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INTRODUCTION

This case boils down to the question: How do you count pollution?

The Commissioner contends that the amount of pollution is determined by “flow,” because it is easy to measure. Veolia contends that the amount of pollution is determined by the amount of “pollutants,” because pollutants are what determine how dirty the flow is.

Veolia contends that the primary purpose is to treat the industrial waste because it is so dirty. The Commissioner contends that the primary purpose cannot be to treat industrial waste alone, because the industrial waste is “only” 17% of the flow treated, even though it is immensely dirtier.

Residential flow is relatively clean. In contrast, industrial flow is saturated with pollutants, making it extremely dirty. As such, it is undisputed that the industrial flow is much dirtier than the residential flow. It is also undisputed that the relatively clean residential flow is used by Veolia to treat the dirty, saturated industrial flow. It is also undisputed that when comparing pollutants, the Treatment Facility cleans more industrial pollutants than residential pollutants.

Because the Treatment Facility’s primary purpose is to treat industrial waste – and the industrial pollutants contained therein – the entire Treatment Facility is exempt from tax.

ARGUMENT

Proposition of Law No. I.

The statutory requirement of “primary purpose” is determined by the property’s function, rather than other arbitrary and easily-identifiable traits.

The main legal issue is applying the statutory standard of “primary purpose.” R.C. 5709.20(L). Veolia contends that the primary purpose is to treat the industrial waste, because it

is loaded with nasty industrial pollutants. The Commissioner contends that the primary purpose is to treat both industrial waste and residential waste. (Tr. 74; Commissioner's brief, at 6-7.)

The Commissioner further contends that Veolia cannot prevail because the subject property treats more residential flow. By doing so, the Commissioner wrongly assumes that "primary purpose" is synonymous with "more."¹

The Commissioner ruled against Veolia, because industrial waste – as counted by using industrial flow – makes up 17% of the waste treated. (Commissioner's brief, at 12.) Unfortunately, that is where the Commissioner's analysis ends.

The Commissioner gives no consideration to the undisputed fact that the industrial waste is much more contaminated.² The Commissioner gives no consideration to the undisputed fact that the cleaner residential waste is used to treat the industrial waste and the industrial contaminants contained therein. (S.T. 221.)

The treatment of 83% residential flow is not the primary purpose, rather it is the vehicle used to clean the murkier industrial waste. But the Commissioner errs where it defines "primary purpose" to be simply "more."

By that logic, when an employee drives his car to work, the primary purpose is to take the automobile – not the employee – to work, because the automobile weighs more. But of course, the car is just a vehicle; the primary purpose is to get the employee to work. Here, the residential flow is just a similar vehicle used to transport, dilute, and clean the filthy industrial waste.

¹ The Commissioner's witness also used a wrong standard, testing for the Treatment Facility's *sole* purpose, rather than its *primary* purpose. (Tr. 76.)

² Pollutants per liter for industrial flow are much greater than the pollutants per liter for residential flow. (Commissioner witness testimony, Tr. 81-82.)

The Commissioner concedes that “primary purpose” is determined by the property’s function. *Timken v. Lindley*, 64 Ohio St.2d 224 (1980). But then it rejects this case law, when it resorts to a simple counting mechanism and fails to accept the functionality of the residential flow. The residential flow is an important vehicle necessary to treat the dirty industrial waste.

Likewise, the Commissioner’s reliance on *Liberty Waste Transp. v. Levin*, BTA No. 2007-B-236 (Sept. 22, 2009) is misplaced. There, the BTA ruled against the taxpayer because of a lack of credible evidence showing “any probable substantial percentage of industrial waste.” In contrast, the instant case has sufficient and significant evidence – which is undisputed.

The undisputed evidence is that substantial concentrated industrial waste is processed, treated, and cleaned at this Treatment Facility. “Industrial influent always carries a greater concentration of pollution.” (S.T. 191.) The Commissioner concedes the evidentiary point in the Final Determination: “The concentration of pollutants in industrial waste is significantly higher than the concentration of pollutants in residential waste.” (S.T. 2.)

Nevertheless, the Commissioner - without the benefit of an EPA analysis - fails to grasp the primary purpose: “*Dilution is critical in the solution to industrial pollution.*”

Proposition of Law No. II.

The Tax Commissioner must consult with the Environmental Protection Agency to consider data presented by the taxpayer which describes the pollution control activities.

The Commissioner misses the point that the use of residential flow is a necessary vehicle largely because it left the consideration of the data to tax professionals rather than the EPA.

The statute plainly contemplates the involvement of the EPA. R.C. 5709.22(B). Veolia did not have the benefit of legal counsel at the Commissioner hearing. In contrast, the Commissioner's representative was an attorney.

The Commissioner contends that it had no legal obligation to consult the EPA. (Commissioner's brief, at 18.) But by not doing so, the Commissioner failed to make a good-faith effort to consider the evidence. It left the analysis of pollution data to a tax official rather than a pollution control engineer. Thus, the Tax Commissioner hearing was a ruse, lacking a good-faith effort by the Commissioner to impartially evaluate the evidence.

This harkens back to the days when the Commissioner would circumvent taxpayer rights by keeping taxpayer refunds – repayments that it knew were available and payable. The Commissioner would not pay those refunds because it claimed it was not obligated to do so.³

Here, the Commissioner knew that the EPA should review the evidence. And the EPA knew that it should review the evidence. But the Department skipped the EPA review, because its lawyer made a calculated decision to keep the EPA out of the loop.

The Commissioner repeatedly makes the point that important evidence was submitted for the first time at the Commissioner level. (Commissioner brief, at 5-6.) The Commissioner

³ In updating the policy, Governor Kasich said, "If government knows a job creator paid too much in taxes then it should do the right thing and give the money back, because government works for us, not the other way around." Governor Kasich, Communication Department statement, Dec. 18, 2012.

Along the same lines, how can the government shield important data from the EPA when the EPA is an important player in the examination of pollution control data?

"It's just simple fairness and I can't believe this wasn't being done already. It's yet another example of a wrong-headed thing that state government was doing that we discovered and are fixing. I just can't figure out why no one was trying to fix these kinds of problems before." *Id.*

shielded this evidence from the EPA. Thus, the EPA missed the entire presentation of “*Dilution is critical in the solution to industrial pollution.*”

Showing great candor, the Commissioner’s BTA hearing witness was flabbergasted that the data was not given to the EPA: “I don’t know what Hillary Houston [the Commissioner’s former counsel] was thinking.” (Tr. 82.)

The Commissioner tries to rebut this criticism by saying that its lawyer met with Mr. Kopec after the hearing. (Commissioner’s brief, at 6.) But reviewing the statutory transcript cites shows that there is no indication that they discussed the new evidence. Moreover, some of those conversations actually took place *before* the Tax Commissioner hearing. At S.T. pages 7-10, Ms. Houston is merely asking the EPA to explain its written recommendation, which was prepared almost one year *prior* to the Tax Commissioner hearing. At S.T. page 346, Ms. Houston is asking again that Mr. Kopec explain the EPA written recommendation. And while the Commissioner claims that this is proof of involving the EPA in the hearing process, these communications occurred *before* the hearing and *prior* to taking the plant manager’s testimony. Finally, the Commissioner points to S.T. 355, but this simply addresses a missing EPA enclosure – and again this is a communication almost a full year *before* the Tax Commissioner hearing.

Veolia thought it was getting a fair consideration. But, because the Commissioner kept this important evidence from the EPA, the hearing was meaningless.

CONCLUSION

The Commissioner relies on the oft-cited proposition that its findings are presumed valid, unless those findings are unreasonable or unlawful. *Hatchadorian v. Lindley*, 21 Ohio St.3d 66 (1986).

It was unreasonable for the Commissioner to decide the matter without having the EPA weigh in on the new evidence. And it was unlawful for the Commissioner to replace the statutory standard of “primary purpose” with an easy measure of “more.”

It was unreasonable for the Commissioner not to consider and address that the residential flow was a necessary vehicle to treat the industrial waste.

It was both unreasonable and unlawful for the Commissioner not to consider the evidence and testimony showing that the primary purpose is to treat the very grimy industrial waste.

Using a proper definition of “primary purpose” based on the property’s functionality and considering all of the undisputed evidence, it is evident that the Treatment Facility satisfies the statutory requirements as an exempt industrial water pollution control facility.

For these reasons, the Tax Commissioner’s final determination and the BTA decision should be reversed.

Respectfully submitted,



Harlan S. Louis (0064288)
Bailey Cavalieri LLC
One Columbus
10 West Broad Street, Suite 2100
Columbus, Ohio 43215-3422
Telephone: (614) 229-3225
Facsimile: (614) 221-0479
Email: Harlan.Louis@BaileyCavalieri.com
ATTORNEY FOR APPELLANT
VEOLIA WATER NORTH AMERICA
OPERATING SERVICES, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Brief of Appellant was served by regular U.S. mail, postage prepaid, on the 22nd day of December, 2014 on the following counsel of record:

Sophia Hussain
Assistant Attorney General
30 East Broad Street, 25th Floor
Columbus, Ohio 43215-3428
ATTORNEY FOR APPELLEE
RICHARD A. LEVIN
TAX COMMISSIONER

Steve Boeder, Mayor
Anna Sizemore, Municipal Manager
CITY OF GERMANTOWN, OHIO
75 North Walnut Street
Germantown, Ohio 45327
APPELLEE

Donnette A. Fisher, Law Director
Steven M. Runge, City Prosecutor
CITY OF FRANKLIN, OHIO
1 Benjamin Franklin Way
Franklin, Ohio 45005
APPELLEE

Randy Winkler, Mayor
Sherry C. Callahan, Manager, Administration
CITY OF CARLISLE, OHIO
760 West Central Avenue
Carlisle, Ohio 45005
APPELLEE



Harlan S. Louis (0064288)
COUNSEL FOR APPELLANT
VEOLIA WATER NORTH AMERICA
OPERATING SERVICES, INC.