

ORIGINAL

In the
Supreme Court of Ohio

VEOLIA WATER NORTH AMERICAN
OPERATING SERVICES, INC.,

Appellant,

v.

RICHARD A. LEVIN, (JOSEPH W. TESTA,) :
TAX COMMISSIONER OF OHIO, :

Appellee. :

Case No. 2014-0170

Appeal from the Ohio Board of Tax Appeals
Case No. 2008-987

MERIT BRIEF OF APPELLEE TAX COMMISSIONER OF OHIO

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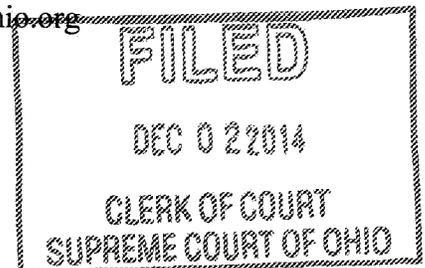


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I. Introduction

Veolia Water North America Operating Services, Inc.'s ("Veolia") wastewater treatment facility that treats 17% industrial waste influent and 83% residential/commercial waste influent does not qualify for exemption as property exclusively used to treat "industrial waste."

Veolia seeks to obtain "industrial water pollution control facility" certification for its wastewater treatment facility. A facility that is "designed, constructed, or installed for the primary purpose" of treating "industrial waste" qualifies for certification. R.C. 5709.20(L); R.C. 6111.01(C). Certification then permits tax exemption for only those portions of the facility that are exclusively used to treat industrial waste. R.C. 5709.21(C)(1). "Auxiliary property," which is personal property that is both necessary for the operation of an exempt facility and is also used in other non-exempt operations of the business, is allowed a partial exemption pursuant to R.C. 5709.21(C)(2). R.C. 5709.21(A)(2).

The Board of Tax Appeals ("Board") affirmed the Tax Commissioner's finding that Veolia's facility partially qualified for the certificate and exemption. The Tax Commissioner based his findings largely upon the expert scientific analysis provided by the Ohio Environmental Protection Agency ("EPA") and information provided by Veolia. ST at 357-361. The EPA's analysis found that certain items qualified for the certification, and these items qualified for 17% exemption based upon the percentage of industrial waste influent treated at the facility, the remaining items were denied certification and exemption. ST at 357-359. The Tax Commissioner credited this analysis and concluded that 17% of the facility's personal property that treated industrial waste was entitled to exemption.

Veolia contends that it was error for the Tax Commissioner to rely on industrial influent flow as the metric for gauging whether to grant an industrial water pollution control facility certificate. In Veolia's view, the proper metric for assessing whether to grant an industrial water pollution control facility certificate should be based upon the percentage of industrial pollutants that must be treated. Though imaginative, Veolia's proffered metric has no basis in the statutory scheme. The exemption is not for treating industrial pollutants or industrial contamination generally, it is specifically for the treatment of "industrial waste" as defined in R.C. 6111.01(C). Board Decision at 7. Acceptance of Veolia's position would require this Court to insert words into R.C. 5709.20(L) and broaden the definition of industrial waste in R.C. 6111.01(C). Contrary to Veolia's claim, "laws relating to exemption from taxation are to be *strictly* construed." *National Tube Co. v. Glander*, 157 Ohio St. 407, 409 (1952) (Emphasis added.); Appellant's Brief at 3, Decision at 5, fn. 3. For these reasons, the Board decision, affirming the Tax Commissioner's determination that only 17% of Veolia's wastewater treatment plant was "primarily" an "industrial water pollution control facility" based upon the measurement of flow of "industrial waste" into the facility, was reasonable and lawful and should be affirmed.

II. Statement of the Case and Facts

Veolia is a for-profit business that provides water services and technology. The facility at issue was previously owned by local municipalities that were members of the Franklin Waste Water Treatment Regional Authority. ST at 540. In 1997, this facility was privatized and sold to Veolia's predecessor, Wheelabrator EOS of Ohio. *Id.* On March 16, 2005, Veolia filed an application with the Ohio Department of Taxation for an exempt industrial water pollution control facility certificate for a facility located in Warren County. ST at 372-448.

A. EPA's Review of the File and the Tax Commissioner's Proposed Findings

R.C. 5709.211(A) provides that the “[C]ommissioner shall provide a copy of a properly completed application to, and obtain the opinion of, the director of environmental protection.” Pursuant to R.C. 5709.211, the Tax Commissioner forwarded Veolia’s application and supporting documentation to the EPA in order to obtain the opinion of the director of environmental protection. The Director of the EPA is required to provide the Tax Commissioner with a recommendation of whether the property is primarily designed, constructed, installed, and used as an exempt facility. R.C. 5709.211

Daniel Kopec, Environmental Specialist 2 Division of Surface Water, reviewed Veolia’s exemption application and drafted the EPA’s recommendation. Mr. Kopec has been working with the EPA for approximately eight years. He has a Bachelor of Science in chemical engineering, and a minor in chemistry. Tr. at 61. Mr. Kopec has reviewed at least 300 tax certification applications. Tr. at 61. He had previously reviewed industrial water pollution control facility applications where the issues in contention were regarding the propriety of exemption for various assets, equipment, and property of applicants. Mr. Kopec has reviewed many landfill exemption applications which involve similar issues to this case, including the acceptance of waste from domestic and industrial sources.

The Director of the EPA, Joseph P. Koncelik, issued his recommendation for partial exemption on August 10, 2006. ST at 359. The EPA found that due to Veolia’s wastewater facility treating residential, commercial, and industrial waste, exemption was only appropriate for the percentage of industrial waste treated (17%). Only the treatment of industrial waste qualifies an entity’s property as an “industrial water pollution control facility.” In addition, the

EPA denied exemption for certain real and personal property of Veolia that was not primarily designed, constructed, installed and used as an exempt facility, but rather was primarily designed and installed for Veolia to conduct its business (such as furniture, vehicles, computers, and lawn mowers). ST at 357-359. Attached to the EPA's recommendation is a letter the EPA received from Veolia, explaining the sources of waste received at the facility. ST at 360-361. This letter also contained a chart detailing total flow (in gallons), the Chemical Oxygen Demand (COD) and Total Suspended Solids (TSS) in pounds (amount of dry weight of pollutants that are in the waste) of waste received from industrial and municipal sources from August 1, 2003 through July 31, 2004. *Id.* The information on this chart was taken from the many flow meters set up in the wastewater collection system; gallons of discharge per day from industrial and non-industrial sources are collected continuously in the ordinary course of business. Hearing Transcript (Tr.) at 50-54; ST at 360. After reviewing the recommendation of the Director of the EPA, the Tax Commissioner issued a proposed finding on August 17, 2006, allowing a partial exemption, same as the EPA's recommendation except with a few additional pieces of property. ST at 351.

B. Tax Commissioners Reconsideration of the Application

Veolia filed a request for reconsideration with the Department of Taxation on October 13, 2006, claiming that all wastewater received at the facility was industrial waste as defined in R.C. 6111.01(C), and that the purpose of all assets at the facility was to treat industrial waste. ST at 350. A hearing was held on Veolia's request for reconsideration at the Department on August 7, 2007.

R.C. 5709.22(B) provides that the "commissioner shall notify the environmental protection agency" "[i]f a reconsideration of the tax commissioner's proposed findings is

requested by the applicant,” and the EPA “shall participate in the hearing if requested in writing by the commissioner, the applicant, or the county auditor.” The Tax Commissioner properly notified the EPA of the hearing on May 1, 2007. ST at 348. In this instance the Tax Commissioner chose not to ask the EPA to participate in the hearing. Veolia also did not request that the EPA be present at the hearing. ST at 346. If *either* party had requested for the EPA’s participation, the EPA would have been required to attend the hearing, pursuant to R.C. 5709.22. However, the statute places no obligation upon the Tax Commissioner to invite the EPA to participate in the hearing. R.C. 5709.22(B).

Veolia’s contention, that the percentage of exemption should be calculated based upon the degree of industrial pollutants in the wastewater after residential and industrial waste are mixed together, was mentioned for the first time by Veolia at the hearing on August 7, 2007. ST at 212. At the Tax Commissioner’s hearing, Veolia provided work sheets and flow charts, illustrating the relationship between industrial and residential pollution and influents processed at the facility, for the first time. ST at 216-275. Veolia described this process as “Dilution is critical in the solution to industrial pollution.” Joseph Hart, plant manager, further elaborated on this “solution” at the Board hearing. Mr. Hart explained that the original design at the facility was for the industrial influent to be treated separately from the residential and commercial influent, but this was changed in order use the residential and commercial waste to dilute and treat the more concentrated industrial waste. Tr. 40-41; ST at 425.

At the Tax Commissioner’s hearing, Veolia also presented for the first time an Ohio property classification analysis report, done by Pricewaterhouse Coopers LLP in 2005. ST at 276-345. On September 10, 2007, Veolia submitted to the Tax Commissioner sampling data on

pollutants in the residential waste coming to the facility between August 13, 2007 and September 5, 2007, more than two years after the submission of its application. ST at 191-193. The concentration of pollutants of industrial influent (COD and TSS) is measured by Veolia in the ordinary course of business, as it is required to in order to be permitted by the EPA to treat industrial waste, and in order to increase their fees if the waste is more concentrated. Tr. 38, 45, 47. However, the concentration of pollutants in residential waste is not measured in the ordinary course of business, and was measured in 2007 solely for litigation purposes. Tr. 45; ST at 130, 193. On September 12, 2007, Veolia submitted to the Tax Commissioner additional supporting and clarifying documentation regarding Veolia's position discussed at the hearing. ST at 129-190.

On November 14, 2007, the Tax Commissioner's counsel met with Mr. Kopec to discuss the EPA's opinion regarding exemption for various assets and property of Veolia. ST at 10. There was ongoing substantive discussion between the Tax Commissioner's counsel and EPA personnel and counsel throughout the decision making process, as late as December 11, 2007. ST at 7-10, 346, 355.

The Tax Commissioner issued his final determination, following the EPA's recommendation for 17% exemption, with a few assets added to the exempt list, on April 29, 2008. ST at 1-6. The Tax Commissioner granted the partial exemption pursuant to R.C. 5709.21(C)(2) for "auxiliary property" meant for property that is used for the operation of an exempt facility and also used in other operations of the business other than an exempt facility purposes. The Tax Commissioner and the EPA held that this facility was concurrently used for

an exempt purpose (treating industrial waste) and a nonexempt purpose (treating residential and commercial waste). Veolia filed its appeal with the Board of Tax Appeals on July 7, 2008.

B. Board of Tax Appeals Hearing

On appeal and at the Board hearing Veolia raised as errors the Tax Commissioner's denial of complete exemption, the use of percentage of influent, instead of industrial pollutants, as the measure for partial exemption, the denial of exemption to real property and "non-recommended property," interpretation of the terms "primary purpose" and "auxiliary property," and the application of the strict construction standards for exempting statutory language. On appeal Veolia raised a claim that Veolia's facility should be an exempt public utility works facility under R.C. 5709.11, however Veolia failed to raise this claim at the hearing or in briefing and as a result the Board did not rule upon it. In addition, as the Board noted in its decision Veolia did not present any evidence or argument on appeal with regard to the "non-recommended property." Decision at 8.

At the Board hearing Veolia presented testimony from Joseph Hart, plant manager. Tr. 15. Mr. Kopec, EPA Environmental Specialist 2 Division of Surface Water, presented testimony on behalf of the Tax Commissioner. Tr. 60. The record before this Court consists of the transcript of the hearing ("Tr."), the Tax Commissioner's Statutory Transcript ("ST"), and Appellant's Exhibit 1 (color copies of statutory transcript pages 149-153).

The Board affirmed the Tax Commissioner's final determination, finding that 17% of Veolia's facility qualified as an "industrial water pollution control facility" that primarily treated industrial waste using the amount of industrial wastes flow as a measurement of the exemption. Decision at 6-7.

The Board found that flow was the “more practical measure;” flow is continually monitored and routinely recorded by Veolia in ordinary course of business. Decision at 7; Tr. at 50-54. Further the Board affirmed the Tax Commissioner’s denial of the 17% exemption to certain property, stating that each piece of property must qualify on its own, and “Veolia did not present any evidence or argument on appeal with regard to the remaining property.” Decision at 8. Last, the Board held that the Tax Commissioner properly followed the statutory procedure for considering an exempt facility certification application and no error was committed by not requesting for the EPA to participate in the Tax Commissioner’s hearing. Decision at 8-9; R.C. 5709.22(B). Veolia has now appealed the Board decision to this Court raising similar errors to those raised before the Board.

III. Law and Argument

Proposition of Law No. 1:

Exemptions from taxation must be strictly construed against the claimed tax reduction.

Exemption from taxation is in derogation of the rights of all taxpayers and effectively shifts a greater tax burden to the nonexempt. *Ohio Children's Society, Inc. v. Porterfield*, 26 Ohio St.2d 30, 33 (1971). When the General Assembly sees fit to encourage certain activities by the granting of a tax exempt status, it is the duty of the courts to strictly construe exemption provisions, unbendingly applying only the express intent of the General Assembly. *Id.* A taxpayer is not allowed the privilege of an exemption unless the statute specifically allows it and in all doubtful cases, exemptions must be denied. *Youngstown Metro Housing Authority v. Evatt*, 143 Ohio St. 268, 273 (1944); *Atlas Crankshaft Corp. vs. Lindley*, BTA Case No. E-1816 (August 15, 1978).

A. Standard of Review

The standard for review for appeals from the Board is set forth in R.C. 5717.04, as follows:

If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

In other words, this Court is limited to determining whether the Board's decision was reasonable and lawful. *PPG Industries, Inc. v. Kosydar*, 65 Ohio St.2d 80, 81 (1981).

The Tax Commissioner's findings are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful. *Hatchadorian v. Lindley*, 21 Ohio St.3d 66 (1986); *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121 (1989). The taxpayer bears the burden of rebutting this presumption of validity. *Belgrade Gardens v. Kosydar*, 38 Ohio St.2d 135, 143 (1974). It is a familiar rule that in order for a taxpayer to derive the benefit of a statutory exemption from taxation, it must be proven that the property in question satisfies each and every requirement of the exempting statute. *Sun Oil Co. v. Lindley*, 56 Ohio St.2d 313, 317 (1978).

Proposition of Law No. 2:

A wastewater treatment facility that processes 83% residential & commercial waste and 17% industrial waste is not designed, constructed, or installed for the primary purpose of treating industrial waste, and it does not qualify for exemption for property used exclusively to treat industrial waste. R.C. 5709.20(L); R.C. 5709.21(C)(1); R.C. 6111.01(C).

- A. Veolia’s wastewater treatment facility that treats 17% industrial waste and 83% residential & commercial waste does not qualify as being *primarily* designed, constructed, or installed for the treatment of industrial waste.**

R.C. 5709.21(B) authorizes the issuance of a pollution control certificate, providing in part that “[i]f the commissioner finds that the property was designed primarily as an exempt facility and is suitable and reasonably adequate for such purpose and is intended for such purpose, the commissioner shall enter a finding and issue a certificate to that effect.” R.C. 5709.21(C)(1) further states that “the certificate shall permit tax exemption pursuant to section 5709.25 of the Revised Code only for that portion of such exempt facility that is exclusively property used for a purpose enumerated in section 5709.20 of the Revised Code.”

This Court has recognized that the plain meaning of the statutes granting tax exemptions for *** [exempt] pollution control facilities is that such exemptions *shall be allowed only for those parts of a facility* that are designed primarily or used exclusively for the control of *** pollution.” *Timken v. Lindley*, 64 Ohio St.2d 224, 228 (1980).

Veolia filed an application seeking to have its wastewater treatment facility certified as an industrial water pollution control facility pursuant to R.C. 5709.20(L). R.C. 5709.20(L) provides the definition of an “industrial pollution control facility”:

Any property designed, constructed, or installed for the primary purpose of collecting or conducting industrial waste to a point of disposal or treatment; reducing, controlling, or eliminating water pollution caused by industrial waste; or reducing, controlling, or eliminating the discharge into a disposal

system of industrial waste or what would be industrial waste if discharged into the waters of this state. This division applies only to property related to an industrial water pollution control facility placed into operation or initially capable of operation after December 31, 1965, and installed pursuant to the approval of the environmental protection agency or any other governmental agency having authority to approve the installation of industrial water pollution control facilities. The definitions in section 6111.01 of the Revised Code, as applicable, apply to the terms used in this division.

(Emphasis added.) R.C. 5709.20(L) notes that the definitions within R.C. 6111.01 apply where applicable. “Industrial waste” and “other waste” are defined as:

“Industrial waste” is any liquid, gaseous, or solid waste substance **resulting from any process of industry**, manufacture, trade, or business, or from the development, processing, or recovery of any natural resource, together with such sewage as is present. R.C. 6111.01(C) (emphasis added).

“Other waste” is garbage, refuse, decayed wood, sawdust, shavings, bark, and other wood debris, lime, sand, ashes, offal, night soil, oil, tar, coal dust, dredged or fill material, or silt, other substances that are not sewage, sludge, sludge materials, or industrial waste, and any other “pollutants” or “toxic pollutants” as defined in the Federal Water Pollution Control Act that are not sewage, sludge, sludge materials, or industrial waste. R.C. 6111.01(D).

Thus, to satisfy R.C. 5709.20(L) and obtain water pollution control certification, Veolia had the burden to show that (1) it’s facility was designed, constructed, or installed for the primary purpose of collecting or conducting industrial waste to a point of disposal or treatment, and (2) the waste that’s primarily being treated is industrial waste as defined in R.C. 6111.01(C). The other requirements in R.C. 5709.20(L) are not at issue in this case. If these criteria are met, R.C. 5709.21(B) authorizes the issuance of a pollution control certificate. The holder of a pollution control certificate is eligible to seek the tax exemption set forth in R.C. 5709.25.

The Board’s decision properly focused on the sufficiency of the evidence presented by Veolia regarding the treatment of “industrial waste” at Veolia’s facility. Decision at 6. In order to reach its determination, the Board utilized an analysis first used in a similar case when Liberty

Waste Transportation, LLC sought a water pollution control certificate for waste disposal at a landfill. The Board “repeatedly looked to the amount of industrial waste versus non-industrial waste.” *Id.* (referencing *Liberty Waste Transp. v. Levin*, BTA No. 2007-B-236, *9 (Sept. 22, 2009).). Since only 17% of the waste treated at Veolia’s facility comes from industrial sources, and only the treatment of “industrial waste” qualifies property as an “industrial water pollution control facility,” the EPA recommended and Tax Commissioner agreed that 17% of “Recommended Property” at Veolia’s facility qualified for certification pursuant to R.C. 5709.20(L). ST 359-363. Veolia’s property that was primarily designed and installed for it to conduct its business rather than treat wastewater, such as: buildings, vehicles, computers, and lawn mowers, were denied exempt facility certification. ST 358-359; Tr. 70-72.

By statute, industrial waste is defined as “any liquid, gaseous, or solid waste substance resulting from any process of industry, manufacture, trade, or business.” 6111.01(C). Producers of industrial waste are specifically designated as such by statute as well. See Revised Code Chapter 6111: Water Pollution Control. Industrial waste producers are regulated by the EPA and are subject to various rules and regulations. *Id.* In order for an entity to be classified as an industrial waste producer, the entity must complete a Waste Discharge Permit. *Id.*; ST 360-361. A sample of waste and information about the industrial waste producer are provided to the EPA on the permit application, in order for the EPA to determine whether the entity is an industrial user of the wastewater collection system, an “industrial waste” producer. *Id.*; R.C. 6111.45. Only 17% of the entities discharging into Veolia’s facility carry waste discharge permits, and are officially designated as industrial waste producers.

This court has held that primary purpose, in the context of exempt pollution control certification, *is determined by the property's function*, not the taxpayer's intent. *Timken*, 64 Ohio St.2d 224. In *Timken* the Court held that it was reasonable and lawful for the Tax Commissioner to certify for *exemption only those facilities or parts thereof* that are designed primarily and used exclusively for an exempt pollution control purpose enumerated in section 5709.20 of the Revised Code. *Timken* at syllabus paragraph two. In *Timken*, this Court restated the rule that R.C. 5709.21 "does not permit exemption of property which serves a pollution control purpose and also provides an incidental function which benefits the taxpayer's production processes." *Timken* at 228 (quoting *Sun Oil Co. v. Lindley*, 56 Ohio St.2d 313 (1978)). *Timken* sought air pollution control certification and exemption for coal-fired boilers at two of its plants. *Timken* at 224. The Tax Commissioner denied exemption for portions of the facilities finding that portions were not used exclusively for air pollution control and other portions were found to be used only partially for such purposes. *Timken* at 225. The Board affirmed the Tax Commissioner's determinations. As such, this Court held that it "was not unreasonable nor unlawful for the Board of Tax Appeals to conclude that the parts of the boilers which hold the water and steam for appellee's manufacturing process are not contemplated by the statutes" because they "are not designed primarily for the control of air or noise pollution, nor are they used exclusively for that purpose." *Timken* at 229.

Similarly, Veolia's facility and associated property and equipment are not designed primarily to treat industrial waste, and the "non-recommended property" does not treat any waste, it's merely business property. Veolia's wastewater treatment facility is designed to collect waste from a variety of sources: residences, business, and industry. Veolia's facility's

primary purpose is to treat wastewater generally, not just to treat “industrial waste” as defined in R.C. 6111.01(C). As a result, the Director of the EPA, the Tax Commissioner, and the Board held that pursuant to the plain language of the exemption statutes and the information provided by Veolia, only certain property qualified for certification and a partial exemption of 17% based upon the amount of industrial flow received and treated at the facility.

As such, it was reasonable and lawful for the Board to hold that there was “no error in the commissioner’s determination that only 17% of the subject facility is entitled to exemption”; “the amount of waste, rather than the amount of contaminants therein” determine “whether the facility’s ‘primary purpose’ is to treat industrial waste” “not ‘industrial contaminants’ or ‘industrial pollution.’” Decision at 6-7.

B. Veolia’s wastewater treatment facility that treats industrial waste and residential & commercial waste does not qualify for the 100% exemption provided for property used *exclusively* to treat “industrial waste” as defined in R.C. 6111.01(C).

Qualifying for a pollution control certificate does not automatically exempt the entire facility, and all of the facility property, from taxes including personal property tax and real property tax. A pollution control certificate allows for “tax exemption pursuant to section 5709.25 of the Revised Code **only for that portion of such exempt facility that is exclusive property used for a purpose enumerated in section 5709.20** of the Revised Code.” R.C. 5709.21(C)(1) (emphasis added). “Exclusive property” is defined as “real and personal property that is installed, used, and necessary for the operation of an exempt facility, and that is not auxiliary property.” R.C. 5709.21(A)(1). If the property is both necessary for the operation of an exempt facility and also used in other non-exempt operations of the business, it does not qualify for complete exemption as exclusive property.

R.C. 5709.21(C)(2) provides for a partial exemption for “auxiliary property,” which is:

Personal property installed, used, and necessary for the operation of an exempt facility that **is also used in other operations** of the business **other than exempt facility purposes** described in section 5709.10 of the Revised Code. R.C. 5709.21(A)(2).

(Emphasis added.) “In order for a taxpayer to derive the benefit of a statutory exemption from taxation, it must be proven that the property in question satisfies each and every requirement of the exempting statute.” *Sun Oil Co.*, 56 Ohio St.2d at 317 (referencing *Dayton Sash & Door Co. v. Kosydar*, 36 Ohio St.2d 120 (1973); *Ohio Children's Society v. Porterfield*, 26 Ohio St.2d 30 (1971)).

This Court has repeatedly held that in the context of the pollution control exemption, “R.C. 5709.21 ‘does not permit exemption of property which serves a pollution control purpose and also provides an incidental function which benefits the taxpayer’s production processes.’” *Timken* at 228 (quoting *Sun Oil Co.*, 56 Ohio St.2d at 317.). In *Timken*, this Court found that denial of exemption and a partial grant of exemption was proper for certain parts of the boilers at issue, due to not being designed primarily for the control of pollution, nor used exclusively for that purpose. *Timken* at 229-230. The parts that were not directly related to the elimination or reduction of the exempt pollution were not exempted under R.C. 5709.21. *Id.*

Veolia’s wastewater treatment facility is not “exclusive property used” to treat industrial waste. R.C. 5709.25. Veolia has not met its burden of proving how its entire facility and all property are exclusively used to treat industrial waste. Veolia’s “recommended property” is concurrently used for an exempt facility purpose (the treatment of industrial waste) and a nonexempt purpose (the treatment of residential and commercial waste). R.C. 5709.21(A)(3). As such, the Tax Commissioner granted Veolia a partial exemption pursuant to R.C.

5709.21(C)(2) for “auxiliary property.” Based upon the EPA’s recommendation, Veolia’s flow measurements, and the pertinent statutes, the Board affirmed the Tax Commissioner’s determination, finding that Veolia’s facility qualified for a 17% exemption based upon the amount of industrial flow received at the facility, was reasonable and lawful and should be affirmed.

C. The Board’s holding that Veolia’s “recommended property” qualified for a 17% exemption based upon the amount of waste, rather than the amount of contaminants therein was reasonable and lawful and should be affirmed.

The plain language of R.C. 6111.01(C) and R.C. 5709.20(L) require that Veolia’s partial exemption be based upon the amount of waste from industrial sources, the industrial “influent,” being treated at Veolia’s facility.

Industrial waste is specifically defined by statute as waste resulting from process of industry, not generally “industrial contaminants” or “industrial pollution.” R.C. 6111.01(C); Decision at 7. In addition, flow is the most accurate and reliable method for determining the portion of the subject property that treats “industrial waste,” instead of measuring partial exemption by the dry weight of industrial pollutants in the mixed wastewater, which is constantly fluctuating and not regularly monitored. Tr. 45.

Based upon the information provided by Veolia to the EPA, the EPA recommended and the Tax Commissioner decided that the percentage of industrial influent flow was the most accurate and appropriate method for determining what portion of the facility is exempt as an “industrial water pollution control facility.” Due to the concurrent use of treating industrial waste as defined by R.C. 6111.01(C) and other types of waste, a complete exemption based upon *exclusive use* was not appropriate. “[L]aws relating to exemption from taxation pro tanto violate

the constitutional requirement of tax uniformity, such laws must be construed most strongly against the exemption.” *Timken* at 227.

Pursuant to R.C. 5709.21(A)(3)(b), Veolia has the burden of proving the auxiliary property exempt cost where the property is used concurrently for an exempt facility purpose and a nonexempt facility purpose. The 17% exemption was determined from Veolia’s chart detailing the flow in gallons and the Chemical Oxygen Demand (COD) and Total Suspended Solids (TSS) in pounds (amount of dry weight of pollutant) of waste received from industrial and municipal sources from August 1, 2003 through July 31, 2004. ST at 223, 360. The flow of waste from various sources is continually monitored and routinely recorded in the ordinary course of business. Tr. 50-54. However, the concentration of industrial pollutants coming into Veolia’s wastewater treatment plan is in constant fluctuation. Tr. 54-55, ST at 191. The information provided by Veolia over the course of this case as to the amount of industrial pollutants treated at the facility varied from as much as 94% to as little as 57%. ST at 2-3, 219, 360. The dry weight quantity of industrial pollutants in the mixed wastewater varies depending upon the day of the week and the time of day. Tr. 54-55. The concentration of pollutants in residential waste was measured for the first time by Veolia during the course of this case on August 13, 2007. ST 130, 193. The concentration of pollutants in Veolia’s wastewater is not a reasonable or reliable measure for its exemption. As such the Board’s finding that there was “no error in the commissioner’s determination that only 17% of the subject facility is entitled to exemption” using “flow as a measurement rather than concentration of pollutants” was reasonable and lawful and should be affirmed.

D. The Board's holding that the Tax Commissioner properly followed the statutory requirements for processing Veolia's exemption application, pursuant to R.C. 5709.22(B), was reasonable and lawful and should be affirmed.

Veolia erroneously claims that the Tax Commissioner denied Veolia a proper hearing by not inviting the EPA and by not providing the EPA with all post-hearing submissions. Appellant's brief at 7.

R.C. 5709.22(B) sets forth the procedural requirements for the Tax Commissioner when processing a pollution control application after receiving the EPA's recommendation. R.C. 5709.22(B) provides that, "[i]f a reconsideration of the tax commissioner's proposed finding is requested by the applicant, *** [t]he commissioner *** shall notify the environmental protection agency," who "shall participate in the hearing if requested in writing by the commissioner, the applicant, or the county auditor." The Tax Commissioner properly notified the EPA once Veolia requested for reconsideration of his proposed findings, and request for a hearing, as required to by R.C. 5709.22(B). ST at 348; Decision at 8.

The Tax Commissioner's notice clearly stated that the EPA was not being requested to be present at the hearing. ST at 348. There is nothing in the record suggesting that Veolia made such a request. Decision at 8. Veolia failed to provide its concentration studies or put forth their claim for proper measurement of industrial waste treatment in their original application. The Tax Commissioner had no obligation to pass on information produced by Veolia after Veolia filed its exemption application, and after the EPA's recommendation had been written, and especially not after the Tax Commissioner's hearing. As such, the Board reasonably and lawfully found "no error on the commissioner's part" and found that Veolia "deprived itself of

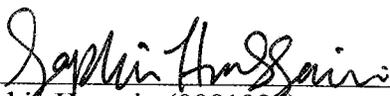
the opportunity to present its additional evidence in the presence of a representative of the EPA.”
Decision at 9.

IV. Conclusion

For all the above reasons, the Court should affirm the decision of the Board affirming the Tax Commissioner’s final determination, finding that the appellants failed to provide sufficient evidence to demonstrate an error in the Tax Commissioner’s final determination.

Respectfully submitted,

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CERTIFICATE OF SERVICE

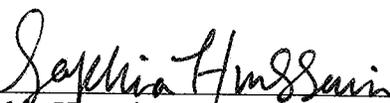
The undersigned hereby certifies that a copy of the forgoing Merit Brief of Appellee Tax Commissioner was Ohio was served upon the following by regular U.S. Mail on this 2nd day of December, 2014:

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