

**IN THE SUPREME COURT OF OHIO**

<b>Teddy L. Wheeler</b>	:	
<b>In his Capacity as Pike County Auditor,</b>	:	<b>Case No. 2014-1362</b>
	:	
<b>Appellee/Cross-Appellant,</b>	:	<b>Appeal from the Ohio Board of Tax Appeals</b>
	:	
<b>v.</b>	:	<b>BTA Case No. 2012-2043</b>
	:	
<b>Joseph W. Testa,</b>	:	
<b>Tax Commissioner of Ohio,</b>	:	
	:	
<b>Appellee,</b>	:	
	:	
<b>and</b>	:	
	:	
<b>Martin Marietta Energy Systems, Inc.</b>	:	
<b>n/k/a Lockheed Martin</b>	:	
<b>Energy Systems, Inc.</b>	:	
	:	
<b>Appellant/Cross-Appellee.</b>	:	

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**APPELLEE/CROSS-APPELLANT, TEDDY L. WHEELER'S REPLY BRIEF TO  
RESPONSE OF APPELLANT/CROSS-APPELLEE MARTIN MARIETTA ENERGY  
SYSTEMS, INC., N/K/A LOCKHEED MARTIN ENERGY SYSTEMS, INC. AND  
APPELLEE/CROSS-APPELLEE TAX COMMISSIONER'S AMENDED MERIT BRIEF**

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## **I. INTRODUCTION**

The overriding theme of the response of Martin Marietta Energy Systems, Inc., n/k/a Lockheed Martin Energy Systems, Inc. (“LMES”) is the unfairness to LMES if this Court follows the rule of law as expressed in Ohio statutes and case law. To emphasize the unfairness, LMES resorts to references to evidence not in the record and derogatory statements attacking the Pike County Auditor (the “Auditor”) and the Auditor’s counsel. Although the initial inclination is to reply to all of these pitiful attempts to divert attention from the relevant issues in this case, the Auditor will focus on the real issues presented to the Court.

The Auditor is merely asking this Court to apply the clear language of the statutes related to personal property taxes. LMES, on the other hand, invites this Court to extend the policy-making function of the legislature to this body. LMES asks this Court to rewrite R.C. 5703.58 and R.C. 5711.31 (statute of limitations), R.C. 5711.16 (definition of manufacturer), R.C. 305.26 (authority of county commissioners to release or compound claims), and R.C. 5703.02 [powers of the Board of Tax Appeals (“BTA”)]. The Tax Commissioner requests the rewriting of R.C. 5711.16 and R.C. 305.26. However, policy-making must stop with the legislature.

For decades, under established Ohio law, any entity that omitted property from a personal property tax return was faced with an unlimited statute of limitations. (See R.C. 5711.31). For at least a century, R.C. 305.26 has never been applied to allow for a waiver of personal property taxes. For over a century, a political subdivision whose agent acted beyond his authority to contract could not be held responsible for the contract. Since the development of the United States legal system, a party who is not a party to a contract cannot be held responsible for the promises set forth in that contract. Nevertheless, LMES asks this Court to reverse, ignore, or rewrite statutes in order to circumvent the rule of law.

The Auditor did not write the statutes or legal opinions that LMES now attempts to contort. He has simply followed the rules that have always existed. The unfairness in this case would arise if this Court rewrites the policies of the legislature after the Auditor has attempted to faithfully follow those policies.

**II. NO MATTER HOW ENTICING THE MERITS OF A CASE, THE MERITS DO NOT JUSTIFY ALLOWING A PARTY WHO LACKS STANDING TO BRING IT.**

With regard to the jurisdictional issues raised by the Auditor, the Tax Commissioner is silent and LMES avoids the issue. The main argument presented by LMES at page 20 of its brief is that this Court could accept jurisdiction and resolve forty-five pending assessments. Ignoring the fact that the other assessments were not before the Board of Tax Appeals (“BTA”) and there is nothing in the record, LMES hints at an easy way out for this Court to eliminate a headache which might arise in the future. However, standing turns on the nature of the claim rather than the enticing nature of the merits. *State ex rel. Flanagan v. Lucas*, 139 Ohio St.3d 559, 2014-Ohio-2588, 13. N.E.3d 1135, ¶39, concurring opinion of Justice Kennedy. Thus, the issue remains – was LMES aggrieved by the Decision and Order (“Decision”) of the BTA journalized on August 7, 2014?

When the wheat is separated from the chaff, LMES is left with three possible arguments. First, LMES argues that any proposed modification of the Decision provides the requisite standing to appeal. Second, LMES argues that the failure of the BTA to find bad faith and award attorney fees leaves it aggrieved. Third, an argument not developed by LMES but suggested by the Pike County Court of Appeals, is that the right to file a cross-appeal to support the Decision provides the requisite standing.

The first argument must be rejected out-of-hand unless the modification is to correct an injury to the appellant. If any proposed modification is sufficient to create standing, this Court’s

holdings that a party must be aggrieved by a decision before it has standing to appeal would be meaningless. Accordingly, the issue remains – was LMES aggrieved by the Decision?

This Court has followed the long-accepted principle that appeals are not allowed for the purpose of settling abstract questions, but only to correct errors injuriously affecting the appellant. *Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals*, 91 Ohio St.3d 174, 177, 743 N.E.2d 894; *Ohio Contract Carriers Assn. Inc. v. Pub. Util. Comm.*, 140 Ohio St. 160, 41 N.E.2d 758 (1942). LMES has presented no explanation as to why it has standing to seek a modification of the Decision.

The second argument, that LMES is aggrieved by the BTA's failure to find bad faith and then award attorney fees, rests upon the proposition that the BTA had the authority to consider these issues. LMES concedes that the BTA does not have statutory or administrative authority to determine bad faith and grant attorney fees to a prevailing party, but has argued that the BTA has the innate authority to do so. However, the BTA, like any statutorily-created body, is limited to the powers specifically prescribed in the applicable statutes. *Valigore v. Cuy. Cty. Bd. of Revision*, 105 Ohio St.3d 302, 2005-Ohio-1733, 825 N.E.2d 604, ¶8; *Cooke v. Kinney*, 65 Ohio St.2d 7, 417 N.E.2d 1061 (1981); *Steward v. Evalt*, 143 Ohio St. 547, 549-550, 56 N.E.2d 159 (1944). Without a specific grant of authority, this Court would have to reverse innumerable cases to grant the BTA the authority to shift attorney fees to another party. Even the BTA recognizes that it does not have such authority. *Gibson v. Limbach*, 1993 WL 88380 (Ohio Board of Tax Appeals); *Gibson v. Limbach*, 1990 WL 208481 (Ohio Board of Tax Appeals).

LMES is asking this Court to hold that the BTA has the innate authority that no other administrative agency has. Even in R.C. Chapter 119 hearings, the shifting of attorney fees is statutorily regulated. (R.C. 119.092). It is absurd to presume that a party is aggrieved by the failure

of an administrative agency to rule on an issue over which it had no jurisdiction or authority. Accordingly, LMES is left with its third and final argument.

LMES's final possible argument is that it may seek a modification to support the ultimate Decision. The Court of Appeals for the Fourth Appellate District cited *Church v. Limbach*, 53 Ohio St.3d 270, 560 N.E.2d 199 (1990), for the proposition that the failure of a BTA party to raise additional issues to support a decision would result in a waiver of that issue. Fortunately, the General Assembly has accounted for this contingency. This Court has stated:

Indeed R.C. 5717.04 expressly affords litigants in BTA cases the opportunity to preserve issues by filing a cross-appeal: when one party to a BTA case files an appeal from the BTA's decision, the other parties have at least ten days to cross-appeal. R.C. 5717.04.

*Polaris Amphitheater Concerts, Inc. v. Delaware Cty. Bd. of Rev.*, 118 Ohio St.3d 330, 2008-Ohio-2454, 889 N.E.2d 103, ¶14.

Actually, the rules of practice of this Court incorporate the provisions of R.C. 5717.04. (See S. Ct. Prac. R. 10.01).

Simply put, once an aggrieved party files an appeal from the BTA, another party may file an appeal. And, in the words of this Court, the appeal may be filed "even if the alleged error aggrieved the party only because of the success of another party's appeal." *Polaris, supra*. Until the aggrieved party's appeal is filed, the successful party is not aggrieved and has no standing to appeal. Otherwise, any party to a BTA case could file an appeal speculating that another appeal is forthcoming and the ten day provision in R.C. 5717.04 would be unnecessary.

### **III. LMES MISCONSTRUES THE PHRASE "PAYABLE TO THE STATE" IN R.C. 5703.58.**

On page 22 of its brief, LMES concludes that R.C. 5703.58 applies to the present assessment. It then argues that this conclusion is dictated by the decisions of *Wasteney v. Schott*, 58 Ohio St. 410, 51 N.E. 34 (1898), and *Underwood v. Yoder Brake and Manufacturing Co.*, 79 Ohio App.3d 423,

607 N.E.2d 527 (2<sup>nd</sup> Dist. 1992). When distilled, the argument equates the phrase “payable to the state” to the conclusion that personal property taxes are state taxes as determined by *Wastenev* and *Underwood*. Thus, according to LMES, every state tax is “payable to the state”.

Pages 35 and 38 of the Auditor’s brief explains that the General Assembly, contrary to LMES’s theory, excluded personal property taxes that are not paid to the state from the ten-year limitation in R.C. 5703.58. The Auditor introduced the Legislative Service Commission analysis, (Auditor Ex. 36) of the bill that enacted R.C. 5703.58 which specifies the taxes to which the ten year limitation applies. The personal property tax is not listed. LMES makes no comment regarding this fact in its brief.

R.C. 5703.58 was enacted in 2006. On July 22, 2010, the Department of Taxation, through John Nofli’s letter, set forth its official position that there is no statute of limitations in the case of omitted personal property. (Auditor’s Ex. 24, p. 2). Even now, the Tax Commissioner has not opposed the Auditor’s contention that R.C. 5703.58 does not apply to personal property taxes.

It must be noted that the phrase “payable to the state” is superfluous if the phrase simply means a state tax as argued by LMES. Each of the taxes and assessments as defined in R.C. 5703.50 are state taxes. If the General Assembly intended to include all of the taxes identified in R.C. 5703.50 it would have omitted the phrase “payable to the state” and merely stated that R.C. 5703.58 was applicable to all taxes administered by the Tax Commissioner. Instead, the General Assembly limited the statute of limitations to only those assessments that result in a payment to the State of Ohio.

The Legislative Service Commission Bill Analysis of Amended Substitute Senate Bill 147 (“Am. Sub. S.B. 147”) further highlights the distinction between personal property taxes and taxes payable to the state. (Auditor’s Ex. 35). Am. Sub. S.B. 147 created a number of rights for taxpayers.

Am. Sub. S.B. 147, now codified in various sections of R.C. Chapter 5703, established certain remedies for taxpayers dealing with the Department. Am. Sub. S.B. 147 related specifically to tangible personal property taxes, corporation franchise taxes, sales taxes, use taxes, and income taxes. (Auditor's Ex. 35, p.1). However, the analysis in Am. Sub. S.B. 147 identified a distinction between tangible personal property taxes and the other taxes. On page 1 in the footnote, the analysis states:

Most of the bill's provisions concern these five taxes. The bill's provisions concerning the Attorney General do not include personal property taxes. (These are not state taxes.)

Auditor's Ex. 35, p.1.

The above–quoted footnote recognizes that the role of state officials is more limited with regard to a tax that will be collected by a subdivision of the state. This is further clarified on page three of the analysis which provides, "Under current law, any amount owed to the state that is not paid within 45 days after payment is due, must be certified to the Attorney General for collection." The footnote, which notes that Am. Sub. S.B. 147's provisions regarding the Attorney General, do not apply to personal property taxes, is in recognition that personal property taxes are not owed to the state and the Attorney General is not required to collect them.

Finally, the phrase "payable to the state" has been used by the General Assembly to distinguish between payments to the State of Ohio rather than payments to political subdivisions. In the first paragraph of R.C. 131.02, the phrase "payable to the state" relates to claims certified to the Attorney General for collection of state funds. (R.C. 131.02). Later in the paragraph, it allows a political subdivision to request the Attorney general to collect an amount "payable to a political subdivision". The distinction is clear. Thus, it is reasonable to conclude that the use of the phrase

"payable to the state" in R.C. 5703.58 was designed to convey the same meaning and LMES's discussion of "state taxes" is irrelevant.

**IV. THE PIKE COUNTY BOARD OF COUNTY COMMISSIONERS HAD NO AUTHORITY TO WAIVE PERSONAL PROPERTY TAXES.**

**A. The history of the PILT Agreement, and its negotiation are irrelevant to deciding whether the Pike County Board of Commissioners had authority to waive personal property taxes.**

On pages 12 to 16 of the Tax Commissioner's brief, he argues that he has authority to review contracts. However, his ability to review contracts is not relevant to this appeal. The Tax Commissioner contends on pages 16 to 17 of his brief that the PILT Agreement supported his cancelation of the preliminary assessment and the BTA's affirmance. This is only true if the PILT Agreement is a valid waiver of the taxes, which, as set forth on pages 38-41 of the Auditor's brief and below, it was not. On pages 17 to 20 of his Brief the Tax Commissioner presents facts regarding the negotiations and implementation of the PILT Agreement. On pages 2-6 LMES has likewise argued several facts regarding the PILT Agreement and also asserts that the PILT Agreement is a clear and unambiguous waiver of personal property taxes. These facts and the clarity of the PILT Agreement are irrelevant to the issue of whether the Pike County Board of Commissioners (the "Commissioners") had authority to enter into the PILT. (Auditor's brief, pgs. 39-41).

The PILT Agreement was signed by the United States government. In an ironic twist, the parties are now arguing that the government was misled. Yet, the federal government has no problem asserting the lack of authority of a government official as a defense to a claimed settlement or waiver. In *Midwest Sports Medicine and Orthopedic Surgery, Inc. v. United States*, 73 F. Supp.2d 870 (S.D. Ohio 1999), the United States successfully argued that a settlement agreement to resolve federal tax liability was signed by an official without the requisite authority and was, therefore, not binding. "Whatever the form in which the Government functions, anyone entering

into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.” *Id.* at 879. And this is so even if the agent may have been unaware of his authority. *Federal Crop Ins. Corporation v. Merrill*, 332 U.S. 380, 384, 68 S. Ct. 1, 3 (1947). When the PILT Agreement was signed, the federal government should have been acutely aware of the risks of not determining the authority of the board of county commissioners to waive personal property taxes.

**B. LMES and the Tax Commissioner's assertion that R.C. 305.26 permitted the Commissioners to waive the personal property taxes in the PILT Agreement is contrary to this Court's holding in *Peter v. Parkinson, Treasurer*.**

On Pages 20 to 24 of the Tax Commissioner’s brief and on page 5 of LMES's brief, they assert that the Commissioners had authority to compromise the personal property taxes in the PILT pursuant to R.C. 305.26. This Court has held: “The board of county commissioners represents the county in respect to its financial affairs, only so far as authority is given to it by the statute.” *Peter v. Parkinson, Treasurer*, 83 Ohio St. 36, 49, 93 N.E. 197 (1910). This Court has also addressed the language of R.C. 305.26, holding:

. . . under no proper interpretation of Section 855 {now R.C. 305.26}, can its provisions be so extended as to include taxes within the term ‘debt’, and hence, a tax being neither a debt, judgment, fine or amercement, no authority is conferred upon the board of county commissioners by the provisions of said section to compound, release or settle the same.

*Parkinson, supra.*

The Tax Commissioner asserts that the Commissioners had the authority to compromise the personal property taxes in the PILT Agreement because they had not yet become an assessment. This peculiar analysis is contrary to the case law set forth on pages 39-41 of the Auditor's brief, requiring explicit authority to waive taxes. This classification as a "pre-assessment waiver", appears to be an attempt to circumvent the holding of *State, ex rel. Donsante v Pethtel*, 158 Ohio St. 35, 106 N.E.2d 626 (1952) (“Where taxes are legally assessed, the taxing authority is without power to compromise,

release or abate them except as specifically authorized by statute, . . ."). *Id.* LMES also asserts that the tax is a debt that the Commissioners can waive pursuant to R.C. 305.26. Regardless of how the waiver is classified, the Pike County Board of Commissioners did not have authority to waive LMES's future tax obligations. The General Assembly has granted boards of county commissioners only limited rights to waive or abate property taxes. (2012 Ohio Atty. Gen. Ops. No. 2012-030). Attorney General DeWine, the Tax Commissioner's counsel, has conclusively opined that a board of county commissioners does not have authority to contractually waive future tax assessments, unless the waiver follows a specific statutory scheme permitting the waiver. There has been no compliance with the provisions allowing a statutory waiver.

LMES cites *City of Cincinnati v. DeGolyer*, 25 Ohio St.2d 101, 267 N.E.2d 282 (1971) for the proposition that a tax is a debt. However, this Court held only that a tax is a debt within the meaning of Section 15 of Article I of the Ohio Constitution. *Id.*, at paragraph 1 of the syllabus. The Court was understandably reluctant to have people imprisoned for the inability to pay their taxes. Moreover, LMES's argument begs the question, if taxes are a debt that can be waived by county commissioners, why has the legislature enacted unnecessary abatement statutes?

**C. The Commissioners have no role in assessing or collecting personal property taxes and have no ability to waive personal property taxes for other subdivisions unless granted specific authority pursuant to an abatement statute, which is not at issue in this case.**

As explained at pages 41 to 42 of the Auditor's brief, if the PILT Agreement is effective, it is only effective as to the one taxing authority who signed the agreement, the Commissioners. It cannot be a release of the taxes due to the other taxing authorities. In fact, the PILT Agreement does not even purport to release taxes due other subdivisions. This contention is not addressed by the Tax Commissioner. LMES asserts, without reference to any law, that the Auditor is incorrect in asserting that the school districts whose voted mileage is at issue, are other taxing authorities pursuant to

personal property tax law. LMES states, “Pike County is the entity that levied the subject taxes.” (LMES Brief, p. 7). LMES then states that, “School districts have never been taxing authorities for purposes of Ohio’s personal property tax.” (LMES Brief, p. 7). If so, someone should explain it to the members of Ohio General Assembly.

R.C. Chapter 5705 governs the levying of taxes. R.C. 5705.03(A) specifically states, “The taxing authority of each subdivision may levy taxes annually . . . on the real and personal property within the subdivision . . .” R.C. 5705.01(A) states, “‘Subdivision’ means any . . . township . . . or a city, local, exempted village, cooperative education, or joint vocational school district.” R.C. 5705.01(C) states, “‘Taxing Authority’ . . . means . . . in the case of a city, local, exempted village, cooperative education, or joint vocational school district, the board of education . . . in the case of a township, the board of township trustees . . . The board of county commissioners is the taxing authority just for the taxes actually levied by the county itself, and was so identified in the language of the PILT.

In addition, this Court has explained that county commissioners may not settle or remit taxes levied for the use of other subdivisions. In *Parkinson, supra*, the Court stated:

Another, and perhaps sufficient, reason why the county commissioners could not rightfully settle or remit the taxes sued for in this case is that such taxes were not wholly levied for, the use of Holmes county, but there was included therein as well, state, township, municipal, and other taxes.

*Id.* at 49-50.

Finally, it must be noted that the clear language of R.C. 305.26 limits the authority of the Commissioners to waive debts “due the county for the use thereof.” Obviously, the authority to waive any debt is confined to those debts due the county for the use of the county. Not even the Tax Commissioner or LMES would argue that all of the personal property taxes are for the use of the county.

**IV. LMES IS THE MANUFACTURER AS DEFINED IN R.C. 5711.16.**

- A. LMES, by virtue of its use and control of machinery and refining of uranium for sale, was a manufacturer pursuant to R.C. 5711.16 subject to personal property taxation. Ownership of the machinery or raw material is not required.**

The BTA specifically held that:

By virtue of MM's restricted relationship with the DOE and its personal property at PORTS, we conclude that MM is not a manufacturer, **as contemplated by R.C. 5711.16**, but that the DOE who rendered ultimate control and supervision over PORTS, was the manufacturer. Therefore, MM was not properly assessed as a manufacturer.

Appendix, p. 26. (emphasis added)

At page 11 of LMES's brief it agrees with the BTA's conclusion and states, "Remarkably, Wheeler and his counsel even claim that the BTA agreed with his position." This twists the import of the Auditor's statement. The Auditor merely asserts that, if LMES was correct in its assertion that "ownership" is the touchstone for personal property tax liability to attach, then the BTA's discussion regarding *ATS Ohio, Inc. v. Tracy*, 76 Ohio St.3d 297, 667 N.E.2d 937 (1996), and the possible applicability of R.C. 5711.16, is superfluous. If ownership decides the issue, there is no dispute that LMES did not own the property. No analysis by the BTA of the requirements of R.C. 5711.16 was required if the lack of ownership, a simple issue, resolves the question.

Neither the BTA nor LMES assert that R.C. 5711.16 would not be applicable if LMES is a manufacturer. LMES argues that LMES did not manufacture, own or refine any tangible personal property on its own account, nor did it own any fixed assets or inventory as a result of, or in connection with, its activities at PORTS. (LMES Brief, p. 12). Neither LMES nor the BTA deny that LMES manufactured the enriched uranium. LMES does not even argue that LMES does not meet the strict definition of a manufacturer in R.C. 5711.16. Both LMES and the BTA suggest that the General Assembly "contemplated" requirements beyond the clear and unambiguous language used in the statute. LMES argues that to be a manufacturer, it had to: (a) own assets; or (b)

manufacture materials on its own account. However, the definition of a manufacturer is devoid of any such requirements.

In 1993, R.C. 5711.16 defined a manufacturer as:

A person who purchases, receives, or holds personal property for the purpose of adding to its value by manufacturing, refining, rectifying, or combining different materials with a view of making a gain or profit by so doing is a manufacturer.

This Court has repeatedly stated that a court, or in this case the BTA, may not construe a statute that is clear and unambiguous. *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 513, 2010-Ohio-2550, 929 N.E.2d 448, ¶20. A court may not add or strike words from such a statute. *Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St.3d 50, 53-54, 524 N.E.2d 441 (1988). It is not up to this Court to make policy, but to implement clear and unambiguous statutes regardless of the perceived wisdom of the statute. *Miller v. Fairley*, 141 Ohio St. 327, 48 N.E.2d 217 (1943). R.C. 5711.16 does not require ownership or manufacturing on one's own account. The addition of these requirements is impermissible.

LMES does not dispute any of the facts presented by Ralph Donnelly, LMES's manager at PORTS in 1993. As set forth on page 44 the Auditor's brief, the specific statements by Donnelly confirm that LMES received and held uranium for the purpose of adding to its value by refining the uranium with a view to making a profit, thus squarely placing LMES within the definition of a manufacturer in R.C. 5711.16. Nevertheless, without a full explanation, and in contradiction of Donnelly's undisputed testimony, the BTA determined that LMES was not a manufacturer "as contemplated by R.C. 5711.16". (Appendix, p. 26). Both the BTA and LMES look to the relationship with DOE and the fact that the uranium was not manufactured on LMES's account to take it out of the definition of a manufacturer. (LMES Brief, p. 12). This of course, adds a

requirement to the definition of a manufacturer. It also assumes that the property owned by DOE is necessarily used by DOE, rather than LMES.

**B. The ATS decision is on point and establishes that LMES's use, not ownership of machinery, is the requirement for determining who is a manufacturer pursuant to R.C. 5711.16.**

At page 12 of its brief, LMES argues that the *ATS* decision is irrelevant. However, *ATS* is directly on point to LMES's argument that it does not meet the definition of a manufacturer because it does not own anything. In *ATS* this Court specifically stated that ownership was not required. In *ATS*, this Court stated:

ATS clearly meets the definition of a manufacturer. There is nothing in the definition, however, that requires the manufacturer to be the owner of the raw materials consumed in the manufacturing process.

\* \* \*

The contrast between the provision that taxes, engines, machinery, and tools "*owned or used*" by a manufacturer, and the provision that taxes inventory-type property "owned" by the manufacturer manifests the intent of the General Assembly to treat the property differently.

*Id.*, at pgs. 299-300 (emphasis added by the Court)

This Court ruled in *ATS* that the definition of a manufacturer, pursuant to R.C. 5711.16, did not require ownership of either the inventory or the equipment used in the manufacturing process. Any conclusion that ownership is required to be a manufacturer ignores *ATS* and is contrary to the clear language of the statute.

If, pursuant to *ATS* and R.C. 5711.16, a manufacturer need not own the raw materials or the machinery or tools, it follows that the manufactured product would not be on "it's own account". LMES would presumably argue that a company that rented all equipment and facilities and refined a customer's raw materials would not be a manufacturer. Such a conclusion based on lack of ownership is contrary to *ATS* and R.C. 5711.16.

**C. The ownership of the facilities and the contractual relationship between DOE and LMES cannot, contrary to the BTA's conclusion, make DOE the manufacturer.**

The BTA concluded, without elucidation, that "by virtue of MM's {LMES} restricted relationship with DOE and its personal property at PORTS . . . DOE, who rendered ultimate control and supervision over PORTS, was the manufacturer." (BTA Decision, pgs. 3-4). The BTA and LMES have concluded that by virtue of the contractual relationship between DOE and LMES, wherein DOE owned the facilities and the raw material, and sold the final product it was the manufacturer. The three witnesses called by LMES, through depositions, confirmed that all of the equipment was in the custody and control of LMES and all of it was used to manufacture enriched uranium. (Nesteruk Depo., p. 43; Donnelly Depo., pgs. 49-51; Dayton Depo., pgs. 40-41). Mr. Donnelly, the plant manager, confirmed that LMES had over 2000 employees in 1992 and 1993 operating all of the equipment at PORTS. (Donnelly Depo., pgs. 42-51). He also stated that the uranium was manufactured by LMES. (Auditor Ex. 9). The conclusion that DOE was the manufacturer when LMES had possession and control of the facilities, can only be reached if one concludes that the work done by LMES employees was automatically the work of DOE by virtue of ownership of the facilities. The conclusion that DOE, as the owner of the facility and materials, is a manufacturer is contradicted by a review of the history of R.C. 5711.16.

One of the earliest versions of the statute that would become R.C. 5711.16 was adopted in 1859, a copy of which is attached hereto as Appendix, p. 1. The definitional language regarding a manufacturer is nearly identical to the version of R.C. 5711.16 that is the subject of this case. The 1859 version states:

Every person who shall purchase, receive or hold personal property of any description, for the purpose of adding to the value thereof by any process of manufacturing, refining, rectifying, or by the combination of different materials, with a view of making a gain or profit by so doing, shall be held to be a manufacturer, . . .

Laws of Ohio, Volume 56, 1859.

The statute does differ from the 1993 version of R.C. 5711.16 in two significant aspects. First, the statute does not limit the inventory to be taxed to only property owned by the manufacturer. Second, the statute recognizes that the owner of a manufacturing facility and a manufacturer are not the same. To be a manufacturer you must meet the definition. As the statute then read, in pertinent part:

Every person owning a manufacturing establishment of any kind, *and every manufacturer*, shall list as part of his manufacturer's stock the value of all engines and machinery of every description, to be used, or designed to be used, in any process of refining or manufacturing . .

*Id.* (emphasis added)

The General Assembly later removed the reference to "every person owning a manufacturing establishment", removing the ownership component, but retaining the requirement of actually doing the work of manufacturing. Accordingly, any assumption that the owner of a facility is automatically the manufacturer is incorrect. The entity actually performing the refining activities is the manufacturer.

**D. Only LMES refined uranium at PORTS.**

Interestingly, LMES has faced the issue of whether its contractual relationship with DOE, under similar contractual provisions, makes the use of government-owned property use by the government. In *Lockheed Martin Energy Systems, Inc. v. Johnson*, 78 S.W.3d 918 (Ct. of App. Tenn. 2002), LMES sued to obtain a refund of use tax that the Tennessee Department of Revenue had assessed and collected on software LMES had developed pursuant to Contract No. DE- AC05 - 840 OR 21400 ("Oak Ridge Operating Contract"). In *Lockheed*, LMES challenged the department's failure to grant a tax exemption for software developed and used by LMES to perform the Oak Ridge Operating Contract. The parties agreed that the software was owned by DOE and, at the termination

of the contract with DOE, title to the software would remain with DOE. The department argued that because of its control over LMES and its ownership of the software, LMES was not using it, the government was.

LMES argued that the long-standing principles enunciated in *United States v. Boyd*, 211 Tenn. 139, 363 S.W.2d 193 (1962), *aff'd*. 378 U.S. 39, 84 S.Ct. 1518, 12 L.Ed.2d 713 (1964) controlled. After a long discussion explaining that the *Boyd* case allowed for the taxation of the use of government-owned property because federal contractors were not agents of DOE's predecessor, the court stated:

The subject software is being "us[ed]" by the taxpayer, it is not being used by the federal government. The federal government is not performing the work at issue, that work is being performed by the taxpayer. The taxpayer has assumed certain obligations and responsibilities under the contract. It uses the subject software to meet and satisfy those obligations and responsibilities. What the taxpayer does is not unique in the business world. In this aspect of its business, the taxpayer provides the service of operating facilities owned by another. It "use[s]" personal property, including software fabricated by it, to do *its* business, in this case the operation of the facility for the federal government. . . .

*Lockheed*, at 927.

The court in *Lockheed* ruled that LMES was using the property not DOE. The *Lockheed* court, relying on *Boyd*, found that "[t]he use by the contractor for his own private ends - in conjunction with commercial activities carried on for profit - is a separate and distinct taxable activity." *Id.* at 926.

The Oak Ridge Operating Contract reviewed in the *Lockheed* case was the same as the LMES contract at PORTS. (Nesterick Depo., p. 41). DOE did not wish to hire employees, but preferred to have a prime contractor. (Nesterick Depo., p. 41). But contrary to its position in the *Lockheed* case, LMES has consistently argued that control over the contractor establishes that DOE is the manufacturer, not the contractor. LMES fails, however, to explain how DOE is refining the

uranium, other than having signed a contract. LMES's argument that the contractor is so closely tied to the government that the contractor's conduct is in fact that of the government is essentially the same argument presented to the United States Supreme Court in *Boyd, supra*, regarding other contractors' tax liability at the DOE Oak Ridge facility. Nevertheless, the Court held that taxing the use of the machinery did not violate the Supremacy Clause. As the United States Supreme Court stated in *Boyd*:

The United States accepts all this but insists that under the present contracts Carbide's and Ferguson's use of government property is not use by them for their own commercial advantage which the State may tax but a use exclusively for the benefit of United States. Since they are paid for their services only, make no products for sale to the government or others, have no investment in the Oak Ridge facility, do not stand to gain or lose by their efficient or nonefficient use of the property, and take no entrepreneurial risk, their use of government property it is claimed, is in reality use by the United States.

We are not persuaded.

*Id.* at 44-45.

The very arguments rejected in *Boyd* are the only conceivable basis for the BTA conclusion that DOE, based on the "restricted relationship" with LMES, rather than LMES, is the manufacturer at PORTS. LMES received and held the uranium. LMES made all decisions and performed all activities associated with the actual enrichment of the Uranium. LMES received a profit for performing the services. Therefore, LMES is the manufacturer and subject to the provisions of R.C. 5711.16.

Essentially, the BTA concludes that the use of the government-owned property is for the sole benefit of the government. However, LMES operated all the equipment and all of the refining operations were done by LMES employees. (Donnelly Depo. p. 55). For DOE to meet the definition of a manufacturer, DOE would have to be performing the work necessary to refine the uranium. The BTA implies that the contractual provisions governing the operation of PORTS so

closely aligned DOE and LMES that the use of machinery and equipment is use by DOE as the manufacturer. However, it was not DOE that was using the machinery and equipment; it was LMES.

**V. THE TAX COMMISSIONER DOES NOT HAVE UNFETTERED DISCRETION TO CANCEL A PRELIMINARY ASSESSMENT.**

The Tax Commissioner on pages 9-12 of his brief asserts the cancelation of the Preliminary Assessment is permissible because the Auditor is a Deputy Tax Commissioner for personal property tax purposes. The Auditor is not an employee, nor a subordinate of the Tax Commissioner. The statutory scheme defines the roles of county auditors and the Tax Commissioner. R.C. 5711.01(F) defines “assessor” for personal property tax purposes to include “the tax commissioner and the county auditor as deputy of the commissioner”. Pursuant to R.C. 5711.24, the county auditor has the obligation to issue a preliminary assessment for property not listed in a single county return. *Michelin Tire Corp. v. Kozydar*, 45 Ohio App.2d 107, 112 (8<sup>th</sup> Dist. 1975). Pursuant to R.C. 5711.11, if the taxpayer filed a single-county return, the county auditor is the assessor. *Mary Snider, Auditor, Union County, Ohio v. Thomas M. Zaino, Tax Commissioner, et al.*, BTA Case Nos. 2002-A-137, 2002-A-138, 2002-A-329, 2002 WL 1415454 (June 28, 2002), at p. 4. There is no dispute that LMES is a single county taxpayer and that it did not file a return. Therefore, it was the Auditor's statutory obligation to issue the preliminary assessment for the property that LMES never listed in a return.

If a taxpayer disputes a preliminary assessment, he may file a petition for reassessment with the Tax Commissioner. (R.C. 5711.31). Pursuant to R.C. 5711.31, the Tax Commissioner "either corrects the preliminary assessment or affirms it by the issuance of a certificate of determination." *Michelin*, at 112. The Tax Commissioner pursuant to R.C. 5711.31 is limited to "either correct{ing} the preliminary assessment or affirm{ing} it by the issuance of a certificate of determination".

*Michelin*, at 112. The Tax Commissioner's role is limited to review of value and classification of property. No statutory authority exists for the Tax Commissioner to cancel a preliminary assessment.

The Tax Commissioner wrongly asserts he has inherent authority to cancel preliminary personal property tax assessments. On page 10 of his brief, he states that his authority to cancel tax assessments is set forth in cases too numerous to list. No case has been found that held that the Tax Commissioner may cancel a preliminary assessment pursuant to R.C. 5711.31. The Tax Commissioner may abate penalties assessed for the failure to timely pay personal property taxes. (R.C. 5711.28). Several cases state that a penalty abatement to zero was a "cancellation". The Tax Commissioner cited one of these irrelevant cases, *Beatrice Foods Co. v. Lindley*, 70 Ohio St.2d 29, 434 N.E.2d 727 (1982). The Tax Commissioner's authority to abate penalties is not an issue presented in this case.

The Tax Commissioner asserts on page 10 of his brief, he may correct an assessment to "zero" or cancel the assessment altogether. If personal property is used in business, the tax or assessment upon it can never be "zero". All property used in business has a minimum value pursuant to the 302 computation. *Campbell Soup Company v. Tracy*, 88 Ohio St.3d 473, 727 N.E.2d 1259 (2000). Because there is always value, there is always a tax for personal property used in manufacturing. The only instance in which a "zero" determination can be made would be for personal property that was improperly listed, and not used in manufacturing.

On page 10 of the Tax Commissioner's brief, he points to *Cincinnati Air Taxi, Inc. v. Bowers*, 173 Ohio St. 99 (1962) as authority for the proposition that the Tax Commissioner can cancel a preliminary personal property tax assessment. The decision in *Cincinnati Air Taxi* is limited to addressing an exemption from personal property taxation for aircraft pursuant to R.C. 4561.18

and, in no way, provides authority to cancel tax assessments. *Id.* at 101. The holding of the case is that strict compliance is required in order to invoke an exemption to taxation. *Id.*

On page 11 of the Tax Commissioner's brief, he states that his obligation to correct assessments pursuant to R.C. 5703.05(H), provides authority to cancel assessments. Pursuant to R.C. 5703.05(H) the Tax Commissioner does not have unfettered discretion. In "redetermining or correcting any tax assessments, {or} valuations" pursuant to R.C. 5703.05(H) the Tax Commissioner must do so in conformity with controlling law. [*See, e.g. Ryland v. Tracy*, 96 Ohio App.3d 392, 400(10<sup>th</sup> Dist. 1994)] [R.C. 5703.05 (H) review must be carried out in accordance with law].

## **VI. CONCLUSION**

In accordance with the Auditor's original merit brief and the foregoing, the Auditor respectfully requests that this Court dismiss LMES's appeal based upon its lack of standing or, in the alternative, reverse the decision of the BTA as unlawful and unreasonable.

**Respectfully submitted,**

**PIKE COUNTY PROSECUTING ATTORNEY  
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**CERTIFICATE OF SERVICE**

A copy of the foregoing was served by regular U.S. Mail upon the persons listed below on this 20<sup>th</sup> day of February, 2015.

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**APPENDIX**

**Laws of Ohio, Vol. 56, 1859**

—By co-signee;

ment shall have been engaged in business, adding together such amounts, and dividing the aggregate amount thereof by the number of months that the person making the statement may have been in business during the preceding year; provided, that no consignee shall be required to list for taxation the value of any property, the product of this state, which shall have been consigned to him, for sale or otherwise, from any place within the state, nor the value of any property consigned to him from any other place for the sole purpose of being stored or forwarded; provided, he shall, in either case, have no interest in such property, or any profit to be derived from its sale; and the word person, as used in this and the succeeding sections, shall be held to mean and include firm, company and incorporation.

—By manufacturers;

SEC. 12. Every person who shall purchase, receive or hold personal property of any description, for the purpose of adding to the value thereof by any process of manufacturing, refining, rectifying, or by the combination of different materials, with a view of making a gain or profit by so doing, shall be held to be a manufacturer; and he shall, when he is required to make and deliver to the assessor a statement of the amount of his other personal property subject to taxation, also include in his statement the average value estimated, as provided in the preceding section, of all articles purchased, received or otherwise held, for the purpose of being used in whole or in part, in any process or operation of manufacturing, combining, rectifying or refining, which from time to time he shall have had on hand during the year next previous to the time of making such statement, if so long he shall have been engaged in such manufacturing business; and if not, then during the time he shall have been so engaged. Every person owning a manufacturing establishment of any kind, and every manufacturer, shall list as part of his manufacturer's stock the value of all engines and machinery of every description, used, or designed to be used, in any process of refining or manufacturing (except such fixtures as shall have been considered as part of any parcel or parcels of real property), including all tools and implements of every kind used, or designed to be used, for the aforesaid purpose.

—By merchants commencing business after day preceding the second Monday of April.

SEC. 13. When any person shall commence any business in any county after the day preceding the second Monday of April in any year, the average value of whose personal property employed in such business shall not have been previously entered on the assessor's list for taxation in said county, such person shall report to the auditor of the county the probable average value of the personal property by him intended to be employed in such business until the day preceding the second Monday of April thereafter; and shall pay into the treasury of such county a sum which shall bear such proportion to the levy for all purposes, on the average, so employed, as the time from the day on which he shall commence such business, as aforesaid, to the day preceding