" of his review of the CAT credit claim. (Decision at 6; Appendix at 27. ).

For the reasons set forth below, the BTA erred in permitting the Tax Commissioner to consider financial statements not in existence as of the June 30, 2006 statutory deadline. The BTA incorrectly disregarded the express provisions of R.C. 5751.53, and, in so doing, allowed the Tax Commissioner to expand his authority beyond that prescribed by the General Assembly.

## **STATEMENT OF FACTS**

### **A. Navistar's Business.**

Navistar has been contributing to the state and local economy for over 100 years by manufacturing trucks at its plant in Springfield, Ohio, where it employs nearly 1,000 workers. (H.R. Vol. II at 277- 278; Supp. Vol. II at 461-462). Navistar, Inc., manufactures and distributes a full line of commercial trucks, buses, and military vehicles under the "International," "Navistar Defense," and "IC" brand names. (Jt. Ex.F. at 3; Supp. Vol. IV at 1168).

Navistar is a publicly-traded company that is required to file financial reports with the Securities and Exchange Commission ("SEC"). For many years, Navistar filed Ohio franchise tax returns on a combined basis with other affiliated entities until the franchise tax was

fully phased out in 2010.<sup>1</sup> When the CAT was adopted in 2005, it registered and has been filing returns and paying CAT ever since. (S.T.at 99-108; Supp. Vol. I at 103-112).

**B. Background.**

In 2005, the General Assembly undertook a complete overhaul of Ohio's business tax regime, including the phase-out of the Ohio franchise tax for most business entities. See, House Bill 66 ("H.B. 66"). In place of these business taxes, the General Assembly proposed the commercial activity tax ("CAT"), a low-rate, broad-based tax on gross receipts for the privilege of "doing business" in Ohio. See R.C. 5751.02. The proposed CAT presented several potential financial ramifications for the state and corporate taxpayers alike. One issue in particular generated anxiety for large Ohio manufacturers. These manufactures carried on their books significant amounts of unused net operating losses ("NOLs").

A NOL is a Federal Income Tax concept that allows a corporation to deduct losses against income. A NOL occurs when certain tax-deductible expenses exceed taxable income in a given year. This NOL can be carried forward and applied to future years' profit in order to reduce tax liability. For example, if a manufacturer experiences a negative net operating income in one year but earns a profit in the next year, the manufacturer may reduce its tax liability for the later year by applying the loss acquired in the first year.

Under Ohio's now-defunct franchise tax law, a taxpayer could deduct net operating losses to reduce its "net income" subject to the tax. If unused, the NOLs could be carried forward for a period of 15-20 years. Because NOLs could be carried forward and used to reduce taxable income in future years, NOLs have monetary value and are reported as assets on

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<sup>1</sup> "Navistar" also includes certain affiliated companies that were members of the company's Ohio combined franchise tax group for tax year 2005, and as such, are "qualifying taxpayers" for purpose of the credit. These affiliates are Navistar Financial Corporation, Harco Leasing Company, Inc. and International Diesel of Alabama.

the manufacturer's balance sheet and in its publicly reported financial statements. (H.R. II, at 281-284; Supp. Vol. II at 465-468). NOLs are especially important to manufacturers, which are subject to a cyclical market. Thus, the ability to carryforward NOLs from lean years to profitable years helps to balance the tax burden over the entire period.

The proposed CAT provided no deduction for NOLs. Manufacturers feared that they not only would lose the benefit of accumulated NOLs, but also that this would create a significant impact on their financial statements.

**C. The CAT credit was created by agreement among Ohio manufacturers, the Tax Commissioner and the General Assembly.**

As H.B. 66 was being considered, a small group of manufacturers approached the General Assembly and the Tax Commissioner to seek a solution to the loss of the franchise tax NOL deduction. The manufacturers wanted to retain as much of the benefit of their deferred tax assets as possible. The Tax Commissioner wanted certainty, both with respect to identifying the deferred assets (*i.e.*, establishing a specific time to measure the amount of deferred assets available for audit purposes) and with respect to the impact any of these assets would have on CAT collections (*i.e.*, the budgetary impact). (See, generally, H.R. III at 473-511; Supp. Vol. II at 657-695. See, also, Appellant's Ex. 46, 47, 49; Supp. Vol. IV at 1518, 1520, 1525). The parties worked hand-in-hand to resolve these issues. The result is what is commonly known as the "CAT credit."

**D. The CAT credit was a one-time only calculation as of the end of a manufacturer's fiscal year.**

With the enactment of H.B. 66, the CAT credit was codified into R.C. 5751.53. As jointly agreed among the manufacturers, the Tax Commissioner, and the General Assembly, the credit permitted a taxpayer with more than \$50 million in unused Ohio franchise tax net

operating loss carryforwards to make a one-time binding election to convert its NOLs in excess of \$50 million (plus its other deferred tax assets) into a credit against its future CAT liability. The amount of the credit is called the “amortizable amount.” Use of the credit is spread out over twenty years, with the taxpayer taking a portion of the “amortizable amount” each year as a credit against its CAT liability according to a statutorily-prescribed schedule. Here, there is no dispute that Navistar did the math correctly as required by the Tax Commissioner’s form.

As agreed, the amortizable amount that forms the basis of the credit was computed using NOL information reported on an original or amended 2005 Ohio franchise tax report filed before July 1, 2006, and other financial data (including any valuation allowance) shown on the taxpayer’s books and records on the last day of its taxable year ending in 2004. See R.C. 5751.53(A) and 5751.53(A)(6). To claim the credit, a corporate taxpayer had to file a report with the Tax Commissioner no later than June 30, 2006 (the “statutory deadline”). See R.C. 5751.53(D). Consequently, Ohio manufacturers were able to retain at least some of the benefit generated by their NOLs. The Tax Commissioner, in turn, had its certainty in that the credit was to be calculated as of a date certain (year-end 2004) and based entirely upon information submitted to the Tax Commissioner by June 30, 2006. This allowed the Tax Commissioner to include the impact of the credit in its revenue projections for the CAT. (See, H.R. III at 473-511; Supp. Vol. II at 657-695).

**E. Navistar’s CAT credit claim was timely filed.**

Navistar was one of fifty-five qualifying manufacturers that claimed the CAT credit by filing the required report by the June 30, 2006 statutory deadline. (Jt. Ex. J; Supp. Vol. IV at 1404). The Tax Commissioner agreed, and the BTA found, that Navistar’s claim form was filed in accordance with all substantive and procedural requirements. R.C. 5751.53(A)(6)(b)

provides that the disallowed Ohio net operating loss carryforward is to be based on the “books and records on the last day of [the] taxable year ending in 2004,” reduced by the related qualifying valuation allowance amount measured from the same documents on the same date. Navistar’s 2004 year ended on October 31, 2004. (H.R. II at 279; Supp. Vol. II at 463).

Navistar prepared its CAT credit report using information reflected in its original Form 10-K financial statement for fiscal year ending October 31, 2004, which had been filed with the SEC on February 15, 2005. (Joint Ex. F; Supp. Vol. IV at 1164). The financial statements reported net operating losses which were partially reduced by a valuation allowance. (Joint Ex. F; Supp. Vol. IV at 1164). Based upon this existing information, Navistar filed its report listing an amortizable amount of \$27,048,726 to be used as the basis for the CAT credit. (S.T. at 109; Supp. Vol. I at 113). The parties agree that there is no dispute as to the actual figures used by Navistar.

**F. The Tax Commissioner denied Navistar’s credit based on events occurring after the statutory deadline.**

R.C. 5751.53(D) provides that the Tax Commissioner “may, until June 30, 2010, 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.” As he had done with other corporate taxpayers, the Tax Commissioner reviewed Navistar’s CAT credit report. However, despite the fact that statute required the amortizable amount to be based upon the Navistar’s books and records existing as of 2004 year-end as reflected in its report due by the filing

deadline of June 30, 2006,<sup>2</sup> the Tax Commissioner determined that he had the authority to reduce Navistar's amortizable amount to zero to reflect subsequent changes to Navistar's financial statements – changes that did not exist on June 30, 2006. On appeal, the BTA affirmed the Tax Commissioner's unlawful extension of his authority because the BTA concluded that the Tax Commissioner could define the scope of his review in the absence of an express statutory restriction. (BTA Decision at 6; Appendix at 27).

**G. Navistar's restatement effective December 2007.**

The Tax Commissioner's decision to deny Navistar any CAT credit was based entirely upon a post-June 30, 2006 adjustment made to its 2004 year-end valuation allowance. Subsequent to the June 30, 2006 reporting deadline established by R.C. 5751.53(D), Navistar underwent a restatement of its 2003, 2004, and 2005 financial statements. A restatement is the revision and filing of a corporation's previous financial statements.<sup>3</sup> In Navistar's case, the corporation began to make revised journal entries in March of 2007, and ultimately filed an amended Form 10-K with the SEC on December 10, 2007. (H.R. Vol. II at 310 and 323; Supp. Vol. II at 494 and 508. Joint Ex. G.; Supp. Vol. III at 850). As a result, Navistar's valuation allowance as of October 31, 2004 was adjusted from a partial (62.5%) to a full (100%) valuation allowance. (H.R. II at 304; Supp. Vol. II at 488).

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<sup>2</sup> R.C. 5751.01(D) provides: "Not later than June 30, 2006, each qualifying taxpayer, consolidated elected taxpayer, or combined taxpayer that will claim for any year the credit allowed in divisions (B) and (C) of this section shall file with the tax commissioner a report setting forth the amortizable amount available to such taxpayer and all other related information that the commissioner, by rule, requires." See, also, Ohio Adm. Code 5703-29-11(A).

<sup>3</sup> The uncontroverted proof before the BTA was: "A restatement essentially means you started with an issued set of financial statements. And at any given point in time a company closes out the year or finishes out the year, it files its reports. When it goes through a restatement, it can't go back and reopen that year, so what it does is it appends that information from that point forward to then adjust the existing accounts and balances to a restated amount." (H.R. Vol. II at 304-305; Supp. Vol. II at 488-489).

**H. The valuation allowance did not eliminate Navistar's NOLs. For accounting purposes only, it altered the forecasted future use of those NOLs.**

The circumstance upon which the Tax Commissioner zeroed-out Navistar's amortizable amount was the adjustment made to Navistar's valuation allowance. A valuation allowance is a line item that offsets all or a portion of the value of a corporation's deferred tax assets (including NOLs) because the corporation has reason to believe that it will not be able to realize the actual value of those deferred assets. (H.R. II at 288; Supp. Vol. II at 472). A valuation allowance is an estimate that uses objective and subjective criteria based upon what the corporation believes, in its best judgment *at that point in time*, will occur in the future. *Id.* For example, if a manufacturer has \$5 million in NOLs on its books, it could apply the NOLs to its next \$5 million in earnings to decrease its tax liability. However, if the manufacturer does not expect profits in the next several years, or does not expect to earn \$5 million in the time before the NOLs would expire, the manufacturer may choose to not record the NOLs at full value, since it is more likely than not that it would be unable to take advantage of the full tax benefit.

Because it is in part based on future performance, a valuation allowance is little more than management's "prediction" of whether a company will be able to actually use its NOLs or other deferred assets in the future. Thus, a valuation allowance effective as of date certain may be changed multiple times upon review. See, generally, H.R. II at 315-420; Supp. Vol. II at 499-604). In fact, the valuation allowance is constantly under review. Whenever a corporation closes its books at the end of the month (or quarterly and yearly), the manufacturer's deferred tax assets change based upon the company's performance over that month. (See H.R. II at 288-289; Supp. Vol. II at 472-473). Because the manufacturer adjusts its deferred tax assets each month, the valuation allowance is modified correspondingly. This is why a valuation allowance is persuasive for only a date certain -- a single "snapshot" in time. Tomorrow's

valuation allowance will, by the very fact that a business continues to operate, fluctuate based upon the manufacturer's most recent activity. This is precisely why the General Assembly (with the Tax Commissioner's urging) mandated a point in time from which to measure the CAT credit, *i.e.*, the books and records existing as of 2004 year-end as reflected in its report due by the filing deadline of June 30, 2006.

Additionally, establishing a valuation allowance on a company's books does not mean that a company is actually limited in any way in using its NOLs in the future. (H.R. II at 317, 423-424; Supp. Vol. II at 501, 607-608). The valuation allowance is an accounting concept - a prediction of the likelihood of fixture value - used for financial reporting purposes while the actual use of the NOLs is limited only by controlling principles of federal or state tax law in a given jurisdiction. In fact, Navistar subsequently released nearly 1.4 billion dollars in valuation allowance to its U.S. deferred tax assets. (Appellant's Ex. 53; Supp. Vol. IV 1525). The release had the effect of reinstating Navistar's deferred tax assets to a level that confirmed the accuracy of the partial valuation allowance used in the CAT credit report filed in June of 2006. Navistar has since used all of its federal NOLs that existed at October 31, 2004, and much of the state NOLs as well, even though the Restatement had established a full valuation allowance against them. (H.R. II at 317-322; Supp. Vol. II at 501-506).

## ARGUMENT

**PROPOSITION OF LAW No. 1: R.C. 5751.53 expressly requires that the CAT credit be based upon Navistar's books and records existing as of 2004 year-end as reflected in its report due by the filing deadline of June 30, 2006. The BTA erred as a matter of law by allowing the Tax Commissioner to rely upon the December 2007 restatement. The Tax Commissioner's actions contradict the provisions of R.C. 5751.53 and are not authorized by the General Assembly.**

**A. The plain language of R.C. 5751.53 establishes a “date certain” for calculating the CAT credit.**

R.C. 5751.53 contains two express statutory directives that establish dates certain for the calculation of the CAT credit. The first controls the date upon which the credit is to be computed. The second sets forth the final date upon which supporting information must be submitted.

**i. The CAT credit was to be calculated based upon financial information booked as of the end of fiscal year 2004.**

R.C. 5751.53 requires both the manufacturer and the Tax Commissioner to predicate the computation of the credit on a date certain – the last day of the fiscal year ended 2004. R.C. 5751.53(A)(6)(b) specifies that the NOL carryforward amount shall be as “ \* \* \* *reflected on its books and records on the last day of its taxable year ending in 2004* \* \* \*.” R.C. 5751.53(A)(6)(b) further requires that the valuation allowance amount also shall be “ \* \* \* *as shown on its books and records on the last day of its taxable year ending in 2004*, with respect to the deferred tax asset relating to its Ohio net operating loss carryforward amount.” (Emphasis added.) This date is absolute. It is not subject to amendment or extension. For Navistar, this date was October 31, 2004.

**ii. The CAT credit was to be based upon the report filed on or before June 30, 2006.**

R.C. 5751.53(D) contains the second statutory directive. It provides, “*Not later than June 30, 2006*, each qualifying taxpayer \* \* \* shall file with the tax commissioner a report setting forth the amortizable amount available to such taxpayer \* \* \*.” (Emphasis added.) R.C. 5751.53(D) provides nothing that would permit a manufacturer to extend the June 30, 2006

deadline or otherwise request the ability to amend its report after the deadline. Navistar met the mandated deadline by filing its report on June 27, 2006. (S.T. at 117; Supp. Vol. I at 121).

**iii. The statutory directives must be applied as written.**

R.C. 5751.53(A)(6)(b) and 5751.53(D), taken together, provide in no uncertain terms that the CAT credit is to be based upon the books and records existing as of 2004 year-end as reflected in its report due by the filing deadline of June 30, 2006. There is no other statutory option for what is to be considered. Neither the BTA nor the Tax Commissioner adhered to the statutory language.

Ohio tribunals have consistently held that the “initial repository of legislative intent is the language of the statute.” *State v. Moore*, 99 Ohio App.3d 748 (1994), appeal dismissed, 72 Ohio St.3d 1526 (1994). See, also, *Bosher v. Euclid Tax Bd. of Review*, 99 Ohio St.3d 330, 2003-Ohio-3886, at ¶14, citing *Roxane Laboratories, Inc. v. Tracy*, 75 Ohio St.3d 125 (1996), *Provident Bank v. Wood*, 36 Ohio St.2d 101(1973), at 105-106; and, *Sears v. Weimer* (1944), 143 Ohio St. 312 at syllabus paragraph 5. Indeed, this Court has held that the “first rule of statutory construction is to look at the statute’s language to determine its meaning. If the statute conveys a clear, unequivocal, and definite meaning, interpretation comes to an end and the statute must be applied according to its terms.” *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St. 3d 122 (2008).

In the instant matter, the BTA had before it a statute that is clear, concise, and explicit in its language; yet, it chose to ignore the provisions laid down by the General Assembly. R.C. 5751.53 fixed a “snapshot” in time for the information that is to be used to calculate the amount of the credit. The plain language of the statute expressly required Navistar to calculate its credit using the valuation allowance that was on its books and records at a fixed point in time,

*i.e.*, the 2004 year-end. There is no other choice in the matter. It is undisputed that Navistar used the statutory reference point to calculate the credit. It is equally undisputed that the credit was based upon the books and records existing as of 2004 year-end as reflected in its report due by the filing deadline of June 30, 2006.

Similarly, the statute charges the Tax Commissioner with the authority to review the CAT credit report. Because the statute expresses that all CAT credit reports must be based on information in existence as of a date certain, the Tax Commissioner's review authority also is – absent an expressed exception – limited to reviewing the credit based upon that same “snapshot” in time. Nothing else makes sense; nothing else conforms to the express language of R.C. 5751.53. Yet, the BTA permitted the Tax Commissioner to recalculate Navistar's credit to zero using the later, December 2007, valuation allowance, clearly contravening the express terms of the statute. The BTA's action is unlawful and must be reversed.

**B. Acting without statutory authorization, the Tax Commissioner artificially expanded the scope of his review to include financial statements not in existence as of the date specified.**

There is nothing overly-complicated in the provisions at issue. R.C. 5751.53 creates a clear “bright line” date for determining the amounts to be used in calculating the credit and requires that the credit stand or fall based on the books as they exist at this “snapshot” in time. Ultimately, the General Assembly has set forth the method and the timelines to be used by the Commissioner in administering the CAT credit. Just as in any other case involving strict statutory limits, there is no authority to deviate from these dates. The Commissioner's attempt to use the December 2007 valuation allowance is similarly proscribed.

Ohio law manifests that there is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend, or improve the provision of a statute to

meet a situation not provided for. *State ex rel. Foster and Slingluff, supra; Apex Powder Corp. v. Peck*, 162 Ohio St. 189 (1954), 192 (one cannot “be reading into the statute words which the General Assembly did not put into the statute.”); *Van Meter v. PUCO*, 165 Ohio St. 391 (1956), (there is no power or authority to “add to legislation something which was not enacted as legislation by the General Assembly”). See, also, *Holiday Inns v. Limbach*, 48 Ohio St. 3d 34 (1990), (a court must give effect to the words used in the statute and “it is not the duty of this court to insert words not used”); and, *Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St. 3d 50 (1980), paragraph three of the syllabus.

Both the BTA and the Tax Commissioner have unreasonably and unlawfully extended the Commissioner’s audit authority in R.C. 5751.53 past the deadline. This is in contradistinction to the very principles of statutory construction this Court has set forth in *Slingluff, State ex rel. Foster*, and their progeny. Cf. *State ex rel. Lorain v. Stewart*, 87 Ohio St.3d 150 (1999), (holding that a county auditor’s authority is not “so expansive” as to authorize him to rewrite the law by essentially adding provisions to a statute that are not contained in the plain language thereof). Cf. *State ex rel. Taraloca Land Co. v. Fawley*, 70 Ohio St.3d 441(1944).

Assuming, *arguendo*, that the Court were to find the BTA’s interpretation of the Tax Commissioner’s statutory review power to be ongoing, the Tax Commissioner’s denial of Navistar’s CAT credit is still unreasonable in that it is unbalanced – geared only toward diminishing the amount of the credit. If R.C. 5751.53 does not provide a “snapshot” in time, Navistar should be permitted to amend its report and to claim the entire credit based upon events that occurred after the December 2007 restatement. In fact, the release of the valuation

allowance is a factual occurrence, rather than the accounting prediction upon which the Tax Commissioner relies. It deserves far more weight than the December 2007 restatement.

In order to reach such a result, however, the Court would have to conclude that there are no time limitations on calculating the credit over its 20-year lifespan. The credit would need to be recalculated annually based upon the most up-to-date information. For any given year, the credit would either be decreased or increased based upon new information. Thus, the Tax Commissioner would decrease the 2004 credit based upon the December 2007 restatement but would then be required to increase the credit in any open year impacted by the subsequent reinstatement of Navistar's deferred assets in 2011.

The foregoing illustrates the unreasonableness of the BTA's decision and the Tax Commissioner's position. It promotes a subjective and overreaching power not intended by R.C. 5751.53. It is for this reason that the statutory language throughout R.C. 5751.53 reflects such an unmistakable element of finality. The valuation allowance that was on Navistar's books on its 2004 year-end is what matters under the statute. It is an objective measure, and it is what the General Assembly expressly intended.

The Tax Commissioner was not granted infinite review authority. The Tax Commissioner was granted authority to review a manufacturer's CAT credit within the confines of the statutory deadlines established by the legislature. Had the General Assembly been concerned that subsequent changes to a taxpayer's books and records or financial statements would require an adjustment of the credit, the authority to consider those changes could have been included in R.C. 5751.53. The General Assembly did not see fit to include this authority. Instead, the amount of the credit is based upon the amounts reflected in the taxpayer's books and records as of the last day of its taxable year ending in 2004, and as set forth on the report filed by

June 30, 2006 pursuant to R.C. 5751.53(D). Navistar complied with every statutory provision required of it. The Tax Commissioner must be held to the same standard. See, *State of Ohio v. Krego*, 70 Ohio Misc. 14 (1981), (“it is a well-established principle of representative government that the legislature cannot delegate its legislative power to any other authority or body, and that any attempt to do so is void and unconstitutional”). As the statutory law contravenes the BTA’s findings and the Tax Commissioner’s assertion of authority not granted thereby, the BTA’s decision must be reversed and Navistar’s CAT credit restored.

**C. The BTA’s decision to allow the Tax Commissioner to enlarge his review authority conflicts with its own precedent.**

In *Aluminum Co. of America v. Evatt* (Jan. 27, 1942), BTA No. 851, 35 Ohio L.Abs. 351, the BTA held that the General Assembly has full knowledge of the rules and practice under which tax laws are applied, and the fact that the General Assembly has not enacted any legislation prescribing any other or different practice to be used by the taxing authorities “is persuasive evidence of the legislative recognition and approval of the method used by the taxing authority in administering” the tax laws. The BTA has consistently held to this standard. For example, in *Case Leasing & Rental, Inc. v. Tracy* (June 30, 1998), BTA No. 1996-T-956, the BTA observed that a “correct parsing” of the statutory language is helpful when applying the meaning of a statute. The BTA cautioned that it is not permissible to apply a statute in a manner that would read into the statute provisions that the General Assembly did not expressly intend to include. *Id.*

Nevertheless, the BTA has unlawfully read into R.C. 5751.53 the ability for the Tax Commissioner to subjectively enlarge the limits of his own authority by administrative fiat. The General Assembly has set forth the method to be used by the Tax Commissioner in

administering the CAT credit, and that method is to base the credit on the taxpayer's books and records existing as of 2004 year-end as reflected in its report due by the filing deadline of June 30, 2006. *Aluminum Co. of America, supra*. The Tax Commissioner's reliance on the December 10, 2007 restatement, which was not filed until well after the statutory deadline, is not provided for by statute and impermissibly extends his authority beyond the statutory cut-off date. Cf. *State ex rel. Lorain, supra*.

**PROPOSITION OF LAW NO. 2: The BTA's decision unlawfully fails to give effect to the entire statute. The decision is therefore not consistent with the statutory provisions.**

**A. The Tax Commissioner's audit authority must be read consistent with the statutory deadlines.**

In finding that the Tax Commissioner had authority to consider books and records not in existence as of the statutory deadline, the BTA relied upon the audit provisions contained in R.C. 5751.53(D): "Unless extended by mutual consent, the tax commissioner may, until June 30, 2010, 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 BTA agreed with the Tax Commissioner that this provision granted the Tax Commissioner the authority to review any information whatsoever, without restriction to the type of information reviewed or the timeframe in which the information was available.

However, the BTA and Tax Commissioner selectively pluck out of the statute snippets of language that they isolate from the full body of law adopted by the General Assembly. R.C. 1.47 mandates that, in enacting a statute, it is presumed that the entire statute is intended to be effective. In other words, it is presumed that an entire statute is intended to have effect and meaning; accordingly, a statute must be construed so that operative effect is given to

every word used. See *Taber v. Ohio Dept. of Human Serv.*, 125 Ohio App.3d 742 (1998), at 747, citing *Richard v. Market Exchange Bank Co.*, 81 Ohio St. 348 (1910). Moreover, where statutory provisions relate to the same general subject matter, they must be read *in pari materia*. See *Bosher, supra*, at ¶14.

Here, the BTA unlawfully read the audit provisions of R.C. 5751.53(D) outside of the context provided by the entire statute. The audit provisions must be read along with the statutory deadlines established in R.C. 5751.53. Those deadlines provided in no uncertain terms that a corporate taxpayer's CAT credit is to be based upon its books and records existing as of 2004 year-end as reflected in its report due by the filing deadline of June 30, 2006. There is no other statutory option for what is to be considered. R.C. 5751.53 provides nothing that would permit a corporate taxpayer to extend the June 30, 2006 deadline or otherwise request the ability to amend its report after the deadline. *All* CAT credit decisions are to be made based upon what existed as of 2004 year-end as reflected in the report due by the filing deadline of June 30, 2006. Thus, the only way to give effect to these time deadlines (and therefore the entire statute) is to limit the Tax Commissioner's audit authority to the same information the taxpayer had to rely upon. To do otherwise not only ignores some provisions of R.C. 5751.53 but also elevates some statutory provisions over others. There is absolutely nothing in R.C. 5751.53 that authorizes either taxpayers *or* the Tax Commissioner to go beyond the books and records as they existed as of 2004 year-end as reflected in the report due by the filing deadline of June 30, 2006. Moreover, to expand the Tax Commissioner's audit authority infinitely, as the Tax Commissioner argues, destroys the very finality that the Tax Commissioner worked so hard to acquire when negotiating the credit.

**B. The Tax Commissioner's claimed audit authority is inconsistent with his own reading of the statutory deadlines.**

The Tax Commissioner admitted before the BTA that once a corporate taxpayer makes the election for the CAT credit, it cannot seek to amend its report after the June 30, 2006 deadline to request a larger credit. (H.R. II, at 218-219; Supp. Vol. II at 402-403). In other words, the taxpayer is restricted to the CAT credit based upon its year-end 2004 books and records as reflected in its report due by the filing deadline of June 30, 2006. According to the Commissioner, R.C. 5751.53 provides nothing that would permit a taxpayer to extend the June 30, 2006 deadline or otherwise request the ability to amend its report after the deadline should information existing after the 2004 year-end deadline demonstrate that the taxpayer was entitled to a credit that was larger than originally sought. *Id.* The election is thus considered to be “binding” on the taxpayer. *Id.* The purpose of this deadline is obvious, the taxpayer’s election for the CAT credit is “frozen in time,” and the claim must succeed or fail based upon the information provided by the June 30, 2006 time limit.

Curiously, however, the Tax Commissioner advanced that a taxpayer *could* possibly amend its report after the June 30, 2006 deadline to request a *smaller* credit. (H.R., II, 219-220; Supp. Vol. II at 403-404). As previously stated, the statute provides for no such post-closing date amendment. The Tax Commissioner uses this interpretation to justify his claim that it is his duty to fully audit each CAT credit report under R.C. 5751.53(D). This position is specious.

The Tax Commissioner’s unbalanced reading of the statute is clearly incompatible with R.C. 5751.53’s written provisions – in their entirety. Navistar has been forthcoming and has done everything expected of it to claim a credit to which it is entitled, a credit that was considered by the Tax Commissioner and budgeted by the Tax Commissioner before its adoption. (Appellant’s Ex. 46, 47, and 49; Supp. Vol. IV at 1518, 1522, and 1525). The

inconsistency the Tax Commissioner's interpretation promotes leads to only one abnormal contradiction: a taxpayer is bound by its books and records existing as of 2004 year-end as reflected in its report due by the filing deadline of June 30, 2006 unless subsequent financial information would allow the Tax Commissioner to reduce (or, in this case, eliminate!) the taxpayer's credit. Such a conclusion would illustrate an example of the exception swallowing the rule. There is nothing in the statute that even remotely suggests that the General Assembly intended such a lop-sided result. In fact, the only way to give effect to the entire statute as written – and thus to the General Assembly's intent – is to harmonize the statutory deadlines with the Tax Commissioner's ability to solely audit the tax credit reports. Both the taxpayers and the Tax Commissioner are bound to set the amount of the CAT credit based upon the 2004 year-end books and records existing as of 2004 year-end as reflected in its report due by the filing deadline of June 30, 2006.

**C. The BTA's decision and the Tax Commissioner's claimed authority are inconsistent with the finality sought by R.C. 5751.53.**

When presented with Ohio manufacturers' business concerns during debate on H.B. 66, the General Assembly and the Tax Commissioner understood that valuation allowances can and often do frequently change as time goes on, particularly in a cyclical industry like Navistar's. To establish some finality, the Tax Commissioner agreed to the CAT credit so long as it was based upon NOLs that the taxpayer's had already booked at the time the credit was sought. (H.R. III, at 498-500; Supp. Vol. II at 682-684). Without the strict statutory cut-off point drafted by the Tax Commissioner and adopted by the General Assembly, a taxpayer's credit amount would be in a constant state of flux, creating unwanted uncertainty for both the state and the taxpayer.

The Tax Commissioner's actions belie the finality that he himself sought. By taking into consideration financial information that was not booked or in existence as of the year-end 2004, the Tax Commissioner perpetuates the uncertainty the General Assembly wanted to eliminate in R.C. 5751.53.<sup>4</sup> He must continuously update the CAT credit amount as later financial information comes in from each of the corporate taxpayers that qualify for the credit; or, he must subjectively determine what new information necessitates a change in the credit and what information must be ignored. Such a situation creates the potential for someone to cherry-pick what financial information is to be considered relevant to the CAT credit.

Indeed, this is precisely what happened to Navistar. On September 7, 2011, Navistar released nearly 1.4 billion dollars in valuation allowance to its U.S. deferred tax assets. (Appellant's Ex. 53; Supp. Vol. IV at 1525). The release had the effect of reinstating Navistar's deferred tax assets to a level that confirmed the accuracy of the partial valuation allowance used in the CAT credit report filed in June of 2006. (H.R., II at 327; Supp. Vol. II at 511). Yet, the Tax Commissioner has refused to acknowledge the accuracy of the original CAT credit report, choosing instead to rely upon the now discredited valuation allowance set forth in the December 2007 restatement. Such treatment certainly was not intended by the General Assembly.

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<sup>4</sup> Focusing on the valuation allowance that had already been reported in the company's financial statements and was thus already on its books at the end of the 2004 tax year also avoided the possibility that a taxpayer that had already recorded a valuation allowance could go back and change its books and records to eliminate or reduce it in order to take advantage of the new CAT credit. This backward focus in the statute thus not only provided certainty to all parties, but also ensured that the but also ensured that the "valuation" of the NOLs was done independently of any CAT credit motivation.

## CONCLUSION

For the foregoing reasons, the Court should reverse the Board of Tax Appeals and enter a final judgment in Navistar's favor, thereby reinstating Navistar's CAT credit as set forth in its report filed with the Tax Commissioner on June 27, 2006.

Respectfully submitted,

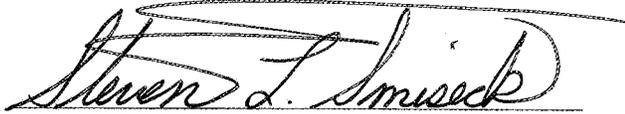
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Appellant's Merit Brief and attached Appendix were delivered via email and certified mail to counsel for appellee, Mike DeWine, Attorney General of Ohio, and Barton A. Hubbard, Assistant Attorney General, 30 East Broad Street, 25<sup>th</sup> Floor, Columbus, Ohio 43215, on September 5, 2014.

A handwritten signature in black ink, reading "Steven L. Smiseck". The signature is written in a cursive style with a long horizontal line extending to the right above the name.

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*Counsel for Appellant, Navistar, Inc.*

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,

Appellant,

v.

Richard A. Levin,  
Tax Commissioner of Ohio,

Appellee.

11-0140  
Case No. \_\_\_\_\_

Appeal from the Ohio  
Board of Tax Appeals

BTA Case No. 2010-575

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BOARD OF TAX APPEALS

NOTICE OF APPEAL OF APPELLANT NAVISTAR, INC.

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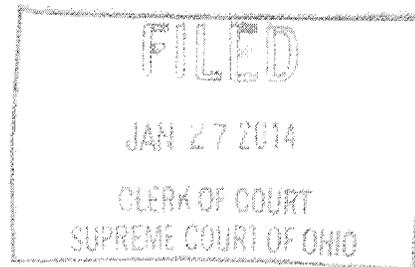
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## NOTICE OF APPEAL OF APPELLANT NAVISTAR, INC.

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 any credit at all. 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,

  
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**OHIO BOARD OF TAX APPEALS**

Navistar, Inc., <sup>1</sup>	)	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. <sup>2</sup> 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-25 <sup>th</sup> 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.

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<sup>1</sup> 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.  
<sup>2</sup> 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."<sup>3</sup> 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

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<sup>3</sup> 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

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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."<sup>4</sup> Tax Commissioner's Ex. 6.

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<sup>4</sup> 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.<sup>5</sup> 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.

<sup>5</sup> 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

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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.



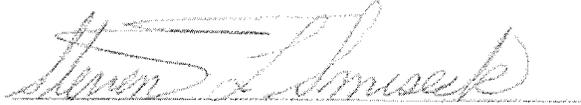
Maryann B. Gall (0011812)

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 27<sup>th</sup> day of January, 2014.



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

1-10-13

**OHIO BOARD OF TAX APPEALS**

Navistar, Inc., <sup>1</sup>	)	CASE NO. 2010-575
	)	
Appellant,	)	(COMMERCIAL ACTIVITY TAX)
	)	
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Richard A. Levin, Tax Commissioner of	)	
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For the Appellee	- Michael DeWine Attorney General of Ohio Barton A. Hubbard Assistant Attorney General State Office Tower-25 <sup>th</sup> Floor 30 East Broad Street Columbus, Ohio 43215

Entered    **DEC 31 2013**

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“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.)

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"(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;

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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.

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“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. \*\*\*

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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."<sup>4</sup> Tax Commissioner's Ex. 6.

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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.<sup>5</sup> 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 cont'd. \_\_\_\_\_

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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.

  
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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.)

## **5751.53 Credit against tax for amortizable net operating losses.**

(A) As used in this section:

- (1) "Net income" and "taxable year" have the same meanings as in section 5733.04 of the Revised Code.
- (2) "Franchise tax year" means "tax year" as defined in section 5733.04 of the Revised Code.
- (3) "Deductible temporary differences" and "taxable temporary differences" have the same meanings as those terms have for purposes of paragraph 13 of the statement of financial accounting standards, number 109.
- (4) "Qualifying taxpayer" means a taxpayer under this chapter that has a qualifying Ohio net operating loss carryforward equal to or greater than the qualifying amount.
- (5) "Qualifying Ohio net operating loss carryforward" means an Ohio net operating loss carryforward that the taxpayer could deduct in whole or in part for franchise tax year 2006 under section 5733.04 of the Revised Code but for the application of division (H) of this section. A qualifying Ohio net operating loss carryforward shall not exceed the amount of loss carryforward from franchise tax year 2005 as reported by the taxpayer either on a franchise tax report for franchise tax year 2005 pursuant to section 5733.02 of the Revised Code or on an amended franchise tax report prepared in good faith for such year and filed before July 1, 2006.
- (6) "Disallowed Ohio net operating loss carryforward" means the lesser of the amounts described in division (A)(6)(a) or (b) of this section, but the amounts described in divisions (A)(6)(a) and (b) of this section shall each be reduced by the qualifying amount.
  - (a) The qualifying taxpayer's qualifying Ohio net operating loss carryforward;
  - (b) The Ohio net operating loss carryforward amount that the qualifying taxpayer used to compute the related deferred tax asset reflected on its books and records on the last day of its taxable year ending in 2004, adjusted for return to accrual, but this amount shall be reduced by the qualifying related valuation allowance amount. For the purposes of this section, the "qualifying related valuation allowance amount" is the amount of Ohio net operating loss reflected in the qualifying taxpayer's computation of the valuation allowance account, as shown on its books and records on the last day of its taxable year ending in 2004, with respect to the deferred tax asset relating to its Ohio net operating loss carryforward amount.
- (7) "Other net deferred tax items apportioned to this state" is the product of (a) the amount of other net deferred tax items and (b) the fraction described in division (B)(2) of section 5733.05 for the qualifying taxpayer's franchise tax year 2005.
- (8)
  - (a) Subject to divisions (A)(8)(b) to (d) of this section, the "amount of other net deferred tax items" is the difference between (i) the qualifying taxpayer's deductible temporary differences, net of related valuation allowance amounts, shown on the qualifying taxpayer's books and records on the last day of its taxable year ending in 2004, and (ii) the qualifying taxpayer's taxable temporary differences as shown on those books and records on that date. The amount of other net deferred tax items may be less than zero.

(b) For the purposes of computing the amount of the qualifying taxpayer's other net deferred tax items described in division (A)(8)(a) of this section, any credit carryforward allowed under Chapter 5733. of the Revised Code shall be excluded from the amount of deductible temporary differences to the extent such credit carryforward amount, net of any related valuation allowance amount, is otherwise included in the qualifying taxpayer's deductible temporary differences, net of related valuation allowance amounts, shown on the qualifying taxpayer's books and records on the last day of the qualifying taxpayer's taxable year ending in 2004.

(c) No portion of the disallowed Ohio net operating loss carryforward shall be included in the computation of the amount of the qualifying taxpayer's other net deferred tax items described in division (A)(8)(a) of this section.

(d) In no event shall the amount of other net deferred tax items apportioned to this state exceed twenty-five per cent of the qualifying Ohio net operating loss carryforward.

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

(10) "Books and records" means 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 accounting principles.

(11)

(a) Except as modified by division (A)(11)(b) of this section, "qualifying amount" means fifty million dollars per person.

(b) If for franchise tax year 2005 the person was a member of a combined franchise tax report, as provided by section 5733.052 of the Revised Code, the "qualifying amount" is, in the aggregate, fifty million dollars for all members of that combined franchise tax report, and for purposes of divisions (A) (6)(a) and (b) of this section, those members shall allocate to each member any portion of the fifty million dollar amount. The total amount allocated to the members who are qualifying taxpayers shall equal fifty million dollars.

(B) For each calendar period beginning prior to January 1, 2030, there is hereby allowed a nonrefundable tax credit against the tax levied each year by this chapter on each qualifying taxpayer, on each consolidated elected taxpayer having one or more qualifying taxpayers as a member, and on each combined taxpayer having one or more qualifying taxpayers as a member. The credit shall be claimed in the order specified in section 5751.98 of the Revised Code and is allowed only to reduce the first one-half of any tax remaining after allowance of the credits that precede it in section 5751.98 of the Revised Code. No credit under division (B) of this section shall be allowed against the second one-half of such remaining tax.

Except as otherwise limited by divisions (C) and (D) of this section, the maximum amount of the nonrefundable credit that may be used against the first one-half of the remaining tax for each calendar year is as follows:

- (1) For calendar year 2010, ten per cent of the amortizable amount;
- (2) For calendar year 2011, twenty per cent of the amortizable amount, less all amounts previously used;
- (3) For calendar year 2012, thirty per cent of the amortizable amount, less all amounts previously used;
- (4) For calendar year 2013, forty per cent of the amortizable amount, less all amounts previously used;
- (5) For calendar year 2014, fifty per cent of the amortizable amount, less all amounts previously used;
- (6) For calendar year 2015, sixty per cent of the amortizable amount, less all amounts previously used;
- (7) For calendar year 2016, seventy per cent of the amortizable amount, less all amounts previously used;
- (8) For calendar year 2017, eighty per cent of the amortizable amount, less all amounts previously used;
- (9) For calendar year 2018, ninety per cent of the amortizable amount, less all amounts previously used;
- (10) For each of calendar years 2019 through 2029, one hundred per cent of the amortizable amount, less all amounts used in all previous years.

In no event shall the cumulative credit used for calendar years 2010 through 2029 exceed one hundred per cent of the amortizable amount.

(C)

- (1) Except as otherwise set forth in division (C)(2) of this section, a refundable credit is allowed in calendar year 2030 for any portion of the qualifying taxpayer's amortizable amount that is not used in accordance with division (B) of this section against the tax levied by this chapter on all taxpayers.

(2) Division (C)(1) of this section shall not apply and no refundable credit shall be available to any person if during any portion of the calendar year 2030 the person is not subject to the tax imposed by this chapter.

(D) Not later than June 30, 2006, each qualifying taxpayer, consolidated elected taxpayer, or combined taxpayer that will claim for any year the credit allowed in divisions (B) and (C) of this section shall file with the tax commissioner a report setting forth the amortizable amount available to such taxpayer and all other related information that the commissioner, by rule, requires. If the taxpayer does not timely file the report or fails to provide timely all information required by this division, the taxpayer is precluded from claiming any credit amounts described in divisions (B) and (C) of this section. Unless extended by mutual consent, the tax commissioner may, until June 30, 2010, 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.

(E) For the purpose of calculating the amortizable amount, if the tax commissioner ascertains that any portion of that amount is the result of a sham transaction as described in section 5703.56 of the Revised Code, the commissioner shall reduce the amortizable amount by two times the adjustment.

(F) If one entity transfers all or a portion of its assets and equity to another entity as part of an entity organization or reorganization or subsequent entity organization or reorganization for which no gain or loss is recognized in whole or in part for federal income tax purposes under the Internal Revenue Code, the credits allowed by this section shall be computed in a manner consistent with that used to compute the portion, if any, of federal net operating losses allowed to the respective entities under the Internal Revenue Code. The tax commissioner may prescribe forms or rules for making the computations required by this division.

(G)

(1) Except as provided in division (F) of this section, no person shall pledge, collateralize, hypothecate, assign, convey, sell, exchange, or otherwise dispose of any or all tax credits, or any portion of any or all tax credits allowed under this section.

(2) No credit allowed under this section is subject to execution, attachment, lien, levy, or other judicial proceeding.

(H)

(1)

(a) Except as set forth in division (H)(1)(b) of this section and notwithstanding division (I)(1) of section 5733.04 of the Revised Code to the contrary, each person timely and fully complying with the reporting requirements set forth in division (D) of this section shall not claim, and shall not be entitled to claim, any deduction or adjustment for any Ohio net operating loss carried forward to any one or more franchise tax years after franchise tax year 2005.

(b) Division (H)(1)(a) of this section applies only to the portion of the Ohio net operating loss represented by the disallowed Ohio net operating loss carryforward.

(2) Notwithstanding division (I) of section 5733.04 of the Revised Code to the contrary, with respect to all franchise tax years after franchise tax year 2005, each person timely and fully complying with the

reporting requirements set forth in division (D) of this section shall not claim, and shall not be entitled to claim, any deduction, exclusion, or adjustment with respect to deductible temporary differences reflected on the person's books and records on the last day of its taxable year ending in 2004.

(3)

(a) Except as set forth in division (H)(3)(b) of this section and notwithstanding division (I) of section 5733.04 of the Revised Code to the contrary, with respect to all franchise tax years after franchise tax year 2005, each person timely and fully complying with the reporting requirements set forth in division (D) of this section shall exclude from Ohio net income all taxable temporary differences reflected on the person's books and records on the last day of its taxable year ending in 2004.

(b) In no event shall the exclusion provided by division (H)(3)(a) of this section for any franchise tax year exceed the amount of the taxable temporary differences otherwise included in Ohio net income for that year.

(4) Divisions (H)(2) and (3) of this section shall apply only to the extent such items were used in the calculations of the credit provided by this section.

**Cite as R.C. § 5751.53**

**History.** Effective Date: 06-30-2005; 03-30-2006

## **5703-29-11 Commercial activity tax credit for unused franchise tax net operating losses.**

(A) A qualifying taxpayer intending to claim the commercial activity tax credit for unused franchise tax net operating losses must file a report with the tax commissioner no later than June 30, 2006. The report shall be filed on a form prescribed by the commissioner for such purpose and shall include, but is not limited to, the following information:

(1) If the qualifying taxpayer was not a member of a combined franchise tax report for tax year 2005, such report shall include the following information:

(a) The taxpayer's name, address, federal employer identification number, Ohio charter or license number, Ohio commercial activity tax account number;

(b) The taxpayer's Ohio net operating loss carryforward that would have been available for use on the taxpayer's 2006 franchise tax report had the taxpayer not elected to claim this credit;

(c) A schedule detailing the computation of the Ohio net operating loss carryforward amount reflected in paragraph (b) above that includes the information set out in the instructions for the report; and

(d) The amortizable amount computed in accordance with section 5751.53 of the Revised Code.

(2) If the qualifying taxpayers filing the report were members of a combined franchise tax report for tax year 2005, then for each member of the 2005 combined franchise return for which an amortizable amount is computed, such report shall include the following information:

(a) The taxpayer's name;

(b) Ohio commercial activity tax account number;

(c) Ohio net operating loss carryforward that would have been available for use on the taxpayer's 2006 Ohio franchise return had the taxpayers not elected to claim this credit;

(d) A schedule detailing the computation of the Ohio net operating loss carryforward amount reflected in paragraph (A)(1)(c) that includes the information set out in the instructions for the report;

(e) The qualifying amount; and

(f) The amortizable amount computed in accordance with section 5751.53 of the Revised Code.

(3) Upon written request or upon audit, the commissioner may require a taxpayer to provide additional documentation to support the credit provided for under section 5751.53 of the Revised Code, including substantiation of any information supplied with the report required under paragraph (A) of this rule, that the deferred tax asset amounts were booked on the taxpayer's financial statements.

(B) Subject to audit by the commissioner, a taxpayer that files such report may claim ten per cent of the amortizable amount as a nonrefundable credit against the commercial activity tax in each of the calendar years 2010 through 2019. For each year in which the taxpayer claims the nonrefundable credit, the taxpayer may apply the credit against only one-half of its commercial activity tax liability remaining after the liability is first reduced by the nonrefundable credits that precede this credit in the order set out in section 5751.98 of the Revised Code. Any portion of the ten per cent amortizable

amount not used in the year that it otherwise could have been claimed may be carried forward and claimed in the following year or years through 2029. Any portion of the nonrefundable credit not claimed by 2029 may be claimed as a refundable credit against the commercial activity tax in calendar year 2030, pursuant to divisions (B) and (C) of section 5751.53 of the Revised Code.

Effective: 06/15/2006

R.C. 119.032 review dates: Exempt

Promulgated Under: 5703.14

Statutory Authority: 5703.05

Rule Amplifies: 5751.53



## ALUMINUM CO. OF AMERICA V EVATT.

851.

## BOARD OF TAX APPEALS

*1942 Ohio Tax LEXIS 13; 35 Ohio L. Abs. 351; 23 Ohio Op. 518*

01/27/1942

**OPINION:**

[\*1] 1. THE TAXING AUTHORITY CHARGED WITH ADMINISTRATION OF THE FRANCHISE TAX IN DETERMINING THE AMOUNT TO BE PAID BY A MANUFACTURING CORPORATION HAVING A PLANT IN OHIO MAY DETERMINE THE PROPORTIONATE AMOUNT OF BUSINESS DONE BY THE CORPORATION IN THIS STATE BY A CONSIDERATION OF THE VALUE OF THE SALES OF ITS MANUFACTURED PRODUCTS MADE FROM SUCH PLANT OR FROM WAREHOUSES OR OTHER STOCKS OF GOODS OF THE CORPORATION LOCATED IN THE STATE, INASMUCH AS THE STATUTES PROVIDING FOR THE DETERMINATION OF SUCH TAX IN PART BY CONSIDERATION OF THE VALUE OF THE BUSINESS DONE IN OHIO AS COMPARED WITH THE TOTAL VALUE OF BUSINESS DONE WHEREVER TRANSACTED DO NOT DIRECT THE USE OF ANY PARTICULAR FACTOR OR FACTORS WITH WHICH SO TO DO. 2. WHERE A FRANCHISE OR OTHER EXCISE TAX IS MEASURED OR LIMITED BY THE VALUE OF THE SALES OF FINISHED PRODUCTS SOLD OR INSTALLED BY THE TAXPAYER IN THE TAXING STATE, THE AMOUNT AND VALUE OF SUCH SALES MAY NOT BE REDUCED OR OTHERWISE AFFECTED BY ALLOCATING ANY PART OF THE SALE PRICE OF SUCH GOODS TO THE COST OF THEIR MANUFACTURE IN WHOLE OR IN PART OUT OF SUCH STATE, AND THIS RULE LIKEWISE APPLIES TO SALES OF ITS PRODUCTS BY A MANUFACTURING CORPORATION FROM ITS PLANT, WAREHOUSES [\*2] OR OTHER REPOSITORIES IN THE TAXING STATE, ALTHOUGH SUCH PRODUCTS ARE WHOLLY MANUFACTURED BY THE CORPORATION IN SOME OTHER STATE OR 3. A FOREIGN CORPORATION ENGAGED IN THE MANUFACTURE OF ALUMINUM AND ALUMINUM PRODUCTS AT A PLANT OPERATED BY IT IN OHIO, FROM WHICH PLANT SALES ARE MADE INDIFFERENTLY TO CUSTOMERS IN OHIO AND ELSEWHERE IS ENGAGED IN A LOCAL BUSINESS IN THIS STATE AND NOT IN ONE THE ACTIVITIES OF WHICH ARE SOLELY IN OR RELATING TO INTERSTATE COMMERCE AND IS THEREFORE SUBJECT TO THE CORPORATION FRANCHISE TAX. 4. THE CORPORATION FRANCHISE TAX IS NOT ONE ON THE PRIVILEGE OF ENGAGING IN INTERSTATE BUSINESS, NOR ONE ON SALES MADE BY THE CORPORATION OF GOODS MANUFACTURED BY IT IN OHIO, NOR IS IT A TAX ON THE GROSS RECEIPTS OR INCOME TAX ON THE PRIVILEGE THE CORPORATION HAS OF DOING BUSINESS IN THIS STATE AND OF OWNING AND USING A PART OF ITS CAPITAL AND PROPERTY IN THIS STATE. 5. THE TAX COMMISSIONERS DID NOT ERR IN INCLUDING IN THE NUMERATOR OF THE BUSINESS FRACTION USED BY HIM IN COMPUTING A FOREIGN CORPORATION'S FRANCHISE TAX THE VALUE OF ALL SALES OF ITS PRODUCTS MANUFACTURED BY IT IN ITS PLANT IN OHIO, WHETHER THE SALES WERE MADE TO CUSTOMERS IN OR OUT OF THE STATE. PENDING [\*3] IN OHIO SUPREME COURT. CASE NO. 29053.

HARRY J. ROSE, SECRETARY.

THIS CAUSE AND MATTER IS BEFORE THE BOARD OF TAX APPEALS ON THE APPEAL OF ALUMINUM COMPANY OF AMERICA, THE APPELLANT ABOVE NAMED, FROM AN ORDER OF THE TAX COMMISSIONER UNDER DATE OF NOVEMBER 8, 1939, MAKING A CORRECTED FRANCHISE TAX ASSESSMENT

AGAINST THE APPELLANT FOR SAID YEAR. ON MARCH 31, 1939, THE APPELLANT, A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF PENNSYLVANIA AND ENGAGED IN THE BUSINESS OF MANUFACTURING AND SELLING ALUMINUM AND ALUMINUM PRODUCTS IN THE STATE OF OHIO AND ELSEWHERE, FILED ITS ANNUAL CORPORATION FRANCHISE TAX REPORT FOR SAID YEAR, AS REQUIRED BY THE PROVISIONS OF 5495-2 GC; WHICH REPORT AS TO THE INFORMATION THEREIN CONTAINED, WAS IN THE FORM PRESCRIBED BY 5497 GC. IN THIS REPORT THE APPELLANT SEPARATELY STATED THE VALUE OF ITS PROPERTY, REAL AND PERSONAL, WHICH WAS OWNED AND USED BY IT IN OHIO, AND THAT OWNED AND USED BY IT OUTSIDE OF OHIO, AND LIKEWISE SET OUT THEREIN ITS LIABILITIES (LESS CAPITAL AND SURPLUS) AS OF JANUARY FIRST OF SAID YEAR. ON THE INFORMATION THUS SET OUT IN APPELLANT'S REPORT THE TAX COMMISSIONER DETERMINED THE BASE VALUE OF THE ISSUED AND OUTSTANDING [\*4] SHARES OF STOCK, AS PROVIDED IN 5494 GC, AND FIXED SUCH VALUE AT THE SUM OF \$180,408,175.00. THEN APPLYING THE PROPERTY FRACTION INDICATED BY THE FAIR VALUE OF APPELLANT'S PROPERTY IN OHIO AS AGAINST THE FAIR VALUE OF THAT OWNED AND USED BY IT IN OHIO AND ELSEWHERE (AS TO THE CORRECTNESS OF WHICH PROPERTY FRACTION NO QUESTION IS MADE IN THIS CASE) AND, LIKEWISE, THE BUSINESS FRACTION INDICATED BY THE VALUE OF THE BUSINESS DONE BY THE CORPORATION IN THIS STATE (AS DETERMINED BY THE TAX COMMISSIONER) AS AGAINST THE TOTAL VALUE OF THE BUSINESS OF THE CORPORATION WHEREVER TRANSACTED, AS SET OUT IN APPELLANT'S REPORT, THE TAX COMMISSIONER DETERMINED THE TAXABLE VALUE OF THE ISSUED AND OUTSTANDING SHARES OF STOCK OF THE CORPORATION REPRESENTED BY THE PROPERTY OWNED AND BUSINESS DONE BY IT IN THIS STATE, AND FOUND SUCH TAXABLE VALUE TO BE \$13,722,387.00. THE TAX COMMISSIONER IN DETERMINING SAID BUSINESS FRACTION APPARENTLY INCLUDED IN THE NUMERATOR THEREOF THE VALUE OF ALL SALES OF ALUMINUM AND ALUMINUM PRODUCTS MADE BY THE APPELLANT DURING THE YEAR 1938 FROM ITS MANUFACTURING PLANT AT CLEVELAND, OHIO, AND INCLUDED IN THE DENOMINATOR OF THE FRACTION THE VALUE OF THE SALES MADE BY APPELLANT [\*5] DURING SAID YEAR OF ALUMINUM AND ALUMINUM PRODUCTS MANUFACTURED BY IT IN OHIO AND ELSEWHERE. AFTER THE TAX COMMISSIONER, BY THE APPLICATION OF THE PROPERTY AND BUSINESS FRACTIONS ABOVE NOTED, HAD DETERMINED THE TAXABLE VALUE OF THE ISSUED AND OUTSTANDING SHARES OF THE STOCK OF THE CORPORATION REPRESENTED BY THE PROPERTY OWNED AND BUSINESS DONE BY THE CORPORATION IN THIS STATE, AND AFTER THE FRANCHISE TAX OF ONE-TENTH OF ONE PER CENT HAD BEEN EXTENDED AGAINST SUCH VALUATION, AS PROVIDED IN 5499 GC, THE APPELLANT ACTING UNDER THE AUTHORITY OF 5500 GC, AND WITHIN THE TIME LIMITED IN SAID SECTION, FILED AN APPLICATION FOR A REVIEW OF THE DETERMINATION THERETOFORE MADE BY THE TAX COMMISSIONER OF THE VALUE OF THE ISSUED AND OUTSTANDING SHARES OF STOCK OF THE CORPORATION REPRESENTED BY THE PROPERTY OWNED AND BUSINESS DONE BY IT IN THIS STATE. IN THIS APPLICATION FOR THE REVIEW OF THE DETERMINATION OF THE TAX COMMISSIONER THEREIN COMPLAINED OF, THE APPELLANT DID NOT QUESTION THE VALUATION OF THE ISSUED AND OUTSTANDING SHARES OF THE STOCK OF THE CORPORATION AS DETERMINED BY THE TAX COMMISSIONER, OR THE CORRECTNESS OF THE PROPERTY FRACTION USED BY SAID OFFICER IN DETERMINING THE TAXABLE VALUE [\*6] OF THE ISSUED AND OUTSTANDING SHARES OF STOCK REPRESENTED BY THE PROPERTY OWNED AND BUSINESS DONE BY THE CORPORATION IN THIS STATE. APPELLANT, HOWEVER, IN SAID APPLICATION QUESTIONED THE CORRECTNESS OF THE BUSINESS FRACTION USED BY THE TAX COMMISSIONER IN MAKING THIS COMPUTATION; AND AS TO THIS THE APPELLANT, AS PREVIOUSLY INDICATED IN THE ANNUAL REPORT FILED BY IT FOR SAID YEAR, CONTENDED THAT THE BUSINESS FRACTION USED BY THE TAX COMMISSIONER IN MAKING SUCH COMPUTATION SHOULD BE ASCERTAINED BY TAKING THE AVERAGE OF TWO FRACTIONS: (1) THE VALUE OF THE SALES OF PRODUCTS MANUFACTURED BY THE APPELLANT AT ITS MANUFACTURING PLANT IN OHIO, WHEREVER SOLD (\$8,710,581.62) AS AGAINST THE VALUE OF SALES MADE OF ALL OF ITS PRODUCTS PRODUCED IN OHIO AND ELSEWHERE (\$71,147,721.65); AND (2) TOTAL SALES FROM ITS OHIO MANUFACTURING PLANT (OR WAREHOUSES) TO OHIO CUSTOMERS (\$1,274,452.16) AS AGAINST THE TOTAL SALES OF ALL OF ITS PRODUCTS EVERYWHERE (\$71,147,721.65). AVERAGING THE BUSINESS FRACTION THUS OBTAINED WITH THE PROPERTY FRACTION AND APPLYING THE RESULTING FRACTION TO THE VALUATION OF THE ISSUED AND OUTSTANDING SHARES OF STOCK OF THE CORPORATION (\$180,408,175.00) GAVE A VALUE TO THAT PART [\*7] OF THE ISSUED AND OUTSTANDING SHARES OF

STOCK OF THE CORPORATION REPRESENTED BY PROPERTY OWNED AND BUSINESS DONE IN THIS STATE OF \$8,999,481.00. THEREUPON AND PURSUANT TO APPELLANT'S APPLICATION FOR REVIEW AND REDETERMINATION, THE TAX COMMISSIONER ON OR ABOUT SEPTEMBER 8, 1939, TENTATIVELY REDETERMINED THE AMOUNT OF APPELLANT'S FRANCHISE TAX FOR THE YEAR 1939 ON THE BASIS SUGGESTED BY APPELLANT IN ITS SAID APPLICATION, AND DETERMINED SAID TAX TO BE THE SUM OF \$8,999.48 BASED ON A TAXABLE VALUATION OF \$8,999,481.00, AS ABOVE STATED. THE APPELLANT PAID SAID SUM OF \$8,999.48 TO THE TREASURER OF STATE IN PAYMENT OF ITS FRANCHISE TAX FOR SAID YEAR. HOWEVER, BY AN AGREEMENT MADE BY AND BETWEEN APPELLANT AND THE TAX COMMISSIONER AT SAID TIME, THE DETERMINATION OF THE CORPORATION'S FRANCHISE TAX ON THIS BASIS FOR THE YEAR 1939 AND ITS PAYMENT BY SAID COMPANY WERE WITHOUT PREJUDICE TO THE RIGHT OF THE TAX COMMISSIONER TO MAKE A FURTHER COMPUTATION OF THE FRANCHISE TAX OF THE CORPORATION FOR SAID YEAR AND, LIKEWISE, WITHOUT PREJUDICE TO THE RIGHT OF THE APPELLANT TO CONTEST ON ITS MERITS ANY INCREASED ASSESSMENT WHICH MIGHT RESULT FROM SUCH FURTHER COMPUTATION BY THE TAX COMMISSIONER. THEREAFTER, [\*8] ON OCTOBER 13, 1939, THE TAX COMMISSIONER ON FURTHER CONSIDERATION OF THE FACTORS TO BE EMPLOYED AND OF THE RESULTING METHOD TO BE USED BY HIM IN DETERMINING THE BUSINESS FRACTION TO BE APPLIED TOGETHER WITH THE ASCERTAINED PROPERTY FRACTION, IN DETERMINING THE PROPORTION OF THE VALUE OF THE ISSUED AND OUTSTANDING SHARES OF STOCK OF THE APPELLANT AND OF OTHER MANUFACTURING CORPORATIONS DOING BUSINESS IN OHIO, REPRESENTED BY THE PROPERTY OWNED AND BUSINESS DONE BY SUCH CORPORATIONS IN THIS STATE, AND ACTING UNDER THE AUTHORITY CONFERRED UPON HIM BY 1464-1 AND 1464-4 GC, ADOPTED AND PROMULGATED RULE NO. 275, WHICH RULE IS AS FOLLOWS: "BUSINESS DONE IN AND OUT OF OHIO BY A CORPORATION SUBJECT TO THE PAYMENT OF FRANCHISE TAXES SHALL BE DETERMINED UNDER 5498 GC, BY ALLOCATION TO THE BUSINESS FRACTION THEREIN PROVIDED SALES IN AND OUT OF OHIO. "ALL SALES OF GOODS FROM WAREHOUSES IN OHIO, WHEREVER MANUFACTURED, SHALL BE CONSIDERED AS OHIO SALES. "IN THE CASE OF MANUFACTURING COMPANIES, ALL SALES OF GOODS MANUFACTURED IN OHIO, WHEREVER SOLD, SHALL BE CONSIDERED AS OHIO SALES, EXCEPT SALES OF SUCH PRODUCTS AS ARE SOLD FROM WAREHOUSES OUTSIDE OF THIS STATE. "THE DENOMINATOR OF SUCH BUSINESS [\*9] FRACTION SHALL IN ALL CASES BE THE TOTAL SALES WHEREVER MADE. " APPLYING THIS RULE TO THE FACTS AND FIGURES REPORTED BY THE THE TAX COMMISSIONER DETERMINED THE BUSINESS FRACTION USED BY HIM BY INCLUDING IN THE NUMERATOR THEREOF THE VALUE OF THE SALES MADE DURING THE YEAR 1938 OF PRODUCTS WHICH, AS FOUND BY THE TAX COMMISSIONER, WERE MANUFACTURED AT THE PLANT OF THE CORPORATION IN THIS STATE AND SOLD FROM SAID PLANT (\$8,710,582.00) AND BY INCLUDING THE DENOMINATOR OF THE FRACTION THE VALUE OF THE SALES MADE BY THE CORPORATION DURING SAID YEAR OF PRODUCTS MANUFACTURED IN OHIO AND ELSEWHERE (\$71,147,722.00). ON THE APPLICATION OF THE BUSINESS FRACTION THUS OBTAINED, TOGETHER WITH THE PROPERTY FRACTION ABOVE NOTED, THE TAX COMMISSIONER FOUND AND DETERMINED THAT THE PROPORTIONATE PART OF THE VALUE OF THE ISSUED AND OUTSTANDING SHARES OF THE CORPORATION REPRESENTED BY PROPERTY OWNED AND BUSINESS DONE BY IT IN THIS STATE WAS \$13,722,387.00. THE TAX EXTENDED ON THIS VALUATION AT THE RATE PRESCRIBED BY 5499 GC, WAS AND IS THE SUM OF \$13,722,39, WHICH AMOUNT IS \$4,722.91 IN EXCESS OF THE SUM OF \$8,999.48 WHICH WAS THE AMOUNT OF THE FRANCHISE TAX TENTATIVELY ASSESSED AGAINST THE CORPORATION [\*10] ON ITS APPLICATION FOR REVIEW THERETOFORE FILED WITH THE TAX COMMISSIONER AND ON THE FORMULA THEREIN SUGGESTED WITH RESPECT TO THE DETERMINATION OF THE BUSINESS FRACTION TO BE USED BY THE TAX COMMISSIONER IN DETERMINING THE FRANCHISE TAXES OF THE CORPORATION FOR SAID YEAR. FOLLOWING THE DETERMINATION OF THIS INCREASED FRANCHISE TAX ASSESSMENT IN THE AMOUNT OF \$4,722.91 AND THE CERTIFICATION OF THE SAME TO THE TREASURER OF STATE FOR COLLECTION, AND FOLLOWING THE DENIAL BY THE TAX COMMISSIONER OF AN APPLICATION FOR REVIEW AND CORRECTION WITH RESPECT TO SAID INCREASED TAX ASSESSMENT FILED BY THE CORPORATION, SAID CORPORATION, ACTING UNDER THE AUTHORITY PROVIDED BY 5611 GC, FILED WITH THE BOARD OF TAX APPEALS AN APPEAL FROM SAID INCREASED FRANCHISE TAX ASSESSMENT FOR THE YEAR 1939 AND FROM THE DETERMINATION MADE BY THE TAX COMMISSIONER OF THE VALUE OF THE ISSUED AND OUTSTANDING SHARES OF STOCK OF THE CORPORATION REPRESENTED BY PROPERTY OWNED AND

BUSINESS DONE BY IT IN THIS STATE, WHICH DETERMINATION RESULTED IN THE INCREASED TAX ASSESSMENT COMPLAINED OF. THE CASE PRESENTED BY THIS APPEAL WAS SUBMITTED TO THE BOARD OF TAX APPEALS UPON A TRANSCRIPT OF THE PROCEEDINGS OF THE TAX COMMISSIONER, [\*11] UPON AN AGREED STATEMENT OF THE FACTS IN THE CASE, AND UPON THE ARGUMENTS AND BRIEFS OF COUNSEL. ALTHOUGH THE APPELLANT IN THE APPEAL FILED BY IT WITH THE BOARD OF TAX APPEALS REFERS TO RULE NO. 275 ADOPTED BY THE TAX COMMISSIONER, AS ABOVE NOTED, AND THEREIN CONTENDS THAT AS TO THE APPELLANT AND ON THE FACTS OF THIS CASE SAID RULE IS UNLAWFUL AND UNREASONABLE, THIS PROCEEDING IS NOT ONE UNDER THE PROVISIONS OF 1464-4 GC, INVOKING THE JURISDICTION AND AUTHORITY OF THE BOARD OF TAX APPEALS TO DETERMINE WHETHER THIS RULE IS REASONABLE OR UNREASONABLE WITHIN THE PURVIEW OF THIS SECTION OF THE GENERAL CODE; BUT THE QUESTION PRESENTED TO THE BOARD ON THIS APPEAL IS WHETHER SAID FRANCHISE TAX ASSESSMENT MADE AGAINST THE APPELLANT IS ERRONEOUS, WHICH QUESTION, OBVIOUSLY, ON THE FACTS ABOVE STATED, INVOLVES THE PRIMARY QUESTION AS TO THE CORRECTNESS OF THE BUSINESS FRACTION USED BY THE TAX COMMISSIONER IN MAKING THE COMPUTATION WHICH LED TO SUCH INCREASED ASSESSMENT. THE DETERMINATION OF THE QUESTION OR QUESTIONS THUS PRESENTED REQUIRES A CONSIDERATION NOT ONLY OF THE PROVISIONS OF THE RULE OF THE TAX COMMISSIONER, ABOVE REFERRED TO, AND OF THE PERTINENT STATUTORY PROVISIONS RELATING TO [\*12] AND PROVIDING FOR THE ASSESSMENT OF FRANCHISE TAXES AGAINST CORPORATIONS IN THIS STATE, BUT ALSO REQUIRES A CONSIDERATION OF FUNDAMENTAL PRINCIPLES OF LAW APPLICABLE TO CASES OF THIS KIND. AS TO THIS IT IS NOTED THAT AS TO FOREIGN CORPORATIONS THE TAX HERE IN QUESTION IS "THE FEE CHARGED AGAINST EACH CORPORATION ORGANIZED FOR PROFIT UNDER THE LAWS OF ANY STATE OR COUNTRY OTHER THAN OHIO, EXCEPT AS PROVIDED HEREIN, FOR THE PRIVILEGE OF DOING BUSINESS IN THIS STATE OR OWNING OR USING A PART OR ALL OF ITS CAPITAL OR PROPERTY IN THIS STATE OR FOR HOLDING A CERTIFICATE OF COMPLIANCE WITH THE LAWS OF THIS STATE AUTHORIZING IT TO DO BUSINESS IN THIS STATE, DURING THE CALENDAR YEAR IN WHICH SUCH FEE IS PAYABLE. " 5495 GC. SEC. 5495-2 GC, PROVIDES THAT ANNUALLY, BETWEEN THE FIRST DAY OF JANUARY AND THE THIRTY-FIRST DAY OF MARCH, EACH CORPORATION INCORPORATED UNDER THE LAWS OF THIS STATE FOR PROFIT, AND EACH FOREIGN CORPORATION FOR PROFIT, DOING BUSINESS IN THIS STATE OR OWNING OR USING A PART OR ALL OF ITS CAPITAL OR PROPERTY IN THIS STATE, SHALL MAKE A REPORT IN WRITING TO THE TAX COMMISSIONER IN SUCH FORM AS MAY BE PRESCRIBED; AND 5497 GC, SETS OUT THE NATURE OF THE INFORMATION REQUIRED [\*13] TO BE GIVEN IN SUCH REPORT AND, AMONG OTHER THINGS, PROVIDES THAT SUCH REPORT SHALL INCLUDE A STATEMENT AS TO "THE TOTAL AMOUNT OF BUSINESS DONE AND THE AMOUNT OF BUSINESS DONE WITHIN THE STATE BY SAID CORPORATION DURING ITS PRECEDING ANNUAL ACCOUNTING PERIOD, GIVEN SEPARATELY". AFTER THE FILING OF SUCH ANNUAL CORPORATION REPORT THE TAX COMMISSIONER, UNDER THE PROVISIONS OF 5498 GC, IS REQUIRED TO DETERMINE THE VALUE OF THE ISSUED AND OUTSTANDING SHARES OF STOCK OF THE CORPORATION FILING SUCH REPORT. THIS SECTION FURTHER PROVIDES THAT THE TAX COMMISSIONER SHALL THEN DETERMINE THE BASE UPON WHICH THE TAX PROVIDED FOR IN 5499 GC, SHALL BE COMPUTED, AS FOLLOWS: "DIVIDE INTO TWO EQUAL PARTS THE VALUE AS ABOVE DETERMINED OF THE ISSUED AND OUTSTANDING SHARES OF STOCK OF EACH CORPORATION FILING SUCH REPORT. TAKE ONE PART AND MULTIPLY BY A FRACTION WHOSE NUMERATOR IS THE FAIR VALUE OF ALL THE CORPORATION'S PROPERTY OWNED OR USED BY IT IN OHIO AND WHOSE DENOMINATOR IS THE FAIR VALUE OF ALL ITS PROPERTY WHERESOEVER SITUATED, IN EACH CASE ELIMINATING ANY ITEM OF GOOD WILL; TAKE THE OTHER PART AND MULTIPLY BY A FRACTION WHOSE NUMERATOR IS THE VALUE OF THE BUSINESS DONE BY THE CORPORATION IN THIS [\*14] STATE DURING THE YEAR PRECEDING THE DATE OF THE COMMENCEMENT OF ITS CURRENT ANNUAL ACCOUNTING PERIOD AND WHOSE DENOMINATOR IS THE TOTAL VALUE OF ITS BUSINESS DURING SAID YEAR WHEREEVER TRANSACTED. " THIS SECTION FURTHER PROVIDES THAT THEREUPON THE TAX COMMISSIONER SHALL CERTIFY TO THE AUDITOR OF STATE THE AMOUNT DETERMINED BY HIM "THROUGH ADDING THE TWO FIGURES THUS OBTAINED FOR EACH CORPORATION". BY 5499 GC, IT IS PROVIDED THAT "THE AUDITOR OF STATE SHALL CHARGE FOR COLLECTION FROM EACH SUCH CORPORATION A FEE (TAX) OF ONETENTH OF ONE PER CENT UPON SUCH VALUE SO CERTIFIED AND SHALL IMMEDIATELY CERTIFY THE SAME TO THE TREASURER OF STATE". AS ABOVE NOTED, THE

PRIMARY QUESTION FOR CONSIDERATION IN THIS CASE IS WHETHER THE TAX COMMISSIONER IN MAKING THE COMPUTATION DETERMINING THE AMOUNT OF THE FRANCHISE TAX TO BE PAID BY THE APPELLANT IN THE YEAR 1939, USED THE PROPER BUSINESS FRACTION TO DETERMINE THE VALUE OF THE BUSINESS DONE BY THE APPELLANT IN THIS STATE DURING THE YEAR 1938 AS COMPARED WITH THE TOTAL VALUE OF ITS BUSINESS DURING SAID YEAR WHEREVER TRANSACTED, OR WHETHER, ON THE OTHER HAND, THE TAX COMMISSIONER IN DETERMINING SUCH BUSINESS FRACTION INCLUDED IN THE NUMERATOR THEREOF [\*15] SALES ITEMS WHICH UNDER THE SUBSTANTIVE LAW APPLICABLE THERETO, SHOULD HAVE BEEN EXCLUDED FROM THE NUMERATOR OF SUCH BUSINESS FRACTION. IN THIS CONNECTION IT DOES NOT APPEAR THAT THE APPELLANT IN THIS CASE DENIES, GENERALLY, THE RIGHT OF THE TAX COMMISSIONER TO TAKE THE VALUE OF THE SALES MADE BY THE CORPORATION FROM ITS MANUFACTURING PLANT IN OHIO AND ELSEWHERE DURING THE YEAR 1938 IN DETERMINING THE PROPORTIONATE VALUE OF THE BUSINESS DONE BY THE CORPORATION IN THIS STATE; BUT ASIDE FROM ITS CONTENTION THAT THE TAX COMMISSIONER IN DETERMINING THE BUSINESS FRACTION TO BE USED BY HIM IN HIS COMPUTATION SHOULD HAVE AVERAGED THE SEPARATE FRACTIONS (PREDICATED ON SALES) INDICATING, RESPECTIVELY, THE INDUSTRIAL AND COMMERCIAL ACTIVITIES OF THE COMPANY DURING SAID YEAR, AS SET OUT IN ITS APPLICATION FOR REVIEW FILED WITH THE TAX COMMISSIONER IN THIS CASE, THE APPELLANT LIKewise CONTENDS THAT THE TAX COMMISSIONER INCLUDED IN THE NUMERATOR OF THE BUSINESS FRACTION USED BY HIM ITEMS OF SALES MADE BY THE CORPORATION FROM ITS MANUFACTURING PLANT IN OHIO WHICH SHOULD NOT HAVE BEEN INCLUDED THEREIN. AS TO THE CONTENTION MADE BY THE APPELLANT THAT THE TAX COMMISSIONER IN DETERMINING THE PROPORTION [\*16] OF BUSINESS DONE BY THE CORPORATION IN THIS STATE, SHOULD HAVE SEPARATELY CONSIDERED THE FACTORS OF MANUFACTURING OPERATIONS AND SALES OF ITS FINISHED PRODUCTS, RESPECTIVELY, AND SHOULD HAVE AVERAGED THE FRACTIONS REPRESENTED BY THE SEVERAL FACTORS, IT IS TO BE OBSERVED THAT ALTHOUGH THE SECTIONS OF THE GENERAL CODE PROVIDING FOR THE FRANCHISE TAX TO BE PAID BY CORPORATIONS FOR THE PRIVILEGE OF DOING BUSINESS IN THIS STATE PROVIDES THAT SUCH TAX SHALL BE DETERMINED IN PART BY A CONSIDERATION OF THE VALUE OF THE BUSINESS DONE BY THE CORPORATION IN THIS STATE AS COMPARED WITH THE TOTAL VALUE OF ITS BUSINESS WHEREVER TRANSACTED, THESE STATUTORY PROVISIONS, LIKE THE LAWS OF THE STATE OF ILLINOIS AND, PERHAPS, OF OTHER STATES AS WELL, PROVIDING FOR CORPORATION FRANCHISE TAXES, DO NOT DIRECT THE USE OF ANY PARTICULAR FACTOR OR FACTORS IN DETERMINING THE PROPORTION OF THE BUSINESS DONE BY THE CORPORATION IN THE STATE. IN THIS SITUATION IT IS COMPETENT FOR THE TAXING AUTHORITY CHARGED WITH THE ADMINISTRATION OF THE FRANCHISE TAX LAW IN DETERMINING THE AMOUNT OF FRANCHISE TAX TO BE PAID BY A MANUFACTURING CORPORATION HAVING A MANUFACTURING PLANT IN OHIO TO DETERMINE THE PROPORTIONATE AMOUNT [\*17] OF BUSINESS DONE BY THE CORPORATION IN THIS STATE BY A CONSIDERATION OF THE VALUE OF THE SALES OF ITS MANUFACTURED PRODUCTS MADE FROM SUCH MANUFACTURING PLANT OR FROM WAREHOUSES OR OTHER STOCKS OF GOODS OF THE CORPORATION LOCATED IN THE STATE. *SEE ILLINOIS IRON & BOLT COMPANY V EMMERSON, SECRETARY OF STATE, 333 ILL. 351; HUMP HAIRPIN MANUFACTURING COMPANY V EMMERSON, SECRETARY OF STATE, 258 U.S. 295; WESTERN CARTRIDGE COMPANY V EMMERSON, SECRETARY OF STATE, 281 U.S. 511.* IN THIS CONNECTION IT IS PERTINENT TO NOTE THAT EVER SINCE THE ORIGINAL ENACTMENT OF THE CORPORATION FRANCHISE TAX LAW OF THIS STATE PROVIDING FOR THE DETERMINATION OF THE AMOUNT OF SUCH TAX ON THE BASIS OF THE PROPORTION OF THE PROPERTY OWNED AND BUSINESS DONE BY THE CORPORATION IN THIS STATE, THE TAX COMMISSION OF OHIO IN ADMINISTERING THIS LAW AS TO A MANUFACTURING CORPORATION, HAS MEASURED THE PROPORTIONATE AMOUNT OF ITS BUSINESS IN OHIO BY THE VALUE OF THE SALES OF ITS MANUFACTURED PRODUCTS FROM ITS FACTORY OR WAREHOUSE OR FROM OTHER STOCKS OF ITS MANUFACTURED GOODS IN THIS STATE. RULE NO. 275, ABOVE REFERRED TO, ADOPTED BY THE TAX COMMISSIONER UNDER DATE OF OCTOBER 13, 1939, IS BUT A CONFIRMATION OF THE UNIFORM [\*18] RULE OF PRACTICE GOVERNING THE DETERMINATION OF THE FRANCHISE TAXES TO BE PAID BY MANUFACTURING CORPORATIONS DOING BUSINESS IN THIS STATE. AS TO THIS IT IS FURTHER NOTED THAT THE ATTORNEY GENERAL IN AN OPINION DIRECTED TO THE TAX COMMISSION OF OHIO UNDER DATE OF APRIL 15, 1915, CONSTRUING 5502 GC, (AS TO FOREIGN CORPORATIONS THE SECTION PRECEDING 5498 GC) SAID: "I AM

OF THE OPINION THAT UNDER THE PROVISIONS OF 5502 GC, IT IS THE DUTY OF THE COMMISSION TO SELECT SOME FACTOR OR CRITERION WHICH WILL REPRESENT THE VOLUME OF THE BUSINESS DONE IN OHIO AS COMPARED WITH THE VOLUME OF THE BUSINESS OF THE COMPANY AS A WHOLE; AND THAT THE BUSINESS BEING MANUFACTURING, AND ALL MANUFACTURING BEING FOR THE PURPOSE OF SALE, THE SALES OF THE PRODUCTS OF THE FACTORIES MAY BE USED AS SUCH A MEASURE OF THE VOLUME OF THE MANUFACTURING BUSINESS. WHEN SO USED THE SALES DO NOT REPRESENT COMMERCE AT ALL, BUT MANUFACTURE, AND MAY JUST AS APPROPRIATELY BE USED FOR THIS PURPOSE AS ANY OTHER CRITERION, SUCH AS THE TOTAL VALUE OF THE MANUFACTURED ARTICLES. " O. A. G. 1915, VOL. 1, P. 460. SEE O. A. G. 1915, VOL. 3, P. 2411; O. A. G. 1932, VOL. 2, P. 615; O. A. G. 1933, VOL. 2, P. 1101; O. A. G. 1937, VOL. [\*19] 1, P. 220. THE SECTIONS OF THE GENERAL CODE OF OHIO PROVIDING FOR CORPORATION FRANCHISE TAXES AND FOR THE DETERMINATION OF THE AMOUNT OF SUCH TAXES HAVE BEEN AMENDED FROM TIME TO TIME SINCE THE ORIGINAL ENACTMENT; AND THE FACT THAT THE LEGISLATURE WITH FULL KNOWLEDGE OF THIS UNIFORM RULE AND PRACTICE BY WHICH THE PROPORTIONATE VALUE OF THE BUSINESS DONE BY MANUFACTURING CORPORATIONS IN THIS STATE HAS BEEN DETERMINED ON A CONSIDERATION OF THE VALUE OF SALES MADE BY SUCH CORPORATIONS FROM MANUFACTURING PLANTS AND WAREHOUSES IN THIS STATE, HAS NOT BY ANY LEGISLATIVE ENACTMENT PRESCRIBED ANY OTHER OR DIFFERENT FACTOR TO BE USED BY THE TAXING AUTHORITY IN DETERMINING THE PROPORTIONATE VALUE OF THE BUSINESS DONE BY SUCH CORPORATIONS IN THE STATE AS COMPARED WITH THE VALUE OF THE TOTAL BUSINESS DONE BY THE CORPORATIONS, IS PERSUASIVE EVIDENCE OF LEGISLATIVE RECOGNITION AND APPROVAL OF THE METHOD USED BY THE TAXING AUTHORITY IN ADMINISTERING THE FRANCHISE TAX LAWS ABOVE NOTED. *BREWSTER V GAGE*, 280 U.S. 327; *STATE EX REL V BROWN*, 121 OH ST 73, 76. IN THIS CONNECTION IT MAY BE OBSERVED THAT ALTHOUGH THE FORMULA ABOVE REFERRED TO, SUGGESTED BY THE APPELLANT AS THE METHOD TO BE USED BY THE [\*20] TAX COMMISSIONER IN DETERMINING THE BUSINESS FRACTION TO BE APPLIED TOGETHER WITH THE PROPERTY FRACTION IN THE COMPUTATION OF APPELLANT'S FRANCHISE TAX FOR THE YEAR 1939, IS SOMEWHAT ARBITRARY AND IS NOT RESPONSIVE IN ANY APPROXIMATE WAY TO THE BASIC CONTENTIONS MADE BY THE APPELLANT WITH RESPECT TO THE APPLICATION OF THE LAW TO THE FACTS OF THIS CASE TOUCHING THE QUESTION OF THE PROPER COMPUTATION OF SAID FRANCHISE TAX, THIS FORMULA AS THE SAME IS PRESENTED BY THE APPELLANT HEREIN, SEEMS TO BE PREDICATED ON THE FACT THAT AS TO A CONSIDERABLE AND SUBSTANTIAL PART OF THE ALUMINUM PRODUCTS WHICH WERE MANUFACTURED BY THE APPELLANT AT ITS PLANT AT CLEVELAND, OHIO, AND WHICH AS FINISHED PRODUCTS WERE SOLD FROM SAID PLANT, SUCH ALUMINUM PRODUCTS WERE PARTIALLY MANUFACTURED IN STATES OTHER THAN OHIO BEFORE THEY WERE DELIVERED TO APPELLANT'S PLANT AT CLEVELAND WHERE THE MANUFACTURING OPERATIONS ON SUCH PRODUCTS WERE COMPLETED. AS TO THIS CONTENTION OF THE APPELLANT IT MAY BE STATED, GENERALLY, THAT WHERE A FRANCHISE OR OTHER EXCISE TAX IS MEASURED OR LIMITED BY THE VALUE OF THE SALES OF FINISHED PRODUCTS SOLD OR INSTALLED BY THE TAXPAYER IN THE TAXING STATE, THE AMOUNT AND VALUE OF SUCH SALES [\*21] MAY NOT BE REDUCED OR OTHERWISE AFFECTED BY ALLOCATING ANY PART OF THE SALE PRICE OF SUCH GOODS TO THE COST OF THEIR MANUFACTURE IN WHOLE OR IN PART OUT OF SUCH STATE. *EATON, CRANE & PIKE COMPANY V COMMONWEALTH*, 241 MASS. 309; *DRAVO CONTRACTING COMPANY V JAMES*, 114 FED. (2D) 242, 246 *PANITZ V DISTRICT OF COLUMBIA*, 122 FED. (2D) 61. AND THIS RULE LIKEWISE APPLIES AS TO SALES OF ITS PRODUCTS BY A MANUFACTURING CORPORATION FROM ITS PLANT, WAREHOUSES OR OTHER REPOSITORIES IN THE TAXING STATE, ALTHOUGH SUCH PRODUCTS ARE WHOLLY MANUFACTURED BY THE CORPORATION IN SOME OTHER STATE OR STATES. SEE *FORD MOTOR COMPANY V CLARK*, 100 FED. (2D) 515, *AFFIRMED FORD MOTOR COMPANY V BEAUCHAMP*, 308 U.S. 331. IN THIS CONNECTION, IT SEEMS CLEAR TO US THAT THE CASE OF *JAMES V DRAVO CONTRACTING COMPANY*, 302 U.S. 134, 82 L. ED. 155, CITED BY APPELLANT ON THIS POINT, IS CLEARLY DISTINGUISHABLE FROM THE CASE HERE PRESENTED SO FAR AS THIS QUESTION IS CONCERNED. IN THE CASE CITED BY APPELLANT IT APPEARED THAT CERTAIN EQUIPMENT INSTALLED BY THE TAXPAYER AS A PART OF A CONSTRUCTION PROJECT IN THE STATE OF WEST VIRGINIA, THE TAXING STATE, WAS NOT ONLY MANUFACTURED IN ANOTHER STATE (PENNSYLVANIA), BUT THAT [\*22] THE TAXPAYER HAD RECEIVED PAYMENT FOR THE SAME IN SUCH OTHER STATE ACCORDING TO THE TERMS OF HIS CONTRACT; AND INASMUCH AS WITH RESPECT TO SAID TAXPAYER THE TAX

THERE IN QUESTION WAS ONE UPON HIS GROSS RECEIPTS AS A CONTRACTOR FOR THE CONSTRUCTION OF SAID PROJECT, IT WAS HELD THAT THE RECEIPTS OF SAID CONTRACTOR IN SUCH OTHER STATE FOR WORK THERE DONE BY HIM WERE NOT SUBJECT TO THE TAX THERE IN QUESTION. AND FOR THIS OBVIOUS REASON THE CASE CITED BY APPELLANT HAS BEEN DISTINGUISHED WITH RESPECT TO THE QUESTION HERE UNDER CONSIDERATION. *FORD MOTOR COMPANY V BEAUCHAMP*, 308 U.S. 331, 84 L. ED. 304, 307; *DRAVO CONTRACTING COMPANY V JAMES*, 114 FED. (2D) 242, 246, SUPRA. WE ARE OF THE VIEW, THEREFORE, THAT THE TAX COMMISSIONER DID NOT ERR IN DENYING APPELLANT'S APPLICATION FOR REVIEW SO FAR AS THIS QUESTION IS CONCERNED. *ASIDE FROM THE CONTENTION MADE BY THE APPELLANT AS TO THE SEPARATE ALLOCATION OF SALES WITH RESPECT TO MANUFACTURING AND SALES ACTIVITIES, RESPECTIVELY, OF THE CORPORATION, HEREIN ABOVE CONSIDERED AND DISCUSSED, THE APPELLANT RELYING UPON THE CASE OF GWIN, WHITE & PRINCE V HENNEFORD*, 305 U. S. 434, 83 L. ED. 272; *WRIGHT AERONAUTICAL CORPORATION V MARTIN, STATE TAX COMMISSIONER*, [\*23] 19 ATL. (2ND) 338, DECIDED BY THE BOARD OF TAX APPEALS OF NEW JERSEY; AND *FLOWERS, SECRETARY OF STATE V PAN AMERICAN REFINING CORPORATION*, 154 S. W. (2ND) 982, DECIDED BY THE COURT OF CIVIL APPEALS OF TEXAS, CONTENTS THAT THE TAX COMMISSIONER ERRED IN INCLUDING AS OHIO BUSINESS AND IN THE NUMERATOR OF THE BUSINESS FRACTION BY WHICH THE PROPORTIONATE AMOUNT OF SUCH OHIO BUSINESS WAS DETERMINED, SALES OF FINISHED PRODUCTS MADE BY THE APPELLANT FROM ITS MANUFACTURING PLANT AT CLEVELAND, OHIO, TO CUSTOMERS IN STATES OTHER THAN OHIO; AND THIS ON THE STATED GROUND THAT SUCH SALES WERE MADE IN INTERSTATE COMMERCE. AS TO THIS IT APPEARS THAT DURING THE YEAR 1938 THE APPELLANT SOLD FROM ITS PLANT AT CLEVELAND, OHIO, FINISHED PRODUCTS THERE MANUFACTURED HAVING A SALE VALUE OF \$8,710,581.00, OF WHICH SALES OF THE VALUE OF \$1,274,452.00 WERE MADE TO OHIO CUSTOMERS, AND SALES OF THE VALUE OF \$7,436,129.00 WERE MADE TO CUSTOMERS OUTSIDE OF OHIO, ON WHICH SHIPMENTS OF THE PRODUCTS SO SOLD WERE MADE FROM THE COMPANY'S CLEVELAND PLANT TO POINTS OUTSIDE OF OHIO. IN THE CONSIDERATION OF THE QUESTION HERE PRESENTED WITH RESPECT TO THE SALES MADE BY THE APPELLANT FROM ITS PLANT AT CLEVELAND TO CUSTOMERS [\*24] OUTSIDE OF OHIO AND THE SHIPMENT OF PRODUCTS SO SOLD TO POINTS OUTSIDE OF THIS STATE, IT IS TO BE NOTED THAT APPELLANT IS NOT ENGAGED IN A BUSINESS THE ACTIVITIES OF WHICH ARE SOLELY IN OR RELATING TO INTERSTATE COMMERCE. ON THE CONTRARY, IT APPEARS THAT THE APPELLANT IS ENGAGED IN THE MANUFACTURE OF ALUMINUM AND ALUMINUM PRODUCTS AT A PLANT OPERATED BY IT IN OHIO, FROM WHICH PLANT SALES ARE MADE INDIFFERENTLY TO CUSTOMERS IN OHIO AND ELSEWHERE. IN OTHER WORDS, THE APPELLANT BY REASON OF ITS MANUFACTURING OPERATIONS IS ENGAGED IN A LOCAL BUSINESS IN THIS STATE AND, BY REASON OF THIS FACT, IS SUBJECT TO THE CORPORATION FRANCHISE TAX PROVIDED FOR BY THE SECTIONS OF THE GENERAL CODE ABOVE REFERRED TO, WHICH TAX IS MEASURED AS THEREIN PROVIDED. AGAIN IT IS NOTED IN THIS CONNECTION THAT THE TAX HERE IN QUESTION IS NOT ONE ON THE PRIVILEGE OF ENGAGING IN INTERSTATE BUSINESS. MOREOVER, THIS TAX IS NOT ONE ON THE SALES MADE BY APPELLANT OF THE GOODS MANUFACTURED BY IT IN OHIO, NOR IS IT A TAX ON THE GROSS RECEIPTS OR INCOME OF THE APPELLANT DERIVED FROM SUCH SALES MADE IN INTERSTATE COMMERCE OR OTHERWISE; BUT THIS TAX AS TO APPELLANT, A FOREIGN CORPORATION, IS A FRANCHISE TAX ON THE PRIVILEGE [\*25] THE CORPORATION HAS OF DOING BUSINESS IN THIS STATE AND OF OWNING AND USING A PART OF ITS CAPITAL AND PROPERTY IN THIS STATE, WHICH TAX IS MEASURED IN PART BY THE PROPORTION OF THE BUSINESS DONE BY THE CORPORATION IN THIS STATE OF THE TOTAL BUSINESS DONE BY SAID CORPORATION. THE DISTINCTION IMPLICIT IN THIS STATEMENT WITH RESPECT TO THIS QUESTION AS TO THE SAME HAS BEEN PRESENTED BY THE APPELLANT ON THE FACTS OF THIS CASE, HAS BEEN RECOGNIZED IN A NUMBER OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES. *THUS IN THE CASE OF CLOVERDALE V ARKANSASLOUISIANA PIPELINE COMPANY*, 303 U. S. 604, 610, 82 L. ED. 1048, IT WAS SAID: "WHILE A PRIVILEGE TAX BY A STATE FOR ENGAGING IN INTERSTATE BUSINESS HAS FREQUENTLY MET THE CONDEMNATION OF THIS COURT AS A REGULATION OF COMMERCE, PRIVILEGE TAXES FOR 'CARRYING ON A LOCAL BUSINESS', EVEN THOUGH MEASURED BY INTERSTATE BUSINESS, HAVE BEEN SUSTAINED. *AMERICAN MFG. CO. V ST. LOUIS*, 250 U. S. 459, 69 L. ED. 1084, 39 S. CT. 522; *FICKLEN V TAXING DIST.*, 145 U. S. 1, 36 L. ED. 601, 12 S. CT. 810, 4 INTERS. COM. REP., 79, OF *WESTERN LIVESTOCK V BUREAU OF REVENUE*, 303 U. S. 250, 82 L. ED. 823, 58 S. CT. 546." IN THE RECENT CASE OF *MCGOLDRICK* [\*26] V *BERWIND-WHITE COAL MINING*

*COMPANY*, 309 U. S. 33, 57, 58, 84 L. ED. 565, 577, THE SUPREME COURT OF THE UNITED STATES REFERRING TO PREVIOUS DECISIONS MADE BY THAT COURT DISTINGUISHING TAXES ON GROSS RECEIPTS DERIVED FROM SALES IN INTERSTATE COMMERCE FROM A TAX CONDITIONED UPON THE EXERCISE OF THE TAXPAYER'S FRANCHISE OR PRIVILEGE OF MANUFACTURING IN THE TAXING STATE, SAID: "IT IS TRUE THAT A STATE TAX UPON THE OPERATIONS OF INTERSTATE COMMERCE MEASURED EITHER BY ITS VOLUME OR THE GROSS RECEIPTS DERIVED FROM IT HAS BEEN HELD TO INFRINGE THE COMMERCE CLAUSE, BECAUSE THE TAX IF SUSTAINED WOULD EXACT TRIBUTE FOR THE COMMERCE CARRIED ON BEYOND THE BOUNDARIES OF THE TAXING STATE, AND WOULD LEAVE EACH STATE THROUGH WHICH THE COMMERCE PASSES FREE TO SUBJECT IT TO LIKE BURDEN NOT BORNE BY INTRASTATE COMMERCE. SEE *WESTERN LIVE STOCK V BUREAU OF REVENUE*, SUPRA (303 U. S. 255, 82 L. ED. 827, 58 S. CT. 546, 115 A. L. R. 944); *GWIN, WHITE & PRINCE V HENNEFORD*, SUPRA (305 U. S. 439, 83 L. ED. 275, 59 S. CT. 325). "IN *J. D. ADAMS MFG. CO. V STOREN*, SUPRA (304 U. S. 311, 82 L. ED. 1369, 1370, 58 S. CT. 913, 117 A. L. R. 429), A TAX ON GROSS RECEIPTS, SO FAR AS LAID BY THE STATE OF THE SELLER UPON [\*27] THE RECEIPTS FROM SALES OF GOODS MANUFACTURED IN THE TAXING STATE AND SOLD IN OTHER STATES, WAS HELD INVALID BECAUSE THERE THE COURT FOUND THE RECEIPTS DERIVED FROM ACTIVITIES IN INTERSTATE COMMERCE, AS DISTINGUISHED FROM THE RECEIPTS FROM ACTIVITIES WHOLLY INTRASTATE, WERE INCLUDED IN THE MEASURE OF THE TAX, THE SALES PRICE, WITHOUT SEGREGATION OR APPORTIONMENT. IT WAS POINTED OUT, PAGES 310-312, THAT HAD THE TAX BEEN CONDITIONED UPON THE EXERCISE OF THE TAXPAYER'S FRANCHISE OR ITS PRIVILEGE OF MANUFACTURING IN THE TAXING STATE, IT WOULD HAVE BEEN SUSTAINED, DESPITE ITS INCIDENTAL EFFECT ON INTERSTATE COMMERCE SINCE THE TAXPAYER'S LOCAL ACTIVITIES OR PRIVILEGES WERE SUFFICIENT TO SUPPORT SUCH A TAX, AND THAT IT COULD FAIRLY BE MEASURED BY THE SALES PRICE OF THE GOODS. "IN *THE CASE OF J. D. ADAMS MFG. CO. V STOREN*, 304 U. S. 311, 312, 82 L. ED. 1365, 1369, THE SUPREME COURT, REFERRING TO THE TAX THERE UNDER CONSIDERATION (A STATE GROSS INCOME TAX) AND DISTINGUISHING SUCH TAX FROM THAT OF THE KIND INVOLVED IN THIS APPEAL, SAID: "IT IS NOT A CHARTER FEE OR A FRANCHISE FEE MEASURED BY THE VALUE OF GOODS MANUFACTURED OR THE AMOUNT OF SALES SUCH AS THE STATE WOULD BE COMPETENT TO DEMAND [\*28] FROM DOMESTIC OR FOREIGN CORPORATIONS FOR THE PRIVILEGE CONFERRED. IT IS NOT AN EXCISE UPON THE PRIVILEGE OF PRODUCING OR MANUFACTURING WITHIN THE STATE, MEASURED BY THE VOLUME OF PRODUCTION OR THE AMOUNT OF SALES. "THE SUPREME COURT, LIKEWISE, IN THIS CASE, DISTINGUISHING THE TAX THEN BEFORE IT FROM THAT INVOLVED IN THE CASE OF *AMERICAN MANUFACTURING COMPANY V ST. LOUIS*, 250 U. S. 459, 63 L. ED. 1084, AND SPEAKING OF THE EARLIER CASE REFERRED TO, SAID: "THAT CASE DEALT WITH A MUNICIPAL LICENSE FEE FOR PURSUING THE OCCUPATION OF A MANUFACTURER IN ST. LOUIS. THE EXACTION WAS NOT AN EXCISE TAX LAID UPON THE TAXPAYER'S SALES OR UPON THE INCOME DERIVED FROM SALES. THE TAX ON THE PRIVILEGE FOR THE ENSUING YEAR WAS MEASURED BY A PERCENTAGE OF THE PAST YEAR'S SALES. THE TAXPAYER HAD DURING THE PRECEDING YEAR REMOVED SOME OF THE GOODS MANUFACTURED TO A WAREHOUSE IN ANOTHER STATE, AND UPON SALE, DELIVERED THEM FROM THE WAREHOUSE. IT CONTENDED THAT THE CITY WAS WITHOUT POWER TO INCLUDE THESE SALES IN THE MEASURE OF THE TAX FOR THE COMING YEAR. THE COURT HELD, HOWEVER, THAT THE TAX WAS UPON THE PRIVILEGE OF MANUFACTURING WITHIN THE STATE AND IT WAS PERMISSIBLE TO MEASURE THE TAX BY THE [\*29] SALES PRICE OF THE GOODS PRODUCED RATHER THAN BY THEIR VALUE AT THE DATE OF MANUFACTURE. "IN *THE CASE OF AMERICAN MANUFACTURING COMPANY V CITY OF ST. LOUIS*, 250 U. S. 459, 63 L. ED. 1084, IT WAS HELD THAT A TAX UPON THE PRIVILEGE OF PURSUING THE BUSINESS OF MANUFACTURING IN THE CITY OF ST. LOUIS IMPOSED BY AN ORDINANCE OF THAT CITY PURSUANT TO THE AUTHORITY OF A PROVISION OF ITS CHARTER, WAS NOT AN UNCONSTITUTIONAL REGULATION OF INTERSTATE COMMERCE MERELY BECAUSE, AS TO THE TAXPAYER THERE REPRESENTED, THE AMOUNT OF THE TAX WAS MEASURED BY THE AMOUNT AND VALUE OF THE SALES OF GOODS MANUFACTURED IN ITS LOCAL FACTORY, WHETHER SUCH GOODS WERE SOLD WITHIN OR WITHOUT THE STATE, EITHER IN DOMESTIC OR INTERSTATE COMMERCE. AS RECOGNIZED BY THE SUPREME COURT OF THE UNITED STATES IN LATER CASES ABOVE REFERRED TO, THE CASE OF *THE AMERICAN MANUFACTURING COMPANY V ST. LOUIS* DISTINCTLY SUPPORTS THE VIEW THAT AS TO A MANUFACTURING CORPORATION HAVING ITS MANUFACTURING PLANT IN THE TAXING STATE, SALES MADE BY THE CORPORATION FROM ITS PLANT TO CUSTOMERS IN OTHER

STATES MAY BE CONSIDERED, TOGETHER WITH THE INTRASTATE SALES MADE BY IT IN MEASURING THE AMOUNT OF A FRANCHISE OR PRIVILEGE TAX TO BE PAID [\*30] BY SUCH CORPORATION. *IN THE CASE OF HUMP HAIRPIN MANUFACTURING COMPANY V EMMERSON*, 258 U. S. 295, 66 L. ED. 623, 625, THE COURT IN SUSTAINING A TAX ASSESSED AGAINST SAID COMPANY UNDER THE CORPORATION FRANCHISE TAX LAW OF THE STATE OF ILLINOIS SAID: "WHILE A STATE MAY NOT USE ITS TAXING POWER TO REGULATE OR BURDEN INTERSTATE COMMERCE (UNITED STATES EXP. CO. V MINNESOTA, 223 U. S. 335, 56 L. ED. 459, 32 SUP. CT. REP. 211; INTERNATIONAL PAPER CO. V MASSACHUSETTS, 246 U. S. 135, 62 L. ED. 624, 38 SUP. CT. REP. 292. ANN CAS. 1918C, 617), ON THE OTHER HAND IT IS SETTLED THAT A STATE EXCISE TAX WHICH AFFECTS SUCH COMMERCE, NOT DIRECTLY, BUT ONLY INCIDENTALLY AND REMOTELY, MAY BE ENTIRELY VALID WHERE IT IS CLEAR THAT IT IS NOT IMPOSED WITH THE COVERT PURPOSE OR WITH THE EFFECT OF DEFEATING FEDERAL CONSTITUTIONAL RIGHTS. AS COMING WITHIN THIS LATTER DESCRIPTION, TAXES HAVE BEEN SO REPEATEDLY SUSTAINED WHERE THE PROCEEDS OF INTERSTATE COMMERCE HAVE BEEN USED AS ONE OF THE ELEMENTS IN THE PROCESS OF DETERMINING THE AMOUNT OF A FUND (NOT WHOLLY DERIVED FROM SUCH COMMERCE) TO BE ASSESSED, THAT THE PRINCIPLE OF THE CASES SO HOLDING MUST BE REGARDED AS A SETTLED EXCEPTION TO THE GENERAL RULE. [\*31] \*\*\* THE TURNING POINT OF THESE DECISIONS IS WHETHER, IN ITS INCIDENCE, THE TAX AFFECTS INTERSTATE COMMERCE SO DIRECTLY AND IMMEDIATELY AS TO AMOUNT TO A GENUINE AND SUBSTANTIAL REGULATION OF, OR RESTRAINT UPON, IT, OR WHETHER IT AFFECTS IT ONLY INCIDENTALLY OR REMOTELY, SO THAT THE TAX IS NOT IN REALITY A BURDEN, ALTHOUGH IN FORM IT MAY TOUCH, AND, IN FACT, DISTANTLY AFFECT, IT. " *THE DECISION OF THE COURT IN THE CASE OF HUMP HAIRPIN MANUFACTURING COMPANY V EMMERSON WAS FOLLOWED IN THE LATER DECISIONS OF ILLINOIS IRON & BOLT COMPANY V EMMERSON*, 333 ILL. 351, 164 N. E. 667 AND *WESTERN CARTRIDGE COMPANY V EMMERSON*, 281 U. S. 511, 74 L. ED. 1004, BOTH OF WHICH CASES, LIKEWISE, AROSE UNDER THE CORPORATION FRANCHISE TAX LAW OF THE STATE OF ILLINOIS. IN THE CASE OF ILLINOIS IRON & BOLT COMPANY V EMMERSON, SUPRA, THE SUPREME COURT OF ILLINOIS HELD, AS INDICATED IN THE HEADNOTE OF THE LAST NAMED REPORT OF THIS CASE, AS FOLLOWS: "WHERE SECRETARY OF STATE, IN COMPUTING FRANCHISE TAX TO BE PAID BY CORPORATIONS UNDER CORPORATION ACT (SMITHHURD REV. ST. 1927, C. 32) PAR. 105, ON EACH \$100 OF PROPORTION OF CAPITAL STOCK REPRESENTED BY BUSINESS TRANSACTED AND PROPERTY LOCATED IN STATE, INCLUDED [\*32] INTERSTATE BUSINESS TRANSACTED BY CORPORATIONS AS WELL AS INTRASTATE BUSINESS TAX WAS NOT INVALID, SINCE TAX IMPOSED ON INTERSTATE COMMERCE WAS INCIDENTAL. " IN THE CASE OF WESTERN CARTRIDGE COMPANY V EMMERSON, SUPRA, IT WAS HELD AS TO THE PETITIONER, A FOREIGN CORPORATION ENGAGED IN THE MANUFACTURE OF PRODUCTS IN THE STATE OF ILLINOIS, THAT ALTHOUGH THE ACCEPTANCE BY THE CORPORATION OF ORDERS FOR ITS PRODUCTS TO BE SHIPPED TO OTHER STATES AND FOREIGN COUNTRIES, AND WHAT WAS THEREAFTER DONE BY IT IN FILING SUCH ORDERS, BECAME COMPONENT PARTS OF INTERSTATE OR FOREIGN COMMERCE, SUCH INTERSTATE COMMERCE WAS NOT UNLAWFULLY BURDENED BY THE INCLUSION OF SALES OF SUCH PRODUCTS MANUFACTURED IN THE STATE AND SHIPPED TO CUSTOMERS IN OTHER STATES, IN COMPUTING A STATE FRANCHISE TAX MEASURED AT A PRESCRIBED RATE ON THE PROPORTION OF THE ISSUED CAPITAL STOCK OF THE COMPANY REPRESENTED BY THE PROPORTION OF ITS BUSINESS TRANSACTED AND PROPERTY LOCATED IN THE STATE. THE COURT IN ITS OPINION IN THIS CASE SAID: "THE TAX IN QUESTION WAS NOT LAID DIRECTLY UPON INTERSTATE COMMERCE, OR ANY OF ITS ELEMENTS. FOR THE DETERMINATION OF THE AMOUNT THE TAXPAYER'S BUSINESS AND PROPERTY LOCATED IN ILLINOIS IS [\*33] DIVIDED BY THE TOTAL OF ALL ITS BUSINESS AND PROPERTY AND THAT PERCENTAGE IS APPLIED TO THE ISSUED SHARES AND THE RESULTING NUMBER TAKEN FOR TAXATION AT THE RATE OF 5 CENTS PER \$100. AS THE AMOUNT DEPENDS ON THE RELATION EACH TO THE OTHERS OF THE VARIOUS ELEMENTS EMPLOYED IN THE CALCULATION, THE FEE OR TAX DOES NOT DIRECTLY DEPEND UPON THE AMOUNT OF THE TAXPAYER'S INTERSTATE TRANSACTIONS. THE EXACTION MAY ARISE WHILE THE SALES TO CUSTOMERS OUTSIDE ILLINOIS DECLINE AND MAY FALL WHILE SUCH SALES INCREASE. "THE AMOUNT IMPOSED UPON PETITIONER DID NOT EVEN INDIRECTLY BURDEN THE INTERSTATE TRANSPORTATION RESULTING FROM THE SHIPPING DIRECTIONS GIVEN BY PETITIONER IN FULFILLMENT OF ITS CONTRACTS OF SALE. THERE IS NOTHING TO INDICATE THAT BY THE ENACTMENT IN QUESTION THE STATE INTENDED TO REGULATE OR BURDEN SUCH COMMERCE OR TO

DISCRIMINATE AS BETWEEN SALES TO ILLINOIS CUSTOMERS AND THOSE MADE TO BUYERS IN OTHER STATES AND COUNTRIES. THE TAX CANNOT BE SAID DIRECTLY OR BY NECESSARY OPERATION TO AFFECT ANY OF THE THINGS DONE BY PETITIONER WHICH, BY REASON OF TRANSPORTATION OF GOODS TO PLACES OUTSIDE ILLINOIS IN ACCORDANCE WITH THE DIRECTIONS OF THE PURCHASERS, BECAME ELEMENTS OR COMPONENT [\*34] PARTS OF INTERSTATE OR FOREIGN COMMERCE. PETITIONER'S SALES PRICES ARE BASED ON DELIVERIES TO COMMON CARRIERS AT ITS FACTORIES. THE EXPENSE OF TRANSPORTATION IS NOT INVOLVED IN THE CALCULATION, AND IT IS PLAIN THAT, IF THE FEE OR TAX IN QUESTION AFFECTED PETITIONER'S INTERSTATE OR FOREIGN COMMERCE AT ALL, THE BURDEN WAS INDIRECT AND REMOTE AND NOT A VIOLATION OF THE COMMERCE CLAUSE. " REFERRING TO THE CASES UPON WHICH THE APPELLANT HEREIN MORE PARTICULARLY RELIES IN SUPPORT OF ITS CONTENTION THAT THE ACTION OF THE TAX COMMISSIONER IN INCLUDING IN THE NUMERATOR OF THE BUSINESS FRACTION USED BY HIM THE VALUE OF SALES OF PRODUCTS FROM ITS PLANT AT CLEVELAND, OHIO, TO CUSTOMERS IN OTHER STATES WAS IN VIOLATION OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION, THE FIRST CASE HEREIN NOTED IS GWIN, WHITE & PRINCE, INC. V HENNEFORD, 305 U. S. 434, 83 L. ED. 272. THAT CASE AROSE UNDER A STATUTORY ENACTMENT OF THE STATE OF WASHINGTON WHICH IMPOSED "A TAX FOR THE ACT OR PRIVILEGE OF ENGAGING IN BUSINESS ACTIVITIES" UPON EVERY PERSON (INCLUDING CORPORATIONS) "ENGAGED WITHIN THIS STATE IN ANY BUSINESS ACTIVITY", AT THE RATE OF ONE-HALF OF ONE PER CENT OF THE "GROSS INCOME OF THE BUSINESS". [\*35] AS AGAINST THE APPELLANT IN THAT CASE, A CORPORATION WHOSE ONLY ACTIVITIES CONSISTED OF ACTING AS THE AGENT OR REPRESENTATIVE OF LOCAL FRUIT GROWERS' ORGANIZATIONS IN MARKETING IN OTHER STATES FRUITS GROWN IN THE STATE OF WASHINGTON, AND IN MAINTAINING REPRESENTATIVES OF THE AGENCY IN OTHER STATES AND DIRECTING THEIR ACTIVITIES IN ALL MATTERS PERTAINING TO THE SALE, SHIPMENT, TRANSPORTATION, AND DELIVERY OF SUCH FRUITS TO PURCHASERS IN OTHER STATES, COLLECTING AND REMITTING THE PROCEEDS OF SUCH SALES AND RECEIVING FOR ALL OF SUCH SERVICES RENDERED BY IT A FIXED SUM FOR EACH BOX OF FRUIT SOLD, IT WAS HELD THAT THE TAX IMPOSED BY THIS STATUTE WAS IN VIOLATION OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION. ALL OF THE ACTIVITIES OF THIS CORPORATION AS AN AGENCY OF THE FRUIT GROWERS OF THE STATE OF WASHINGTON IN THE SALE OF FRUIT GROWN BY THEM RELATED TO INTERSTATE COMMERCE; AND INASMUCH AS SOME OF SUCH ACTIVITIES WERE CARRIED ON IN OTHER STATES BY REPRESENTATIVES OF THE AGENCY IN SUCH STATES, ONE OF THE GROUNDS RELIED UPON BY THE COURT IN CONDEMNING THIS TAX AS A VIOLATION OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION IS STATED IN THE OPINION OF THE COURT AS FOLLOWS: "IF WASHINGTON [\*36] IS FREE TO ENACT SUCH A TAX, OTHER STATES TO WHICH THE COMMERCE EXTENDS MAY, WITH EQUAL RIGHT, LAY A TAX SIMILARLY MEASURED FOR THE PRIVILEGE OF CONDUCTING WITHIN THEIR RESPECTIVE TERRITORIAL LIMITS THE ACTIVITIES WHICH CONTRIBUTE TO THE SERVICE. " MOREOVER, SINCE ALL OF THE BUSINESS OF THE APPELLANT CORPORATION WAS INTERSTATE IN ITS CHARACTER, AND INASMUCH AS THE AMOUNT OF THE TAX BASED ON THE GROSS INCOME OF THE CORPORATION WAS DIRECTLY PROPORTIONAL TO THE VOLUME OF SUCH INTERSTATE BUSINESS, THE COURT FURTHER HELD AS A REASON FOR CONDEMNING THE TAX THAT THE SAME "THOUGH NOMINALLY IMPOSED UPON APPELLANT'S ACTIVITIES IN WASHINGTON, BY THE VERY METHOD OF ITS MEASUREMENT REACHES THE ENTIRE INTERSTATE COMMERCE SERVICE RENDERED BOTH WITHIN AND WITHOUT THE STATE AND BURDENS THE COMMERCE IN DIRECT PROPORTION TO ITS VOLUME". THE CASE OF GWIN, WHITE & PRINCE, INC. V HENNEFORD, SUPRA, IS OBVIOUSLY DISTINGUISHABLE WITH RESPECT TO THE QUESTION AT HAND FROM THE CASE NOW BEFORE THIS BOARD ON THE APPEAL OF THE ALUMINUM COMPANY OF AMERICA. AS ABOVE NOTED, GWIN, WHITE & PRINCE, INC. WAS ENGAGED EXCLUSIVELY IN INTERSTATE COMMERCE IN THE CONDUCT OF ITS BUSINESS, AND THE TAX AGAINST IT UNDER THE [\*37] LAW AND UNDER CONSIDERATION WAS SO MEASURED AS TO AMOUNT AS TO BE IN SUBSTANCE AND EFFECT A TAX ON THE GROSS RECEIPTS OF ITS BUSINESS, AND WAS DIRECTLY PROPORTIONED TO THE AMOUNT OF SUCH BUSINESS. IN THE CASE NOW BEFORE THIS BOARD ON THE APPEAL OF THE ALUMINUM COMPANY OF AMERICA IT APPEARS THAT THE APPELLANT IS A CORPORATION ENGAGED IN THE MANUFACTURE OF ALUMINUM AND ALUMINUM PRODUCTS AT A MANUFACTURING PLANT IN THIS STATE; AND THAT IT IS EXERCISING ITS PRIVILEGE OF DOING BUSINESS IN THE STATE OF OHIO AND OF OWNING AND USING A PART OF ITS CAPITAL IN THIS

STATE. IN THIS SITUATION THE APPELLANT COMPANY IN THE CASE NOW BEFORE US IS CLEARLY SUBJECT TO THE FRANCHISE TAX PROVIDED FOR BY 5495 ET SEQ GC; WHICH TAX IS NOT ONE ON THE INCOME OR GROSS RECEIPTS OF THE COMPANY WITH RESPECT TO ITS ACTIVITIES IN THIS STATE, NOR IS SUCH TAX EVEN MEASURED BY SUCH INCOME OR GROSS RECEIPTS IN ANY PROPORTIONAL WAY BY THE INCOME OR GROSS RECEIPTS OF THE CORPORATION REFERABLE TO BUSINESS DONE BY IT IN THIS STATE. ON THE CONTRARY, THE TAX ASSESSED AGAINST THE APPELLANT IN THIS CASE IS, UNDER THE PROVISIONS OF OUR LAW, MEASURED ONLY IN PART BY THE VALUE OF THE BUSINESS DONE BY THE CORPORATION IN THIS STATE; [\*38] WHICH BUSINESS AS TO THE VALUE THEREOF IN THIS STATE, IS COMPUTED NOT ON THE GROSS INCOME OR GROSS RECEIPTS OF THE COMPANY WITH RESPECT TO ITS BUSINESS IN OHIO, BUT, AS IN THE CASES OF AMERICAN MANUFACTURING COMPANY V ST. LOUIS, HUMP HAIRPIN COMPANY V EMERSON, AND WESTERN CARTRIDGE CO. V EMMERSON, SUPRA, IS COMPUTED ON THE VALUE OF SALES OF ITS MANUFACTURED PRODUCTS MADE FROM ITS MANUFACTURING PLANT IN THIS STATE. IN THIS CONNECTION IT IS NOTED THAT THE COURT IN ITS OPINION IN THE CASE OF GWIN, WHITE & PRINCE, INC. V HENNEFORD, SUPRA, EXPRESSLY STATES THAT THE TAX UPHeld BY THAT COURT IN AMERICAN MANUFACTURING COMPANY V ST. LOUIS, SUPRA, WAS NOT OPEN TO THE OBJECTION DIRECTED TO THE TAX THERE IN QUESTION. AND INASMUCH AS THE CASE NOW BEFORE THIS BOARD ON THE APPEAL OF THE ALUMINUM COMPANY OF AMERICA IS, WE THINK MORE DIRECTLY CONTROLLED WITH RESPECT TO THE QUESTION HERE UNDER CONSIDERATION BY THE CASES OF AMERICAN MANUFACTURING COMPANY V ST. LOUIS, HUMP HAIRPIN COMPANY V EMMERSON, AND WESTERN CARTRIDGE COMPANY V EMMERSON, SUPRA, WE ARE OF THE VIEW THAT THE CASE OF GWIN, WHITE & PRINCE, INC. V HENNEFORD, SUPRA, IS NO MORE APPLICABLE TO THIS CASE THAN IT WOULD BE TO CASES OF THE [\*39] KIND CONSIDERED AND DECIDED IN AMERICAN MANUFACTURING COMPANY V ST. LOUIS, HUMP HAIRPIN COMPANY V EMMERSON AND WESTERN CARTRIDGE COMPANY V EMMERSON, SUPRA. IN OTHER WORDS, AS DISTINGUISHED FROM THE TAX UNDER CONSIDERATION IN THE CASE OF GWIN, WHITE & PRINCE, INC., IN ITS APPLICATION TO THE APPELLANT IN THAT CASE THE TAX NOW BEFORE US UNDER THE LAWS OF THIS STATE IS, AS TO THE APPELLANT IN THIS CASE, LIKE THAT UNDER CONSIDERATION IN THE CASE OF AMERICAN MANUFACTURING COMPANY V ST. LOUIS, ONE WHICH, AS TO THE CURRENT YEAR IN QUESTION, IS MEASURED WITH RESPECT TO THE BUSINESS DONE BY THE APPELLANT IN THIS STATE BY THE VALUE OF THE SALES MADE BY IT IN THE PRECEDING YEAR OF PRODUCTS MANUFACTURED BY THE COMPANY AT ITS PLANT IN THIS STATE, WHICH SALES WERE MADE INDIFFERENTLY TO CUSTOMERS BOTH IN AND OUT OF THE STATE. THE ONLY DISTINCTION BETWEEN THE TAX HERE IN QUESTION IN ITS APPLICATION TO THE APPELLANT IN THIS CASE FROM THAT CONSIDERED BY THE COURT IN THE CASE OF AMERICAN MANUFACTURING COMPANY V ST. LOUIS IS THAT IN THE CASE CITED THE TAX WAS MEASURED WHOLLY BY THE VALUE OF THE BUSINESS DONE BY THE CORPORATION DURING THE PRECEDING YEAR, MEASURED BY THE VALUE OF THE SALES OF ITS MANUFACTURED [\*40] PRODUCTS MADE DURING SUCH YEAR, WHILE THE TAX HERE UNDER CONSIDERATION, LIKE THE CORPORATION FRANCHISE TAX OF THE STATE OF ILLINOIS CONSIDERED IN THE HUMP HAIRPIN COMPANY AND WESTERN CARTRIDGE COMPANY CASES, IS ONE MEASURED IN PART BY THE BUSINESS DONE BY THE APPELLANT DURING THE PRECEDING YEAR AND IN PART BY THE PROPERTY OWNED AND USED BY IT IN THIS STATE. OBVIOUSLY, NO CLAIM CAN BE JUSTLY MADE THAT THIS DISTINCTION WITH RESPECT TO THE MEASUREMENT OF THE TAX IN ANY WAY AFFECTS THE CASE OF AMERICAN MANUFACTURING COMPANY V ST. LOUIS AS AN AUTHORITY SUPPORTING THE TAX HERE IN QUESTION WITH RESPECT TO THE QUESTION HERE UNDER CONSIDERATION AND SUPPORTING THE VIEW THAT AS TO THIS QUESTION THE CASE OF GWIN, WHITE & PRINCE, INC. V HENNEFORD IS CLEARLY DISTINGUISHABLE FROM THE CASE NOW BEFORE THIS BOARD. *WITH RESPECT TO THE IMMEDIATE QUESTION HERE UNDER CONSIDERATION, OUR ATTENTION HAS BEEN CALLED TO THE CASE OF WRIGHT AERONAUTICAL COMPANY V MARTIN, 19 ATL. (2ND) 338, RECENTLY DECIDED BY THE BOARD OF TAX APPEALS OF NEW JERSEY. IN THIS CASE THE BOARD OF TAX APPEALS OF SAID STATE HELD THAT R. S. SECTIONS 54:32A-1 ET SEQ OF THE LAWS OF THAT STATE PROVIDING FOR THE ASSESSMENT OF A PRIVILEGE [\*41] TAX AGAINST FOREIGN CORPORATIONS DOING BUSINESS IN THAT STATE, BASED UPON THE PROPORTION OF CAPITAL STOCK ISSUED, WHICH "GROSS INCOME FROM BUSINESS DONE IN THIS STATE BEARS TO TOTAL GROSS INCOME FROM ENTIRE BUSINESS", REQUIRE A DETERMINATION BY THE STATE TAX COMMISSIONER OF THE*

PROPOSITION OF INTRASTATE SALES TO TOTAL SALES OF THE COMPANY, AND THAT THE INCLUSION BY THE TAX COMMISSIONER WITHIN "GROSS INCOME FROM BUSINESS DONE IN THIS STATE", OF SUCH PORTION OF THE RECEIPTS FROM OUT-OF-STATE SALES OF PRODUCTS MANUFACTURED BY THE COMPANY IN NEW JERSEY AS HE DEEMED WAS ALLOCABLE TO THE COST OF MANUFACTURING SUCH PRODUCTS AT ITS PLANT IN NEW JERSEY, WAS NOT AUTHORIZED BY THE PROVISIONS OF SAID ACT. ALTHOUGH WE ARE IN ACCORD WITH THE VIEW OF THE NEW JERSEY BOARD OF TAX APPEALS THAT UNDER THE FACTS IN THE CASE THERE COULD BE NO ALLOCATION OF SALES RECEIPTS OF THE CORPORATION AS BETWEEN ITS MANUFACTURING AND OTHER ACTIVITIES, WE ARE UNABLE TO DETERMINE FROM THE OPINION OF THE BOARD OF TAX APPEALS IN THE CASE ABOVE CITED WHETHER THE FACTS BEFORE THE BOARD IN THAT CASE FAIRLY PRESENTED THE QUESTION NOW BEFORE THIS BOARD ON THE APPEAL FILED BY APPELLANT IN THIS CASE. ALTHOUGH IT APPEARS FROM [\*42] THE OPINION IN THE CITED CASE THAT THE PETITIONER IN THAT CASE HAD ITS MANUFACTURING PLANT IN NEW JERSEY AND SOLD ITS PRODUCTS THERE MANUFACTURED "TO CUSTOMERS WITHIN AS WELL AS OUT OF THE STATE", IT DOES NOT AFFIRMATIVELY APPEAR WHETHER SALES TO CUSTOMERS OUT OF THE STATE WERE MADE DIRECTLY FROM THE MANUFACTURING PLANT OF SAID COMPANY IN NEW JERSEY OR WHETHER, ON THE OTHER HAND, THE MANUFACTURED PRODUCTS OF THE COMPANY WERE SHIPPED BY IT TO WAREHOUSES, STOREROOMS, OR OTHER REPOSITORIES IN OTHER STATES AND WERE THERE SOLD TO CUSTOMERS. *IN THIS CONNECTION THE FACT THAT THE BOARD OF TAX APPEALS OF NEW JERSEY CITES THE CASE OF FORD MOTOR CO. V CLARK, 100 FED. (2D) 515, 308 U. S. 331, AS A CASE CONVERSE ON THE FACTS TO THE CASE THERE UNDER CONSIDERATION, IS SOME INDICATION THAT IN THE CASE BEFORE SAID BOARD IT APPEARED THAT THE SALES THERE IN QUESTION WERE NOT MADE DIRECTLY FROM THE PLANT OF THE COMPANY IN NEW JERSEY TO CUSTOMERS IN OTHER STATES, BUT THAT SUCH SALES WERE MADE FROM REPOSITORIES OF THE COMPANY IN OTHER STATES AND TO CUSTOMERS OF THESE RESPECTIVE STATES WHERE PAYMENTS THEREFOR WERE MADE AND RECEIVED. IN ANY VIEW AS TO THIS QUESTION, WE ARE INCLINED TO THE OPINION THAT [\*43] THE DECISION IN THE CASE OF WRIGHT AERONAUTICAL CO. V MARTIN, SUPRA, AS AN AUTHORITY SHOULD BE LIMITED TO THE PARTICULAR CASE BEFORE THE BOARD OF TAX APPEALS MAKING SAID DECISION. AND WE CANNOT ASCRIBE ANY WEIGHT TO SAID DECISION ON THE QUESTION NOW BEFORE THIS BOARD; WHICH QUESTION, AS ABOVE NOTED, INVOLVES A CONSIDERATION OF SALES MADE BY THE APPELLANT DIRECTLY FROM ITS MANUFACTURING PLANT IN OHIO TO CUSTOMERS IN OTHER STATES. COUNSEL FOR THE APPELLANT HEREIN HAVE LIKEWISE CALLED TO OUR ATTENTION THE CASE OF FLOWERS, SECRETARY OF STATE V PAN AMERICAN REFINING CORPORATION, 154 S. W. (2ND) 92, RECENTLY DECIDED BY THE COURT OF CIVIL APPEALS OF TEXAS. THE QUESTION CONSIDERED AND DETERMINED BY THE COURT IN THIS CASE WAS AS TO THE CONSTRUCTION TO BE PLACED UPON A STATUTE OF THAT STATE WHICH PROVIDED THAT: "EVERY DOMESTIC AND FOREIGN CORPORATION HERETOFORE OR HEREAFTER CHARTERED OR AUTHORIZED TO DO BUSINESS IN TEXAS, SHALL, \*\*\* EACH YEAR, PAY \*\*\* A FRANCHISE TAX \*\*\*, BASED UPON THAT PROPORTION OF THE OUTSTANDING CAPITAL STOCK, SURPLUS AND UNDIVIDED PROFITS, PLUS THE AMOUNT OF OUTSTANDING BONDS, NOTES AND DEBENTURES, OTHER THAN THOSE MATURING IN LESS THAN A YEAR FROM THE DATE OF ISSUE, [\*44] AS THE GROSS RECEIPTS FROM ITS BUSINESS DONE IN TEXAS BEARS TO THE TOTAL GROSS RECEIPTS OF THE CORPORATION FROM ITS ENTIRE BUSINESS, WHICH TAX SHALL BE COMPUTED AT THE FOLLOWING RATES FOR EACH ONE THOUSAND DOLLARS (\$1,000.00) OR FRACTIONAL PART THEREOF; ONE DOLLAR (\$1.00) TO ONE MILLION DOLLARS (\$1,000,000.00), SIXTY CENTS (60) \*\*\*. " TOUCHING THE QUESTION OF THE APPLICATION OF THIS STATUTE TO THE FACTS OF THE CASE BEFORE THE COURT, IT APPEARED THAT THE PAN AMERICAN REFINING CORPORATION, A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF DELAWARE AND HAVING ITS PRINCIPAL EXECUTIVE OFFICE IN THE CITY OF NEW YORK, OPERATED AN OIL REFINERY AT TEXAS CITY IN THE STATE OF TEXAS, FROM WHICH POINT IT SOLD AND SHIPPED ITS VARIOUS REFINED PRODUCTS TO CUSTOMERS IN THE STATE OF TEXAS AND, ON THE APPROVED ORDER OF THE OFFICE AT NEW YORK, TO CUSTOMERS OUTSIDE OF THE STATE OF TEXAS. THE QUESTION SUBMITTED TO THE COURT FOR ITS CONSIDERATION AND DETERMINATION WAS AS TO THE CONSTRUCTION TO BE PLACED UPON THIS STATUTE WITH RESPECT TO THE QUESTION WHETHER IN THE COMPUTATION OF THE TAX THEREIN PROVIDED FOR, AS AGAINST THIS CORPORATION THERE SHOULD BE INCLUDED AS BUSINESS DONE BY THE COMPANY IN [\*45]*

TEXAS GROSS RECEIPTS FROM THE SALE OF ITS REFINED PRODUCTS TO CUSTOMERS BOTH IN AND OUT OF THE STATE OF TEXAS, OR WHETHER SUCH COMPUTATION SHOULD BE MADE BY INCLUDING ONLY THE GROSS RECEIPTS FROM INTRASTATE SALES. AS TO THIS THE SECRETARY OF STATE, THE APPELLANT IN THE CASE BEFORE THE TEXAS COURT OF CIVIL APPEALS, CONTENDED THAT SINCE THE STATUTE ALLOCATES THE TAXABLE CAPITAL OF THE CORPORATION BASED UPON ITS GROSS RECEIPTS "FROM BUSINESS DONE IN TEXAS", IT NECESSARILY AND PROPERLY INCLUDED GROSS RECEIPTS FROM THE CORPORATION'S INTRASTATE REFINING BUSINESS OPERATED SOLELY IN TEXAS, REGARDLESS OF THE QUESTION WHETHER SUCH REFINED PRODUCTS WERE SOLD AND SHIPPED TO CUSTOMERS IN THE STATE OR OUT OF THE STATE. THE COURT IN ITS OPINION STATED THAT THE STATUTE IMPOSING THE TAX THEREUNDER CONSIDERATION MIGHT BE CONSTRUED IN ACCORDANCE WITH THE CONTENTION OF THE SECRETARY OF STATE; AND IT WAS CONCEDED THAT THE STATUTE, SO CONSTRUED, WOULD BE CONSTITUTIONAL. HOWEVER, IT APPEARED AS A FACT IN THE CASE THAT IMMEDIATELY AFTER THE ENACTMENT OF THE STATUTE IMPOSING THIS TAX THE TAXING AUTHORITIES OF TEXAS, FOLLOWING AN OPINION OF THE ATTORNEY GENERAL OF THAT STATE, CONSTRUED THE STATUTE AS AUTHORIZING [\*46] THE INCLUSION AS "BUSINESS DONE IN TEXAS" OF GROSS RECEIPTS FROM INTRASTATE SALES ONLY, AND ADMINISTERED THE LAW IN ACCORDANCE WITH THIS CONSTRUCTION UNTIL A SHORT TIME BEFORE THE LITIGATION IN THE DECIDED CASE BEGAN. THE COURT GIVING EFFECT TO THIS LONG CONTINUED ADMINISTRATIVE CONSTRUCTION OF THE STATUTE, AND APPARENTLY, SOLELY BY REASON OF SUCH ADMINISTRATIVE CONSTRUCTION OF THE STATUTE, FOLLOWED THIS CONSTRUCTION OF THE STATUTE AND HELD THAT IN THE COMPUTATION OF THE TAX THERE SHOULD BE INCLUDED AS BUSINESS DONE BY SAID CORPORATION IN TEXAS ONLY GROSS RECEIPTS FROM SALES MADE BY THE CORPORATION TO CUSTOMERS IN TEXAS AND THAT GROSS RECEIPTS ON THE SALE AND SHIPMENT OF REFINED PRODUCTS TO CUSTOMERS OUT OF THE STATE SHOULD BE EXCLUDED IN MAKING SUCH COMPUTATION. AS ABOVE NOTED, NO QUESTION WAS APPARENTLY MADE AS TO THE CONSTITUTIONALITY OF THE STATUTE UNDER THE CONSTRUCTION CONTENDED BY THE SECRETARY OF STATE, THE APPELLANT IN SAID CASE, FOR IT WAS CONCEDED THAT THE STATUTE WOULD BE CONSTITUTIONAL UNDER THIS CONSTRUCTION OF ITS PROVISIONS. THE CASE WAS DECIDED IN FAVOR OF THE TAXPAYER, NOT ON THE VIEW THAT THE INCLUSION IN THE TAX BASE OF GROSS RECEIPTS FROM INTERSTATE SALES MADE [\*47] BY IT FROM ITS PLANT AT TEXAS CITY WOULD BE UNCONSTITUTIONAL, BUT UPON THE GROUND THAT THE STATUTE AS UNIFORMLY CONSTRUED BY THE TAXING AUTHORITIES OF THE STATE CHARGED WITH THE ADMINISTRATION OF THE LAW DID NOT INTEND TO INCLUDE GROSS RECEIPTS FROM SALES OF THIS KIND. ASIDE FROM THE FACT THAT THE CORPORATION FRANCHISE TAX HERE IN QUESTION UNDER THE LAWS OF OHIO IS MEASURED WITH RESPECT TO THE BUSINESS OF THE APPELLANT CORPORATION IN THIS STATE BY THE VALUE OF THE SALES MADE FROM ITS CLEVELAND PLANT, AND NOT, AS IN THE TEXAS CASE, BY THE GROSS RECEIPTS OF THE CORPORATION FROM SALES MADE BY IT FROM ITS PLANT IN THAT STATE, AND ASIDE FROM THE SIGNIFICANT DISTINCTION THAT THE TAX HERE UNDER CONSIDERATION IS MEASURED NOT ONLY BY THE BUSINESS DONE BY THE CORPORATION IN OHIO, BUT LIKEWISE BY THE PROPERTY OWNED AND USED BY IT IN THIS STATE, IT APPEARS AS A FACT OF SUCH NOTORIETY AS TO BE THE SUBJECT OF JUDICIAL KNOWLEDGE THAT EVER SINCE THE ORIGINAL ENACTMENT OF THE CORPORATION FRANCHISE TAX LAW OF THIS STATE IN THE YEAR 1902 THE TAXING AUTHORITIES OF THIS STATE IN THE ADMINISTRATION OF SAID LAW, FOLLOWING OPINIONS OF ATTORNEYS GENERAL OF OHIO, HAVE UNIFORMLY CONSTRUED THIS LAW SO AS TO [\*48] AUTHORIZE AND REQUIRE THE INCLUSION AS BUSINESS DONE BY A MANUFACTURING CORPORATION IN THIS STATE THE VALUE OF SALES OF PRODUCTS FROM ITS MANUFACTURING PLANT HERE LOCATED, WHETHER SUCH SALES WERE MADE TO CUSTOMERS IN THE STATE OF OHIO OR ELSEWHERE. AND INASMUCH AS, IN OUR VIEW, THE STATUTE SO CONSTRUED AND APPLIED IS CONSTITUTIONAL, WE DO NOT FEEL AUTHORIZED TO DEPART FROM THE CONSTRUCTION THUS PLACED UPON THE STATUTE PROVIDING FOR THIS TAX AND BY PROCESS OF JUDICIAL LEGISLATION GIVE EFFECT TO ANOTHER AND MORE LIMITED CONSTRUCTION OF THIS STATUTE. WE ARE OF THE OPINION, THEREFORE, THAT THE TAX COMMISSIONER DID NOT ERR IN INCLUDING IN THE NUMERATOR OF THE BUSINESS FRACTION USED BY HIM IN THE COMPUTATION OF APPELLANT'S CORPORATION FRANCHISE TAX FOR THE YEAR 1939, THE VALUE OF ALL SALES OF ITS MANUFACTURED PRODUCTS MADE BY SAID CORPORATION FROM ITS PLANT AT CLEVELAND, OHIO, WHETHER THE SALE OF

SUCH PRODUCTS WERE MADE TO CUSTOMERS IN THE STATE OF OHIO OR TO CUSTOMERS OUT OF SAID STATE. IN THE CONSIDERATION AND DETERMINATION OF THE QUESTIONS ABOVE NOTED PRESENTED ON THE APPEAL OF THE APPELLANT HEREIN, WE ARE NOT UNMINDFUL OF THE FACT THAT THE APPELLANT IS A PENNSYLVANIA CORPORATION [\*49] HAVING ITS PRINCIPAL OFFICE IN THE CITY OF PITTSBURGH IN SAID STATE, AND THAT DURING THE YEARS 1938 AND 1939 AND AT ALL OTHER TIMES HERE IN QUESTION "CONTRACTS FOR THE SALE BY THE COMPANY OF MERCHANDISE WERE MADE BY THE COMPANY AT ITS PITTSBURGH OFFICE, AND ALL CUSTOMERS' ORDERS FOR THE PURCHASE OF MERCHANDISE FROM THE COMPANY, IF ACCEPTED, WERE ACCEPTED BY THE COMPANY AT ITS PITTSBURGH OFFICE, AND ALL COLLECTIONS FOR GOODS SOLD WERE MADE BY THE COMPANY'S PITTSBURGH OFFICE". *ALTHOUGH IN THIS SITUATION IT MAY BE SAID THAT ALL CONTRACTS OF SALE OF THE APPELLANT'S PRODUCTS, WHETHER THE SAME WERE MANUFACTURED IN OHIO OR ELSEWHERE, WERE MADE IN THE STATE OF PENNSYLVANIA, AND ANY AND ALL CREDITS ACCRUING TO THE COMPANY BY REASON OF SUCH SALES WOULD BE TAXABLE AS INTANGIBLE PERSONAL PROPERTY UNDER THE LAWS OF THAT STATE, VIRGINIA V IMPERIAL SALES COMPANY, 293 U. S. 15; WHEELING STEEL CORPORATION V FOX, 298 U. S. 193,* THESE FACTS DO NOT ALTER OR OTHERWISE AFFECT THE FURTHER FACT THAT THE APPELLANT IS DOING BUSINESS IN OHIO AND IS FOR THIS REASON SUBJECT TO THE TAXING POWER OF THIS STATE WITH RESPECT TO BUSINESS DONE AND PROPERTY OWNED AND USED BY THE COMPANY IN THIS STATE. NEITHER IS IT [\*50] MATERIAL IN THIS VIEW THAT THE GROSS RECEIPTS FROM THE SALE OF THE COMPANY'S PRODUCTS MANUFACTURED IN OHIO AND ELSEWHERE ACCRUE TO THE COMPANY AT ITS PITTSBURGH OFFICE; FOR, AS ABOVE NOTED, THE TAX HERE IN QUESTION UNDER THE OHIO LAW IS NOT MEASURED IN ANY RESPECT BY THE GROSS RECEIPTS OF THE COMPANY FROM THE SALE OF ITS PRODUCTS, BUT WITH RESPECT TO THE BUSINESS DONE BY IT IN THIS STATE SUCH TAX IS MEASURED BY THE VALUE OF THE SALES MADE FROM ITS MANUFACTURING PLANT IN THIS STATE; AND, AS ABOVE NOTED, THIS FACTOR OF THE VALUE OF SALES SO MADE IS ONE WHICH IS COMPETENT FOR THE STATE TO USE IN DETERMINING THAT PART OF THE TAX ATTRIBUTABLE TO BUSINESS DONE BY THE CORPORATION IN THIS STATE. IN THIS CONNECTION IT IS PERTINENT TO NOTE THAT ALTHOUGH IN LEGAL CONTEMPLATION ALL CONTRACTS OF SALE OF APPELLANT'S MANUFACTURED PRODUCTS WERE MADE AT THE OFFICE OF THE COMPANY IN PITTSBURGH, THE SALES HERE IN QUESTION, THE VALUE OF WHICH WAS USED BY THE TAX COMMISSIONER IN COMPUTING THIS TAX, WERE MADE IN OHIO; FOR, EXCEPT AS TO SPECIFIC OR IDENTIFIED GOODS, A CONTRACT FOR THE SALE OF GOODS DOES NOT CONSTITUTE A SALE OF THE SAME; AND ORDINARILY AND IN THE USUAL COURSE OF BUSINESS OF THE SALE OF MANUFACTURED [\*51] PRODUCTS ON PURCHASE ORDERS, A SALE OF THE GOODS IS NOT EFFECTED UNTIL SUCH GOODS HAVE BEEN SEGREGATED FROM THE MASS OR STOCK OF GOODS IN THE FACTORY AND DELIVERED TO THE CUSTOMER OR TO A CARRIER FOR SHIPMENT TO SUCH CUSTOMER. 55 CORPUS JURIS, P. 542; *VILLAGE OF BELLEFONTAINE V VASSAUX, 55 OH ST 323.* IT THUS APPEARS THAT THE SALES HERE IN QUESTION, AS DISTINGUISHED FROM THE CONTRACTS THEREFOR, WERE MADE FROM THE MANUFACTURING PLANT OF THE APPELLANT CORPORATION AT CLEVELAND, OHIO; AND ON THE CONSIDERATION ABOVE NOTED, THE VALUE OF SUCH SALES WAS PROPERLY USED BY THE TAX COMMISSIONER IN DETERMINING THE PROPORTIONATE PART OF THE APPELLANT'S BUSINESS DONE IN THIS STATE. MOREOVER, AS TO A MANUFACTURING CORPORATION, IT MAY BE SAID THAT INASMUCH AS THE VALUE OF THE SALES OF THE PRODUCTS MANUFACTURED BY THE CORPORATION IN OHIO IS TAKEN ONLY AS A MEASURE (IN PART) OF THE PRIVILEGE OR FRANCHISE UNDER WHICH THE CORPORATION DOES BUSINESS IN THIS STATE, IT IS IMMATERIAL WHETHER SUCH SALES ARE EFFECTED IN THIS STATE OR OUT OF THE STATE. *AMERICAN MFG. CO. V ST. LOUIS, 250 U. S. 459.* AS A CONSIDERATION ASSUMED TO BE PERTINENT IN THE DISPOSITION OF THE QUESTIONS ABOVE NOTED AND DISCUSSED, AND [\*52] LIKEWISE, APPARENTLY, AS AN INDEPENDENT GROUND OF ERROR ON THE PART OF THE TAX COMMISSIONER IN COMPUTING THE TAX HERE IN QUESTION, THE APPELLANT CONTENDS THAT THE INCLUSION OF THE VALUE OF THE SALES MADE BY IT FROM ITS MANUFACTURING PLANT IN THIS STATE AND, MORE PARTICULARLY, OF THOSE MADE TO CUSTOMERS IN OTHER STATES, RESULTED IN THE ALLOCATION TO OHIO OF AN UNFAIR AND EXCESSIVE AMOUNT OF TAXES; *AND IN SUPPORT OF ITS CLAIM THAT SUCH ALLOCATION WAS ILLEGAL THE APPELLANT CITES THE CASE OF HANS REES' SONS V N. C., 283 U. S. 123, 75 L. ED. 879.* THIS CASE IS ONE WHICH AROSE UNDER AN INCOME TAX LAW OF THE STATE OF NORTH CAROLINA, AND THE HOLDING OF THE COURT WAS, IN EFFECT, THAT

A STATE INCOME TAX UPON A CORPORATION CONDUCTING ITS BUSINESS AS A UNITARY ENTERPRISE IN SEVERAL STATES IS INVALID IF IT ALLOCATES A GROSSLY UNREASONABLE PORTION OF THE INCOME OF THE CORPORATION TO THE TAXING STATE. THE EVIDENCE IN THE CASE BEFORE THE COURT SHOWED THAT ALTHOUGH IN EACH OF THE TAX YEARS THERE IN QUESTION ONLY 17% OF THE CORPORATION'S INCOME RESULTED FROM ITS MANUFACTURING OPERATIONS WITHIN THE STATE OF NORTH CAROLINA, THE STATUTORY FORMULA APPLIED BY THE COMMISSIONER OF REVENUE OF THAT STATE IN [\*53] DETERMINING THE AMOUNT OF INCOME TAXES PAYABLE BY THE CORPORATION IN THAT STATE RESULTED IN THE ALLOCATION TO THE STATE OF NORTH CAROLINA OF AN AVERAGE OF ABOUT 80% OF THE CORPORATION'S TOTAL INCOME IN SAID YEARS. AS BEFORE NOTED HEREIN, THE TAX HERE IN QUESTION ON THE APPEAL NOW BEFORE THIS BOARD IS AS TO THE APPELLANT A TAX EXTENDED AT THE RATE PROVIDED IN 5499 GC, ON THE PROPORTIONATE VALUATION OF THE ISSUED AND OUTSTANDING SHARES OF STOCK OF THE APPELLANT CORPORATION REPRESENTED BY THE BUSINESS DONE AND BY THE PROPERTY OWNED AND USED BY IT IN OHIO. AS BEFORE NOTED, THE NET WORTH OF THE APPELLANT CORPORATION REPRESENTED BY THE TOTAL VALUE OF ITS ISSUED AND OUTSTANDING SHARES OF STOCK FOR THE TAX YEAR HERE IN QUESTION WAS AND IS THE SUM OF \$180,408,175.00. APPLYING THE FORMULA PROVIDED BY 5498 GC, AND MEASURING THE BUSINESS DONE BY THE CORPORATION IN OHIO BY THE VALUE OF THE SALES OF ITS FINISHED PRODUCTS MADE FROM ITS MANUFACTURING PLANT IN THIS STATE, THE TAX COMMISSIONER DETERMINED THE PORTION OF THE TOTAL VALUE OF THE ISSUED AND OUTSTANDING SHARES OF STOCK OF THE CORPORATION REPRESENTED BY PROPERTY OWNED AND BUSINESS DONE BY IT IN THIS STATE TO BE \$13,722,387.00; WHICH AMOUNT [\*54] IS 7.6073% OF THE TOTAL VALUE OF THE ISSUED AND OUTSTANDING SHARES OF STOCK OF SAID COMPANY. THE TAX EXTENDED ON THIS VALUATION SO FOUND AND DETERMINED AT THE RATE PROVIDED IN 5499 GC, IS \$13,722.39. ASIDE FROM THE CONSIDERATION THAT THE TAX HERE IN QUESTION IS NOT ONE ON THE INCOME OF THE CORPORATION, WE ARE UNABLE TO FIND ON THE FACTS OF THIS CASE THAT APPLICATION BY THE TAX COMMISSIONER OF THE STATUTORY FORMULA AND RULE, ABOVE REFERRED TO, RESULTED IN THE ALLOCATION TO THIS STATE FOR THE PURPOSE OF THIS TAX OF AN UNREASONABLE PORTION OF THE NET WORTH OF THE COMPANY AS REPRESENTED BY THE TOTAL VALUE OF ITS ISSUED AND OUTSTANDING SHARES OF STOCK; AND STILL LESS ARE WE ABLE TO FIND THAT THE DETERMINATION MADE BY THE TAX COMMISSIONER WAS ARBITRARILY MADE, AS IS CLAIMED BY THE APPELLANT. MOREOVER, WITH RESPECT TO THE AMOUNT OF THIS CORPORATION FRANCHISE TAX ASSESSED AGAINST THE APPELLANT, THE QUESTION BETWEEN THE STATE AND THIS TAXPAYER IS WHETHER SUCH TAX "EXCEED (S) THE REASONABLE VALUE OF THE PRIVILEGE OR FRANCHISE ORIGINALLY CONFERRED OR ITS CONTINUED ANNUAL VALUE HEREAFTER". *SOUTHERN GUM COMPANY V LAYLIN*, 66 OH ST 578. AND, FOLLOWING THE LANGUAGE OF THE OPINION OF THE COURT [\*55] IN THE CITED CASE, - WHERE IT APPEARED THAT THE TAX THERE IN QUESTION WAS ONE-TENTH OF ONE PER CENT ON THE FULL AMOUNT OF THE SUBSCRIBED OR ISSUED AND OUTSTANDING STOCK OF THE CORPORATION, - IT MAY BE SAID THAT THE TAX HERE IN QUESTION IS NOT UNREASONABLE, AND DOES NOT APPEAR TO BE ABOVE THE CONTINUING VALUE OF THE FRANCHISE OF THE APPELLANT CORPORATION TO OWN PROPERTY AND DO BUSINESS IN THIS STATE. IN ANY EVENT WE ARE UNABLE TO SAY ON THE FACTS OF THIS CASE THAT THE TAX ASSESSED AGAINST THE APPELLANT DOES NOT HAVE A REASONABLE RELATION TO THE VALUE OF THE PRIVILEGE GRANTED TO THE APPELLANT AS A FOREIGN CORPORATION DOING BUSINESS IN THIS STATE. FINDING NO ERROR IN THE PROCEEDINGS RELATING TO THE DETERMINATION AND ASSESSMENT OF THE TAX HERE IN QUESTION, THE ORDERS OF THE TAX COMMISSIONER COMPLAINED OF IN THIS APPEAL ARE AFFIRMED. BOARD OF TAX APPEALS. ENTRY THIS CAUSE AND MATTER CAME ON TO BE HEARD BEFORE THE BOARD OF TAX APPEALS ON THE APPEAL OF ALUMINUM COMPANY OF AMERICA, THE APPELLANT ABOVE NAMED, FROM A CORRECTED CORPORATION FRANCHISE TAX ASSESSMENT MADE AGAINST IT AS A FOREIGN CORPORATION BY THE TAX COMMISSIONER UNDER DATE OF NOVEMBER 8, 1939, AND FROM AN ORDER OF THE TAX [\*56] COMMISSIONER DENYING AN APPLICATION FOR REVIEW AND CORRECTION FILED BY THE APPELLANT WITH RESPECT TO SAID ASSESSMENT. SAID CAUSE WAS HEARD BY THE BOARD OF TAX APPEALS UPON A TRANSCRIPT OF THE PROCEEDINGS OF THE TAX COMMISSIONER RELATING TO THE DETERMINATION AND ASSESSMENT OF APPELLANT'S CORPORATION FRANCHISE TAX FOR SAID YEAR, UPON THE STIPULATION OF FACTS SIGNED AND FILED BY THEIR RESPECTIVE

COUNSEL FOR THE PARTIES IN THE CASE, AND UPON THE ARGUMENTS AND BRIEFS OF COUNSEL; AND THE CAUSE WAS SUBMITTED TO SAID BOARD FOR ITS CONSIDERATION AND DETERMINATION. UPON CONSIDERATION THEREOF THE BOARD FINDS THAT ON MARCH 31, 1939, THE APPELLANT, A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF PENNSYLVANIA AND ENGAGED IN THE BUSINESS OF MANUFACTURING AND SELLING OF ALUMINUM AND ALUMINUM PRODUCTS IN THE STATE OF OHIO AND ELSEWHERE, FILED ITS ANNUAL CORPORATION FRANCHISE TAX REPORT FOR SAID YEAR, AS REQUIRED BY THE PROVISIONS OF 5495-2 GC; WHICH REPORT AS TO THE INFORMATION THEREIN CONTAINED WAS IN MANNER AND FORM AS REQUIRED BY 5497 GC. IN THIS REPORT THE APPELLANT SEPARATELY STATED THE VALUE OF ITS PROPERTY, REAL AND PERSONAL, WHICH WAS OWNED AND USED BY IT IN OHIO, AND THAT OWNED AND [\*57] USED BY IT OUTSIDE OF OHIO; AND LIKEWISE SET OUT THEREIN ITS LIABILITIES (LESS CAPITAL AND SURPLUS) AS OF JANUARY 1 OF SAID YEAR. ON THE INFORMATION THUS SET OUT IN APPELLANT'S REPORT THE TAX COMMISSIONER DETERMINED THE VALUE OF THE ISSUED AND OUTSTANDING SHARES OF STOCK OF SAID CORPORATION AS PROVIDED IN 5498 GC, AND FIXED SUCH VALUE AT THE SUM OF \$180,408,175.00. APPLYING THE PROPERTY FRACTION INDICATED BY THE FAIR VALUE OF APPELLANT'S PROPERTY IN OHIO AS AGAINST THE FAIR VALUE OF THAT OWNED AND USED BY IT IN OHIO AND ELSEWHERE AND, LIKEWISE, THE BUSINESS FRACTION INDICATED BY THE VALUE OF THE BUSINESS DONE BY THE CORPORATION IN THIS STATE (AS DETERMINED BY THE TAX COMMISSIONER) AS AGAINST THE TOTAL VALUE OF THE BUSINESS OF THE CORPORATION WHEREVER TRANSACTED AS SET OUT IN APPELLANT'S REPORT, THE TAX COMMISSIONER DETERMINED THE TAXABLE VALUATION OF THE ISSUED AND OUTSTANDING SHARES OF STOCK OF THE CORPORATION REPRESENTED BY THE PROPERTY OWNED AND BUSINESS DONE BY IT IN THIS STATE, AND FOUND SUCH TAXABLE VALUE TO BE \$13722,387.00. AFTER THE TAX COMMISSIONER BY THE APPLICATION OF THE PROPERTY AND BUSINESS FRACTIONS ABOVE STATED, AND DETERMINED THE TAXABLE VALUE OF THE ISSUED AND [\*58] OUTSTANDING SHARES OF THE STOCK OF THE CORPORATION REPRESENTED BY PROPERTY OWNED AND BUSINESS DONE BY THE CORPORATION IN THIS STATE, AND AFTER THE FRANCHISE TAX OF ONE-TENTH OF ONE PERCENT HAD BEEN EXTENDED AGAINST SUCH VALUATION AS PROVIDED IN 5499 GC, THE APPELLANT ACTING UNDER THE AUTHORITY OF 5500 GC, FILED AN APPLICATION FOR A REVIEW AND CORRECTION OF THE DETERMINATION THERETOFORE MADE BY THE TAX COMMISSIONER OF THE VALUE OF THE ISSUED AND OUTSTANDING SHARES OF STOCK OF THE CORPORATION REPRESENTED BY THE PROPERTY OWNED AND BUSINESS DONE BY THE CORPORATION IN THIS STATE. FOLLOWING THE FILING OF SAID APPLICATION FOR REVIEW AND CORRECTION THE TAX COMMISSIONER REDETERMINED THE VALUATION OF THE ISSUED AND OUTSTANDING SHARES OF THE STOCK OF THE CORPORATION REPRESENTED BY THE PROPERTY OWNED AND BUSINESS DONE BY THE CORPORATION IN OHIO BY THE APPLICATION OF THE PROPERTY FRACTION, ABOVE NOTED, AND A BUSINESS FRACTION DETERMINED BY A FORMULA SUGGESTED BY APPELLANT AND SET OUT IN ITS APPLICATION FOR REVIEW AND CORRECTION; WHICH METHOD OF COMPUTATION GAVE A VALUATION TO THAT PART OF THE ISSUED AND OUTSTANDING SHARES OF STOCK OF THE CORPORATION REPRESENTED BY PROPERTY OWNED AND BUSINESS DONE [\*59] BY THE CORPORATION IN THIS STATE IN THE SUM OF \$8,999,481.00, UPON WHICH VALUATION THE FRANCHISE TAX EXTENDED AT THE RATE PROVIDED FOR IN 5499 GC, WAS \$8,999.48. THE FRANCHISE TAX OF THE APPELLANT FOR THE YEAR 1939 WAS TENTATIVELY COMPUTED BY THE TAX COMMISSIONER ON THIS BASIS AND THE AMOUNT OF TAX THUS DETERMINED WAS PAID BY THE APPELLANT UNDER AN AGREEMENT BY AND BETWEEN THE APPELLANT AND THE TAX COMMISSIONER THAT THE DETERMINATION OF THE CORPORATION'S FRANCHISE TAX ON THIS BASIS FOR THE YEAR 1939 AND ITS PAYMENT BY SAID COMPANY WAS WITHOUT PREJUDICE TO THE RIGHT OF THE TAX COMMISSIONER TO MAKE A FURTHER COMPUTATION OF THE FRANCHISE TAX OF THE CORPORATION FOR SAID YEAR, AND WITHOUT PREJUDICE TO THE RIGHT OF THE APPELLANT TO CONTEST THE VALIDITY OF ANY INCREASED ASSESSMENT WHICH MIGHT RESULT FROM SUCH FURTHER COMPUTATION BY THE TAX COMMISSIONER. THEREAFTER ON OR ABOUT NOVEMBER 8, 1939, THE TAX COMMISSIONER ON THE FACTS AND FIGURES SET OUT IN APPELLANT'S REPORT, MADE A CORRECTED AND FINAL DETERMINATION OF THE VALUATION OF THE ISSUED AND OUTSTANDING SHARES OF STOCK OF THE CORPORATION REPRESENTED BY THE PROPERTY OWNED AND USED AND BY BUSINESS DONE BY THE CORPORATION IN THIS STATE; [\*60] AND DETERMINED SUCH VALUATION BY THE USE OF THE PROPERTY

FRACTION, ABOVE STATED, (AS TO THE CORRECTNESS OF WHICH NO QUESTION IS MADE IN THIS CASE) AND OF A BUSINESS FRACTION DETERMINED BY THE TAX COMMISSIONER BY INCLUDING IN THE NUMERATOR OF SUCH BUSINESS FRACTION THE VALUE OF THE SALES MADE DURING THE YEAR 1938 OF PRODUCTS WHICH, AS FOUND BY THE TAX COMMISSIONER, WERE MANUFACTURED BY THE APPELLANT AT ITS MANUFACTURING PLANT IN THIS STATE (\$8,710,582.00), AND BY INCLUDING IN THE DENOMINATOR OF THE FRACTION THE VALUE OF THE SALES MADE BY THE CORPORATION DURING SAID YEAR OF PRODUCTS MANUFACTURED BY IT IN OHIO AND ELSEWHERE (\$71,147,722.00). THE BUSINESS FRACTION THUS OBTAINED WAS THE SAME AS THAT USED IN THE ORIGINAL COMPUTATION OF THE FRANCHISE TAX TO BE PAID BY SAID CORPORATION FOR SAID YEAR; AND THE APPLICATION OF THIS FRACTION TOGETHER WITH THE PROPERTY FRACTION ABOVE NOTED RESULTED IN A TAX ASSESSMENT IN THE AMOUNT OF \$13,722.39; WHICH AMOUNT WAS AND IS \$4,722.91 IN EXCESS OF THAT PREVIOUSLY DETERMINED BY THE TAX COMMISSIONER AND PAID BY THE APPELLANT AS AFORESAID. THE APPEAL OF THE APPELLANT HEREIN IS FROM THIS CORRECTED ASSESSMENT MADE BY THE TAX COMMISSIONER, WHICH RESULTED [\*61] IN THE INCREASE HEREIN COMPLAINED OF. THE BOARD OF TAX APPEALS ON CONSIDERATION OF THE ISSUES OF LAW AND FACT IN THIS CASE, FINDS NO ERROR IN THE PROCEEDINGS OF THE TAX COMMISSIONER BY WHICH SAID OFFICER FOUND AND DETERMINED THAT THE PROPORTIONATE PART OF THE VALUE OF THE ISSUED AND OUTSTANDING SHARES OF STOCK OF THE APPELLANT CORPORATION REPRESENTED BY PROPERTY OWNED AND USED AND BUSINESS DONE BY SAID CORPORATION IN THIS STATE WAS \$13,722,387.00, AND UPON WHICH VALUATION A TAX AT THE RATE PRESCRIBED BY 5499 GC, WAS EXTENDED. IT IS, THEREFORE, BY THE BOARD OF TAX APPEALS CONSIDERED AND ORDERED THAT THE PROCEEDINGS AND ORDERS OF THE TAX COMMISSIONER COMPLAINED OF IN THIS APPEAL BE, AND THE SAME HEREBY ARE, AFFIRMED. I HEREBY CERTIFY THE FOREGOING TO BE A TRUE AND CORRECT COPY OF THE ACTION OF THE BOARD OF TAX APPEALS OF THE DEPARTMENT OF TAXATION, THIS DAY TAKEN, WITH RESPECT TO THE ABOVE MATTER.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Corporations Finance Franchise Tax Computation Tax Law State & Local Taxes Franchise Tax Imposition of Tax Tax Law State & Local Taxes Income Tax Corporations & Unincorporated Associations Imposition of Tax