Supreme Court of Ohio Clerk of Court - Filed February 02, 2015 - Case No. 2014-1362

In the
Supreme Court of Ohio

Teddy L. Wheeler, In his capacity as Pike County Auditor	:	
Appellee/Cross-Appellant,	:	Case No. 2014-2017
v.	:	On Appeal from the Ohio Board of Tax Appeals
Joseph W. Testa, Tax Commissioner of Ohio,	:	BTA Case No. 2012-2043
Appellee,	:	
and	:	
Martin Marietta Energy Systems, Inc., a/k/a Lockheed Martin Energy Systems, Inc.,	:	
Appellant/Cross-Appellee.	:	

APPELLEE/ CROSS-APPELLEE TAX COMMISSIONER'S MERIT BRIEF

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INTRODUCTION

This is a case of buyer's remorse. In 1998, Appellant, Teddy L. Wheeler ("Wheeler"), in his capacity as Pike County Auditor, initiated, conducted, and finalized the negotiations with the Federal Government for an agreement to receive guaranteed payments in exchange for a release of any claims for real or personal property taxes against the government or its contractors for years reaching back to 1992. Wheeler presented this agreement to his County Commissioners and, once approved, he collected the payments from the Federal Government under the contract. Now, all these years later, Wheeler regrets making the deal.

The 1998 agreement is known as a payment-in-lieu-of-taxes agreement ("1998 PILOT Agreement") and covers tax years 1992 through 1997. Under the terms of the 1998 PILOT Agreement, Pike County received a guaranteed payment from the United States Department of Energy ("DOE"), in exchange for Pike County's release of *any and all* claims for tax on government-owned real or personal property at the Portsmouth Gaseous Diffusion Plant ("PORTS"). Wheeler presented that 1998 PILOT Agreement to the Pike County Commissioners, and the Commissioners approved it. In accordance with its agreement, the DOE made the guaranteed payments to Pike County.

In 2010, in an attempt to collect additional funds, and in contravention of the terms of the 1998 PILOT Agreement, Wheeler issued a preliminary assessment against Appellee, Martin Marietta Energy Systems, Inc., now known as Lockheed Martin Energy Systems, Inc. ("MMES/LMES") for its use of government-owned property at PORTS for the 1993 tax year.[1]

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[1] Lockheed Martin Energy Systems, Inc. was formerly known as Martin Marietta Energy Systems, Inc. Because Lockheed Martin Energy Systems, Inc. and Martin Marietta Energy Systems, Inc. are related entities, in this brief they are referred to as "MMES/LMES."

When the Tax Commissioner reviewed Wheeler's actions under petition of LMES, he cancelled the assessment. The Tax Commissioner found that in the plain language of the 1998 PILOT agreement, Wheeler had agreed to give up his ability to issue these assessments.[2] The Tax Commissioner correctly observed that Wheeler could not collect the tax that the County had contractually agreed to forgo all those years ago.

Among the Tax Commissioner's broad powers to administer taxation is the authority to correct an assessment through cancellation, particularly when that assessment was improperly imposed by an auditor, acting in the capacity as the Tax Commissioner's deputy. See, e.g., R.C. 5703.05; R.C. 5711.31. And despite the wide-ranging arguments presented by Wheeler in his Merit Brief, this power of the Tax Commissioner disposes of the entire appeal. In his appeal, Wheeler has thrown the kitchen sink at this Court in an effort to generate controverted issues. But the reality is that this appeal is resolved by simple application of the Tax Commissioner's statutory authority to correct the assessments of his deputy assessors, like Auditor Wheeler.

This Court should recognize Wheeler's actions for what they are — a long-foreclosed attempt at a tax-grab. Naturally, under such circumstances, the Tax Commissioner has the authority to correct the actions of one of his deputy assessors, by cancelling the improper assessment.

For the foregoing reasons, the Board of Tax Appeals ("BTA") affirmed the Tax Commissioner's final determination. This Court should affirm.

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[2] The BTA disposed of this appeal on the sole holding that the Tax Commissioner's reliance on the 1998 PILOT Agreement to cancel the assessment was appropriate and proper. Therefore, Wheeler's arguments with respect to MMES/LMES's alleged ownership or beneficial interest of personal property at the PORTS facility, or claimed status as a manufacturer, are not implicated in this appeal. In fact, the BTA never ruled on these issues, finding the Tax Commissioner's authority to cancel the assessment was properly exercised. For these reasons, the Tax Commissioner has limited his response to Wheeler's Propositions of Law No. 2, 4, and 5.

FACTS AND PROCEDURAL POSTURE

A. The PILOT Agreement

Auditor Wheeler and MMES/LMES have long histories with Pike County. Wheeler was elected to his position in Pike County in November of 1986 and he has held the position continuously since January 1, 1987.[3] Hearing Transcript ("HT") at 17, 18. MMES/LMES started its management, operation, and maintenance the buildings and facilities at PORTS in Pike County under contract with the federal government in 1991. BTA Pre-Hearing Statement of Appellee, MMES/LMES; Joint Stipulations of Fact at 1; MMES/LMES Supp. at 101. PORTS was constructed by the United States Government in the 1950s. MMES/LMES Merit Brief at 1. MMES/LMES only operated in Pike County. Joint Stipulations of Fact at 11; MMES/LMES Supp. at 103.

MMES/LMES did not file a personal property tax return for 1993. ST at 1. MMES/LMES did file personal property tax returns for 1994, 1995 and 1996, but listed no taxable property and identified the taxable value as $0. ST at 75, 81.

On August 21, 1998, the DOE and Pike County entered into the 1998 PILOT agreement, which released the DOE and its contractors from all potential tax liabilities, including personal property taxes, for several tax years including 1993. Under this agreement, Pike County received payments known as payments-in-lieu-of-taxes from the Federal Government, which the County accepted in full satisfaction of any and all tax claims that could arguably be made against the Federal Government's real and personal property. See ST at 578.

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[3] Wheeler did not run for Pike County Auditor in November 2014, and his term ends in March 2015. R.C. 319.01. See also Pike County Elected Officials for 2014: http://www.electionsonthe.net/oh/pike/electoff/County.pdf, and 2015: http://www.electionsonthe.net/oh/pike/electoff/County2015.pdf (last accessed February 2, 2015).

In this compromise settlement agreement, the parties acknowledged that the DOE owned real and personal property in Pike County, that the government-owned real and personal property was exempt from taxation pursuant to the laws of the United States and Ohio Constitutions, and that counsel for the DOE and Pike County had opined that the DOE contractors (i.e., MMES/LMES) were not liable for taxes on the government-owned real and personal property. ST at 578. The DOE offered to make, and Pike County agreed to accept, a payment-in-lieu-of-taxes to Pike County for tax years 1992 through 1997. ST at 579.

This payment represented "the loss of ad valorem tax revenue for County government purposes for tax years 1992 through 1997 * * * [and constituted] *full satisfaction of any and all claims the County may have for taxes for tax years 1992 through 1997 against DOE and DOE's contractors, of any nature whatsoever, on, with respect to, or measured by the value or use of Government-owned real or personal property which is utilized in carrying on the activities of DOE.*" ST at 579 (emphasis added).

In return, Pike County agreed to waive and release "any and all claims for said taxes for tax years 1992 through 1997." ST at 579. To formalize the compromise settlement agreement, the Pike County Board of Commissioners resolved to accept the payment from the DOE for tax years 1992 through 1997 and to place the money into a new, specific, general fund account, as titled by the County Auditor, i.e. Wheeler. ST 583. DOE's acknowledgement of the 1998 PILOT Agreement was sent to Wheeler, and thereafter, he distributed the money to the appropriate taxing district in the appropriate millage. ST at 584; HT at 83, 84; Joint Stipulations of Fact at 7; MMES/LMES Supp. at 102. This compromise settlement agreement is the 1998 PILOT Agreement.

This payment-in-lieu-of-taxes procedure was one with which Wheeler and Pike County officials were familiar. Pike County had been entering into similar payment-in-lieu-of-taxes agreements, and receiving those payments for every year that PORTS had been operating from 1952 through 1997. Joint Stipulations of Fact at 6; MMES/LMES Supp. at 102. Wheeler, in his capacity as Pike County Auditor, personally executed payment-in-lieu-of-taxes agreements for tax years 1986-88, 1989, 1990, 1991, and the DOE payments-in-lieu-of-taxes for the 1986-1987 and 1992-1997 tax years occurred as a result of Wheeler's initiation and negotiation. Joint Stipulations of Fact at 7, 9; MMES/LMES Supp. at 102, 103. In other words, Wheeler has been involved in payment-in-lieu-of-taxes agreements as long as he has been the Pike County Auditor.

B. The Preliminary Assessment Certificate of Valuation and the Assessment

Still, in 2010, Wheeler relied on MMES/LMES' failure to file a personal property tax return for 1993 as the foundation for the preliminary assessment certificate of valuation that he issued nearly twenty years after the fact. ST at 1. On December 23, 2010, Wheeler, in his official capacity as the Pike County Auditor and as the Tax Commissioner's deputy, issued a preliminary assessment certificate of valuation to MMES/LMES for the 1993 tax year.[4] Statutory Transcript ("ST") at 695; Joint Stipulations of Fact at 1; MMES/LMES Supp. at 103.

When Wheeler determined the personal property within PORTS for the purposes of the 2010 preliminary assessment certificate of valuation, he relied on a one-page list of personal property that was purchased, and owned, by the federal government and not considered to be property of MMES/LMES. Joint Stipulations of Fact at 1, 2; MMES/LMES Supp. at 101, 102. This list was created in September 1992 and Wheeler obtained this list in November 1992

[4] Wheeler also issued the assessment against Martin Marietta Utility Services, Inc. ST at 1, 695. That assessment has since been cancelled and is not a part of this litigation. ST at 1, fn. 1.

through a public records request. ST at 445, 448; HT at 33-36; Wheeler's BTA Hearing Exhibit 10; MMES/LMES Supp. at 94-97.

Based on this single, general listing of personal property at the PORTS facility from 1992, Wheeler determined in 2010 that the value of the property was $158,512,000. ST at 445, 448; HT at 33-36. To arrive at that value, Wheeler applied a depreciation factor to the property that was not based upon Tax Commissioner guidelines or accounting standards, but instead upon what he thought was "fair." HT at 91, 127, 128. Thereafter, the Pike County Treasurer issued a personal property delinquency tax statement for $23,244,789, including unpaid tax, a non-payment penalty, and interest.[5] ST at 448, 699.

C. The Petition for Reassessment

MMES/LMES filed a petition for reassessment with the Tax Commissioner. ST at 691. MMES/LMES challenged the ability of Wheeler, as the Tax Commissioner's deputy, to issue the preliminary assessment certificate of valuation and the resulting personal property tax assessment. Among MMES/LMES's other arguments, MMES/LMES contended that all the personal property contained within PORTS was owned by the federal government. ST at 254, 272, 273, 275, 691, 692; Joint Stipulations of Fact, at 1; MMES/LMES Supp. at 101. Therefore, MMES/LMES continued, it did not have the obligation to pay any personal property tax on that property. ST at 254, 272, 273, 275, 691, 692; Joint Stipulations of Fact at 1; MMES/LMES Supp. at 101.

Thereafter, MMES/LMES filed an amended and restated petition for reassessment. In this amended petition for reassessment, MMES/LMES asserted that the assessment was

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[5] Since the issuance of the assessment at issue in this matter, Wheeler, in his official capacity as the Pike County Auditor and as the Tax Commissioner's deputy, has issued an additional forty-four assessments beginning with tax year 1955. ST at 1, fn. 1.

"contrary to a compromise settlement agreement entered into by Pike County on August 21, 1998, which released the United States Department of Energy ('DOE') and [MMES/LMES] from all potential tax liabilities, specifically personal property taxes, for various tax years including tax year 1993. As part of the compromise and settlement, Pike County received from the DOE certain payments known as payments-in-lieu-of-taxes ('PILOTs'), which the County accepted in full satisfaction of any and all tax claims that could arguably be made against [MMES/LMES]." See ST at 578, 659.

D. The Tax Commissioner's Final Determination cancelled the assessment and the BTA's Decision affirmed the cancellation.

On May 25, 2012, the Tax Commissioner issued a final determination. ST at 1-3. In this determination, the Tax Commissioner found that the 1998 PILOT agreement, and the DOE's payments to Pike County pursuant to that agreement, contractually precluded Wheeler from issuing a personal property tax assessment. ST at 2. Consequently, the Tax Commissioner cancelled the assessment. ST at 3.

Wheeler appealed to the BTA. In its decision, the BTA found that MMES/LMES did not own the personal property in question, and the BTA held that the terms of the 1998 PILOT Agreement precluded any assessment of personal property tax against MMES/LMES. BTA Decision, p. 4. The BTA concluded that the Tax Commissioner's cancellation of the assessment was reasonable, lawful, and supported by competent and probative evidence. *Id.* Specifically, the BTA stated that "if the commissioner determines that an assessment has been issued by an auditor in error, the commissioner has the authority to cancel such assessment, i.e., to review the acts of his deputies, including county auditors * * *, and to take whatever action is necessary to correct any errors made, including cancellation." *Id.* at 2. Accordingly, the BTA affirmed. *Id.* at 4.

STANDARD OF REVIEW

The standard of review is well-settled: this Court affirms reasonable and lawful BTA decisions. R.C. 5717.04; *Stds. Testing Laboratories, Inc. v. Zaino*, 100 Ohio St.3d 240, 2003-Ohio-5804, ¶ 10. *See also Strongsville Bd. of Edn. v. Cuyahoga Cty Bd. of Revision*, 77 Ohio St.3d 402, 405 (1997).

As applied here, the BTA found that the Commissioner properly cancelled the assessment that Wheeler, in his official capacity as the Pike County Auditor and as the Tax Commissioner's deputy, issued against MMES/LMES. The record fully supports the BTA's decision and based on that evidence, the BTA's decision is reasonable and lawful. This Court must affirm that decision.

ARGUMENT

The Tax Commissioner's broad statutory powers in the area of personal property taxation include the authority to correct a tax assessment issued by a deputy assessor, such as Wheeler in his capacity as Pike County Auditor, up to and including correction by cancellation. In this case, the Tax Commissioner properly cancelled the assessment issued by Auditor Wheeler, because the terms of the 1998 PILOT Agreement (which was negotiated and performed by Auditor Wheeler) bound him from issuing the personal property tax assessment on MMES/LMES.

As explained below, the Tax Commissioner has the express statutory authority to correct personal property assessments issued by county auditors, including correction "to zero," meaning correction by cancellation. When correcting assessments, the Tax Commissioner is expressly authorized to examine relevant documents, such as the PILOT Agreement in this case, and to adduce the meaning and effect of such documents on the assessment. And, the Tax Commissioner has the express statutory duty to oversee the taxation of personal property in

Ohio. In this context, when a county auditor issues an assessment, he is acting as the Tax Commissioner's deputy, and is subject to correction by the Tax Commissioner for misdeeds.

Tax Commissioner's Proposition of Law Number 1:

> *The Tax Commissioner is charged with the administration of the personal property tax in Ohio. His statutory powers with respect to personal property assessments include the power to correct assessments by cancellation and to review broadly the actions of his deputy assessors, the county auditors.*

In the context of personal property tax, the county auditors may make assessments as a deputy of the Tax Commissioner and the Tax Commissioner reviews and makes such corrections to those assessments as necessary. The Tax Commissioner's power to correct an assessment incudes the power to cancel, which is the ultimate correction.

Prior to the enactment of the commercial activity tax and the phase-out of the personal property tax, the rule with respect to the taxation of personal property was that as of January 1st of each year, personal property owners were to file a return on which the owner listed the personal property it owned, the value of that property, and where that property was located. R.C. 5711.02, R.C. 5711.03.[6] See also Am. Sub. House Bill 66, 126th General Assembly (regarding the enactment in 2005 of the commercial activity tax and phase-out of the personal property tax in 2008).

The county auditor, as a deputy of the Tax Commissioner, can assess "such taxable property for the purpose of the preliminary assessment[.]" R.C. 5711.11. The assessment is final unless the property owner files a petition for reassessment. R.C. 5711.25. If a petition for reassessment is filed, the Tax Commissioner reviews the assessment and will make such

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[6] R.C. 5711.02 and 5711.03 applied to taxpayers with property in only one county. Taxpayers with property in more than one county would make a combined return to the tax commissioner, in which all the taxable property in the state is listed and preliminary assessment certificates are transmitted to the appropriate county auditor from the tax commissioner. R.C. 5711.13, 5711.25.

corrections as he finds necessary and will issue a new final determination thereupon. R.C. 5711.31.

The Tax Commissioner's power to correct personal property assessments is found in R.C 5711.31. That statute provides simply that "[t]he commissioner may make corrections to the assessment, as the commissioner finds proper." This broad grant of authority enables the Tax Commissioner to conduct a comprehensive and discretionary review of personal property assessments.

Naturally, the Tax Commissioner's power to correct includes the power to correct the assessment to "zero," or, in the appropriate case, to cancel the assessment altogether. *See, e.g*, *Cincinnati Air Taxi, Inc. v. Bowers*, 173 Ohio St. 99, 99-100, (1962) (Tax Commissioner declined to cancel personal property tax assessments, BTA affirmed some assessments, but ordered cancellation of another, Supreme Court reversed BTA's cancellation and affirmed Tax Commissioner's original determination). Indeed, it is often necessary, in review of an assessment for the Tax Commissioner to cancel parts, or all of the assessment, as new evidence emerges to support the taxpayers' claims. *See, e.g.*, *Beatrice Foods Co. v. Lindley*, 70 Ohio St.2d 29, 32, (1982) (Tax Commissioner cancelled penalty portion of tax assessment). And the BTA and this Court frequently remand cases to the Tax Commissioner with instructions to cancel assessments. The examples of such cancellations are too numerous to list.

When, as here, an assessment is improper in its entirety, then Tax Commissioner is well within his express statutory authority to correct an assessment by cancelling it altogether or correcting it to zero.

The Tax Commissioner's authority to correct personal property tax assessments is extraordinarily strong, because the county auditors are deputies of the Tax Commissioner. R.C.

5711.01(F), 5711.02, 5711.03, 5711.24. The General Assembly has expressly provided that an auditor as "assessor" is "a deputy of the commissioner." R.C 5711.01(F). Indeed, where an auditor has authority to assess, he is "required to assess as [the Tax Commissioner's] deputy." R.C 5711.24.

The import of these provisions is clear: when an auditor, as deputy Tax Commissioner, issues an assessment that the Tax Commissioner himself disagrees with, the General Assembly intended the Tax Commissioner to have ultimate authority to correct the assessment. The discharge of the Tax Commissioner's duties includes the ability to correct an assessment as appropriate, and inherent within that ability is the power to review actions taken by his deputy commissioners. R.C. 5703.05(H), R.C. 5711.31; *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47 (1917).

In addition to the specific authority to correct personal property assessments in R.C. 5711.31, the Tax Commissioner also has general authority to correct assessments issued by himself or his deputies. R.C. 5703.05(H) provides that the Tax Commissioner's powers include:

> *Making all tax assessments, valuations*, findings, determinations, computations, and orders the department of taxation is by law authorized and required to make *and*, pursuant to time limitations provided by law, on the commissioner's own motion, *reviewing, redetermining, or correcting any tax assessments, valuations,* findings, determinations, computations, or orders the commissioner has made[.]

(Emphasis added).

This case represents an unwarranted effort of a deputy to challenge the determination of the Commissioner, for whom he is supposed to act. This is not an appropriate case in which to limit the Tax Commissioner's authority. Wheeler's effort to limit the Tax Commissioner's powers is merely an attempt to sustain a stale and contractually-foreclosed assessment. Nor does Wheeler's Merit Brief truly challenge the principle that the Tax Commissioner has the authority

to correct an assessment through cancellation. Wheeler's Merit Brief devotes all of one paragraph in support of this argument, without any citation to decisional authority. Wheeler's Merit Brief at 48. Not even Wheeler contests the ability of the Tax Commissioner to correct assessments of deputy commissioners through assessment cancellation.

Because the county auditor acts on behalf of the Tax Commissioner as his deputy when issuing preliminary assessment certificates, and the Tax Commissioner has the statutory duty to administer and oversee the taxation of personal property, the Tax Commissioner may review and correct any actions taken in his name by his deputies under the general authority of R.C 5703.05(H) as well as the specific authority of R.C 5711.31.

Tax Commissioner's Proposition of Law Number 2:

> *When reviewing petitions for reassessment of personal property assessments, and correcting such assessments, the Tax Commissioner is expressly and statutorily authorized to review documents, such as contracts, and determine their meaning and effect.*

A. The Tax Commissioner has the express statutory authority to review and apply contracts when considering a petition for reassessment.

When evaluating an assessment, the Tax Commissioner has the express and inherent authority to review contracts and to determine the nature and effect of those contracts on the assessment at hand. Indeed, the Tax Commissioner can demand production of documents and has the duty to inquire and to be informed "on the matters necessary to be known in order to discharge his duties." R.C. 5703.36; R.C. 5703.05(H); R.C. 5711.31. In this case, the Tax Commissioner informed himself on the matters necessary to review the petition for reassessment by reviewing the PILOT agreements and other materials pertinent to this appeal.

The General Assembly has conferred a high degree of statutory authority and discretion on the Tax Commissioner to review all matters necessary in connection with a personal property

assessment issued by himself or a deputy assessor, such as Auditor Wheeler. R.C. 5703.05; R.C. 5703.36; R.C. 5711.31. See also *A. Bentley & Sons Co.*, 96 Ohio St. at 47; *Baxla v. Tracy*, BTA Case No. 94-M-16 (June 28, 1996) (for the principle that the Tax Commissioner also has the additional powers that are necessarily implied from those that are specifically granted).

In the context of personal property assessments, the Tax Commissioner has the statutory authority to inspect the taxpayer's books, accounts, records, and memoranda, and to "inform himself as best as he can on matters necessary to be known in order to discharge his duties[.]" R.C. 5711.09.

In connection with the broader, more general powers of the Tax Commissioner articulated in R.C. 5703.05, the Tax Commissioner has "[a]ll powers whatsoever of an inquisitorial nature, as provided by law[.]" R.C. 5703.04(A). This inquisitorial power allows the Commissioner to, among other things, "inspect books, accounts, records, and memorandums[.]" *Id.* See also R.C. 5703.18; R.C. 5703.19 (for purposes relating to taxation, the Tax Commissioner may "compel the * * * production of books, accounts, papers, records, [and] documents" and then inspect those materials so produced under risk of penalty for non-compliance). And in any event, should the Tax Commissioner not receive the information he has requested, the Tax Commissioner still has the responsibility and obligation to "inform himself as best he can on the matters necessary to be known in order to discharge his duties." R.C. 5703.36.

In every tax administered by the Tax Commissioner, the BTA and this Court have long recognized and, in fact, required that the Tax Commissioner's discharge of his statutory duties necessarily includes the review of contracts relevant to the taxpayer's circumstances in order to resolve the tax issue.

For example, the Tax Commissioner often reviews contracts in connection with the taxability of sales of employment services. Generally, such sales are considered taxable, unless the "permanent assignment" exemption is met. R.C. 5739.01(JJ)(3). And the only way to ascertain if this exemption applies is for the Tax Commissioner to review the employment-service contract between the taxpayer and the vendor that supplied the employee. *See, e.g., Bay Mechanical & Elec. Corp. v. Testa*, 133 Ohio St.3d 423, 2012-Ohio-4312, ¶ 7.

Other examples of contract review abound. In the context of sales and use tax, this Court has recently explained that contracts may make the difference between taxability or not. In *Cincinnati Golf Mgt., Inc. v. Testa*, 132 Ohio St.3d 299, 2012-Ohio-2846, the Tax Commissioner reviewed a contract between the City of Cincinnati and a facilities management contractor for operation and management of the City's public golf courses. The contractor asserted that its purchases of for the golf courses were exempt from sales tax, because it was an agent of the City and could use the City's sales-tax exemption. *Id.* at ¶ 5, 6. Based on his review of the contract, the Tax Commissioner determined that the contractor was not an agent of the City with respect to the purchases. *Id.* at ¶ 6. The Board of Tax Appeals and this Court agreed. *Id.* at ¶ 8, 11.

The list of illustrative cases is potentially limitless. Additional examples include *NLO, Inc. v. Limbach*, 66 Ohio St.3d 389 (1993) (the terms of the taxpayer's underlying contract with federal government determined whether purchases of supplies and equipment qualified as exempt purchases) and *Schenley Affiliated Brands Corp. v. Limbach*, 45 Ohio St.3d 90, 92 (1989) (the terms of a contract between a liquor vendor and the Ohio Department of Liquor Control determined whether ownership of liquor transferred and resulted in a personal property tax obligation on the vendor).

Even if the Tax Commissioner did not have the express statutory authority to request and review relevant agreements when reviewing a challenge to as assessment, such authority necessarily would be implied. The Tax Commissioner may exercise powers that are necessarily implied from those that are specifically granted. *A. Bentley & Sons Co.*, 96 Ohio St. at 47; *Baxla, supra.* Implied powers follow from an express grant to the extent reasonably necessary to make the express power effective. *A. Bentley & Sons Co.* at 47.

The Tax Commissioner has authority to "make corrections to the assessment, as the commissioner finds proper" (R.C 5711.31) and to demand production of documents and to inquire and to be informed "on the matters necessary to be known in order to discharge his duties" (R.C. 5703.36; R.C. 5703.05(H); R.C. 5711.31). Indeed, the Tax Commissioner has "[a]ll powers whatsoever of an inquisitorial nature as provided by law, including, the right to inspect books, accounts, records, and memorandums, to examine persons under oath, to issue orders or subpoenas for the production of books, accounts, papers, records, documents." R.C 5703.04(A).

Naturally attendant to the power to demand production of documents, to review those documents, and the power to inform himself on "matters necessary to be known," is the power of the Tax Commissioner to review contracts and to determine their nature and effect on the tax issue at hand. The Commissioner's general powers, duties, and functions with regard to tax matters are comprehensive and subject to few limitations in his review of tax assessments. Therefore, after the Tax Commissioner has reviewed all of the materials that would allow him to be informed "on the matters necessary to be known in order to discharge his duties," including contracts pertinent to the matter, he has the inherent (as well as statutory) authority to rely on

those documents and materials when he corrects or cancels an assessment. R.C. 5703.05; R.C. 5703.36.

B. In this case, the Tax Commissioner appropriately relied upon the 1998 PILOT Agreement and other documents and information to cancel the personal property assessment Wheeler imposed on MMES/LMES.

The record supports the conclusion reached by both the Tax Commissioner and the BTA that Wheeler's assessment must be cancelled. When this matter was presented to the Tax Commissioner for his review, the Tax Commissioner, in his discretion, cancelled the assessment after reviewing the 1998 PILOT Agreement and other "matters necessary to be known in order to discharge his duties." R.C. 5703.36; R.C. 5703.05(H); R.C. 5711.31; *A. Bentley & Sons, Co.*, 96 Ohio St. at 47.[7]

The Tax Commissioner's cancellation is supported by a range of materials, including the 1988 PILOT Agreement between Pike County and the DOE, the other Pike County payment-in-lieu-of-taxes agreements, the resolutions made by the Pike County Board of County Commissioners, and the PORTS operating agreement between MMES/LMES and the DOE.

And the Tax Commissioner properly corrected - through cancellation - the preliminary assessment certificate and the resulting assessment because:

> 1) The PORTS operating agreement provided that MMES/LMES did not own the personal property within the facility and that MMES/LMES managed operated, and maintained the PORTS facility pursuant to the direction and control of the DOE,

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[7] Wheeler places considerable emphasis on a 2010 letter from Department employee John Nofli (the "Nolfi Letter"). But this letter is not evidence that the Department believed the value of personal property at MMES/LMES was taxable. Wheeler Merit Brief at 13, 17, 18, 19. The unsigned Nolfi Letter presumes there was no PILOT agreement and the Department's understanding in this regard was never corrected. There is also no evidence that the addressee of this letter actually received the letter, and counsel for the Tax Commissioner and MMES/LMES objected to the admission of this letter at the hearing as inadmissible hearsay. HT at 42-44. Notably, once the Department became aware of the PILOT Agreement, it cancelled the assessment.

2) The 1998 PILOT Agreement provided that the parties acknowledged that the DOE owned the personal property at PORTS and that the property was exempt from taxation,

3) The 1998 PILOT Agreement further provided that the Pike County Commissioners waived all claims for real and personal property tax against the DOE and its contractors such as MMES/LMES in exchange for, and acceptance of, the payments-in-lieu-of-taxes, and

4) The resolution in which the Pike County Board of County Commissioners resolved to accept payment-in-lieu-of-taxes pursuant to the 1998 PILOT Agreement and to place those monies in a general fund account with Auditor Wheeler.

ST at 3, 254, 272, 273, 578, 579, 583; Joint Stipulations of Fact, at 1; MMES/LMES Supp. at 101.

Thus, the Tax Commissioner's conclusion that the 1998 PILOT Agreement foreclosed Wheeler's ability to issue any preliminary assessment of valuation or accompanying assessment to MMES/LMES, is amply supported by the record and should be affirmed by this Court.

As explained below, contrary to Wheeler's arguments, there exist no good grounds to disregard the 1998 PILOT Agreement.

C. Wheeler's reasons to disregard or invalidate the 1998 Pilot Agreement must fail.

1. The 1998 PILOT Agreement, and nearly all of the other PILOT agreements for Pike County, exists only because of Wheeler's own efforts.

Remarkably, Wheeler now asserts that the 1998 PILOT Agreement—an agreement that he personally sought, negotiated, presented to his County Commissioners for approval, finalized, and received payments under—is invalid. The record in this matter amply demonstrates that Wheeler has been *personally involved* in the creation, negotiation, and implementation of this 1998 PILOT Agreement for many years. Yet he now asserts that the agreement that he

negotiated, recommended, and performed on, *in his official capacity as County Auditor* is of no legal effect. Breathtaking as this argument is, it is unavailable to Wheeler.

Wheeler's involvement in what eventually became the 1998 PILOT Agreement began in February 1996, when he sent written correspondence to the DOE and specifically requested a payment-in-lieu-of-taxes for DOE's PORTS operations for the 1992, 1993, 1994 and 1995 tax years on behalf of the Board of Pike County Commissioners, Scioto Valley Local Schools, Pike County Schools, Scioto Township Trustees and the Seal Township Trustees (the "1996 Request"). ST 572, 575. In May 1996, the DOE reviewed this 1996 Request, indicated that the calculation formula in the letter was not in accordance with the formula used in Pike County's previous payment-in-lieu-of-taxes requests, and requested that Wheeler resubmit his request for tax years 1992 through 1995 in accordance with the previously applied formula. ST at 573, 575.

Wheeler declined to resubmit according to the DOE's request. Instead, Wheeler submitted a second request for payment-in-lieu-of-taxes in June 1996. In July 1996, the DOE responded and advised Wheeler that his proposed calculation formula had not been approved, and the DOE again requested that Wheeler resubmit his payment-in-lieu-of-taxes request for tax years 1992 to 1995 in accordance with the previously approved calculation formula. ST at 573. For the next year, Wheeler did not communicate with the DOE. ST at 573.

In September 1997, Wheeler again asked the DOE about the payment-in-lieu-of-taxes request for tax years 1992 through 1995, and he acquiesced to the DOE's request that he submit such a request in accordance with the approved calculation formula. ST at 573, 575. For the 1996 and 1997 tax years, however, Wheeler requested in February 1998 that a different payment-in-lieu-of-taxes calculation formula be applied. ST at 573, 575. The DOE declined Wheeler's request and further advised that because payment-in-lieu-of-taxes funding was becoming

questionable, Wheeler should promptly submit a proposal for tax years 1992 through 1997 that met the DOE's expectations. ST at 573. Wheeler complied in April 1998, and the DOE finalized Wheeler's request for payment-in-lieu-of-taxes for tax years 1992-1997. ST at 574, 577. See also, Joint Stipulations of Fact at 9; MMES/LMES Supp. at 103.

Moreover, Wheeler's involvement in the 1998 PILOT Agreement was "full circle." After he negotiated the terms of the 1998 Pilot Agreement and presented that agreement to the Pike County Commissioners, the Commissioners passed a resolution acknowledging the 1998 PILOT Agreement and stated that the "monies received as payment-in-lieu-taxes shall be placed into a new specific general fund account, as titled by the County Auditor." ST at 583. The referenced auditor is Auditor Wheeler and Wheeler has not suggested that the DOE did not make the payment-in-lieu-taxes.

To the contrary, the record indicates that on or about September 4, 1998, a payment-in-lieu-of-taxes in the amount of $175,546.83 was forwarded to Pike County. ST at 584; Joint Stipulations of Fact at 7, 9; MMES/LMES Supp. at 103. The record also indicates that Wheeler "distributed the amounts to the various taxing authorities in Pike County based on that authority's percentage of the total millage for the taxing district." Joint Stipulations of Fact at 7, 9; MMES/LMES Supp. at 103. Namely, Wheeler distributed the funds to the Board of Pike County Commissioners, the Scioto Valley Local Schools, the Pike County Schools, the Scioto Township Trustees and the Seal Township Trustees.

But Wheeler's involvement in Pike County payment-in-lieu-of-taxes agreements extends beyond the 1998 PILOT Agreement. Wheeler also requested that the DOE make payments-in-lieu-of-taxes for the 1986-1987 tax years, and he personally executed PILOT Agreements for the 1986-1988, 1989, 1990, and 1991 tax years. Joint Stipulations of Fact at 7; MMES/LMES Supp.

at 103. Nor did the terms of these payments-in-lieu-of-taxes agreements vary with any substance. The terms of the agreement for the 1991 tax year were essentially identical to the 1998 PILOT Agreement, with the only difference being that it represented "the loss of ad valorem tax revenue for school purposes for tax year 1991." ST at 601-603. After Wheeler executed the 1991 tax year agreement, the Pike County Commissioners accepted the agreement through resolution in 1993. ST at 606. And in each instance when the DOE paid to Pike County the amount representing the payment-in-lieu-of-taxes, Wheeler then distributed the payment-in-lieu-of-taxes received from the DOE to the appropriate bodies throughout Pike County, based on their percentage of the total millage for the taxing district. Joint Stipulations of Fact at 7; MMES/LMES Supp. at 103. Even as recently as 2008, Wheeler had requested another payment-in-lieu-of-taxes agreement with the DOE for the 1998-2007 tax years, to which the DOE agreed. ST at 607-608.

The bottom line is that the 1998 PILOT Agreement was executed *because of* Wheeler's efforts to ensure that it was presented to the Pike County Commissioners for their approval. This 1998 PILOT Agreement exists *because* of Wheeler's participation, effort, and negotiation to ensure its presence before the Pike County Commissioners for their execution and memorialization on behalf of - and for the benefit of - all the taxing districts in Pike County. ST at 572. Wheeler's fingerprints remain all over this document and he cannot disavow either his participation in the process or the legitimacy of the document.

2. *The Pike County Commissioners' had the statutory authority to compromise tax debts as memorialized in the 1998 PILOT Agreement.*

In order to duck his involvement in procuring the 1998 PILOT Agreement, Wheeler argues that the Pike County Commissioners lacked the authority to enter the 1998 PILOT Agreement. Wheeler's Merit Brief at p. 38-42; Proposition of Law No. 3. In this proposition of

law, Wheeler asserts that the Commissioners acted unilaterally and improperly when they signed the 1998 PILOT Agreement all those years ago. Wheeler's position is that if the Pike County Commissioners lacked the authority to enter into the 1998 PILOT, that agreement is then void and not a document upon which the Tax Commissioner can rely to cancel the assessment against MMES/LMES.

Wheeler is incorrect as a matter of law. The Pike County Commissioners acted within their grant of authority set forth in the Ohio Revised Code, which authorizes a board of county commissioners to release claims in which its members are not personally interested, provided the board "shall enter upon its journal a statement of the facts in the case and the reasons for such release[.]" R.C. 305.26.

Here, the Pike County Commissioners acted pursuant to this statutory authority. They were presented by Auditor Wheeler with the opportunity to release a potential, yet questionable, claim for real and personal property taxes against the DOE in connection with the PORTS facility and the DOE's contractor, MMES/LMES. ST at 578. As stated in the 1998 PILOT Agreement, this opportunity was presented to, and memorialized by, the Pike County Commissioners in agreeing to accept a payment-in-lieu-of-taxes for tax years 1992 through 1997 from the DOE in exchange for the Pike County Commissioners' release of "any and all claims for said taxes for tax years 1992 through 1997." ST at 579.

The contested nature of the real and personal property tax claims in connection with the PORTS facility was no surprise: the 1998 PILOT Agreement expressly stated so. ST at 578. In resolution of this controversy, the parties agreed in the 1998 PILOT Agreement that the United States government owned property, facilities, and other personal property in Pike County that was not subject to taxation, that the government's work on, in, and with that property was being

performed by contractors, and that it was the "opinion of Counsel for the DOE and Counsel for [Pike] County that such contractors are not liable for taxes on, with respect to, or measured by the value or other use of such government-owned real and personal property under existing State and Federal law[.]" ST at 578.

Based on this contractual language, the Pike County Commissioners fully understood the problematic nature of any assessment being successfully imposed on the real and personal property on, in, used, or at the PORTS facility. And with this full understanding, the Pike County Commissioners exercised their authority as granted in R.C. 305.26 to release any claim for the assessment of real or personal property against the DOE in connection with the PORTS facility and its contractors, such as MMES/LMES. Moreover, the Pike County Commissioners properly memorialized their action: they passed a resolution and included that resolution in Minute Book 38 of the Pike County records. R.C. 305.26; ST at 583.

Implausibly, Wheeler now contends that the Pike County Commissioners were without authority to enter into the 1998 PILOT Agreement because the Pike County Commissioners' actions were essentially the same as releasing a claim for tax bills that have already been assessed. According to Wheeler, the Pike County Commissioners have no authority to engage in such an act in the absence of specific statutory authority. *State ex rel. Donsante v. Pethtel*, 158 Ohio St. 35, 36 (1952) ("agencies in the state are without power to compromise or to release a claim for taxes, either wholly or in part"); Wheeler's Merit Brief at 38-42.

Wheeler's authority to support his argument, however, is inapposite. In each of the cases cited by Wheeler, the agency attempted to act with respect to an original assessment *already been properly issued and imposed* on the taxpayer. *See Interstate Motor Freight Sys. v. Donahue*, 8 Ohio St.2d 19 (1996); *Donsante*, 158 Ohio St. at 35; *Peter v. Parkinson*, 83 Ohio St.

36 (1910); *Brown v. Lindley*, BTA Case No 81-B-407 (February 28, 1985); 2012 Ohio Atty.Gen.Ops. No. 2012-030.

In this case, when the Pike County Commissioners entered into and memorialized the 1998 PILOT Agreement, they foreclosed and precluded the possibility of an assessment in connection with the PORTS facility property and its contractors. Moreover, in executing and memorializing the 1998 PILOT Agreement, the Pike County Commissioners specifically recognized and relinquished the option of pursuing any such claim, with the specific acknowledgement and understanding that the tax exempt nature of the property made any type of claim in this respect more than doubtful. ST at 578.

Yet the authorities cited by Wheeler have additional significant distinctions, such as:

1) MMES/LMES, as the assessed party, has not made any purported accord and satisfaction that the Pike County Commissioners sought to accept, *Contra Interstate Motor Freight Sys.*, *supra*, *Brown, supra;*

2) The state treasurer has not initiated litigation for the collection of the unpaid, assessed taxes, that the Pike County Commissioners attempted to settle, *Contra Peter*, *supra;* and

3) The Pike County Commissioners have not purportedly granted a tax exemption to the DOE or MMES/LMES, *Contra* 2012 Ohio Atty.Gen.Ops. No. 2012-030 (a board of county commissioners may grant real property tax exemptions to private businesses only pursuant to specific statutory authorization, and that authorization is not provided within R.C. Chapter 307). The DOE's ownership of the property made it exempt as a matter of law, and the Pike County Commissioners understood this fact, as evidenced in 1998 PILOT Agreement.

But perhaps the most significant distinction between the cases cited by Wheeler and this circumstance is that the 1998 PILOT Agreement does not evidence a transaction that has the traditional characteristics of a tax. Although the parties to the 1998 PILOT Agreement are governmental entities, the 1998 PILOT Agreement is nevertheless an express and certain agreement that originates in, and is founded upon, a contract. *See Peter*, *supra,* at *48 (distinguishing between a tax and a debt). Specifically, the Pike County Commissioners agreed

to a transaction in which for their release of any purported claim for the assessment of real or personal property against the PORTS facility and its contractors, they would receive a certain sum of money from the DOE. In this regard, payments-in-lieu-of-taxes have not been considered to be taxes in disguise. *City of Dayton v. Cloud*, 30 Ohio St.2d 295, 302 (1972). Moreover, if the DOE had not fulfilled its contractual promise to make the promised payment, the Pike County Commissioners would not have had a claim for back taxes, but would have instead enforced the promise through a breach of contract action. *See, e.g., CHU Brothers Tulsa Partnership, P.L.L. v. The Sherwin Williams Co.*, 187 Ohio App.3d 261, 2010-Ohio-261, ¶ 4 (commercial landlord filed a breach of contract action against tenant who refused to pay pursuant to PILOT agreement).

The Pike County Commissioners acted within the scope of their authority, as set forth in R.C. 305.26, when they released any questionable future claim for the assessment of real or personal property against the PORTS facility and its contractors in exchange for a sum of money from the DOE, and executed and memorialized the 1998 PILOT Agreement. Therefore, the Tax Commissioner properly included this agreement within the scope of the "matters necessary to be known in order to discharge his duties" and to correct the assessment imposed against MMES/LMES through cancellation.

3. Wheeler cannot raise a challenge the Pike County Commissioners' authority to execute and memorialize the 1998 PILOT Agreement.

As explained, the Pike County Commissioners possessed the requisite authority to sign the 1998 PILOT Agreement and the Tax Commissioner properly considered the document in correcting the assessment imposed on MES/LMES through cancellation.

But even if this was untrue, Wheeler cannot raise such a claim. The Pike County Board of County Commissioners' approval of the 1998 PILOT Agreement has not caused Auditor

Wheeler any harm. Wheeler acknowledges that he is not a "taxing authority" or a part of the county's taxing authorities that would have been included within the purview of the 1998 PILOT agreement.[8] HT at 131, 132.

Instead, as Wheeler concedes, as county official, he is bound by agreements made by his commissioners. At hearing, Wheeler acknowledged that the Pike County Commissioners entered into the 1998 PILOT agreement, that the Pike County Commissioners possessed the authority to bind the county, and that he, as Auditor of the county, was bound by the terms of that agreement. HT 113, 114.

Moreover, when the Board of County Commissioners entered into the 1998 PILOT agreement, Pike County obtained money from the Federal Government which, according to the agreement, would otherwise have been unrecoverable. ST at 578, 579, 583. Once that money was released to Pike County, Wheeler performed his duties as set forth in the resolution that authorized the 1998 PILOT agreement. ST at 583, 584. Wheeler also performed without complaint, meaning that he placed the PILOT funds into a new specific general fund, as named by him. ST at 583, 584.

Moreover, even if the Pike County Board of County Commissioners had no authority to enter into the 1998 PILOT agreement and accept those payments, the proper remedy was for Auditor Wheeler to seek relief through some means other than issuing a preliminary assessment certificate in 2010 that: 1) pertained to a tax year nearly 20 years ago, 2) addressed the same issue as the 1998 PILOT agreement also executed nearly 15 years ago, and 3) applied to the

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[8] Wheeler uses the term "taxing authority" to refer to Pike County, Ohio. Wheeler's Merit Brief at 10, 38. Yet this term is not defined within R.C. Chapter 5711, the provisions pertaining to the listings of personal property. Rather, the term "taxing districts" is defined. R.C. 5711.01(F). In view of the disparity of terms, the Tax Commissioner is generally unclear as to Wheeler's meaning of the term "taxing authority" as it relates to the personal property statutes.

personal property tax, which had been phased-out of the state of Ohio in 2008, i.e., 2 years earlier. In other words, some other action at law would have been the appropriate venue to set aside an invalid contract, not the issuance of a personal property tax assessment.

* * *

In sum, Wheeler's reevaluation, second-guessing, and even reneging, of his own actions and negotiations in connection with the 1998 PILOT Agreement sound of "buyer's remorse." Apparently Wheeler now believes that Pike County should have received more money than it did as a result of his participation in the 1998 PILOT Agreement, and that he can extract more money from MMES/LMES through the tax assessment process that the 1998 PILOT Agreement specifically chose to forego. And to this end, Wheeler seeks to limit the Tax Commissioner's ability to review all relevant materials necessary for his to properly discharge his statutory duties and to otherwise discredit the applicability of those materials that would restrict his ability to preliminary assessment certificates. This is not the case to limit the Tax Commissioner's ability to cancel assessments.

Wheeler's argument is contrary to the Tax Commissioner's specific statutory authority. And the Tax Commissioner's possession of the statutory authority to review all relevant materials, including all the payment-in-lieu-of-taxes agreements initiated, negotiated, finalized and executed by Wheeler, and to correct invalid assessments through cancellation simply cannot be limited by Wheeler's present dissatisfaction with the 1998 PILOT Agreement. The Tax Commissioner properly corrected the actions of his deputy assessor by cancelling the assessment.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the BTA.

Respectfully submitted,

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I certify that a true copy of the foregoing Appellee Tax Commissioner's Merit Brief was served upon the following by U.S. mail and email transmission on this 2nd day of February, 2015:

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