

IN THE SUPREME COURT OF OHIO

Board of Education of the Columbus City Schools, :
 :
Appellant, : Case No. 2014-0885
 :
v. :
 :
Franklin County Board of Revision, : Appeal from the Ohio Board of
Franklin County Auditor, and Albany Tax Appeal - Case No. 2011-3590
Commons, Ltd., :
 :
Appellees.

**APPELLANT'S NOTICE OF PRESENTATION OF
ADDITIONAL AUTHORITY**

Mark H. Gillis (0066908)
COUNSEL OF RECORD
Rich & Gillis Law Group, LLC
6400 Riverside Drive, Suite D
Dublin, OH 43017
(614) 228-5822
Fax: (614) 540-7474
mgillis@richgillislawgroup.com

Attorneys for Appellant
Board of Education of the Columbus City
School District

Ron O'Brien (0017245)
Franklin County Prosecuting Attorney
William J. Stehle (0077613)
COUNSEL OF RECORD
Assistant County Prosecutor
373 South High Street, 20th Floor
Columbus, Ohio 43215

Attorney for Appellee County Auditor

Charles L. Bluestone, Esq (0060897)
Bluestone Law Group, LLC
141 East Town Street, Suite 100
Columbus, Ohio 43215
(614) 220-5900
Fax (614) 462-1930

Attorney for Appellee
Albany Commons, Ltd.

The Honorable Mike DeWine (0009181)
Ohio Attorney General
30 East Broad Street, 17th Floor
Columbus, OH 43215
PH: (614) 466-4986

Attorney for Ohio Tax Commissioner

Pursuant to S.Ct.Prac.R. 16.08, Appellant Board of Education of the Columbus City School District presents the following authority decided after the deadline for filing Appellant's merit brief:

1. *Bd. of Edn. of the South-Western City Schools v. Franklin Cty. Bd. of Revision*, 10th Dist. No. 14AP-729, 2015-Ohio-1780.
2. *Navistar, Inc. v. Testa*, Slip Opinion No. 2015-Ohio-3283.
3. *Best Ventures Corp. v. Wood Cty Bd. of Revision* BTA No. 2014-3293, Ohio Tax LEXIS 3080 (Jul. 16, 2015)

Respectfully Submitted,

/s/ Mark H. Gillis
Mark Gillis (0066908)
Rich & Gillis Law Group, LLC
6400 Riverside Drive, Suite D
Dublin, OH 43017
PH: (614) 228-5822
FAX: (614) 540-7476

Attorneys for Appellant
Board of Education of the Columbus City
School District

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Notice of Presentation of Additional Authority was served on the following via email transmission this 24th day of August, 2015:

Charles L. Bluestone, Esq.
Bluestone Law Group, LLC
141 East Town Street, Suite 100
Columbus, Ohio 43215
chuck@bluestonelawgroup.com
Attorney for Appellee
Albany Commons, Ltd.

The Honorable Mike DeWine
Ohio Attorney General
30 East Broad Street, 17th Floor
Columbus, OH 43215
Christine.Mesirow@OhioAttorneyGeneral.gov
Attorney for Ohio Tax Commissioner

William J. Stehle (0077613)
COUNSEL OF RECORD
Assistant County Prosecutor
373 South High Street, 20th Floor
Columbus, OH 43215
wstehle@franklincountyohio.gov

Attorney for County Appellees

/s/ Mark H. Gillis
Mark Gillis (0066908)

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Board of Education of the South-Western :
City Schools et al., :
Appellants-Appellees, :
v. :
Franklin County Board of Revision, : No. 14AP-729
(BTA No. 2013-521)
Appellee-Appellee, : (REGULAR CALENDAR)
Bank Street Partners, :
Appellee-Appellant. :

D E C I S I O N

Rendered on May 12, 2015

*Rich & Gillis Law Group, LLC, Mark H. Gillis, and
Kimberly G. Allison, for appellee Board of Education of the
South-Western City Schools.*

Michael N. Schaeffer, for appellant.

APPEAL from the Ohio Board of Tax Appeals

SADLER, J.

{¶ 1} Appellant, Bank Street Partners ("Bank Street"), appeals from a decision and order of the Ohio Board of Tax Appeals ("BTA") determining the taxable value of certain real property as of January 1, 2011. For the following reasons, we reverse the judgment of the BTA.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} In 2006, Bank Street purchased three parcels of undeveloped real property in the South-Western City School District. In 2011, the Franklin County Auditor ("auditor") assigned a total true value of \$661,800 to the property as follows: \$263,600 for Parcel No. 570-278106, \$242,300 for Parcel No. 570-278107, and \$155,900 for Parcel No. 570-278108. On April 2, 2012, Bank Street filed a complaint against valuation, seeking a reduction of true value to \$430,000. Appellee, Board of Education of the South-Western City School District ("BOE"), filed a counter-complaint seeking to retain the auditor's valuation.

{¶ 3} On January 23, 2013, the Franklin County Board of Revision ("BOR") conducted an evidentiary hearing on the complaint. On February 11, 2013, the BOR issued a decision reducing the total true value of the three parcels to \$420,000 as follows: \$167,000 for Parcel No. 570-278106, \$153,800 for Parcel No. 570-278107, and \$99,200 for Parcel No. 570-278108. The BOE appealed to the BTA seeking reinstatement of the auditor's valuation.

{¶ 4} Following an evidentiary hearing on October 29, 2013, the BTA determined that appellee presented insufficient evidence to support the BOR's reduction in value. Accordingly, the BTA reinstated the auditor's value. Bank Street filed a notice of appeal to this court on September 16, 2014.

II. ASSIGNMENTS OF ERROR

{¶ 5} Bank Street assigns the following three assignments of error:

I. The Board of Tax Appeals ("BTA") erred in simply reverting back to the Auditor's original assessment of value by not making its own independent determination of value.

II. The BTA erred by not finding that competent, credible and probative evidence was submitted to the Board of Revision ("BOR") sufficient to support the BOR's opinion of value.

III. The BTA erred in sustaining the appeal of Appellants challenging the BOR when the Appellants failed to come forward and offer evidence which demonstrated its right to the value sought.

III. STANDARD OF REVIEW

{¶ 6} An appellate court reviews decisions of the BTA to determine whether they are reasonable and lawful. *Bd. of Edn. of the Columbus City Schools v. Franklin Cty. Bd. of Revision*, 10th Dist. No. 14AP-167, 2014-Ohio-4360. In *Columbus City Schools*, we stated:

The fair market value of property for tax purposes is a question of fact, the determination of which is primarily within the province of the taxing authorities and an appellate court will not disturb a decision of the BTA unless it affirmatively appears from the record that such decision is unreasonable or unlawful.

The BTA's findings of fact are to be affirmed if supported by reliable and probative evidence, and the BTA's determination of the credibility of witnesses and its weighing of the evidence are subject to a highly deferential abuse-of-discretion review on appeal. However, we will reverse a BTA decision if the decision is based on an incorrect legal conclusion.

(Internal citations omitted.) *Id.* at ¶ 19, quoting *Piepho v. Franklin Cty. Bd. of Revision*, 10th Dist. No. 13AP-818, 2014-Ohio-2908, ¶ 4-5.

IV. LEGAL ANALYSIS

A. First Assignment of Error

{¶ 7} In Bank Street's first assignment of error, Bank Street argues that the BTA erred in simply reverting back to the auditor's original assessment of value and not making its own independent determination of value. In this regard, we note that a property's "true value" for a particular tax year is either the sale price, if the sale occurred within a reasonable length of time from the tax year and the sale was at arm's length (Ohio Adm.Code 5703-25-05(A)(2), R.C. 5713.03), or the property's fair or current market value (Ohio Adm.Code 5703-25-05(A)(1), R.C. 5713.31). In this case, the latest sale of the property was the sale to Bank Street in 2006. There is no dispute that the 2006 sale is too remote in time to provide a valid measure of true value in 2011. Bank Street did not have the property appraised by an expert. Rather, Bank Street elected to proceed on its complaint for a decrease in value based solely upon the testimony of a property owner.

1. Evidence Produced at the BOR

{¶ 8} Testimony before the BOR established that Larry Clarke is a partner in Bank Street and that he is a licensed real estate broker. Clarke claimed to have bought or sold more than 100 properties in his capacity as a partner in Bank Street. He is not a licensed real estate appraiser.

{¶ 9} Clarke stated that Bank Street purchased the three parcels at issue in September 2006 at a price of \$313,000 and that he negotiated the purchase price through the prior owner's broker. According to Clarke, Bank Street intended to either sell the property or find a third-party willing to lease the site for future development. To that end, Clarke listed the property for sale on his own web site.

{¶ 10} Clarke opined that the three parcels at issue in this case were "worth" \$420,000 as of January 1, 2011.¹ Clarke explained that he arrived at this figure by comparing asking prices for other properties in the area. He also opined that the market value for the property is \$420,000 currently. On cross-examination, Clarke admitted that Bank Street had never obtained an appraisal of the property.

{¶ 11} Clarke testified that Prairie Township had recently hired him to find eight to ten acres of undeveloped land upon which it could build a senior citizen center. At the time of the hearing before the BOR, Clarke stated that Prairie Township had just executed a real estate purchase contract whereby it agreed to purchase nine acres on West Broad Street and Galloway Road for \$360,000 or \$40,000 per acre. Clarke testified that the listing price for the nine-acre Prairie Township property was \$750,000. Clarke did not disclose the location of the Prairie Township property in relation to the three parcels in question, nor did he describe the Prairie Township property in any meaningful way. Nevertheless, Clarke opined that the three parcels of property that are the subject of this action are on a better site than the Prairie Township property.

{¶ 12} Other than its counsel's cross-examination of Clarke, the BOE did not present evidence at the hearing before the BOR. Rather, the BOE relied upon its cross-examination of Clarke and the auditor's valuation. The BOE appealed to the BTA from the BOR's decision to decrease the value of the property.

¹ The testimony at the BOR is recorded on an audio disc, but it has not been transcribed.

2. Appeal to the BTA

{¶ 13} R.C. 5717.01 governs proceedings before the BTA in an appeal from the BOR. *Coventry Towers, Inc. v. Strongsville*, 18 Ohio St.3d 120, 122 (1985). The statute gives the BTA three options when hearing an appeal: the board may confine itself to the record and the evidence certified to it by the BOR, hear additional evidence from the parties or may make such other investigation of the property as is deemed proper. *Id.* In *Coventry*, the Supreme Court of Ohio held that in order to fully perform its statutory duty of establishing the taxable value of property, the BTA must consider a valuation analysis revised since being offered at the BOR. *Id.*

{¶ 14} In this instance, the BTA elected to hold an evidentiary hearing on the matter in addition to a review of the certified record of the BOR. The BTA conducted an evidentiary hearing on October 29, 2013, at which time the BTA heard additional evidence.

3. Evidence Produced at the BTA

{¶ 15} At the hearing before the BTA, Bank Street once again presented the testimony of Clarke, who related that he is a real estate broker with 40 years of experience in commercial real estate and that he owns a company known as City Corporation which has a 25 percent stake in Bank Street. He also owns a company known as Corum Real Estate Company ("Corum"). Clarke testified that Bank Street bought the three parcels at issue from a now-defunct condominium developer in June 2006 for the total price of \$313,000. Clarke negotiated the purchase price on behalf of Bank Street, and he is listed as the broker. According to Clarke, State Street purchased the land at Norton Road and Sullivant Avenue as an investment property for future resale or development.

{¶ 16} Clarke testified that the property has generated very little interest since Bank Street put it on the market and that there has been very little development in the area. According to Clarke, Bank Street's efforts to sell the property have consisted of erecting four four-by-eight signs on the property advertising it for sale and listing the property on the Excelergy web site. Clarke recalled that shortly after Bank Street acquired the property, he received an offer from O'Riley's Auto Parts, but O'Riley's backed out of

the deal because they desired property closer to Broad Street. Clarke was not asked about the amount of the offer. Clarke stated that O'Riley's offer has been the only interest expressed in the property.

{¶ 17} Clarke testified that Corum brokered a recent purchase by the BOE of nine acres of undeveloped land in Prairie Township. He stated that the Prairie Township property is just 1.9 miles away from the three parcels that are the subject of this litigation. According to Clarke, the total purchase price was \$360,000 or \$40,000 per acre. The settlement statement for the purchase, which was offered into evidence by Bank Street, shows that the sale closed on April 4, 2013 and that Corum received a commission of \$10,800 on the sale.

{¶ 18} Clarke testified that he is aware that the BOE had purchased 40 acres of undeveloped property on Holt Road and Big Run Road in December 2012 for the price of \$19,700 per acre. According to Clarke, "a few years prior" he sold property to the BOE located directly across the street from the Holt Road location for a price of \$31,000 per acre. (BTA Tr. 16.)

{¶ 19} Based upon his ownership interest in the subject property, the comparable sales in the area, and his knowledge, skill, and experience as a real estate broker and developer, Clarke opined that the fair market value of the three parcels as of January 1, 2011 was \$430,000. Clarke apportioned the value among the three parcels as follows: \$145,000 for Parcel No. 570-278106, a 2.017 acre tract, \$175,000 for Parcel No. 570-278107, a 2.472 acre tract, and \$110,000 for Parcel No. 570-278108, a 1.79 acre tract. Clarke explained that he valued Parcel No. 570-278108 at a lower per acre figure because it contained a flood plain area and that he assigned a higher per acre value to Parcel No. 570-278107 because it had more frontage.

{¶ 20} On cross-examination, Clarke stated that he listed the property for sale on the Excelergy web site but not on the Multiple Listing Service. Although Clarke believes the property is still listed with Excelergy, he was unable to recall the asking price. Clarke acknowledged that he has never been licensed as a real estate appraiser and that State Street has never had the parcels evaluated by a licensed appraiser. He also admitted that although his company brokered the purchase of the Prairie Township property, he had no

personal involvement in the transaction. During the BTA hearing, counsel for the BOE interposed the following objection to Clarke's opinion testimony:

Okay. We would just note that any testimony that Mr. Clarke provided regarding the circumstances surrounding the sale [Holt Road] would be hearsay and we would raise an objection to that testimony.

And while we note that Mr. Clarke, as an owner, is competent to provide an opinion of value, he has not been qualified as a real estate appraisal expert; therefore, we would also object to any opinion of value as to the comparability of any sale comparables that have been discussed here today in relation to the subject parcels.

(BTA Tr. 24.)

{¶ 21} Other than counsel's cross-examination of Clarke, the BOE did not present evidence at the hearing before the BTA, choosing instead to rely upon its cross-examination of Clarke and the auditor's original assessment.

4. The Owner-Opinion Rule

{¶ 22} In *Worthington City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 140 Ohio St.3d 248, 2014-Ohio-3620, the Supreme Court discussed the application of the "owner-opinion" rule in proceedings before the BTA:

Ordinarily, testimony as to property value is not competent and admissible unless it is the professional opinion of an expert. *See Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 605 N.E.2d 936 (1992), paragraph one of the syllabus ("It is a general rule of evidence that before one may testify as to his opinion on the value of property, one must qualify as an expert"). But equally well recognized is the exception allowing an owner "to testify concerning the value of his property without being qualified as an expert, because he is presumed to be familiar with it from having purchased or dealt with it." *Id.*, paragraph two of the syllabus.

Indeed, "Ohio law has long recognized that an owner of either real or personal property is, by virtue of such ownership, competent to testify as to the market value of the property." *Smith v. Padgett*, 32 Ohio St.3d 344, 347, 513 N.E.2d 737 (1987). Grounds for this "owner-opinion rule" lie in the assumption that the owner " 'possess[es] sufficient

acquaintanceship with [the property] to estimate the value of the property, and [the owner's] estimate is therefore received *although his knowledge on the subject is not such as would qualify him to testify if he were not the owner.*' " (Emphasis added in *Smith*.) *Id.*, quoting 22 Corpus Juris, Evidence, Section 685, at 586-587 (1920). The court has recognized the validity of the owner-opinion rule in the context of valuing realty for tax purposes. *Amsdell v. Cuyahoga Cty. Bd. of Revision*, 69 Ohio St.3d 572, 574, 1994 Ohio 314, 635 N.E.2d 11 (1994); *WJJK Invests., Inc. v. Licking Cty. Bd. of Revision*, 76 Ohio St.3d 29, 32, 1996 Ohio 437, 665 N.E.2d 1111 (1996); *Valigore v. Cuyahoga Cty. Bd. of Revision*, 105 Ohio St.3d 302, 2005-Ohio-1733, 825 N.E.2d 604, ¶ 5. Important in the owner-opinion rule, however, is that the owner qualifies primarily as a fact witness giving information about his or her own property; usually the owner may not testify about comparable properties, because that testimony would be hearsay. *See Raymond v. Raymond*, 10th Dist. Franklin No. 11AP-363, 2011-Ohio-6173, ¶ 19-20.

(Emphasis sic.) *Id.* at ¶ 18-19.

{¶ 23} The *Worthington* case is the most recent authority from the Supreme Court applying the owner-opinion rule in the context of an appeal to the BTA. In *Worthington*, the taxpayer/owner appealed to the BOR seeking a decrease in the property values assessed by the auditor. At the BOR hearing, the corporate owner of the property presented the testimony of an employee with both knowledge and experience in real estate tax valuation and a Masters in Business Administration. The school district did not present any evidence at the BOR, did not object to the witness's opinion of fair market value, and did not cross-examine the witness. In the appeal to the BTA, the parties waived a hearing and presented their arguments through briefs, relying on the record developed before the BOR. The BTA subsequently refused to recognize the witness as an owner, rejected the opinion testimony as incompetent, and reinstated the auditor's valuation.

{¶ 24} The Supreme Court reversed the BTA and reinstated the auditor's valuation. The court in *Worthington* concluded as follows:

Because it found the owner's valuation to be not probative, and because it confronted an absence of additional evidence,

the BTA ordered that the auditor's value be reinstated. While this is a logical disposition, the BTA nonetheless erred in rendering it. That is so because our decision in *Bedford Bd. of Edn.*, 115 Ohio St.3d 449, 2007-Ohio-5237, 875 N.E.2d 913, prescribes a different rule under these circumstances: when the board of revision has reduced the value of the property based on the owner's evidence, that value has been held to eclipse the auditor's original valuation.

In *Bedford*, as here, the owner presented an owner's opinion of value using the income approach and utilizing actual income and expenses. Even though the owner's opinion relied entirely on income and expenses of the subject property, rather than data derived from the larger market, we held in a four-to-three decision that the BTA had erred by reverting to the auditor's valuation inasmuch as the owner's evidence (despite those defects identified by the BTA) had negated that valuation.

* * *

In sum, the rule from the *Bedford* case precluded the BTA's reverting to the auditor's valuation in spite of the BTA's findings about the probative force of the evidence that Northpointe presented at the BOR. Under these circumstances, the BOR's adopting a new value based on [the owner's] testimony "shift[ed] the burden of going forward with evidence to the board of education on appeal to the BTA." *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 139 Ohio St.3d 193, 2013-Ohio-4543, 11 N.E.3d 206, ¶ 16, analysis regarding burden undisturbed on reconsideration, 139 Ohio St.3d 212, 2014-Ohio-1940, 11 N.E.3d 222, ¶ 10. Since no new evidence was presented at the BTA, the BTA should have retained the BOR's valuation of the property.

Id. at 35-36, 41.

{¶ 25} The BOE argues that *Worthington* is distinguishable from this case because Clarke's testimony is neither competent nor probative. Specifically, the BOE contends that "[c]learly the BOR's decisions herein were not based upon competent probative evidence since the property owner has failed to submit ANY evidence relating to the values of the individual parcels at issue in this case." (Emphasis sic.) (Appellee's brief, 16-17.) While this is true with respect to Clarke's testimony at the BOR, as noted above,

Clarke's testimony at the BTA included his opinion of the fair market value for each of the parcels in question as of January 1, 2011. He also provided reasons why he assigned a different value per acre for each of the three parcels. Thus, the *Worthington* case is not distinguishable on the specific grounds asserted by the BOE.

{¶ 26} Bank Street argues that the *Worthington* case requires a reversal of the BTA decision and reinstatement of the BOR decision. Here, as in *Worthington*, the BOR accepted the owner's opinion regarding fair market value. Under *Worthington* and the *Bedford* rule, when the BOR has reduced the value of the property based on the owner's evidence, that value eclipses the auditor's original valuation. Thus, a strict application of *Worthington* to the circumstances of this case means that the BTA was precluded from reverting back to the auditor's valuation in spite of its conclusion that Bank Street's evidence at the BOR lacked probative value. Here, the BOR's adoption of a decreased value for the property based on Clarke's testimony shifted the burden to the BOE to produce other evidence in support of the auditor's valuation in its appeal to the BTA. *Id.* According to Bank Street, since the BOE presented no new evidence in support of the auditor's valuation, the BTA should have retained the BOR's valuation of the property.

{¶ 27} In discussing the application of the rule in *Bedford Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 115 Ohio St.3d 449, 2007-Ohio-5237, in an owner-opinion case, the *Worthington* court stated:

[T]he *Bedford* rule addresses circumstances in which the board of revision relies on specific and plausible evidence to reach a valuation different from that originally found by the auditor.

The *Bedford* rule is particularly applicable in circumstances like those presented here. In this case, the BOE opposed the owner's opinion of value and could have stated before the BOR the reasons that it should not adopt that valuation, but it failed to do so. In this respect, the present case differs dramatically from *Vandalia-Butler*, 130 Ohio St.3d 291, 2011-Ohio-5078, 958 N.E.2d 131. Here, the BOE failed to inform the BOR of reasons why the owner's opinion was not competent or probative, whereas in *Vandalia-Butler*, the board of revision's notes "reflect[ed] that the BOE objected to the appraisal report as hearsay 'because the appraiser wasn't

[at the hearing] to question.' " *Id.* at ¶ 4-5. *Compare Plain Local Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 130 Ohio St.3d 230, 2011-Ohio-3362, 957 N.E.2d 268, ¶ 18-20 (hearsay objection to written appraisal report was waived because it was not raised before the board of revision).

Moreover, Northpointe actually presented [the owner's] as a witness before the BOR, thereby making him available for cross-examination, but the BOE's counsel failed to use that opportunity to build a record that would have permitted the BOE to "meet its burden of proof before the BTA by showing—through cross-examination of [the witness] * * *—that the board of revision had erred when it reduced the value from the amount first determined by the auditor." *Vandalia-Butler City School Dist. Bd. of Edn. v. Montgomery Cty. Bd. of Revision*, 106 Ohio St.3d 157, 2005-Ohio-4385, 833 N.E.2d 271, ¶ 9.

Id. at ¶ 38-40.

{¶ 28} As previously noted, the BOE cross-examined Clarke in the BOR proceedings. In the proceedings at the BTA, counsel for the BOE not only cross-examined Clarke, she interposed objections to certain portions of Clarke's testimony. Thus, under the circumstances of this case, *Worthington* does not necessarily require the result desired by Bank Street.

{¶ 29} In *Vandalia-Butler City School Dist. Bd. of Edn. v. Montgomery Cty. Bd. of Revision*, 106 Ohio St.3d 157, 2005-Ohio-4385, the auditor assessed the value of an apartment complex at \$5,994,310. The owner filed a complaint with the BOR seeking a reduction in value to \$3,980,000. At the BOR hearing, the owner presented the testimony of a real-property tax consultant in support of a lower valuation. The BOR reduced the value of the property to \$4,147,200, and the school district appealed.

{¶ 30} The BTA discounted the opinion testimony of the tax consultant because he was not qualified to offer expert testimony of the property's value. However, at the BTA hearing, the owner presented the additional testimony of a state-certified real estate appraiser. The appraiser calculated a value for the property under three different methods to reach his final conclusion that the property's value was \$4,000,000. The BTA found the appraiser's opinion unconvincing, describing his cost-approach analysis as "circular" and characterizing his income analysis as "unreliable." The BTA further found

that the appraisal was not "probative" of the property's value. In the absence of any other competent and probative evidence supporting the BOR's reduction in value, the BTA reversed the BOR's decision and reinstated the auditor's valuation. *Id.* at ¶ 8.

{¶ 31} In *Vandalia-Butler*, the Supreme Court stated:

In the absence of probative evidence supporting the reduction in value ordered by the board of revision, and in light of the problems identified by the BTA with the even lower value proposed by the [owner's] appraiser, the BTA's conclusion that the county auditor's original valuation should be reinstated was not unreasonable. "In the absence of probative evidence of a lower value," a county board of revision and the BTA "are justified in fixing the value at the amount assessed by the county auditor." *Salem Med. Arts & Dev. Corp. v. Columbiana Cty. Bd. of Revision* (1998), 82 Ohio St.3d 193, 195, 1998 Ohio 248, 694 N.E.2d 1324. The BTA's decision to reject the board of revision's valuation and reinstate the auditor's original finding is supported by the evidence, and the BTA did not abuse its discretion in reaching that conclusion.

Id. at ¶ 12.

{¶ 32} *Vandalia-Butler* is significant in this appeal for several reasons. First, the case stands for the proposition that even though the BOR has accepted the owner's evidence of a lower value, the BTA is justified in reinstating the auditor's valuation if it finds that the owner's witness was not competent to provide an opinion of fair market value. Under such circumstances, the *Bedford* rule would not apply. *Worthington* at ¶ 39. Second, as noted above, the Supreme Court in *Worthington* has cited *Vandalia-Butler* for the proposition that a board of education, in an appeal from the BOR's decision to decrease the value assessed by the auditor, may "meet its burden of proof before the BTA by showing—through cross-examination of [the witness] * * *—that the board of revision had erred when it reduced the value from the amount first determined by the auditor." *Worthington* at ¶ 40. Finally, the case stands for the proposition that even though the owner presents the additional testimony of a competent expert witness in proceedings before the BTA, the BTA may reinstate the auditor's valuation if it finds that the opinion of the owner's witness does not have probative value. *Vandalia-Butler* at ¶ 12.

5. The BTA Decision

{¶ 33} Here, the BTA decision reads, in relevant part, as follows:

*The BOR reduced the value of the subject property based on the owner's testimony regarding his marketing efforts and the amount for which he would agree to sell the property. This board has previously found that asking prices are not competent and probative evidence of a property's worth. * * * Additionally, we recognize that a variety of professionals may provide valuation services. We must also note, however, that real estate salespeople "have training in their field but may or may not have extensive appraisal experience. They are generally familiar with properties in a given locale and have access to market information. They frequently use sales and other market information for property comparison purposes in pricing. Some may develop appraisal expertise. As a group, real estate salespeople evaluate specific properties, but they typically do not consider all the factors that professional appraisers do." The Appraisal of Real Estate (13th Ed. 2008), 8-9.*

When the value of property is adjusted from that at which it was originally assessed, such adjustment, whether effected by this board or a board of revision, must be supported by sufficient competent and probative evidence. When a board of revision adjusts value which does not meet this criteria or the rationale for the value adopted cannot be discerned, it may be appropriate to reinstate the property's original valuation. *Vandalia-Butler City School Dist. Bd. of Edn. v. Montgomery Cty. Bd. of Revision*, 106 Ohio St.3d 157, 2005-Ohio-4385; *Vandalia-Butler City School Dist. Bd. of Edn. v. Montgomery Cty. Bd. of Revision*, 130 Ohio St.3d 291, 2011-Ohio-5078, ¶21. * * * *Accordingly, upon consideration of the existing record, we are constrained to conclude that there exists insufficient evidence to support the BOR's reduction in value and, as a result, we must reinstate those values originally assessed by the auditor.*

(Emphasis added.) (Sept. 5, 2014 Decision and Order, 2-3.)

{¶ 34} Although the BTA decision concludes that Bank Street presented insufficient evidence to support the BOR's reduction in value, the BTA decision does not contain any factual findings in support of that conclusion. With regard to the threshold

issue of Clarke's competency to offer his opinion of fair market value, Clarke testified in his capacity as both an owner of the subject real property and as a real estate broker with experience in the local market and knowledge of recent sales of commercial real estate in the area. Because Clarke is an owner of the property, he is competent to offer his opinion of fair market value. The BOE acknowledged Clarke's competency at the proceedings before the BTA, but objected to his opinion of fair market value on other grounds. Because the BTA decision contains no finding regarding Clarke's competency and no ruling upon the objection interposed by the BOR, we are unable to determine whether the BTA engaged in the burden-shifting analysis required by *Worthington*.

{¶ 35} With regard to the probative value of Bank Street's evidence, we note that the BTA decision contains the following introductory statement: "This matter is now considered upon the notice of appeal, the transcript certified by the BOR * * * *and the record of the hearing before this board.*" (Emphasis added.) (Sept. 5, 2014 Decision and Order, 1.) However, the only specific reference to Clarke's testimony is the statement that "[t]he BOR reduced the value of the subject property based on the owner's testimony regarding his marketing efforts and the amount for which he would agree to sell the property." (Sept. 5, 2014 Decision and Order, 2.) The decision contains no discussion of Clarke's testimony at the BTA, which was more extensive than his testimony at the BOR.

{¶ 36} In *Bedford Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 132 Ohio St.3d 371, 2012-Ohio-2844, the Supreme Court "recognized that the BTA 'has the duty to state what evidence it considered relevant in reaching its determination,' and we thereby require that the BTA evaluate the evidence before it in making its findings." *Id.* at ¶ 18, quoting *HealthSouth Corp. v. Levin*, 121 Ohio St.3d 282, 2009-Ohio-584, ¶ 34, 36. The court further stated:

We hold that the BTA erred by ignoring and failing to weigh the significance of the testimony regarding the seller's tax motivations in allocating the sale price to the subject property. Because it is the duty of the BTA to weigh the evidence and determine the facts concerning valuation, we must remand for proper consideration of the effect of that testimony.

* * *

When the BTA's decision is "silent on the subject" of potentially material evidence, that silence makes the court "'unable to perform its appellate duty,'" with the result that the proper course is to remand so that the BTA may afford the taxpayer the review of the evidence that is its due. *Dublin Senior Community L.P. v. Franklin Cty. Bd. of Revision*, 80 Ohio St.3d 455, 462, 687 N.E.2d 426 (1997), quoting *Howard v. Cuyahoga Cty. Bd. of Revision*, 37 Ohio St.3d 195, 197, 524 N.E.2d 887 (1988).

Id. at ¶ 3, 29.

{¶ 37} The *Worthington* court likewise stated that "the BTA unquestionably had a duty to independently weigh all the evidence before it, which in this case consisted of evidence adduced before the BOR." *Id.* at ¶ 34, citing *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 76 Ohio St.3d 13, 15 (1996); *Sapina v. Cuyahoga Cty. Bd. of Revision*, 136 Ohio St.3d 188, 2013-Ohio-3028, ¶ 25, citing *Vandalia-Butler* at ¶ 13. Here, Bank Street called Clarke as a witness both at the BOR hearing and the BTA hearing. As previously discussed, Clarke provided testimony at the BTA that he did not provide at the BOR. The BOE's counsel also engaged in a more substantial cross-examination of Clarke at the BTA and interposed specific objections to certain portions of Clarke's testimony. In addition to the competency objection, the BOE asserted a hearsay objection to Clarke's testimony regarding the comparable sale on Holt Road. The BTA decision does not contain a ruling upon the BOE's hearsay objection.

{¶ 38} Pursuant to *Worthington*, the BTA had a duty to weigh all the evidence before it, including the new evidence submitted at the October 29, 2013 hearing. *See Columbus City Schools* (BTA erred by reverting to the auditor's valuation without first considering the additional testimony presented by the property owner at the BTA hearing). Yet the BTA decision contains no mention of the evidence presented at the BTA hearing, no ruling upon the objections, and no finding regarding Clarke's credibility. *See, e.g., Vandalia-Butler* at ¶ 15 ("BTA * * * erred by adopting the BOR's valuation without addressing the hearsay objection."); *Simmons v. Cuyahoga Cty. Bd. of Revision*, 81 Ohio St.3d 47, 49 (1998) (although an owner of real property is competent to express an opinion regarding value, the BTA may reject the testimony if it is not credible). The BTA decision also lacks the type of critical analysis that was cited with approval by the

Supreme Court in *Vandalia-Butler*. Given the state of the BTA decision, we cannot conclude that the BTA satisfied its duty to weigh the evidence and determine the facts concerning valuation.

{¶ 39} Accordingly, it is our determination that the BTA abused its discretion in failing to make a finding regarding Clarke's competence to provide an opinion of fair market value and by failing to rule upon the BOE's competency objection. Because of this error, we are unable to determine whether the BTA engaged in the burden-shifting analysis required by *Worthington*. We further find that the BTA abused its discretion in concluding that Bank Street's evidence was not sufficient without first considering the new evidence presented at the October 29, 2013 hearing, including cross-examination, and by failing to rule on the BOE's hearsay objection. Accordingly, we hold that the BTA's decision to simply revert to the auditor's value was unreasonable and unlawful. For these reasons, we sustain Bank Street's first assignment of error.

{¶ 40} Having sustained Bank Street's first assignment of error, we must reverse the judgment of the BTA and remand the matter for further proceedings. In this regard, it is axiomatic that "[u]pon remand from an appellate court, the [trial] court is required to proceed from the point at which the error occurred." *State ex rel. Douglas v. Burlew*, 106 Ohio St.3d 180, 2005-Ohio-4382, ¶ 9, quoting *State ex rel. Stevenson v. Murray*, 69 Ohio St.2d 112, 113 (1982). In this instance, the BTA erred by failing to make a threshold determination concerning Clarke's competence and by failing to make a determination whether the BOE met its burden under *Worthington* and *Vandalia-Butler*. Accordingly, upon remand, the BTA must examine and evaluate all the evidence before it in light of *Worthington* and *Vandalia-Butler*.²

{¶ 41} Because we have sustained Bank Street's first assignment of error and remanded the case for the BTA to examine and evaluate the evidence in light of *Worthington* and *Vandalia-Butler*, Bank Street's second and third assignments of error are rendered moot.

² In fairness to the BTA, we note that the Supreme Court decided the *Worthington* case just days prior to the BTA decision and order in this case.

V. CONCLUSION

{¶ 42} Having sustained Bank Street's first assignment of error and having determined that Bank Street's second and third assignments of error are moot, we reverse the judgment of the Ohio Board of Tax Appeals and remand the case for further proceedings.

*Judgment reversed;
cause remanded.*

KLATT and DORRIAN, JJ., concur.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Navistar, Inc. v. Testa*, Slip Opinion No. 2015-Ohio-3283.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2015-OHIO-3283

NAVISTAR, INC., APPELLANT, v. TESTA, TAX COMMR., APPELLEE.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Navistar, Inc. v. Testa*, Slip Opinion No. 2015-Ohio-3283.]

Commercial-activity-tax credit—R.C. 5751.53 authorizes the tax commissioner to issue a final determination changing the amount of potential CAT credit to reflect a correction of an inaccuracy or error in the original reported amount.

(No. 2014-0140—Submitted May 6, 2015—Decided August 18, 2015.)

APPEAL from the Board of Tax Appeals, No. 2010-575.

FRENCH, J.

{¶ 1} Under Ohio’s 2005 tax-reform legislation, the new commercial-activity tax (“CAT”) was enacted “to replace the existing corporate-franchise and personal-property taxes,” which were phased out under that legislation for industrial corporations like Navistar, Inc. *Beaver Excavating Co. v. Testa*, 134 Ohio St.3d 565, 2012-Ohio-5776, 983 N.E.2d 1317, ¶ 23, citing Am.Sub.H.B. No.

66, 151 Ohio Laws, Part II, 2868; R.C. 5733.01(G)(2). In this appeal, appellant, Navistar, Inc., claims that it is due a credit against the CAT.

{¶ 2} According to the testimony of employees of the Department of Taxation, the tax break at issue here, referred to simply as the “CAT credit,” was intended to restore a portion of the value of a corporate asset, known as a “deferred-tax asset,” the value of which would otherwise be substantially reduced by the transition from the franchise tax to the CAT. Specifically, the CAT credit would preserve part of the value of net operating losses (“NOLs”) that taxpayers like Navistar had accumulated and were entitled to carry forward to later years and use as a deduction against income. But with the phase out of the franchise tax for most taxpayers (including industrial corporations like Navistar) and its replacement by the CAT, those NOLs would have lost their value under state tax law unless a special tax break was created. That tax break was the CAT credit, R.C. 5751.53.

{¶ 3} In this appeal, Navistar complains that as a result of Navistar’s 2007 restatement of its 2004 financial statement, the tax commissioner erroneously reduced the amount of its potential CAT credit from over \$27 million to zero. The tax commissioner based his determination on the restatement’s increase in the “valuation allowance,” an accounting entry that reflects the company’s estimation of its future ability to realize the tax benefit of its NOLs. The 2007 restatement increased Navistar’s valuation allowance from 62.4 percent to 100 percent; that increase led to a 100 percent offset of the NOLs for purposes of computing Navistar’s potential CAT credit.

{¶ 4} Navistar contends that the tax commissioner had no statutory authority to adjust the amount of potential CAT credit based on accounting changes that were made after the deadline for applying for the CAT credit in June 2006. The tax commissioner, on the other hand, argues that his statutory audit

authority under R.C. 5751.53(D) allowed him to change the amount of potential CAT credit based on a subsequent restatement of the relevant accounting entries.

{¶ 5} In addition, the parties disagree on a legal and factual issue concerning the importance of generally accepted accounting principles (“GAAP”). Navistar argues that the CAT-credit statute took a “snapshot” of the company’s books and records as of the time the credit application was filed in June 2006 and that no subsequent changes to the accounting entries can be taken into account, even if those changes are necessary to bring the company’s financial reporting into compliance with GAAP. But Navistar also argues that even if GAAP compliance is required to qualify for the credit, it has proved through expert testimony that the restatement’s increase in the valuation allowance to 100 percent did *not* involve a correction required by GAAP, but instead constituted a different estimation of probabilities made by different management at a different point in time. The original valuation allowance for 2004, under this view, was reasonable because it was within the range permitted under GAAP.

{¶ 6} We read R.C. 5751.53(D) as authorizing the tax commissioner to issue a final determination changing the amount of potential CAT credit, but limiting that authority to making changes that reflect a correction of an inaccuracy or error in the original reported amount. As a result, we conclude that the tax commissioner’s use of Navistar’s restated valuation allowance as the basis for the final determination was justified only if the restated valuation allowance was a correction of error, which in this context can be the case only if Navistar’s original valuation allowance was not in compliance with GAAP.

{¶ 7} Whether Navistar’s original valuation allowance was in compliance with GAAP is a question of fact that must be determined in light of evidence that militates both ways. The Board of Tax Appeals (“BTA”) considered certain statements by Navistar as relevant to this point but ignored the testimony of Navistar’s experts, an omission that makes the BTA’s decision unreasonable and

unlawful. We therefore vacate the BTA’s decision and remand the cause for a determination whether the original valuation allowance was in compliance with GAAP based upon all the evidence in the record. Disposition of this case will depend upon that determination.

NET OPERATING LOSSES AND THE CAT CREDIT

{¶ 8} The franchise tax’s net-income method used the corporation’s federal “taxable income,” with Ohio adjustments, as the base on which the tax was imposed. *See* R.C. 5733.04(I) and 5733.05(B). As a general matter, “[t]he taxable income of a taxpayer engaged in business or profit-oriented activities is generally net profits rather than gross receipts or gross income.” 1 B. Bittker & L. Lokken, *Federal Taxation of Income, Estates, and Gifts*, ¶ 20.1.1 (3d Ed.1999). By contrast, Ohio’s CAT is measured not by net income but by the gross receipts generated by income-producing activity. *See* R.C. 5751.01(F) (defining “gross receipts” as “the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person, including the fair market value of any property and any services received, and any debt transferred or forgiven as consideration”); R.C. 5751.03 (imposing the tax on the “taxable gross receipts”). Compared with the franchise tax that it replaced, the CAT imposes a lower rate of taxation on a larger tax base: a tax base that consists of revenues that have not been offset by expenses.

{¶ 9} Under the franchise-tax law, which previously applied to Navistar, a corporation that experienced an NOL one year was allowed to use that loss to offset income in a different year by “carrying back” or “carrying forward” the NOL and using it as a deduction against income in a different year. *See* R.C. 5733.04(I)(1)(b).

{¶ 10} Because Ohio’s franchise-tax law, along with other corporate-income-tax laws, allowed a carryforward of NOLs, accounting principles required

that the future benefit be reflected as an asset on the corporation's books and records and accompanying financial statements. When the CAT was enacted in 2005, corporations feared that the substantial Ohio portion of the NOL asset on their books would lose its value. To soften that blow, the CAT credit was devised and was included in the original CAT legislation. Navistar refers to the promulgation of R.C. 5751.53 as a "grand bargain" between Ohio franchise-tax payers and the tax department, under which the taxpayers would support the tax reform while still retaining some of the value of their Ohio deferred-tax assets such as NOLs.

{¶ 11} Under R.C. 5751.53, taxpayers were able to compute a potential amount of CAT credit. That amount consists of a portion of the Ohio-apportioned NOLs on their books at the end of their 2004 fiscal year, which, when adjusted, furnished a total amount of credit that could be used to reduce CAT liabilities over a period of up to 20 years, stretching from 2010 (the year the CAT was fully phased in and the general franchise tax phased out for taxpayers such as Navistar) through 2029. R.C. 5733.01(G)(2)(a)(vi) (phase out of franchise tax); R.C. 5751.53(B)(1) through (10).

{¶ 12} The starting point for determining the potential CAT credit was the amount of Ohio-related NOLs on the corporation's books at the end of fiscal year 2004. R.C. 5751.53(A)(5), (6), and (9). That number would be reduced by the amount of "related valuation allowance." R.C. 5751.51(A)(6)(b). "Valuation allowance" is an adjustment dictated by accounting principles that is made on the books from year to year to reflect the likelihood that the company will realize the tax benefit of the NOLs. The less likely the corporation will be able to use the NOLs, the greater the valuation allowance. The lump sum that resulted from offsetting the Ohio NOLs with the valuation allowance would be "amortized" over a period of up to 20 years beginning with calendar year 2010; the lump sum

is therefore referred to in the statute as the “amortizable amount.” R.C. 5751.53(A)(9) and (B).

{¶ 13} To take the credit, a company was required to file an Amortizable Amount Report with the tax commissioner by June 30, 2006, that set forth the computation of the amortizable amount. R.C. 5751.53(D). The statute then gave the tax commissioner until June 30, 2010, to “audit the accuracy of the amortizable amount * * * and adjust the amortizable amount or, if appropriate, issue any assessment or final determination, as applicable, necessary to correct any errors found upon audit.” *Id.*

FACTUAL BACKGROUND

{¶ 14} Navistar is in the business of manufacturing commercial trucks, buses, and military vehicles under the brand names International, Navistar Defense, and IC. Navistar has long operated a manufacturing plant in Springfield, Ohio, as well as facilities in other states. Before enactment of the CAT, Navistar was a longtime franchise-tax payer in Ohio.

{¶ 15} Navistar timely filed its Amortizable Amount Report (together with its franchise-tax return for tax year 2005) on or about June 23, 2006. To qualify for the CAT credit, a taxpayer must have “qualifying Ohio net operating loss carryforward equal to or greater than the qualifying amount” of \$50 million. R.C. 5751.53(A)(4) and (A)(11). It is undisputed that Navistar met that requirement.

{¶ 16} Under R.C. 5751.53(A)(9)(a), the “amortizable amount” is 8 percent of the sum of the taxpayer’s “disallowed Ohio net operating loss carryforward” and other deferred tax items that are not at issue here. As relevant here, R.C. 5751.53(A)(6)(b) defines “disallowed Ohio net operating loss carryforward” as the “Ohio net operating loss carryforward amount” that Navistar “used to compute the related deferred tax asset reflected on its books and records on the last day of its taxable year ending in 2004, adjusted for return to accrual,” reduced by the “qualifying related valuation allowance amount.” The

“ ‘qualifying related valuation allowance amount’ is the amount of Ohio net operating loss reflected in [Navistar’s] computation of the valuation allowance account, as shown on its books and records on the last day of its taxable year ending in 2004.” *Id.* In its June 2006 Amortizable Amount Report, Navistar computed its amortizable amount as \$27,048,726.

{¶ 17} In December 2007, Navistar undertook a massive restatement of its books and financial statements as noted in its annual Form 10-K filed with the Securities and Exchange Commission (“SEC”). Among other things, the restatement increased Navistar’s valuation allowance from 62.4 percent to 100 percent. The restated financials did not eliminate the NOLs or other deferred-tax assets from the company’s books; instead, the restatement merely increased the valuation allowance to the point that it completely offset the value of the assets as part of the company’s net worth.

{¶ 18} The tax commissioner issued his final determination in this matter on January 11, 2010. The commissioner noted his statutory authority to audit the accuracy of the amortizable amount under the CAT-credit statute, R.C. 5751.53(D). Next, the commissioner concluded that “later restated financial statements must be used, even if the correction occurred much after the period at issue.” The commissioner referred to the 2007 restated financials for 2004 as a “correction” of previous error and characterized the “revised financial statements” as “the most up-to-date *and accurate* financial statements for Navistar *under generally accepted accounting principles.*” (Emphasis added.) Because the “restated financial statements revised the valuation allowance to one hundred percent,” the tax commissioner adjusted the amortizable amount to zero.

{¶ 19} Navistar appealed to the BTA.

EVIDENCE PRESENTED DURING THE BTA PROCEEDINGS

Navistar's admissions

{¶ 20} The tax commissioner points to certain statements that he views as admissions by Navistar, some of which were relied upon in the BTA decision. First, the transmittal letter sent with the Amortizable Amount Report and the 2005 franchise-tax return stated that Navistar was “currently undergoing a restatement examination of its financial statements for the years 2002, 2003, 2004, and 2005,” that “changes [would] occur to the 2002, 2003, and 2004 financial statements as part of this examination which [would] impact” the Amortizable Amount Report and the 2005 franchise-tax return, and that Navistar “reserve[d] [its] right to file these changes” with the state “when these items become final.”

{¶ 21} Second, the revised Form 10-K that Navistar filed with the SEC on December 10, 2007, pertaining to the 2005 fiscal year, specifically stated that Navistar “determined that [it] *did not apply FASB Statement No. 109 properly* and that a full valuation allowance should be established for net U.S. and Canadian deferred tax assets based on the weight of positive and negative evidence, particularly our recent history of operating losses.” (Emphasis added.)

{¶ 22} Third, Form 8-K, which Navistar filed with the SEC in April 2006, identified four matters that required restatement; these matters did not involve deferred-tax assets. But the document went on to enumerate 11 “items being reviewed,” and those items included deferred-tax assets.

{¶ 23} The tax commissioner also urged the BTA to consider a civil complaint filed by Navistar’s parent corporation against its former accountants. *See Navistar Internatl. Corp. v. Deloitte & Touche, L.L.P.*, N.D.Ill. case No. 1:11-cv-03507. The BTA examiner accepted the complaint into evidence, but refused to consider the complaint as an admission by Navistar. In its decision, the BTA took no position on the examiner’s ruling, and instead stated as follows:

While we acknowledge the commissioner's reference to the existence of litigation between [Navistar] and the accounting firm previously involved in the audit of its financial returns, such litigation and the allegations made by [Navistar] therein need not serve as the basis upon which we decide this matter given the grant [to audit the accuracy of the amortizable amount] provided by R.C. 5751.53(D).

BTA No. 2010-575, 2013 Ohio Tax LEXIS 7601, 9, (Dec. 31, 2013), fn. 4.

Expert testimony

{¶ 24} The tax commissioner introduced testimony of accounting professor Ray Stephens. The hearing examiner accepted Stephens as an expert for purposes of the issues before the board, and the BTA reinforced that ruling by “reject[ing] as unfounded [Navistar’s] argument that * * * Stephens[] be found unqualified to offer an expert opinion regarding the accounting issues involved herein.” *Id.*

{¶ 25} Stephens expressed his opinion that the amount of Navistar’s CAT credit should be zero. Stephens based his opinion on his review of Navistar’s SEC filings and the civil complaint, in addition to his accounting knowledge. On cross-examination, Stephens opined that Navistar’s restatement of its financials amounted to an admission that its original valuation allowance was not in compliance with GAAP. In other words, Stephens based his opinion concerning the GAAP-compliance of the initial valuation allowance on Navistar’s supposed admission that it was not in compliance with GAAP.

{¶ 26} Navistar introduced two experts who testified to the crucial factual issue that the BTA ought to resolve in this case: whether the original valuation allowance for 2004 was in compliance with GAAP.

{¶ 27} Douglas Pinney, a certified public accountant and a specialist in income-tax accounting issues, opined that the restated valuation allowance should have no effect on the computation of the CAT credit. Pinney supported his conclusion by noting that his review of documentation indicated that the tax-adjusting entries on Navistar’s books in relation to the restated financials did not occur until after the filing deadline for the Amortizable Amount Report and were not part of the 2004 books and records that the statute requires be used in computing the amortizable amount. Pinney also explained that the valuation allowance involves subjective factors with respect to projecting whether the benefit of deferred-tax assets is likely to be actually realized. For that reason, Pinney testified, there is never a single number that is the “correct” valuation allowance, but instead, there is a range of numbers that might be acceptable for a valuation allowance under GAAP. Pinney testified that the original valuation allowance, which was made part of the company’s books and records in early 2005 and formed the basis for the 2006 Amortizable Amount Report, was reasonable and was in compliance with GAAP.

{¶ 28} Pinney also testified about Navistar’s Form 8-K from 2006 and Form 10-K with the restated financials from 2007. On Form 10-K, Navistar stated, “[W]e did not apply FASB Statement No. 109 properly” with respect to the deferred-tax assets and valuation allowance. Asked how he reconciled that statement with his other opinions, Pinney responded that the quoted statement “doesn’t necessarily mean that the valuation allowance itself was incorrect.” With respect to Navistar’s Form 8-K, Pinney testified that Navistar was “simply indicat[ing] they were going to review this area,” i.e., the deferred-tax assets and valuation allowance.

{¶ 29} Navistar also called Beth Savage, a certified public accountant who was a consultant for troubled companies. Her testimony amplified Pinney’s point that the determination of the valuation allowance involves subjective judgment in

weighing factors and predicting future events. She described the full valuation allowance in the restated financials as a “very conservative” position. Like Pinney, she testified that the credit calculation on the 2006 Amortizable Amount Report was proper because “[t]he calculation was done at a point in time[;] they used the information that was available to [them] then, and I believe that amount is supportable under generally accepted accounting principles.”

Fact testimony

{¶ 30} Navistar called its vice president of tax, Carol Garnant, who confirmed the subjective aspect of the valuation allowance and added the historical perspective of having gone through the restatement process in her position at Navistar, testifying that neither the IRS nor any state authorities had found any fraudulent entries or accounting practices. She also testified that Navistar had in fact been able to realize the value of its NOLs.

{¶ 31} Navistar also called three Ohio Department of Taxation officials as on cross-examination to establish the historical background of the CAT credit.

THE BTA DECISION

{¶ 32} The BTA affirmed the tax commissioner’s determination. Taking as its starting point R.C. 5751.53(D)’s authorization for the commissioner to “ ‘correct *any errors* found upon audit,’ ” the BTA concluded that Navistar’s Form 10-K and the transmittal letter that it sent with its Amortizable Amount Report were admissions that the 2007 restatement of the valuation allowance constitutes the correction of error in the earlier financial statements. (Emphasis added by the BTA.) 2013 Ohio Tax LEXIS 7601, 8. The BTA stated, “It is uncontested [that Navistar] undertook a comprehensive restatement of its financial statements so that they were ultimately revised in accordance with generally accepted accounting principles.” *Id.* Following the tax commissioner’s reasoning, the BTA treated Navistar’s statements as establishing that the change in valuation allowance corrected an earlier error. Under this analysis, the restated

valuation allowance was in compliance with GAAP but the original valuation allowance was not. In reaching its conclusion, however, the BTA ignored Navistar’s accounting evidence, which contradicted the idea that the original valuation allowance was not in compliance with GAAP.

ANALYSIS

{¶ 33} Navistar presented a twofold argument to the BTA and presents the same arguments here. On the one hand, Navistar asserts that the tax commissioner lacked any authority to adjust the valuation allowance based on the restatement of financial statements that occurred after the June 2006 deadline for filing the Amortizable Amount Report. On the other hand, Navistar presented considerable evidence to the BTA to negate any inference that the 2007 restatement of the valuation allowance constituted the correction of an error in the original financial statements—thereby implicitly conceding that the tax commissioner might rely on a later financial restatement if it constituted the correction of an error in the original.

{¶ 34} We disagree with Navistar’s first argument. The plain language of R.C. 5751.53(D) authorizes the tax commissioner to “adjust” the amortizable amount on account of his review of the “accuracy” of the reported amount and empowers the commissioner to “correct any errors found upon audit.” The deadline for doing so was June 30, 2010, so we must conclude that the commissioner could order corrections based on information that became available to him before that date—even if the information became available only after the deadline for filing the report in June 2006. It follows that if the 2007 restatement of the valuation allowance cured an earlier inaccuracy or corrected an earlier error, it lay within the tax commissioner’s authority to adopt the restated valuation allowance.

{¶ 35} We also agree with the tax commissioner that because the amortizable amount is computed by using amounts reflected in the company’s

books and records, R.C. 5751.53(A)(9)(a) and 5751.53(A)(6)(b), and those books and records must be maintained in accordance with GAAP, R.C. 5751.53(A)(10), a correction to the books and records that brings them into compliance with GAAP is a correction that the tax commissioner should recognize when issuing his determination regarding the accuracy of the amortizable amount pursuant to R.C. 5751.53(D). That conclusion also furnishes the standard for determining whether the original valuation allowance was inaccurate or in error for purposes of applying R.C. 5751.53(D): if the original valuation allowance is established to have been within the range acceptable under GAAP, then the later restatement of the valuation allowance does not involve error correction, and the tax commissioner lacks authority to adopt the restated allowance.

{¶ 36} The BTA acknowledged the tax commissioner's statutory authority to correct error, but the BTA's decision is unreasonable and unlawful in its failure to consider and weigh all the conflicting evidence concerning whether the original valuation allowance was in compliance with GAAP. Specifically, the BTA considered the official statements made by Navistar in its SEC filings as admissions, but it failed to consider the countervailing expert and lay testimony offered by Navistar. We therefore vacate the BTA's decision and remand the cause with the instruction that the BTA carefully consider and weigh all pertinent evidence before determining whether Navistar's original valuation allowance was in compliance with GAAP.

{¶ 37} One point of dispute remains. Before the BTA and this court, the tax commissioner has sought to rely on the complaint filed in Illinois by Navistar's parent corporation against its former accountants. The hearing examiner admitted the complaint as evidence but rejected the tax commissioner's argument that it constituted admissions against interest or statements by a party opponent. The examiner also limited the tax commissioner's use of the complaint in examining witnesses.

{¶ 38} The BTA’s decision neither explicitly nor implicitly overturned the hearing examiner’s ruling; instead, the board acquiesced in the ruling by noting that it need not rely on the complaint in reaching its decision. 2013 Ohio Tax LEXIS 7601, 9, fn. 4. As a result, the hearing examiner’s ruling that precluded the use of the Illinois complaint as an admission has merged into the BTA’s decision and constitutes the law of this case, subject to challenge by the tax commissioner in this appeal. *See Grover v. Bartsch*, 170 Ohio App.3d 188, 2006-Ohio-6115, 866 N.E.2d 547, ¶ 9 (“Interlocutory orders * * * are merged into the final judgment,” with the result that “an appeal from the final judgment includes all interlocutory orders merged with it”).

{¶ 39} The tax commissioner has not adequately challenged the BTA’s evidentiary ruling: he has neither specified it as an error in a protective notice of cross-appeal¹ nor formally contested it through a proposition of law and argument in his brief. *See Household Fin. Corp. v. Porterfield*, 24 Ohio St.2d 39, 46, 263 N.E.2d 243 (1970) (an issue “considered by the board and alluded to in both oral argument and the briefs” was nonetheless “deemed to be abandoned” when it was “not presented to this court as a proposition of law and argued as such”); *E. Liverpool v. Columbiana Cty. Budget Comm.*, 116 Ohio St.3d 1201, 2007-Ohio-5505, 876 N.E.2d 575, ¶ 3. Although the commissioner did allude to the issue in a footnote of his brief to this court, and although he reiterated the point during oral argument, his bare assertion that the Illinois complaint constitutes admissions against interest does not acknowledge the BTA examiner’s contrary ruling, much less advance specific arguments in opposition to that ruling. *See Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921

¹ In BTA appeals, it has been held necessary in some circumstances for an appellee to file a protective cross-appeal in order to advance alternative grounds for affirmance or to overturn explicit rulings of the BTA. *See, e.g., Dayton-Montgomery Cty. Port Auth. v. Montgomery Cty. Bd. of Revision*, 113 Ohio St.3d 281, 2007-Ohio-1948, 865 N.E.2d 22, ¶ 33. We do not reach the question whether a protective cross-appeal was necessary here, because we hold that the tax commissioner waived the issue.

N.E.2d 1038, ¶ 53 (argument effectively waived where “[n]o argument is supplied regarding whether the relevant case law, applied to the facts of this case, justifies a decision in [the party’s] favor”); *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 271, 2011-Ohio-2638, 951 N.E.2d 751, ¶ 19 (“it is not generally the proper role of this court to develop a party’s arguments”). The tax commissioner has not shouldered the burden of demonstrating an abuse of discretion by the BTA’s examiner. It follows that the tax commissioner has waived his right to rely on the Illinois complaint as admissions by Navistar and may not do so on remand.

CONCLUSION

{¶ 40} For these reasons, we vacate the BTA’s decision and remand the cause with the instruction that the BTA determine, based on a consideration of all the evidence in accordance with this opinion, whether the valuation allowance originally reported on Navistar’s Amortizable Amount Report was or was not in compliance with GAAP. If the BTA determines that the original valuation allowance was in compliance with GAAP, the BTA shall reverse the tax commissioner’s determination and reinstate the amortizable amount as originally reported. If the BTA determines that the original valuation allowance was not in compliance with GAAP, the BTA shall affirm the tax commissioner’s determination.

Judgment accordingly.

O’CONNOR, C.J., and LANZINGER, KENNEDY, and O’NEILL, JJ., concur.

PFEIFER and O’DONNELL, JJ., dissent.

PFEIFER, J., dissenting.

{¶ 41} I agree with much of the majority opinion, including its most important holding, that R.C. 5751.53(D) authorizes the tax commissioner to issue a final determination changing the amount of potential commercial-activity-tax

credit to reflect a taxpayer’s correction of an inaccuracy or error in the original reported amount. I agree that the books and records used to compute the amortizable amount must be maintained in accordance with generally accepted accounting principles (“GAAP”) and that when such books and records are corrected to become GAAP-compliant, the tax commissioner should recognize that correction when determining the amortizable amount pursuant to R.C. 5751.53(D).

{¶ 42} I disagree, however, with the majority’s ultimate disposition of the case, vacating the decision of the Board of Tax Appeals (“BTA”) and remanding the cause to the BTA. The majority concludes that the BTA did not consider the testimony of appellant Navistar, Inc.’s experts regarding whether the original valuation allowance was in compliance with GAAP, and it admonishes the BTA to, on remand, “carefully consider and weigh all pertinent evidence before determining whether Navistar’s original valuation allowance was in compliance with GAAP.” Majority opinion at ¶ 36.

{¶ 43} Does this court have a reason to believe that the BTA was not “careful” in making its determination the first time around? Is assessing carefulness a part of our standard of review of BTA decisions? The fact that Navistar’s experts are not mentioned in the BTA’s decision does not mean that the BTA failed to take into account their testimony. Obviously, the BTA placed more weight on the statements that Navistar itself made at the time it filed the amortizable amount with the Department of Taxation. The BTA quotes the statement from Navistar’s assistant director of tax that Navistar was “ ‘currently undergoing a restatement of its financial statements for the years 2002, 2003, 2004 and 2005’ ” and that “ ‘[Navistar] believe[s] that changes will occur to the 2002, 2003 and 2004 financial statements as part of this examination which will impact the return and report that we are filing today.’ ” BTA No. 2010-575, 2013 Ohio Tax LEXIS 7601, 9 (Dec. 31, 2013). The BTA decision also quotes from

Navistar's statement to the Securities and Exchange Commission apprising it of errors in Navistar's previously filed financial statements:

In its Form 10-K, [Navistar] stated, in part: "In addition, in previously issued financial statements, we had established a partial valuation allowance with respect to our net U.S. and Canadian deferred tax assets. We reassessed our need for a valuation allowance and determined that *we did not apply FASB Statement No. 109 properly* and that a full valuation allowance should be established for net U.S. and Canadian deferred tax assets based on the weight of positive and negative evidence, particularly our recent history of operating losses."

(Emphasis sic.) *Id.* at fn. 5. The BTA concluded that Navistar's books were "corrected to comport with generally accepted accounting principles." *Id.* at 11. There is no reason for this court to tamper with that factual finding. This case should be over.

{¶ 44} I also disagree with the majority's ruling regarding the complaint by Navistar's parent corporation filed in federal court in Illinois against its former accountants, Deloitte & Touche, L.L.P. ("Deloitte"), alleging multiple GAAP violations in accounting services Deloitte performed for Navistar in the time period relevant to this case. *Navistar Internatl. Corp. v. Deloitte & Touche, L.L.P.*, N.D.Ill. case No. 1:11-cv-03507. One assertion in the complaint reads as follows:

As a direct result of Deloitte's fraudulent statements and omissions, as well as Deloitte's incompetence and malpractice, Navistar was forced to fire Deloitte in 2006, hire new auditors,

overhaul its accounting records and, in 2007, issue a massive restatement of its financial statements for fiscal years 2003, 2004, and the first three quarters of 2005 * * *.

{¶ 45} The majority holds that “the tax commissioner has waived his right to rely on the Illinois complaint as admissions by Navistar and may not do so on remand.” Majority opinion at ¶ 39. But the complaint has been admitted into evidence, and it is unclear what the BTA’s position is on whether the tax commissioner can use the complaint to prove his case. It has some evidentiary value. The hearing examiner, near the end of the hearing, told the tax commissioner’s counsel, “You can make any argument you want about it at this point. It is evidence in the record.” The BTA itself never ruled on how the complaint could be used; it concluded only that it did not need to rely on the complaint to arrive at its decision:

While we acknowledge the commissioner's reference to the existence of litigation between [Navistar] and the accounting firm previously involved in the audit of its financial returns, such litigation and the allegations made by [Navistar] therein need not serve as the basis upon which we decide this matter given the grant provided by R.C. 5751.53(D).

2013 Ohio Tax LEXIS 7601 at 9, fn. 4. This is not a ruling that precludes the use of the complaint for any reason. How the commissioner may use the complaint remains an open question. It is the BTA, as fact-finder, that must decide what significance to accord the complaint on remand.

O’DONNELL, J., concurs in the foregoing opinion.

Maryann B. Gall; Vorys, Sater, Seymour & Pease, L.L.P., Laura A. Kulwicki, and Steven L. Smiseck, for appellant.

Michael DeWine, Attorney General, and Barton A. Hubbard, Assistant Attorney General, for appellee.

Bricker & Eckler, L.L.P., Mark A. Engel, and Anne Marie Sferra, urging reversal for amici curiae, Ohio Manufacturers' Association and Ohio Chamber of Commerce.

OHIO BOARD OF TAX APPEALS

BEST VENTURES, CORP., (et. al.),

CASE NO(S). 2014-3293

Appellant(s),

(REAL PROPERTY TAX)

vs.

DECISION AND ORDER

WOOD COUNTY BOARD OF REVISION, (et. al.),

Appellee(s).

APPEARANCES:

For the Appellant(s) - BEST VENTURES, CORP.
Represented by:
CHRISTOPHER M. FRASOR
SPITLER HUFFMAN, LLP
131 EAST COURT STREET
BOWLING GREEN, OH 43402

For the Appellee(s) - WOOD COUNTY BOARD OF REVISION
Represented by:
KELLEY A. GORRY
RICH & GILLIS LAW GROUP, LLC
6400 RIVERSIDE DRIVE, SUITE D
DUBLIN, OH 43017

Entered Thursday, July 16, 2015

Mr. Williamson, Ms. Clements, and Mr. Harbarger concur.

Appellant Best Ventures Corp. Inc. ("owner") appeals a decision of the board of revision ("BOR") which determined the value of the subject real property, a hotel, specifically parcel number Q61-400-090102001000, for tax year 2013. This matter is considered upon the notice of appeal, the transcript certified by the BOR pursuant to R.C. 5717.01, and any written argument filed by the parties.

The subject's total true value for tax year 2013 was initially assessed at \$1,562,300. A decrease complaint was filed by the owner with the BOR seeking a reduction in total value to \$985,000, as reflected in an appraisal it provided; no countercomplaint was filed. The BOR, in rendering its determination, considered a sale of another area hotel that was also before the BOR and which the owner's appraiser had also appraised; the BOR concluded that since the instant property was "better" than the other hotel, which, within days of the BOR hearing, had sold for \$1.6 million, even though the appraiser had appraised it for less than its ultimate sale price, the other hotel's sale price supported the auditor's original valuation of the subject. Consequently, the BOR issued a decision maintaining the initially assessed valuation, which led to the present appeal.

When cases are appealed from a board of revision to this board, an appellant must prove the adjustment in value requested. See, e.g., Shinkle v. Ashtabula Cty. Bd. of Revision, 135 Ohio St.3d 227, 2013-Ohio-397. As the Supreme Court of Ohio has consistently held, "[t]he best method of determining value, when such information is available, is an actual sale of such property between one who is willing to sell but not

compelled to do so and one who is willing to buy but not compelled to do so. *** However, such information is not usually available, and thus an appraisal becomes necessary." *State ex rel. Park Invest. Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410. Such is the case in this matter, as the record does not indicate that the subject property "recently" transferred through a qualifying sale.

Before the BOR, the owner presented the appraisal report and testimony of Robert D. Domini, MBA, MAI, a state certified general real estate appraiser in Ohio. His report indicates that the subject property is improved with a "[t]wo story limited service hotel built in 1981 having a gross building area of 42,559 square feet, per Auditor records. There are approximately 98 rooms." The subject parcel consists of 3.33 acres. S.T., Ex. F at 1.

Mr. Domini utilized both a sales comparison and an income approach to render his value determination herein. Under the income approach, because "the subject is an operating hotel," Mr. Domini determined a "going-concern" value, i.e., "the total value of the property, including both the real property and the personal property attributed to business value," as well as a fee simple value. S.T., Ex. F at cover letter. His report indicates that "[t]he cost approach is not developed due to the varying ages of the improvements and the subjectivity involved in the estimation of depreciation which would provide an unreliable estimate of value." S.T., Ex. F at 27.

Using the sales comparison approach, Mr. Domini compared the subject to four properties which sold between August 2010 and March 2013 that he deemed comparable. He made quantitative adjustments to the comparables' sales prices for differences from the subject, including land size/location, age/condition, amenities, and entry, resulting in a value estimate of \$13,000 per room, or \$1,300,000, rounded. S.T., Ex. F at 9-16.

Under the income approach, Mr. Domini considered the subject's as well as the market's average daily room rates ("ADR") and occupancy rates to arrive at an effective gross income ("EGI") of \$592,358. While Mr. Domini indicated that he relied upon market data in his analysis, the ADR and occupancy rates chosen were the average rates of the subject, S.T., Ex. F at 18, 21, which Mr. Domini indicated was "an aging facility with few amenities located in a competitive market." He concluded that "[u]nless management identifies a larger market share and additional expense reductions for the subject, the viability of the property as a hotel will be [in] jeopardy." S.T., Ex. F at 20. From such EGI, Mr. Domini deducted general operating expenses of 70% (excluding real estate taxes) taken from a market survey, and a reserve for replacement of 5% based upon a market range and the subject's age, to arrive at a net operating income ("NOI") of \$184,141. Mr. Domini then capitalized the income at 14.8%, including tax additur, based upon a review of comparable sales' cap rates and market information. He concluded to a final value of the going-concern, via the income approach, of \$1,200,000, rounded. S.T., Ex. F at 17-26.

He went on to allocate the going-concern value, calculating the "business value" using "a method developed by Steve Rushmore, MAI, president of HVS International." S.T., Ex. F at 28. Then, starting with the \$1,200,000 going concern value, he deducted \$1 for the estimated depreciated value of furniture, fixtures and equipment, "based upon the depreciated value of the equipment as supplied by the owner," and \$215,000 for the estimated business value, which included the officers' salaries at zero, and the franchise and management fees, i.e., \$59,236 and \$155,000, respectively, resulting in a fee simple value of \$985,000. S.T., Ex. F at 28. In reconciling the foregoing approaches, Mr. Domini concluded to an overall fee simple value for the subject property for tax year 2013 of \$985,000, relying upon the income approach to value, as supported by the sales comparison approach.

Upon review of the owner's appraisal evidence, we must conclude that the BOR's determination that the report did not provide competent, probative evidence of the subject's value was proper. First, although the cover letter to the report indicates that "[t]he appraisal states our opinion of the property's fee simple market value as of January 1, 2013," such statement is later belied by other statements in the report, including later in the same cover letter, where it states that "the market value of the fee simple interest of the subject ***

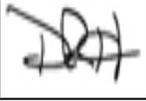
was as of July 2, 2013 ***." The same statement relating to value "as of July 2, 2013" is repeated in the report's conclusion. S.T., Ex. F at 28. Therefore, it is unclear whether the report actually provides an opinion of value as of the relevant tax lien date.

Further, Mr. Domini's derivation of value using the income approach includes substantial reliance upon the subject's actual performance, which is inappropriate since the appraiser clearly indicated through the report and his testimony that the property suffered under poor management and was not operating at stabilized levels; if the property was underperforming due to management issues, it is questionable whether the subject's actual experience was reflective of the market. While Mr. Domini indicated he relied upon the market, he utilized the subject's actuals in several categories, including ADR and occupancy rates, and franchise and management fees. In addition, there is no support in the report for the methodology used and the outcome derived in his fee simple analysis, including the amounts attributed to business value and personal property, i.e., furniture, fixtures and equipment, which necessarily inform the fee simple value to which he concluded. His reliance upon others' conclusions and methodologies in that regard, e.g., Mr. Rushmore and the owner, without more support for doing so, does not provide substantive, probative evidence upon which this board may rely. Accordingly, we, like the BOR, decline to adopt the income approach set forth in the appraisal.

Although not primarily relied upon in the appraiser's final valuation determination, Mr. Domini's sales comparison approach conclusion of \$1,300,000 is actually more supportive of the county's valuation of the subject. It is therefore the order of this board that the total true value of the subject property for tax year 2013 shall be that which the BOR previously determined, as follows:

TRUE VALUE
 \$1,562,300
 TAXABLE VALUE
 \$ 546,800

It is the decision and order of the Board of Tax Appeals that the Wood County Auditor shall list and assess the subject property in conformity with this decision.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Ms. Clements		
Mr. Harbarger		

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



 Kathleen M. Crowley, Board Secretary