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Appellee-Cross Appellee, Joseph W. Testa, Tax Commissioner of Ohio, requests that this Court deny the motion for stay filed by Appellant-Cross Appellee Martin Marietta Energy Systems, Inc., a/k/a Lockheed Martin Energy Systems, Inc. (LMES) with respect to the multiple petitions for reassessment filed by LMES that are presently pending before the Ohio Department of Taxation and that pertain to tax years other than the one at issue in this appeal. The basis for this response is detailed in the attachment memorandum.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF RESPONSE

I. Introduction

This Court should deny the motion for stay filed by Appellant-Cross Appellee Martin Marietta Energy Systems, Inc., a/k/a Lockheed Martin Energy Systems, Inc. (LMES) with respect to the petitions for reassessment filed by LMES that are presently pending before the Ohio Department of Taxation. These particular petitions for reassessment are for tax years other than the year presented in this instant appeal, and are separate and independent from the proceedings that are presented in this appeal.

The Tax Commissioner has voluntarily stayed issuing a final determination on any of these pending petitions for reassessment. Therefore, this motion for stay is moot.

Yet even if the Court were to address the merits of LMES' motion for stay, this motion must be denied. LMES' request to stay the Tax Commissioner's action on those petitions for reassessment is contrary to basic principles of property valuation and taxation, and the request is an infringement on the ability of the Tax Commissioner to perform his statutory duties. There is also no basis upon which to grant LMES' motion for stay and LMES has the ability to adequately protect its interests without this Court's intervention.

In the context of real property taxation, this Court has long held that concepts such as claim preclusion and issue preclusion do not apply, because each tax year stands on its own. *Olmstead Falls Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 122 Ohio St.3d 134, 2009-Ohio-2461, ¶ 16. Accordingly, this Court's resolution of this appeal will not automatically result in the same consequences for the pending petitions for reassessment before the Tax Commissioner. In other words, while this Court's decision in this appeal will be *precedent* for the pending appeals, it will not *fully resolve* them, and the decision in this appeal may not be applied as res

judicata to preclude issues and claims in later years—even if they are the same issues and claims.

This Court also does not have the authority to issue a stay order for petitions for reassessment pending before the Tax Commissioner. Tax Commissioner is not a court or a part of the judiciary. The Tax Commissioner is an executive body that has the discretion to act within the statutory obligations and duties granted to him by the General Assembly. For LMES to request this court to interfere with these statutory obligations and duties is an unauthorized judicial encroachment on the executive branch and the discretion of the Tax Commissioner, clearly presenting separation of powers concerns. *State ex rel. Mahoning Cty. Commrs. v. Maloney*, 100 Ohio St.3d 248, 2003-Ohio-5770, ¶ 18; *State ex rel. Wilke v. Hamilton Cty. Bd. of Commrs.*, 90 Ohio St.3d 55, 60-61, 734 N.E.2d 811 (2000). This court must reject LMES' request to have this Court involve itself in the Tax Commissioner's executive functions of the administration and enforcement of the state's tax laws.

This Court must deny LMES' request for a stay of the separate and independent proceedings taking place before the Tax Commissioner.

II. Statement of the Relevant Facts

This is an appeal from a decision of the Board of Tax Appeals (BTA). In this BTA decision, the BTA affirmed the final determination of the Tax Commissioner, which cancelled the personal property tax assessment issued by the Auditor of Pike County, Teddy Wheeler, Appellee-Cross Appellant (Auditor Wheeler), against LMES for the 1993 tax year. See BTA Decision, dated August 7, 2014. On August 8, 2014, LMES filed its Notice of Appeal of the BTA decision with this Court. In that Notice of Appeal, LMES raised sixteen errors with respect to that BTA decision. LMES Notice of Appeal, dated August 8, 2014.

As represented in the motion for stay filed by LMES, Auditor Wheeler has issued preliminary assessment certificates of valuation and associated personal property tax assessments against LMES for additional tax years. LMES Motion for Stay, at 3. LMES has filed separate petitions for reassessment with respect to each of the additional preliminary assessment certificates of valuation and associated personal property tax assessments. Id. at 3. These additional petitions for reassessment are presently pending before the Tax Commissioner for his final determination. Id. at 4.

LMES states that the basis for the motion to stay is because LMES “will be further required to litigate those cases before the BTA [and] LMES should not be forced to incur those additional costs.” Id. at 4. Specifically, LMES contends that this appeal will dispose of the petitions for reassessment pending before the Department and that LMES should not be forced to incur additional and unnecessary expenses to establish a factual record and otherwise litigate and defend the petitions. Id. at 8.

LMES, however, is wrong and it is not entitled to any stay in the Tax Commissioner’s proceedings on those petitions for reassessment.

III. LMES’ Motion for Stay Should be Denied.

This motion is moot. The Tax Commissioner has voluntarily stayed issuing a final determination on any of the pending petitions for reassessment. Therefore, there is no dispute presented in this motion for stay for the Court to consider. On this basis alone, this LMES’ motion to stay must be denied.

Moreover, the arguments raised by LMES supporting its motion for stay are without merit. LMES is requesting this Court to grant through a stay a form of relief to which LMES would not be otherwise entitled through any other means. In doing so, LMES requests this court to erroneously apply principles of estoppel, and to improperly infringe on the ability of the Tax

Commissioner to perform his statutory duties. Moreover, even under considerations that are generally applicable to motions for stay, LMES fails to demonstrate any need for an order staying the Tax Commissioner's determinations on each of the separate and independent presently pending petitions for reassessment.

A. Each tax year constitutes a new “claim” and, therefore, principles of estoppel do not apply. The issues presented in this appeal cannot equate to the issues presented in any of the pending petitions for reassessment.

The rationale LMES provides for its requested stay of proceedings to the pending petitions of reassessment (but not this appeal), is that resolution of the current proceedings will dispose of the pending proceedings. LMES Motion for Stay, at 1, 8. Without so saying, LMES is asserting the doctrine of estoppel: that the ultimate issue of property value - or lack thereof, as asserted by LMES - for one year equates with the ultimate issue of property value for other tax years. LMES goes so far as to affirmatively state that “the operative facts and legal issues are identical” between this appeal and the issues presented in the pending petitions for reassessment. *Id.* at 9.

But LMES's request for a stay overlooks basic principles of property valuation. This Court has recently rejected exactly such claims as LMES's, explaining that that it is “elemental that for purposes of any challenge to the calculation of real property, each tax year constitutes a new ‘claim’ or ‘cause of action,’ such that the determination of value for one tax year does not operate as *res judicata* that would bar litigation of value as to the next tax year.” *Olmstead Falls Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 122 Ohio St.3d 134, 2009-Ohio-2461, ¶ 16. In other words, the ultimate issue of value for one tax year does not constitute the “same issue” for purposes of collateral estoppel as the ultimate issue of value for a later tax year. *Id.* at ¶ 17, 18. *See also Worthington City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 124 Ohio St.3d 27, 2009-Ohio-5932, ¶ 24.

This principle is not exclusive to real property valuation. It also applies in the area of personal property valuation, because “[q]uite simply, each tax year may or may not present a different set of facts from those presented for any other tax year, with the result that the determination of facts for one year does not preclude a determination of new facts for the other year. *Progressive Plastics, Inc. v. Testa*, 133 Ohio St.3d 490, 2012-Ohio-4759, ¶ 18.

LMES’ motion for stay falls squarely within the principle that each tax year stands on its own merits. This appeal pertains to a personal property tax for the 1993 tax year and LMES argues that this appeal is not only identical – in fact and in law - to the facts and legal issues presented in the pending petitions for reassessment, but that this appeal will be dispositive of the facts and legal issues in the pending petitions. But LMES’ assertion that one tax year is dispositive of any other tax year is wrong. Each tax year constitutes its own “claim” or “cause of action.” *Olmstead Falls Bd. of Edn.*, 122 Ohio St.3d 134, 2009-Ohio-2461, at ¶ 16.

This Court must reject LMES’ failed estoppel argument. Based on the foregoing precedents, LMES erroneously conflates the ultimate issue of personal property tax value for tax year 1993 as presented in this instant case with the issue of value for each of the other tax years presented in the pending petitions for reassessment as if they were the “same issue.” *Id.* at ¶ 18. Principles of estoppel do not apply to, and do not form a basis upon which to grant any motion for stay with respect to the Tax Commissioner’s action on, each of the independent petitions for reassessment filed by LMES.

B. The judiciary will not interfere in the Tax Commissioner’s executive function of the administration and enforcement of the state’s tax law unless there is an allegation of unlawful action.

Moreover, from all appearances, LMES’ motion for stay is nothing but an inappropriate attempt to invite the Court to control the actions of the Tax Commissioner.

In filing this motion for stay, LMES is attempting to prevent the Tax Commissioner from issuing the final determinations on each of LMES' pending petitions for reassessment. In other words, LMES interfering with the Tax Commissioner's ability to perform his statutorily authorized duties. And LMES' motion for stay not only implicates - it fully presents - separation of powers concerns by impermissibly interjecting the Court into the execution of the Tax Commissioner's statutorily authorized duties.

The Tax Commissioner is a member of the executive branch of government. See R.C. 121.03(J) ("the following administrative department heads shall be appointed by the governor. . . the tax commissioner"). That the Tax Commissioner has "statutorily authority duties" refers to the provision that "[a]ll powers, duties, and functions of the department of taxation are vested in and shall be performed by the tax commissioner[.]" R.C. 5703.05. Included within the Tax Commissioner's obligations is the requirement to assess all taxable personal property, unless the county auditor is required to make the assessment as the Tax Commissioner's deputy, and to make "corrections to the assessment, as the commissioner finds proper" within his discretion. R.C. 5711.24; R.C. 5711.31. See also, R.C. 5711.11. In fulfilling his duties, the Tax Commissioner is authorized to review any materials that allow him to be informed "on the matters necessary to be known in order to discharge his duties." R.C. 5703.36.

As suggested by the foregoing, the statutes do not impose any restrictions or limitations on the Tax Commissioner's decision-making process, or restrict any of the materials that the Tax Commissioner may review in that process. The Commissioner's general powers, duties, and functions with regard to tax matters are comprehensive and subject to few limitations. R.C. 5703.05; R.C. 5703.36; R.C. 5711.24; R.C. 5711.31. And dovetailing with the specific grant of authority is the principle that the Tax Commissioner has the additional powers that are

necessarily implied from those that are specifically granted. *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47 (1917); *Baxla v. Tracy*, BTA Case No. 94-M-16 (June 28, 1996).

LMES' request for a stay is, in effect, asking this Court to interfere with the operation and execution of the Tax Commissioner's foregoing statutory functions. Mutual cooperation among the branches of government is necessary, but such cooperation does not mean the functions of one branch of government should be surrendered to, or diminished to the benefit of, another branch. *State ex rel. Hague v. Ashtabula Cty. Bd. of Commrs.*, 123 Ohio St.3d 489, 2009-Ohio-6140, ¶ 23. And just as this Court has acknowledged that the judiciary must be free from excessive control by other governmental branches to ensure independence and authority, the Court has also stated that it will not allow the judiciary to encroach on the functions of other branches of government. *See, e.g., State ex rel. Mahoning Cty. Commrs. v. Maloney*, 100 Ohio St.3d 248, 2003-Ohio-5770, ¶ 18; *State ex rel. Wilke v. Hamilton Cty. Bd. of Commrs.*, 90 Ohio St.3d 55, 60-61, 734 N.E.2d 811 (2000).

Indeed, this Court's rule with respect to mandamus actions against the Tax Commissioner is a manifestation of the above principle that the Court will not interfere - or interject - in the functions of other branches of government. In that regard, unless the Tax Commissioner is about to act in a manner that is specifically enjoined by law, or if the Tax Commissioner is abusing his discretion or arbitrarily refusing to perform his duties, the Court will not entertain an action in mandamus to direct or control the Tax Commissioner's discretion in connection with the administration and enforcement of the state's tax laws. *See State ex rel. Foster v. Evatt*, 144 Ohio St. 65, 56 N.E.2d 265 (1944); *State ex rel. Foster v. Miller*, 136 Ohio St.295, 25 N.E.2d 686 (1940), paragraphs two and three of the syllabus. In other words, the judiciary will not

interfere in the Tax Commissioner's executive functions of the administration and enforcement of the state's tax laws unless there is unlawful action on the part of the Tax Commissioner.

In this case, the Tax Commissioner is fully within his statutorily authorized duties to act on each of LMES' petitions for reassessment and to issue a respective final determination for each petition. There is no allegation that the Tax Commissioner is exceeding his authority or acting in a manner other than that which is reasonable and lawful. And because LMES could not ask this Court to control the Tax Commissioner's discretion with respect to the pending petitions for reassessment though an action in mandamus, LMES should similarly not be allowed an end-run-around and otherwise request a stay of the exercise of that lawful discretion.

LMES's motion for stay asks this Court to become extrinsically intertwined in the Tax Commissioner's affairs in a manner that is patently and unambiguously unauthorized by principle and by law. LMES' motion for stay must be denied.

C. General consideration of LMES' motion for stay confirms that the motion should be denied.

As a final matter, LMES' motion for stay of LMES' pending petitions for reassessment fails to comport with the general considerations applied to motions for stay. Simply stated, LMES' motion fails to demonstrate any need for this type of action. For instance, there is no threat immediate action on the part of the Tax Commissioner that will result in irreparable financial or personal harm. *See, e.g., State ex rel. Electronic Classroom of Tomorrow v. Cuyahoga Cty. Court of Common Pleas*, 126 Ohio St.3d 1536, 2010-Ohio-3840 (immediate stay of execution granted in \$1.2 million dispute pending appeal); *Rowell v. Smith*, 129 Ohio St.3d 1412, 2011-Ohio-3386 (stay granted in child custody case); *State v. Bryan*, 91 Ohio St.3d 1477, 744 N.E.2d 774 (2001) (stay granted in a death penalty case).

Nor does this situation fit into any of the circumstances generally contemplated for which a stay would be appropriate. This is not a request for a stay pertaining to this instant appeal, there are no multiple claims or parties so as to risk inconsistent judgments within the same action, and no bond has been posted in any court. On these facts, the rule and statute provisions generally applicable to requests for stays do not apply. *See, e.g.*, Civ.R. 62; App.R. 7; R.C. 2505.09. To the contrary, the pending petitions for reassessment which LMES wants the Tax Commissioner to delay determining are matters upon which the Tax Commissioner is statutorily authorized to act and are each separate and independent “claims” or “causes of action.” R.C. 5703.05; R.C. 5703.36; R.C. 5711.24; R.C. 5711.31; *Olmstead Falls Bd. of Edn.*, 122 Ohio St.3d 134, 2009-Ohio-2461, at ¶ 16. There is no basis for the Court to stay proceedings that are separate and independent from this instant appeal.

LMES also suffers no prejudice in allowing the Tax Commissioner to perform his statutory duty of acting on each of LMES’ petitions for reassessment and issuing a final determination. Once the final determinations have been released, LMES can fully protect its interests by filing an appeal with the Board of Tax Appeals for each of the determinations, should it so choose. R.C. 5717.02. LMES’ right of appeal remains fully intact and available and its concern of “inconsistent and incomplete results” will be addressed in each instance, as appropriate.

Accordingly, LMES is not entitled to a stay and its request in this regard must be denied.

III. Conclusion

Based on the foregoing, the request for stay by LMES is moot. The Tax Commissioner has voluntarily stayed issuing a final determination on any of the pending petitions for reassessment and LMES’ motion must be denied.

But even if the Court is to reach a decision on the merits of the motion, this request remains contrary to basic principles of property valuation and taxation, is an infringement on the ability of the Tax Commissioner to perform his statutory duties, and is not consistent with the general considerations that apply to motions for stay. The Tax Commissioner respectfully requests that this Court deny the motion for stay requested by LMES.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Appellee-Cross Appellee Tax Commissioner's Response to Motion to Stay of Appellant-Cross Appellee Martin Marietta Energy Systems, Inc., a/k/a Lockheed Martin Energy Systems, Inc., was served upon the following by U.S. mail on this 20th day of October, 2014:

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