2011
Ohio Tax Update

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Personal Income

In *Lang v. Levin*, (Jan. 11, 2011), BTA No. 2010-K-2493, the BTA found that it did not have authority to overturn the tax commissioner's decision requiring the taxpayer to repay an erroneously issued $15,000 refund plus interest. The taxpayer argued that he no longer had the resources to repay the erroneously-issued refund. Given that the State's error created the problem, the taxpayer's notice of appeal requested that the State bear part of the cost of its mistake. The taxpayer proposed that the BTA order the tax commissioner and the taxpayer to settle the dispute for $7,500. However, lacking the authority to grant the relief that the taxpayer requested, the BTA affirmed the tax commissioner's final determination.

In *MacClellan v. Levin*, (Feb. 1, 2011), BTA No. 2010-K-2595, the BTA concluded that it lacked jurisdiction to hear the matter because the taxpayer failed to assert an error in the tax commissioner's decision with sufficient specificity. The taxpayer's notice of appeal referenced her prior personal income tax payments and remaining balance; she also requested the opportunity to pay the amounts owed in monthly installments. The BTA found that the taxpayer's notice of appeal failed to "enumerate in definite and specific terms the precise errors claimed." Thus, the taxpayer failed to meet statutory requirements for appeal were not met and the BTA affirmed the tax commissioner's decision. *See also Steele v. Levin*, (Feb. 1, 2011), BTA No. 2010-K-3191; *Krouskoupf v. Levin,* (Aug. 9, 2011), BTA No. 2010-A-2758; *Brown v. Levin,* (Sept. 27, 2011), BTA No. 2010-K-663.

In *Matthews v. Levin,* (Mar. 4, 2011), BTA No. 2010-K-1923, the BTA held that the tax commissioner lacked the authority to evaluate the merits of a taxpayer's reassessment petition relating to a personal income tax assessment. Because the taxpayer failed to timely file an amended individual income tax return reflecting changes in her federal adjusted gross income, as required by R.C. 5747.10, the taxpayer received an income tax assessment for tax year 2006 that included interest and penalties. Under R.C. 5747.13(B), a taxpayer may challenge an assessment by timely filing a petition for reassessment and paying the amount required by statute. However, the taxpayer failed to comply with the former R.C. 5747.13(E)(2) by paying "the assessment, including interest but not the penalty." Therefore, the BTA affirmed the tax commissioner's final determination because the taxpayer had not remitted "the entire amount of the assessment required by statute at the time her petition for reassessment was filed." *See also Massacci v. Levin,* (Mar. 4, 2011), BTA No. 2010-A-2112; *Rumple v. Levin,* (Mar. 4, 2011), BTA No. 2010-A-3022; *Shuster v. Levin,* (Mar. 4, 2011), BTA No. 2010-K-3857; *Senu-Oke v. Levin,* (Apr. 26, 2011), BTA No. 2010-M-1965 (lack of jurisdiction because petitioner failed to file within the sixty-day limitation period pursuant to R.C. 5747.13(B)); *Hein v. Levin,* (May 2, 2011), BTA No. 2010-K-1420; *Ward v. Levin,* (May 2, 2011), BTA No. 2010-A-2423; *Boakye-Dankwa v. Levin,* (May 17, 2011), BTA No. 2010-K-837; *Brandt v. Levin,* (May 17, 2011), BTA No. 2010-M-860; *Cullin v. Testa,* (June 7, 2011), BTA No. 2011-M-626; *Brunetti v. Levin,* (July 26, 2011), BTA No. 2010-M-540; *Krouskoupf v. Levin,* (Aug. 2, 2011), BTA No. 2011-K-610; *Buckley v. Testa,* (Aug. 16, 2011), BTA Nos. 2011-A-718 and 2011-A-719; *Vallo v. Levin,* (Oct. 25, 2011), BTA No. 2011-M-867; *Schafer v. Levin,* (Dec. 13, 2011), BTA No. 2011-K-920; *Krouskoupf v. Levin,* (Dec. 13, 2011), BTA No. 2011-K-622.

In *Steiner v. Levin,* (Mar. 4, 2011), BTA No. 2010-M-2443, the BTA dismissed the taxpayers' appeal for lack of jurisdiction due to the taxpayers' failing to identify a specific error in their notice of appeal regarding the tax commissioner's determination, as required by R.C. 5717.02. The tax commissioner dismissed the taxpayers' petition for reassessment because the taxpayers failed to file their 2007 individual income tax return prior to the assessment and did not pay the total tax and interest with the petition as required by former R.C. 5747.13(E). Further, in their appeal, the taxpayers did not identify any error on the tax commissioner's part, but rather challenged the state's ability to assess income taxes. *See also Vazquez v. Levin,* (Mar. 7, 2011), BTA No. 2010-K-1709.

In *Hicks v. Levin,* (May 24, 2011), BTA Nos. 2011-M-123—2011-M-126, the BTA dismissed the taxpayer's appeal for lack of jurisdiction due to the taxpayer failing to file a timely notice of appeal with the tax commissioner. The taxpayer filed a notice of appeal with the BTA, but failed to file a copy of the notice of appeal with the tax commissioner. As a result, the taxpayer failed to satisfy the sixty-day deadline for filing a copy of the notice of appeal with both the BTA and the tax commissioner, as required under R.C. 5717.02. *See also Krouskoupf v. Levin,* (Mar. 4, 2011), BTA No. 2010-K-1404; *Beal v. Levin,* (Mar. 4, 2011), BTA No. 2010-K-2784; *Ebert v. Levin,* (Mar. 4, 2011), BTA No. 2010-M-2870; *Mackey v. Levin,* (Mar. 4, 2011), BTA No. 2010-K-3430; *Shoup v. Levin,* (Mar. 4, 2011), BTA No. 2010-M-3660; *Schweitzer v. Levin,* (Mar. 22, 2011), BTA No. 2010-M-

1512; *Graham v. Levin,* (Mar. 22, 2011), BTA No. 2010-M-2991; *Michel v. Levin,* (Mar. 29, 2011), BTA No. 2011-M-5.

In *Braham v. Levin,* (June 28, 2011), BTA No. 2010-M-2256, the BTA dismissed the appeal, holding that it did not have jurisdiction to hear the taxpayers' appeal due to the taxpayers' failure to identify a specific error in their notice of appeal regarding the tax commissioner's determination, as required by R.C. 5717.02. Although the BTA did not determine the merits of the case, it did state that, had it possessed jurisdiction to consider the case, it would have concluded that the tax commissioner was correct in dismissing the appellants' petition for reassessment because payment of tax and interest due was not made prior to filing the petition for reassessment, as required by former R.C. 5747.13(E)(2). *See also Castro v. Levin,* (Aug. 30, 2011), BTA No. 2010-A-2484.

Corporation Franchise

In *Oakley Roofing Co. v. Levin,* (Mar. 4, 2011), BTA No. 2010-M-2347, the BTA affirmed the tax commissioner's final determination, which dismissed the taxpayer's petition for reassessment because the taxpayer had not made payment of interest before filing its petition. The taxpayer challenged a corporation franchise assessment which indicated that interest and penalties were outstanding, although the taxpayer paid the tax due. Therefore, the tax commissioner lacked jurisdiction to consider the petition because R.C. 5733.11(E)(1) requires that "payment of the assessment, including interest but not penalty" be made at the time of filing a petition for reassessment.

In *Michael Falatok Enter., Inc. v. Levin,* (May 17, 2011), BTA No. 2010-K-902, the BTA dismissed the taxpayer's appeal for lack of jurisdiction due to the taxpayer failing to identify a specific error in its notice of appeal, as required under R.C. 5717.02. The tax commissioner dismissed the taxpayer's petition for reassessment regarding a corporation franchise tax assessment issued for tax year 2007 because the taxpayer failed to comply with filing requirements imposed by R.C. 5733.11(E). Further, the taxpayer admitted to being unable to "describe an error made by the tax commissioner," but rather challenged the penalty amount imposed as being unreasonable. However, the tax commissioner was unable to grant such equitable relief. Therefore, the BTA did not have jurisdiction to address the matter. *See also The Price is Right Travel Serv., Inc. v. Levin,* (Oct. 25, 2011), BTA No. 2009-M-702 (holding that the BTA lacked jurisdiction to hear the matter because the appellant failed to identify a specific error).

In *Nicholson, Inc. v. Levin,* (May 17, 2011), BTA No. 2010-A-1088, the BTA affirmed the tax commissioner's final determination, holding that the tax commissioner did not have jurisdiction to consider the taxpayer's petition for reassessment because the taxpayer failed to pay the total tax and interest assessed with its petition for reassessment as required under R.C. 5733.11(E)(1). *See also Koehler Counselors, Inc. v. Testa,* (Nov. 15, 2011), BTA No. 2011-M-713.

In *WEBMLS v. Levin,* (June 7, 2011), BTA No. 2010-M-3421, the BTA dismissed the taxpayer's appeal for lack of jurisdiction because the tax commissioner had yet to issue a final determination from which the taxpayer could file an appeal pursuant to R.C. 5717.02.

Municipal Income

In *Ladd v. City of Oregon,* (Mar. 29, 2011), BTA No. 2008-K-2371, the BTA reversed the decision of the City of Oregon Tax Board of Review and held that the taxpayer was entitled to deduct certain expenses listed on federal form 2106-EZ. The taxpayer claimed deduction for unreimbursed business expenses; however, Oregon's tax department informed the taxpayer that his resident city was located in the "metropolitan area" and was nondeductible. The IRS refers to "metropolitan area" without providing a definition of the term, so Oregon attempted to define the term as "any location within 60 miles from the site where work is being performed…." Thus, the taxpayer's 43 mile distance was within the definition created by Oregon. Nonetheless, the BTA determined that the city's informal adoption of a definition for "metropolitan area" constituted an improper limitation.

In *Ochsner v. City of Cincinnati,* (June 14, 2011), BTA No. 2008-K-2053, the BTA affirmed the Municipal Board of Appeal's ("MBOA") decision that the taxpayer's severance pay was taxable; the severance pay qualified as "other compensation." The taxpayer was a resident of Kentucky; however, the taxpayer's employer withheld and remitted municipal income tax to the City of Cincinnati throughout his thirty-five years of employment until retirement on December 31, 2006. The taxpayer signed a "Waiver and Release of Claims Under the Cinergy Corp. Merger Severance Plan for Non-Union Employees," in exchange for separation pay in a lump sum amount of $153,367.23, of which $3,220.71 in income tax was withheld and remitted to the City of Cincinnati. The taxpayer sought refund of $3,220.71 in his 2007 city income tax return, asserting that he no longer worked for his former employer in 2007 and that his former employer's tax records incorrectly identified him as an employee instead of as a retiree. The MBOA affirmed the city tax commissioner's

denial of the taxpayer's refund request which stated that "[s]everance pay is earned when an employee is working and it is taxable to the city based on the employee's work location. You worked in the City of Cincinnati before you retired." The BTA determined that Section R5 of the City of Cincinnati Income Tax Rules and Regulations provides that tax is imposed on "other compensation," among other items. Further, other compensation is defined to include severance pay and "incentive payments, no matter how described, including, but not limited to, payments to induce early retirement." Pursuant to the terms of the agreement, the taxpayer's former employer agreed to pay him a lump sum in exchange for his resignation and the taxpayer acknowledged that he would not have been entitled to the benefits absent his resignation. Therefore, the BTA held that whether the lump sum payment was defined as a severance agreement, or as an agreement intended to induce retirement, it clearly fell within the definition of "other compensation," which is subject to Cincinnati income tax, as provided in *Matchett v. Chillicothe Mun. Bd. of Appeal* (Mar. 2, 1010), BTA No. 2007-M-1148, unreported (distinguishing *Czubaj v. Tallmadge,* Summit App. No. 21389, 2003-Ohio-5466).

In *Middleton v. Myers,* 193 Ohio App.3d 632, 2011-Ohio-2470, the defendant appealed his conviction and sentence in the Middletown Municipal Court for failing to file his municipal income tax returns for 2003 and 2004, which violated Section 890.18(a)(1) of the Middletown Municipal Code ("MMC"). The defendant alleged that his Middletown residence was merely a "temporary abode" rather than his "domicile," because he lacked intent to remain at his Middletown residence for an indefinite time, and that the Court did not apply the proper legal standard. The court determined that, pursuant to *Cleveland v. Surella* (1989), 61 Ohio App.3d 302, 305, 572 N.E.2d 763, "domicile" has generally been defined as a "residence in fact, combined with the intention of making the place of residence one's home for an indefinite period." Further, *State ex rel. Kaplan v. Kuhn* (C.P. 1901), 8 Ohio N.P. 197, 202, 11 Ohio Dec. 321, 333, provides that "it is necessary to look not only at the acts and declarations of the person but to the surrounding circumstances, such as family relations, business pursuit and vocation in life, mode of life, means, fortune, earning capacity, conduct, habits, disposition, age, prospects, residence, lapse of time, voting and payment of taxes." The evidence presented showed that the defendant received and paid for water service for the two years that he filed and paid income tax in the year prior and for three years following the years at issue, in addition to the defendant's testimony that he ate, breathed, and slept at his Middletown residence. The defendant's only evidence that the Middletown residence was only a temporary abode was his claim that his domicile was "God's earth." Also, the defendant lived at the Middletown residence for more than 90 days during tax years 2003 and 2004; thus, he was a resident of Middletown pursuant to Section 890.02(a)(36) of the MMC and was obligated to file his municipal income tax returns for 2003 and 2004, as provided in Section 890.05(a) of the MMC. Therefore, the court affirmed the defendant's conviction and sentence.

In *Panther II Transp. v. Vill. of Seville Bd. of Income Tax Review,* (Aug. 23, 2011), BTA No. 2008-M-1247, the BTA reversed the Municipal Board of Appeals decision where it denied the refund of net profit income taxes paid by a motor transportation company. The motor transportation company contended that R.C. 4921.25 precluded the municipality from imposing the tax. The BTA applied the holding from *Cincinnati Bell Tel. Co. v. City of Cincinnati* (1998), 81 Ohio St. 3d 599, which provides that municipalities have a broad grant of power, including the power to tax, unless restricted by an affirmative act of the General Assembly. The BTA determined that R.C. 4921.25 exempts public utility companies and motor transportation companies from taxes imposed by local authorities. Therefore, the municipality improperly assessed taxes against the motor transportation company.

Employer Withholding

In *Neuroscience, Inc. v. Levin,* (Mar. 4, 2011), BTA No. 2010-M-324, the BTA dismissed the appeal, holding that it did not have jurisdiction to hear the taxpayer's appeal due to the taxpayer's failure to identify a specific error in its notice of appeal regarding the tax commissioner's determination, as required by R.C. 5717.02. The tax commissioner affirmed an employer withholding tax assessment and dismissed the taxpayer's petition for reassessment because the taxpayer had not paid the interest that was due by the time when the taxpayer filed the petition for reassessment. Although the BTA did not determine the merits of the case, it did provide that, if it had possessed jurisdiction to consider the case, it would have concluded that the tax commissioner was correct. *See also Classic Presentations, Inc. v. Levin,* (May 17, 2011), BTA No. 2010-K-299; *Bob's General Service Contracting, Inc. v. Levin,* (Sept. 27, 2011), BTA No. 2010-K-1491.

In *Dazzle Services v. Testa,* (Dec. 13, 2011), BTA No. 2011-A-1761, the BTA affirmed the tax commissioner's final determination, holding that he did not have jurisdiction to consider the employer's petition for reassessment because the employer failed to pay the total tax and interest due with the

petition for reassessment, as required by R.C. 5747.13(E)(5).

School District Income

In *Richardson v. Levin*, (Feb. 1, 2011), BTA No. 2010-K-1218, the BTA found that R.C. 5747.13(E)(2) requires taxpayers to include unpaid taxes and interest with petitions for reassessment. Because the taxpayer failed to accompany the petition for a school district income tax reassessment with the requisite payments, the BTA affirmed the tax commissioner's decision to dismiss the petition. *See also Mason & Bacon v. Levin*, (Feb. 8, 2011), BTA No. 2010-M-2724; *Shortt-Tucker v. Levin,* (Apr. 26, 2011), BTA No. 2010-K-577; *Mitchell v. Levin,* (May 17, 2001), BTA No. 2009-A-992; *Abernethy v. Levin,* (May 17, 2011), BTA No. 2010-K-533; *Garvine v. Levin,* (June 7, 2011), BTA No. 2009-M-927.

In *Butler v. Levin,* (Mar. 4, 2011), BTA No. 2010-K-3021, the BTA dismissed the taxpayer's appeal for lack of jurisdiction; the taxpayer failed to file a timely notice of appeal with the tax commissioner. The taxpayer filed a notice of appeal with the BTA, but failed to file a copy of the notice of appeal with the tax commissioner. Therefore, the taxpayer failed to satisfy the sixty-day deadline for filing a copy of the notice of appeal with both the BTA *and* the tax commissioner, as R.C. 5717.02 requires.

Ad Valorem

Procedure

In *Plain Local Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision* (2011), 130 Ohio St. 3d. 230, 2011-Ohio-3362, the Supreme Court ruled that an appraisal with an effective date other than tax lien date could nevertheless serve as probative evidence of value if an appraiser provided appropriate testimony that its contents applied equally as of tax lien date. In addition, where the BOE failed to object to the introduction of an appraisal report where the appraiser did not appear to testify before the BOR, the report nevertheless was competent evidence to be considered by the BOR and BTA.

In *Eastbrook Farms, Inc. v. Warren Cty. Bd. of Revision* (May 2, 2011), 194 Ohio App. 3d 193, 2011-Ohio-203, the Court of appeals ruled that a court of common pleas did not have to perform a trial de novo on an appeal from the BOR, but rather was required to consider all the evidence previously adduced and such additional evidence as it deemed appropriate. Moreover, it held that the trial court could rely upon an appraisal performed by an individual with a great deal of experience, even though the individual was not certified by the State.

In *Welsh v. Lake Cnty. Bd. of Revision*, (Jan. 4, 2011), BTA No. 2010-V-2872, the BTA found that it lacked jurisdiction to consider the merits of the case because no BOR decision had been issued. *See also Horner v. Levin*, BTA No. 2010-M-1037 (holding that the BTA lacked jurisdiction to hear the matter when no final determination by the tax commissioner had been made); *Buckley v. Levin,* (Mar. 4, 2011), BTA No. 2010-K-1592; *Choina v. Levin,* (Mar. 4, 2011), BTA No. 2010-K-1691; *Churlik v. Levin,* (Mar. 4, 2011), BTA No. 2010-A-1697; *Cullin v. Levin,* (Mar. 22, 2011), BTA No. 2010-A-1921; *Mitchell v. Levin,* (Mar. 22, 2011), BTA No. 2010-M-2014; *Nunn v. Levin,* (Mar. 29, 2011), BTA No. 2010-K-1297; *Krehnbrink v. Levin,* (Mar. 29, 2011), BTA No. 2010-M-2105; *Senn v. Levin,* (Apr. 8, 2011), BTA No. 2009-K-1114; *Tamarkin v. Levin,* (Mar. 29, 2011), BTA No. 2010-K-2786 (holding that an appellant must appeal a final determination and not a letter subsequently sent by the Ohio Department of Taxation's compliance division); *KC Bailey LLC v. Franklin Cnty. Bd. of Revision,* (June 28, 2011), BTA No. 2009-K-495 (holding that the BTA lacked jurisdiction to hear the case because the BOR had yet to issue a decision on the complaint).

In *East Cleveland Bd. of Educ. v. Cuyahoga Cnty. Bd. of Revision,* (Jan. 11, 2011), BTA Nos. 2010-K-2400 and 2010-K-2401, the BTA found that the BOR lacked jurisdiction to hear the case because the initial valuation complaint incorrectly identified the property owner. The BTA explained that accurately identifying the property owner in a valuation complaint is necessary to ensure that proper notice is provided to the owner(s). Because the valuation complaint had identified the property owner incorrectly, the BTA remanded the matter to the BOR with instructions to dismiss the complaint. The effect of the BTA's decision was to vacate the BOR's valuation determination and reinstate the values that the county Auditor originally assigned to the properties. *See also Equity Trust Co. v. Lucas Cnty. Bd. of Revision*, (Jan. 11, 2011), BTA Nos. 2010-K-1786—2010-K-1789 and 2010-K-2178 (affirming the BOR's determination that complaints were jurisdictionally deficient when they incorrectly identified the property owner); *Bastin v. Greene Cnty. Bd. of Revision*, (Jan. 11, 2011), BTA No. 2009-M-1825 (holding that the BOR lacked jurisdiction to hear a complaint that incorrectly identified the owner as an individual rather than a trustee); *Slaughter v. Butler Cnty. Bd. of Revision*, (Jan. 25, 2011), BTA No. 2009-K-4265 (same); *Holowecky v.*

Franklin Cnty. Bd. of Revision, (Feb. 8, 2011), BTA No. 2010-K-1074 (holding that, when the titled owner was "WECTEC LLC," the BOR lacked jurisdiction to hear a complaint signed "Daniel E. Holowecky, Principal WECTEC LLC" and with the property owner identified as "Daniel E. Holowecky"); *Bd. of Educ. of the South-Western City Schs. v. Franklin Cnty Bd. of Revision,* (Mar. 15, 2011), BTA No. 2008-M-1995; *Conrad v. Butler Cnty. Bd. of Revision,* (Mar. 22, 2011), BTA No. 2010-K-28*; Bevel Hudson Land Co. v. Summit Cnty. Bd. of Revision,* (May 24, 2011), BTA No. 2009-M-3066 (holding that a valuation complaint must correctly identify the property owner regardless of any error in the auditor's records); *Bd. of Educ. of the South-Western City Sch. v. Franklin Cnty. Bd. of Revision,* (June 7, 2011), BTA No. 2009-M-22 (holding that the BOR lacked jurisdiction to hear a complaint that incorrectly identified the property owner as "K. Novak" rather than "K. Novak, Trustee."); *Bd. of Educ. of the South-Western City Sch. v. Franklin Cnty. Bd. of Revision,* (June 7, 2011), BTA No. 2009-M-31; *Tack Investments LLC v. Franklin Cnty. Bd. of Revision,* (Aug. 2, 2011), BTA No. 2011-A-318; *Wakim v. Ashtabula Cnty. Bd. of Revision,* (Aug. 2, 2011), BTA No. 2011-K-2949.

In *Nw. Inv. Co. v. Fulton Cnty. Bd. of Revision*, (Jan. 11, 2011), BTA Nos. 2010-K-1970 and 2010-K-1982, the BTA held that it did not have jurisdiction to hear the matter because the appellant failed to comply with R.C. 5717.01; the appellant had failed to file a copy of the notice of appeal with the BOR. *See also CMP Properties L.T.D. v. Cuyahoga Cnty. Bd. of Revision*, (Jan. 11, 2011), BTA No. 2010-M-1054; *Wilson v. Hamilton Cnty. Bd. of Revision,* (Apr. 26, 2011), BTA No. 2009-A-377; *Hale v. Delaware Cnty. Bd. of Revision,* (Apr. 19, 2011), BTA No. 2010-A-2904; *Lee v. Summit Cnty. Bd. of Revision,* (May 17, 2011), BTA No. 2009-K-1020; *Laboda v. Cuyahoga Cnty. Bd. of Revision,* (May 17, 2011), BTA No. 2009-A-928; *Jordan v. Lucas Cnty. Bd. of Revision,* (May 24, 2011), BTA No. 2009-K-1806; *Imblum v. Lorain Cnty. Bd. of Revision,* (May 24, 2011), BTA No. 2009-K-1417; *Glazer v. Portage Cnty. Bd. of Revision,* (May 24, 2011), BTA No. 2009-M-1137.

In *Shaw v. Lake Cnty. Bd. of Revision,* (Apr. 19, 2011), BTA No. 2011-M-331, the BTA held that it lacked jurisdiction to consider the appeal because the notice of appeal had been filed outside of the thirty-day time period. *See also Prewitt v. Cuyahoga Cnty. Bd. of Revision,* (Mar. 29, 2011), BTA No. 2010-M-1670; *Briar Rd. Enterprises LLC v. Cuyahoga Cnty. Bd. of Revision,* (Apr. 26, 2011), BTA No. 2009-M-873; *Ellis v. Cuyahoga Cnty. Bd. of Revision,* (Apr. 19, 2011), BTA No. 2009-A-301); *Hribar v. Cuyahoga Cnty. Bd. of Revision,* (Apr. 19, 2011), BTA No. 2009-A-180; *Eichholz v. Lorain Cnty. Bd. of Revision,* (May 2, 2011), BTA No. 2009-A-654; *DiGeronimo v. Cuyahoga Cnty. Bd. of Revision,* (May 17, 2011), BTA No. 2009-K-1119; *Kozlowski v. Cuyahoga Cnty. Bd. of Revision,* (May 17, 2011), BTA No. 2009-M-795; *Ragheb v. Franklin Cnty. Bd. of Revision,* (May 17, 2011), BTA No. 2009-A-229; *Barnes v. Lucas Cnty. Bd. of Revision,* (May 24, 2011), BTA No. 2009-K-1421; *Groves v. Lucas Cnty. Bd. of Revision,* (May 24, 2011), BTA No. 2009-M-1473.

In *Bd. of Educ. of the Columbus City Sch. v. Franklin Cnty. Bd. of Revision,* (Mar. 4, 2011), BTA No. 2010-M-3420, the BTA held that, because the board of education filed its notice of appeal with the Franklin County Court of Common Pleas under R.C. 5717.05 prior to filing its notice of appeal with the BTA, the Franklin County Court of Common Pleas had exclusive jurisdiction over the appeal. *See also Bd. of Educ. of the Forest Hills Local Sch. Dist. v. Hamilton Cnty. Bd. of Revision,* (Mar. 7, 2011), BTA No. 2010-A-2754; *Cincinnati Sch. Dist., Bd. of Educ. v. Hamilton Cnty. Bd. of Revision,* (Mar. 7, 2011), BTA No. 2010-A-3007.

In *Sonnet Invs. LLC v. Cuyahoga Cnty. Bd. of Revision*, (Jan. 11, 2011), BTA No. 2010-M-416, the BTA found that the BOR lacked jurisdiction to consider a second valuation complaint because the taxpayer filed a valuation complaint twice in a three-year period without meeting a statutory exception. R.C. 5715.19(A)(2) generally prohibits the filing of multiple valuation complaints in a single triennium. However, the statute permits a second filing when the complainant alleges, among other exceptions, that the property's occupancy has changed by at least fifteen percent and that the change has a "substantial economic impact" on the subject property. To qualify for that exception, the change in occupancy must have taken place by the tax lien date for the year in which the complaint is filed. Here, the valuation complaint was filed for tax year 2008, making the relevant tax lien date January 1, 2008. The taxpayer's property did not meet the R.C. 5715.19(A)(2)(d) exception until November 2008 (i.e., after the relevant January 1, 2008 tax lien date). The exception needs to have been satisfied as of the relevant tax lien date, not necessarily the later date when the complaint was filed. For that reason, the BTA ordered the BOR to dismiss the valuation complaint, effectively reinstating the 2008 property value that the county auditor had originally placed on the property. *See also Bd. of Educ. of the Huber Heights City Sch. v. Montgomery Cnty. Bd. of Revision,* (May 17, 2011), BTA No. 2010-M-2856 (holding that each R.C. 5715.19(A)(2) exception must have "occurred after the tax lien date for the tax year for which the prior complaint was filed," therefore, the BOR lacked jurisdiction

to hear the case.); *Circle T LLC v. Allen Cnty. Bd. of Revision,* (June 14, 2011), BTA No. 2009-M-1277; *Wenrick v. Franklin Cnty. Bd. of Revision,* (Aug. 23, 2011), BTA No. 2010-A-2015; *Krishna Akron Hospitality Group, LLC v. Summit Cnty. Bd. of Revision,* (Oct. 25, 2011), BTA No. 2010-A-3210; *Prospect Place v. Hamilton Cnty. Bd. of Revision,* (Dec. 6, 2011), BTA No. 2011-K-959; *Novak v. Medina Cnty. Bd. of Revision,* (Dec. 13, 2011), BTA No. 2010-Q-1085; *Dionisopoulos v. Cuyahoga Cnty. Bd. of Revision,* (Dec. 20, 2011), BTA Nos. 2010-Q-1076 through 2010-Q-1082.

In *Griffith v. Meigs Cnty. Bd. of Revision*, (Jan. 11, 2011), BTA No. 2009-K-2705, the BTA found that, to file a second valuation complaint within a three-year period, a taxpayer must allege a statutory exception found in R.C. 5715.19(A)(2), even when a complainant's previous valuation complaint is jurisdictionally defective.

In *Bd. of Educ. of the Worthington City Schs. v. Franklin Cnty. Bd. of Revision*, (Jan. 11, 2011), BTA No. 2008-M-1885, the BTA found that the BOR lacked jurisdiction over a valuation complaint that provided no answer to question no. 8—which seeks the increase or decrease in taxable value sought by the property owner—or question no. 9—which seeks justification for the requested change in value. The BTA explained that, when answers to those questions are not provided, the BOR is unable to determine whether notices to school boards and other entities required by R.C. 5715.19(B) must be sent. Consequently, the BTA remanded the matter to the BOR with instructions to dismiss the valuation complaint. The decision effectively reinstated the auditor's original assessment of the property's value. *See also Kachoria v. Cuyahoga Cnty. Bd. of Revision,* (June 7, 2011), BTA Nos. 2009-A-404 and 2009-A-405; *Simovic v. Cuyahoga Cnty. Bd. of Revision,* (Aug. 2, 2011), BTA No. 2010-M-1002; *McConnell-Gunnell v. Franklin Cnty. Bd. of Revision,* (Oct. 18, 2011), BTA No. 2011-Q-1425.

In *Bd. of Educ. for the Conneaut City Sch. Dist. v. Ashtabula Cnty. Bd. of Revision*, (Jan. 11, 2011), BTA No. 2010-A-2059, the BTA construed a school district's motion to extend the discovery deadline as a motion to compel. The school district's motion was submitted at the end of the 120-day discovery period during which the BTA could intervene in the discovery process. The BTA explained that it could extend discovery periods when parties agree to comply with discovery requests. Here, however, no such agreement had been reached. Thus, the court construed the district's motion as a motion to compel, thereby giving the appellee 14 days in which to respond to the district's requests.

In *Stone Creek Office LLC v. Fairfield Cnty. Bd. of Revision*, (Feb 8, 2011), BTA No. 2010-M-1585, the BTA found that the BOR did not lack jurisdiction to hear a claim when the property owner's original valuation complaint did not identify the subject property's second "tax increment financing" parcel number. The matter involved a single parcel of property, the value of which was divided between two separate parcel numbers, pursuant to a "tax increment financing" arrangement. The division of value between the parcel numbers allowed a portion of the value of improvements added to the property to be exempted from real property taxation. The property owner's original valuation complaint only identified one of the two parcel numbers, even though both numbers related to the same property. The BTA held that the BOR had jurisdiction to consider the matter because a valuation complaint is not jurisdictionally deficient when a complaint misidentifies only one of a single property's two parcel numbers.

In *Meadowview Vill. Inc. v. Medina Cnty. Bd. of Revision,* (Mar. 4, 2011), BTA No. 2010-M-1219, the BTA affirmed the BOR's dismissal of the taxpayer's complaint for lack of jurisdiction as a result of the taxpayer failing to follow the mandatory conditions of R.C. 5715.19, including that statute's deadline. Specifically, R.C. 5715.19(A)(1) provides, "anyone contesting the valuation of property must file a complaint on or before the 31st day of March of the ensuing tax year." *See also Katz v. Montgomery Cnty. Bd. of Revision,* (May 17, 2011), BTA No. 2009-M-967; *Brazina v. Montgomery Cnty. Bd. of Revision,* (May 24, 2011), BTA No. 2009-A-1142; *Price v. Cuyahoga Cnty. Bd. of Revision,* (June 28, 2011), BTA No. 2009-K-2777; *Bosak v. Cuyahoga Cnty. Bd. of Revision,* (June 28, 2011), BTA No. 2009-K-2757; *Sage v. Cuyahoga Cnty. Bd. of Revision,* (Aug. 9, 2011), BTA No. 2010-A-970; *McCourt v. Lorain Cnty. Bd. of Revision,* (Aug. 16, 2011), BTA No. 2010-K-1424; *Lowe v. Cuyahoga Cnty. Bd. of Revision,* (Sept. 27, 2011), BTA No. 2010-A-3099; *Bd. of Educ. of the Westerville City Sch. v. Delaware Cnty. Bd. of Revision,* (Aug. 9, 2011), BTA No. 2011-A-909 (vacating the BOR's holding and reinstating the auditor's original valuation due to lack of jurisdiction).

In *Alexander & Keybank NA, Co-Trs. v. Cuyahoga Cnty. Bd. of Revision,* (Mar. 15, 2011), BTA No. 2009-A-3001, the BTA found that the BOR lacked jurisdiction to hear the case because the real estate broker did not have standing to file the initial valuation complaint. R.C. 5715.19(A) identifies parties who are authorized to file valuation complaints; however, a broker cannot file an effective valuation complaint because doing so without a law license constitutes the unauthorized practice of law. Further, the

real estate broker did not have a fiduciary relationship with the property owner. A valuation complaint does not vest jurisdiction in the BOR if the complaint is filed by a person not identified by the statute, or by a person who lacks a fiduciary relationship with the property owner. Here, the BTA provided that the real estate broker did not share a fiduciary relationship with property owners regarding the preparation and filing of a real property tax valuation complaint on behalf of a client. *See also Springfield City Sch. Dist. Bd. of Educ. v. Clark Cnty. Bd. of Revision,* (Apr. 19, 2011), BTA Nos. 2008-K-2523 and 2008-K-2524 (holding that a salaried project manager does not owe a fiduciary duty to a corporation and cannot, therefore, prepare and file a complaint with a BOR).

In *Schetter v. Champaign Cnty. Bd. of Revision,* (Oct. 18, 2011), BTA No. 2009-K-1157, the BTA affirmed the BOR's dismissal of the taxpayer's complaint because the complaint was filed by a non-attorney and the jurisdictional defect was not corrected prior to the March 31 filing deadline. On the complaint, a non-attorney "financial planner" listed himself as "complainant's agent" and signed the complaint on behalf of the property owner. The BOR dismissed the complaint as having been filed by a non-attorney engaging in the unauthorized practice of law. The BTA has previously found that where a fiduciary relationship exists between an agent and the property owner, certain non-attorneys may prepare and file complaints on another's behalf without engaging in the unauthorized practice of law; however, a complaint filed by a non-attorney certified public accountant is insufficient. Further, the taxpayer's attempt to amend the complaint to include the signature of a proper person in May 2009 was insufficient because a complainant may not amend its complaint after the March 31 filing deadline.

In *Liann v. Ottawa Cnty. Bd. of Revision,* (Dec. 20, 2011), BTA No. 2010-M-2239, the BTA remanded the case to the BOR, ordering it to reschedule a hearing and consider the merits of an erroneously-dismissed valuation claim. The BOR dismissed the complaint because neither the property owner nor her counsel appeared at the BOR hearing; rather, a real estate appraiser and a real estate agent appeared. The BOR permitted neither the real estate appraiser, nor the real estate agent, to present information regarding the property owner's claim that her property was overvalued, reasoning that two non-attorneys could not present evidence at a BOR hearing on the property owner's behalf, although the complaint was prepared and filed by an authorized attorney. The BTA followed the Supreme Court of Ohio's decision in *Cincinnati Sch. Dist. Bd. of Educ. v. Hamilton Cnty. Bd. of Revision,* 127 Ohio St. 3d 63, 2010-Ohio-4907, where the Court held that jurisdiction vests at the time of the filing of the complaint and once jurisdiction vests, "a later instance of the unauthorized practice of law during the proceedings does not retroactively divest the tribunal of jurisdiction." Therefore, jurisdiction had vested in the BOR prior to the hearing, even though neither the owner, nor the attorney, appeared at the hearing.

In *TIC CY Airport Columbus 33, LLC v. Franklin Cnty. Bd. of Revision,* (Oct. 11, 2011), BTA No. 2009-M-549, the BTA dismissed the appellant's appeal for lack of jurisdiction because the appellant did not appeal from a final appealable order of the BOR. The property owner sought a continuance of a valuation complaint hearing filed by the BOE. The BOR denied the request for continuation, and the property owner appealed the denial of continuance request, although the property owner appeared through counsel at the hearing. The BOE contended that the appeal should have been dismissed because the BOR's action was not an appealable determination that the BTA possessed jurisdiction to consider under R.C. 5703.02. The BTA found it lacked jurisdiction to review the matter because the owner filed the appeal to the BTA before the BOR had issued a decision on the valuation complaint.

In *Lorensen v. Ottawa Cnty. Bd. of Revision,* (Dec. 13, 2011), BTA No. 2009-M-655, the BTA affirmed the BOR's dismissal of the appellant's valuation complaint, but for a different reason than the BOR had cited. The BOR dismissed the taxpayer's complaint because the taxpayer's valuation complaint incorrectly identified the tax year in issue as "2009" rather than "2008." The BTA found that this defect did not constitute a jurisdictional flaw; the listing of the correct tax year on a complaint does not run to the core of procedural efficiency. However, the BTA discovered that the complaint did not name at least one owner of the property, which *is* a core jurisdictional requirement. Therefore, the BOR lacked jurisdiction to hear the complaint because the taxpayer incorrectly identified the property owners as individuals, rather than as trustees. *See also Richards v. Ottawa Cnty. Bd. of Revision,* (Dec. 13, 2011), BTA No. 2009-W-676 (holding that inclusion of the tax year on the complaint form does not run to the core of procedural efficiency; therefore, the BTA remanded the appeal to the BOR with instructions to make a valuation determination).

Valuation

In *Vandalia-Butler City Sch. Bd. of Edn. v. Montgomery Cty. Bd. of Revision,* __ Ohio St. 3d __, 2011-Ohio-5078 (October 5, 2011), the Supreme Court ruled that rather than accept the BOR's characterization of the evidence, the BTA must independently weigh and consider the evidence when the

parties do not present additional evidence before the BTA. In this case, the BTA had expressed reservations about the evidence on which the BOR relied; therefore, it should not have accepted the BOR's decision, but rather should have engaged in its own analysis of the evidence. The case was remanded for that purpose.

In *Wickline v. Greene Cty. Bd. of Revision*, BTA No. 2008-V-760 (Jan. 18, 2011), the taxpayer appealed the BOR's decision, arguing that the property's true value was lower than the BOR's valuation assessment. With respect to three factors, the BOR found that the property's value was higher than that assessed by the county auditor. However, the BTA concluded that the BOR failed to support that decision with sufficient evidence. Similarly, while the taxpayer provided evidence to support a reduction in the value assessed to the subject property, the BTA also found that evidence unconvincing. The taxpayer's "comparable" land sales from 2003 were too remote to be relevant to the relevant 2007 tax lien date; they were also, among other things, not supported by sufficient documentation. The taxpayer also failed to prove that the auditor's measurements establishing the size of the subject property were erroneous. Consequently, with the exception of the BOR's three miscellaneous increases to the auditor's assessment—for which the BTA reinstated the values originally assessed by the auditor—the BTA affirmed the BOR's decision.

In *Cummins Prop. Servs., LLC v. Franklin Cnty. Bd. of Revision*, (Jan. 4, 2011), BTA No. 2008-M-785, the BTA held that a property's value for tax year 2005 should have reflected the county auditor's appraisal made as of the 2005 tax lien date, not the property's 2002 sale price. The taxpayer contested the auditor's appraisal, arguing that the property's value should have been based on the 2002 sale price (reduced by $62,500, the value of a portion of the property that sold prior to the 2005 tax lien date). In addition, the taxpayer argued that the value of the improvements made to the property between the 2002 sale and 2005 tax lien date should have been disregarded, as most of those improvements were made to fixtures, not the building itself. The BTA found that the improvements made to the property after the sale and before the relevant tax lien date called into question whether the 2002 sale was sufficiently "recent" to indicate the property's 2005 value. Because of that, the taxpayer bore the burden of proving that the property's post-improvement value was different than that established by the auditor. The taxpayer failed to do so; thus, the property's value for the 2005 tax year remained at the value determined by the auditor.

In *Ivanhoe Realty Co. v. Cuyahoga Cnty. Bd. of Revision*, (Jan. 11, 2011), BTA No. 2008-M-601, a taxpayer appealed from the BOR's valuation of the subject property. At a hearing before the BTA, the taxpayer's appraiser testified that the sales comparison approach to valuation is the only acceptable method for valuing buildings, like the taxpayer's, that are in an obvious state of disrepair. The BTA agreed. The BTA also accepted the appraiser's valuation of the subject property, finding that it was the best evidence available in the record. The BTA ordered the auditor to list and assess the subject property in accordance with its decision to adopt the appraiser's opinion of value.

In *Baker v. Erie Cnty. Bd. of Revision*, (Feb. 8, 2011), BTA No. 2008-M-1149, the BOR had reduced the value of the subject property from the auditor's original assessment because the evidence showed that the housing market had become stagnant. The BTA affirmed the BOR's reduction, finding that it was supported by evidence in the record; however, the BTA found that the property owner's evidence did not support any further reductions. The BOR reduced the subject property's value based on the appellant's demonstration that a property that the appellant claimed was comparable to his own sold for $420,000 on February 14, 2008 and that same property sold for $425,000 on August 18, 2004, nearly four years earlier. The BOR found that that evidence established that the housing market had become stagnant. Accordingly, the BOR reduced the subject property's value to reflect its fair market value four years prior to the relevant tax lien date, and the BTA affirmed that decision. The limited additional evidence proffered by the appellant—the purchase price of an additional two homes in his neighborhood that he asserted were similar in size, age, and condition to his own—was an insufficient basis upon which the BTA could rely to further reduce the value of the appellant's property.

In *Bushong v. Allen Cnty. Bd. of Revision*, (Feb. 8, 2011), BTA No. 2008-M-1213, the BTA affirmed the BOR's decision to uphold the county auditor's property value assessment for tax year 2007. The appellant property owners prepared a comparative market analysis, dated November 27, 2007, for the BOR. According to the BOR's appraiser, the housing market began declining in the county in which the subject property was located in the third quarter of 2007. Consequently, without additional evidence, the BTA was unable to find that an analysis conducted in November 2007 reflected property values on January 1, 2007, the relevant tax lien date. The appellant also presented the BTA with evidence on three additional properties, arguing that each was comparable to the subject. Because little information as

to the location of those properties was provided, the BTA also found that information insufficient to prove that a reduction in value for the subject was warranted.

In *Bd. of Educ. of the Kettering City Schs. v. Montgomery Cnty. Bd. of Revision*, (Feb. 15, 2011), BTA No. 2008-K-1931, the BTA found that the best evidence of the subject property's value for tax year 2007 was the price at which it sold at an auction in March 2008. The appellant board of education argued that an auction of property cannot be considered an arm's length sale and the county auditor's assessment was the best indication of the property's 2007 value. However, because the auction at issue was publicly advertised, had multiple bidders present and actively participating, was employed only after the property had been offered for sale unsuccessfully, and the seller had authority to reject the winning bid, the BTA found that the price at which the property sold at auction was competent and probative evidence of its value. Because the appellant failed to prove that the price at which the property sold at the voluntary auction did not accurately reflect its value, the BTA found that price to be the best evidence of the property's 2007 value.

In *Nusekabel v. Hamilton Cnty. Bd. of Revision*, (Feb. 15, 2011), BTA No. 2010-K-40, the appellant property owner appealed the BOR's decision to increase the value of one of the property owner's properties. The county auditor originally assessed the subject property at a value of $117,100. However, at the hearing before the BOR, an appraiser and employee of the auditor's office appraised the subject property, finding that it had been undervalued by the auditor. Instead, the appraiser opined that the value of the subject was $150,000. The BTA disagreed. Because the appraiser failed to inspect the subject property or those referenced as comparables, the BTA rejected the BOR's decision to increase the value of the property on the basis of the appraiser's valuation. In addition, while the appellant demonstrated the existence of adverse factors (i.e., a cracked foundation continuing through the brick and mortar joints) that *may* effect a property's value, the appellant failed to prove a particular diminution in the property's value caused by those factors. Consequently, the BTA found that the appellant's request for a reduction in value from that assessed by the auditor was without sufficient support, and the BTA reinstated the auditor's original valuation assessment.

In *On the Greens Property Co. v. Lake Cty. Bd. of Revision*, BTA Nos. 2007-M-1651, 1642 (March 4, 2011), the BTA held that where there is no evidence in the record to support the determination of value made by the BOR, the decision will be reversed notwithstanding the failure of the appellant to introduce any evidence of its own.

In *Canton Cty. Sch. Dist. Bd. of Edn. v. Stark Cty. Bd. of Revision,* BTA Nos. 2008-M-31, 32 (March 22, 2011), where a property owner introduces appraisal evidence upon which a BOR bases a determination of value and the BOE, on appeal, makes assertions that are without factual support, the BTA will uphold the BOR's decision. *See also Sears Roebuck & Co. v. Cuyahoga Cty. Bd. of Revision*, BTA No. 2008-K-2343 (June 14, 2011).

In *Emes Health Care, Inc. v. Cuyahoga Cty. Bd. of Revision*, BTA Nos. 2008-A-560, 627, and 628 (March 15, 2011), the BTA held that a BOR may not rely upon an appraisal report that uses an effective date other than tax lien date and where the appraiser does not appear and testify. The BOE objected to the report on the basis of hearsay. Absent any evidence to support the action taken by the BOR, the BTA reverted to the value initially placed on the property by the auditor.

In *Bd. of Edn. of Westerville City Sch. v. Delaware Cty. Bd. of Revision*, BTA No. 2008-A-1455 (Sept. 27, 2011), the BTA adopted the value placed on a mixed-use property as a result of an appraisal report that considered the various uses of the property in deriving a value for the property. Again, the BOE failed to introduce any contrary evidence that refuted the various assumptions underlying the appraisal report.

In *Bd. of Educ. of the Willoughby-Eastlake City Sch. Dist. v. Lake Cnty. Bd. of Revision,* (Mar. 4, 2011), BTA No. 2010-M-3739, the BTA held that it did not have jurisdiction over the appeal because the Board of Education ("BOE") was not an aggrieved party. Because the BOE's notice of appeal requested the same value of the property that the BOR had determined, the BTA found that the BOE had not been aggrieved by the BOR's decision and dismissed the BOE's appeal. The property owner originally filed a real property valuation complaint seeking to decrease the value of its property below the auditor's assessment. The BOR conducted a hearing and obtained an appraisal of the property, and decided to increase the value of the property to $136,000,000. During the hearing, the BOE sought to amend its complaint by increasing its value assertion to $136,000,000, which was identical to the value reached in the appraisal that the BOR obtained. The BOR issued a decision to increase the property's value to $136,000,000. Next, the BOE filed an appeal of the decision, asserting, a value of $136,000,000 in its notice of appeal value, resulting in the property owner seeking dismissal for the reason that the BOE was not aggrieved by the BOR's decision. The BTA granted the property owner's dismissal of the appeal and held that the BOE was not aggrieved because it did not request a different value of the property in its notice of appeal, but instead asserted the exact valuation that the BOR had previously determined.

Sale

In *Worthington City Sch. Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 129 Ohio St. 3d 3, 2011-Ohio-2316 (May 19, 2011), the Court held that in order to establish that a sale is not recent, the party seeking to avoid the use of the sale price must present evidence of changes in the market. In this case, the property owner showed the performance of the property had deteriorated, but had failed to show that the changes were due to market factors. *See also West 3rd & Superior Ltd. v. Cuyahoga Cty. Bd. of Revision*, BTA No. 2008-M-613 (May 2, 2011).

In *North Royalton City School Dist. Bd. of Edn .v Cuyahoga Cty. Bd. of Revision,* 129 Ohio St. 3d 172, 2011-Ohio-3092, the Supreme Court held that the price paid in a sale made pursuant to a long-term purchase option, where the price was negotiated 7 years earlier, established the value of the property. The Court emphasized that it was the date of the sale itself, not the date the price was established, that controlled. The Court observed that if market conditions had changed, the property owner could have argued duress under the terms of the agreement to avoid the price being taken as the value of the property. While acknowledging that the situation was unusual, it was emphasized that the property owner failed to allege that market conditions had changed.

In *Hilliard City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision,* 128 Ohio St. 3d 565, 2011-Ohio-2258 (May 17, 2011), the Court addressed the allocation of a purchase price among real estate, tangible personal property, and intangible good will. The price was not allocated in the purchase contract or on the conveyance fee statement. The Court held that the allocation to TPP indicated in an appraisal performed by a bank in conjunction with the sale was more probative than was the property owner's allocation on its financial statements that was unexplained. None of the price was allocate to goodwill due to the lack of any probative evidence on the matter. Interestingly, the appraiser who had performed the appraisal did not appear and did not offer any testimony regarding the appraisal, yet it was deemed credible for allocation purposes.

In *Highland Crest Assocs., LLC v. Lucas Cnty. Bd. of Revision* (2011), 194 Ohio App.3d 127, 2011-Ohio-2078, the appellate court reversed the Lucas County Court of Common Pleas' decision and affirmed the BOR's determination, holding that the appropriate tax value of a 20-unit, low-income housing facility was $360,000. The purchase agreement in the sales transaction reflected that the property was sold for $660,731, which was the balance due on a federally-insured loan at the time of closing. This purchase agreement reflected the entire balance owed on the debt for the purposes of achieving certain goals with the federal agency; the seller did not receive any proceeds from the sale, but was forgiven of its debt. The taxpayer next contended that the true value of the property was $360,000, presenting the closing statement, the affidavit of the seller, the testimony of the attorneys involved in the transaction, and an appraisal of the property, while the BOE contended that the true value was the sale price of $660,731. The appellate court determined that there was enough evidence to establish that the purchase price was manipulated by the parties to achieve certain goals with the federal agency, and that it did not accurately reflect the true value of the property. Therefore, the trial court abused its discretion by accepting the purchase price set forth in the purchase agreement instead of considering other evidence indicating the true market value of the property.

In *Forest Hills Local School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (Nov. 22, 2011), BTA Nos. 2008-Q-1901 and 2008-Q-1906, the BTA held that the price paid in an arm's-length transaction reflected the value of the property, notwithstanding the facts that the property was subsequently leased back to the seller and seller financing was provided. The evidence showed that the lease back was short-term in nature and that the terms of both the lease and the financing were at market rates that were negotiated by the parties. The BTA remarked that there was an absence of any evidence of collusion between the parties.

In *Bd. of Educ. of the Columbus City Sch. v. Franklin Cnty. Bd. of Revision,* (Aug. 09, 2011), BTA No. 2008-A-947, the BTA found value of a 13.912 acre property that was improved with a senior living facility. The land associated with the property sold for $3,593,490; however, this sale did not include the value of the improvements. While the BTA accepted the purchase price of the land as constitutes the property's land value, the BTA retained the County Auditor's valuation of the improvements since they had not sold.

In *Strongsville Bd. of Educ. v. Cuyahoga Cnty. Bd. of Revision*, (Jan. 18, 2011), BTA Nos. 2008-M-1146—1147, the BTA held that the price at which the subject property sold in an arm's length transaction 22 months after the relevant tax lien date—January 1, 2006—was the best evidence in the record of the property's value. In that case, the subject property was transferred in an arm's length sale for $1,396,000 on October 15, 2007. The subject property was again transferred on January 17, 2008; however, in that sale, no money was paid for the transfer even though it was not a gift. The BTA found that the second transfer provided little information of the subject property's

value. In addition, the information provided suggested that the transfer may not have been an arm's length transaction. Ultimately, notwithstanding the fact that the sale occurred 22 months after the relevant tax lien date, the BTA found that the price at which the property sold on October 15, 2007 was the best evidence of the property's 2006 value.

In *Bd. of Edn. for Toledo Public Schools v. Lucas Cty. Bd. of Revision* BTA nos. 2008-Q-1721 and 2008-Q-1791 (Nov. 15 2011), the BTA ruled that a sale conducted 22 months prior to tax lien date was evidence of the value of the property on tax lien date. The occurrence of the sale shifted to the other party the burden to demonstrate that the sale was remote. In this case, the property owner failed to demonstrate that a reduction in occupancy during the interim was due to market conditions, and its appraiser failed to make timing adjustment for sales that it used in its appraisal report that also pre-dated tax lien date. See also *Bd. of Edn. of Columbus City Schools v. Franklin Cty. Bd. of Edn.* BTA No. 2008-M-1106 (Nov. 8, 2011), (16 months between date of sale and tax lien date not shown to be remote).

In *Bd. of Edn. of Columbus City Schools v. Franklin Cty. Bd. of Revision,* BTA No. 2008-M-1888 (May 2, 2011), the BTA held that a sale pursuant to public auction was a valid sale for determining the value of the subject property. It rejected the argument of the BOE that an auction sale is per se a forced sale. The auction was conducted publicly, with a number of bidders. Absent any evidence to the contrary, the BTA upheld the sales price as the value of the property. See also *Bd. of Edn. of Kettering Cty. Schools v. Montgomery Cty. Bd. of Revision*, BTA No. 2008-K-1931 (Feb. 15, 2011).

In *Bd. of Edn. for the Mayfield City School District v. Cuyahoga Cty. Bd. of Revision,* BTA No. 2008-M-409 (April 26, 2011), and *Bd. of Edn. of the Columbus City Schools v. Franklin Cty. Bd. of Revision*, BTA No. 2008-K-2179 (April 26, 2011), the BTA held that business exigencies were not sufficient to establish that a sale was made under duress. Recognizing that motives for entering into transactions vary, the BTA declined to delve into business motives, presuming that parties will act in their own self-interest.

In *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision,* BTA Nos. 2008-M-988, 989, and 1023 (April 26, 2011), the BTA held that where improvements to a property that was recently sold were subsequently torn down, the portion of the purchase price allocated to land remained valid for determining the value of the land after the new improvements were constructed.

In *Bd. of Edn. of the South-Western Cty. Sch. v. Franklin Cty. Bd. of Revision*, BTA No. 2008-K-1994 (March 1, 2011), the BTA held that even though improvements were demolished shortly after tax lien date, the price paid for the property prior to tax lien date was indicative of the value of the entire parcel for the year the improvements were demolished.

In *McKelvey v. Montgomery Cnty. Bd. of Revision*, (Jan. 18, 2011), BTA Nos. 2008-K-2200—2008-K-2202, the taxpayer's notice of appeal alleged that the county auditor overvalued a property. The taxpayer argued that the property's value should have been based on the price paid through a recent land installment agreement. In its opinion, the BTA explained that "a land installment contract *may* constitute a valid arm's-length sale upon which value may be predicated…." However, without more than a taxpayer's oral testimony regarding that agreement, the BTA declined to accept evidence of the land installment agreement to determine the value of the subject property.

In *Bd. of Educ. of the Cleveland Heights/Univ. Heights City Sch. Dist. v. Cuyahoga Cnty. Bd. of Revision*, (Feb. 1, 2011), BTA No. 2006-V-2112, the BTA reversed the BOR, finding that the value of the property for tax year 2005 was the sale price paid by the taxpayer in May 2005. Because the taxpayer purchased the subject property through a sale-leaseback transaction, the taxpayer argued that the sale was not at an arm's length. The taxpayer also argued that the sale price should have been reduced by the value of an adjacent parking garage, which the taxpayer negotiated to use and manage, but not purchase, as part of the sale. The BTA rejected the taxpayer's arguments. Unlike traditional sale-leaseback arrangements, the seller of the subject property agreed to rent vacant space from the taxpayer for three years, during which time the seller never occupied the space. The BTA found that the "so-called 'leaseback'" arrangement in no way negated the arm's-length nature of the sale. The BTA also found that the record provided no evidence to show that the purchase price of the subject property included the taxpayer's interest in managing and using the parking garage. Thus, it was improper to adjust the purchase price downward for the taxpayer's non-ownership interest in the parking garage.

In *Brumenshenkel v. Knox Cnty. Bd. of Revision*, (Feb. 8, 2011), BTA Nos. 2008-M-1207 and 2009-M-2519, the appellant challenged the BOR's property value assessment of the subject property for tax years 2007 and 2008. The appellant purchased the subject property from the Secretary of Housing and Urban Development ("HUD") after HUD acquired the property through a sheriff's sale. The appellant argued that, despite purchasing the property from HUD, the transfer was at arm's

length. The appellant also argued that, due to the property's poor condition, declining market, and neighboring properties with sales listings below the auditor's assessment, the value of his property should have been reduced further (i.e., even lower than the purchase price paid to HUD). The BTA disagreed, finding that the appellant failed to prove that the values assessed by the BOR were in error. The BTA held that purchasing a property from HUD acquired through a sheriff's sale does not constitute an arm's length transaction; thus, the recent price paid by the appellant to purchase the property was not the "true value for taxation purposes." The BTA also rejected the appellant's additional arguments, holding that the BOR's valuation already accounted for the property's condition. The appellant supplied no opinion of value from a qualified appraiser, and the BTA held that sales listings are not sufficient to establish property value. Consequently, the BTA affirmed the BOR's property value assessment.

Exemption

In *The Chapel v. Testa* (2011), 129 Ohio St. 3d 21, 2011-Ohio-545, the Supreme Court of Ohio held that, just like any other institution, a church may achieve property tax exemption for real property that it owns and holds open to the public for recreational purposes. The Court overturned the Board of Tax Appeals, finding that "if the use to which property is put otherwise qualifies as charitable, neither the fact of ownership by a religious organization nor the existence of religious motives in connection with the charitable use will defeat the claim of exemption." The property owner, a church, owned several parcels of property that were improved with a church, as well as several playing fields and a running trail surrounding the property's perimeter. The church had received exemption for the church facilities, but the tax commissioner and Board of Tax Appeals had denied exemption for the portions of the property used for public recreation. The church used the playing fields to host a variety of sporting leagues. Most of the participants in the sporting events were *not* congregants of the church. The church used the property for public recreational use in support of its "sports ministry." The Court held that the property should have received exemption because it was owned by an institution—the church—and was accessible without charge to the public for recreational use. Thus, exemption for the property was appropriate under R.C. 5709.12—the general charitable use statute—and the church was not required to achieve exemption under R.C. 5709.07, which provides a more specific exemption for "houses of public worship." The Court held that the church's religious motivation for keeping the property available to the public for free recreational use did not prevent the church from taking advantage of the general charitable use statute. Thus, the Court confirmed that "any institution, irrespective of its charitable or noncharitable character, may take advantage of a tax exemption if it is making exclusive charitable use of the property." In short, if a church (or any institution) owns property and uses it for charitable purposes—such as using the property to provide free recreational activities that are open to the general public—the church (or institution) may receive exemption for the property, even if a religious motive animates the church's decision to use the property in a charitable manner.

In *The Chapel v. Wilkins* (Apr. 19, 2011), BTA No. 2007-V-2, the BTA, on remand from the Supreme Court of Ohio, found several acres of land exempt because the land was open to the public for recreational purposes, which satisfies a charitable use of real property under R.C. 5709.12(B). However, the portion of land possessing oil wells remained taxable.

In *Columbus City Sch. Dist. Bd. of Educ. v. Testa,* 130 Ohio St.3d 344, 2011-Ohio-5534, the Supreme Court of Ohio reversed the BTA's decision, holding that the BTA had erroneously affirmed the tax commissioner's grant of a real property tax exemption to property owned by the "State of Ohio for the use and benefit of The Ohio State University" ("OSU"). OSU received title to a two-story building through a bequest intended to provide scholarships to veterinary-medicine students at OSU. The building, which was subject to a leasehold interest by a third-party before OSU merged title, generated rental income from a commercial tenant on the first floor and residential tenants on the second floor. OSU filed an exemption application for property, pursuant to R.C. 3345.17, which provides that income-producing property may not be exempted under the statute unless the activity conducted on the property bears an operational relationship to university activities. Upon review, the Supreme Court of Ohio determined that the language of R.C. 3345.17 ties an exemption to the use of the property, not to the use of the proceeds; therefore, OSU was not entitled to exemption. OSU had claimed that, because it used the proceeds of the rental income to support the university, the property should have been exempt. The Court rejected this argument.

In *Elizabeth Williams Grp. Home, Inc. v. Levin*, (Feb. 1, 2011), BTA No. 2010-K-1967, the tax commissioner denied the taxpayer's application to receive real property tax exemption status for the subject property. The taxpayer filed a notice of appeal. The tax commissioner subsequently served the taxpayer

with discovery requests, including requests for admissions, but the tax commissioner alleged that he received no response. Due to the taxpayer's failure to respond to the tax commissioner's requests for admissions, the tax commissioner filed a motion before the BTA—asserting that no material issue of controversy existed—essentially seeking summary judgment. However, the BTA overruled the tax commissioner's motion, finding that the BTA "is without authority to act in a summary manner with respect to substantive issues involved in an appeal."

In *Jemison v. Levin*, (Feb. 8, 2011), BTA Nos. 2008-M-734—2008-M-754, the BTA affirmed the tax commissioner's decision to exempt city-owned property from real property taxation when that property was used for "watershed purposes." R.C. 5709.08 provides that real or personal property belonging to the state or United States used exclusively for a public purpose is exempt from taxation. The subject property was used primarily to "facilitate potable water" to people served by the city's waterworks; no evidence suggested that any portion of the property was used by a private entity or for a non-public purpose. The appellant challenging the real property tax exemption argued that granting tax exemptions for all city-owned property used for water transmission, regardless of whether the properties contained observable wetland, was a "slippery slope" that would lead to the exemption of any city-owned land not used for a commercial purpose. The BTA found that "public purpose" was define broadly in this context, and without evidence that the land was being used by a private entity or for a non-public purpose, the filtering function served by the city-owned land (in the watershed) met the statutory "public purpose" requirement.

In *Delaney v. Levin*, (Feb. 15, 2011), BTA No. 2010-M-1857, the BTA found that it lacked jurisdiction to hear the matter because the tax commissioner vacated the final determination before the taxpayer filed the notice of appeal. R.C. 5703.05 provides statutory authority for a tax commissioner to reconsider decisions, and once a decision has been vacated, it effectively no longer exists. Because the tax commissioner vacated the final determination before the taxpayer filed the notice of appeal, there was no decision from which the appellant could appeal. Consequently, the BTA lacked jurisdiction to hear the matter.

In *Graceworks Lutheran Services v. Levin,* (Mar. 4, 2011), BTA No. 2010-A-3790, the BTA dismissed the taxpayer's appeal regarding an application for exemption from real property taxation due to lack of jurisdiction. Here, Grace Lutheran Services erroneously sent the copy of the notice of appeal addressed to the tax commissioner to the BTA instead. Therefore, it failed to satisfy the sixty-day deadline for filing a copy of the notice of appeal with the tax commissioner *and* the BTA as required under R.C. 5717.02. *See also The City of Ashtabula, Ohio v. Levin,* (Mar. 4, 2011), BTA No. 2011-M-340; *Wellspring Retreat & Resource Ctr. v. Levin,* (Mar. 4, 2011), BTA No. 2010-K-3304; *Sanyoura Mgmt. Ltd. v. Levin,* (Mar. 4, 2011), BTA No. 2010-K-3621.

In *Hopewell Baptist Church v. Levin,* (July 26, 2011), BTA No. 2010-M-3272, the BTA determined that the tax commissioner lacked jurisdiction to consider the appellant's exemption application because the applicant failed to pay the non-remittable taxes on the property, as R.C. 5713.08 requires. The applicant acquired property in Mahoning County, Ohio, in January 2009 and filed an application for real property tax exemption in April 2010. The tax commissioner notified the applicant that the county treasurer's certificate indicated that the property had unpaid taxes in the amount of $3,863.60 for tax year 2009, and that unless all taxes were paid within sixty days, the applicant's exemption application for exemption would be dismissed. Nonetheless, the appellant failed to provide a treasurer's certificate indicating that all non-remittable taxes, penalties, and interest had been paid in full. Therefore, the tax commissioner dismissed the appellant's application for lack of jurisdiction, and the BTA affirmed the dismissal.

Current Agricultural Use Valuation (CAUV)

In *Maralgate, LLC v. Greene Cty. Bd. of Revision* (2011), __ Ohio St. 3d __, 2011-Ohio-5448 (October 26, 2011), the Court held that a 70 acre parcel, transferred by the owner out of a 700+ acre tract to a single member LLC for liability reasons, continued to qualify for CAUV. R.C. 5713.30(A)(1) merely required common ownership, not identical ownership. Instead, the parcel could be considered in conjunction with the remaining, contiguous property. Since the growth of timber on the property was not conducted for commercial purposes, the entire parcel qualified for CAUV status.

In *Babb v. Coshocton Cnty. Bd. of Revision*, (Jan. 25, 2011), BTA No. 2008-M-963, the taxpayer appealed the BOR's decision to remove his entire property from CAUV status. The BTA agreed with the taxpayer, but only in part. The case involved a taxpayer who owned land used to harvest hay and house two oil wells; the taxpayer also owned a large portion of woodland, which he purported to use to harvest trees for commercial sale. The taxpayer argued that all of his approximately 170 acres should retain CAUV status. The BTA disagreed. Because the

hayfield was not used "primarily for profit" *by the taxpayer*, the hayfield did not qualify for CAUV status. By contrast, because the taxpayer used the woodlands primarily for a commercial purpose—as evidenced by having harvested the woodlands in the past; regularly cutting vines, thinning trees, and applying herbicides; and seeking assistance in growing trees for saleable products—the BTA found that the portion of the taxpayer's woodlands not used for oil production should retain CAUV status. The fact that the taxpayer had only infrequently harvested from the land was not a bar to retaining that status.

In *Brauer v. Greene Cnty. Bd. of Revision,* (Mar. 4, 2011), BTA No. 2008-A-781, the taxpayer appealed the BOR's decision that his property did not qualify for inclusion in the CAUV program under R.C. 5713.30(A)(1). The BTA reversed the BOR's decision, concluding that the taxpayer "provided sufficient, competent, probative evidence that the subject property should have been properly included in the CAUV program in 2007 as land devoted exclusively to agricultural use." The taxpayer owned two contiguous parcels of land which were part of the CAUV program prior to the taxpayer owning them; however, after the taxpayer filed an application for CAUV status, the auditor removed the parcels from the CAUV list. The BOR agreed with the auditor because the animals on the land did not have access to graze upon all of the land and there were no signs of wood cutting, although the taxpayer claimed to have cut wood on the land. The BTA referred to *Chrisman v. Licking Cnty. Bd. of Revision*, (Sept. 19, 1986), BTA No. 1985-C-753, unreported, where the BTA defined the word 'exclusively' to mean 'primarily.' Further, the taxpayer's parcels satisfied the CAUV program because the land was devoted exclusively to agricultural use for the preceding three years and continued to be so devoted in 2007, with 14 acres of the land being used as pasture for cattle, 10 acres of woodland being used to harvest and sell wood, and 6 acres being used for poultry housing in addition to 1 acre being utilized for the taxpayer's residence.

Tangible Personal Property

In *WCI Steel, Inc. v. Testa* (2007), 129 Ohio St. 3d 256, 2011-Ohio-3280, the Court addressed the sufficiency of a notice of appeal from the Tax Commissioner to the BTA. The Court held that in order to meet the specificity requirements of R.C. 5717.02, it was sufficient for the notice to indicate the taxpayer's objections to the action of the tax commissioner, and to identify the treatment it believes to be appropriate. In doing so, the Court distinguished and limited its decision in *Ohio Bell Tel. Co. v. Levin*, 124 Ohio St. 3d 211, 2009-Ohio-6189. In addition, the Court rejected the Tax Commissioner's argument that the BTA could not consider any evidence that had not previously been submitted to the BTA; instead, it re-affirmed many earlier decisions and R.C. 5717.02 that additional evidence could be presented to the BTA.

In *Delaney v. Testa* (2011), 128 Ohio St. 3d 248, 2011-Ohio-550, the Supreme Court of Ohio affirmed the BTA's decision, holding that the Greene County Auditor failed to specify error in her complaint, as required by R.C. 5717.02. The Auditor appealed to the BTA from final assessment certificates issued by the tax commissioner against Waste Management of Ohio, Inc. relating to a personal property tax for certain equipment mounted on the waste-disposal trucks which were owned and operated by the company. The BTA dismissed the appeal for lack of jurisdiction because the Auditor did not specify an error. Rather than contesting the specificity requirement pursuant to R.C. 5715.02, the Auditor argued that enforcing the specification requirement would deprive her of her constitutional due process right because she was not a participant in the initial proceedings associated with the taxpayer's petition for reassessment. The Supreme Court of Ohio determined that "a public official's right to participate in tax assessment proceedings exists not by constitutional right but by legislative grant." Therefore, the Auditor must have established a constitutional basis to which she was entitled; however, the Auditor did not allege that she attempted to participate in the assessment and was denied the opportunity to do so. Additionally, the Court lacked jurisdiction to consider the Auditor's claim that the final assessment certificates constituted a taking of the property of the citizens of Greene County without due process, because the Auditor did not assert the claim in the notice of appeal to the BTA. Because the Auditor's failure to follow the statutory procedures did not constitute a due process violation, and because the Auditor failed to specify error in her notice of appeal, the Supreme Court of Ohio upheld the BTA's decision requiring the Auditor to specify error pursuant to R.C. 5717.02.

In *Put-in-Bay Boat Line Co. v. Levin* (2011), 2011-Ohio-974, the Sixth District Court of Appeals affirmed the BTA's decision and the tax commissioner's final determinations, which denied the taxpayer's petitions for reassessment of public utility personal tax assessments for 2006 and 2007. The taxpayer operated a water transportation business in both Port Clinton and Put-in-Bay taxing districts, but housed all of its watercraft in the Port Clinton taxing district during the winter. The taxpayer provided in its annual reports that all of its taxable property,

including its watercraft, was located in the Put-in-Bay taxing district, because this is where the taxpayer's principal place of business was located. Upon audit, the tax commissioner issued an assessment against the taxpayer by first apportioning the taxable value of the taxpayer's watercraft to the Port Clinton taxing district, and then apportioning the remaining taxable property value to the Put-in-Bay taxing district; thus, the taxpayer only objected to the tax commissioner's apportionment of the taxable value of the taxpayer's watercraft located in Port Clinton. In applying R.C. 5727.15(D), the tax commissioner should determine the total cost of personal property reported by the taxpayer as of tax lien day, December 31, in each taxing district where the public utility taxpayer has property physically located. Next, the total taxable value of the taxpayer's personal property is apportioned based upon the ratio of cost of personal property in each taxing district to total cost of personal property in Ohio. Therefore, the tax commissioner's ratio apportionment methodology was applied correctly.

In *Put-in-Bay Boat Line Co. v. Levin,* (July 26, 2011), BTA No. 2010-A-1203, the BTA affirmed the tax commissioner's final determination relating to the appellant taxpayer's 2008 public utility personal property tax because the appellant did not dispute the facts. The BTA's decision was consistent with the Sixth District Court of Appeals decision in *Put-in-Bay Boat Line Co. v. Levin, 2011-Ohio-974*, where the court affirmed the tax commissioner's methodology of apportioning the taxable value of watercraft owned or operated by appellant among several taxing districts for tax years 2006 and 2007.

In *Kohl's Department Stores, Inc. v. Levin*, (Feb. 15, 2011), BTA No. 2010-M-1958, the tax commissioner vacated his final determination before the appellant's notice of appeal was filed. Because the BTA lacks jurisdiction to hear matters challenging the tax commissioner's vacated decisions, the BTA dismissed the matter.

In *Gheen Rentals, Inc. v. Levin,* (Aug. 30, 2011), BTA No. 2009-A-3233, the BTA dismissed the taxpayer's appeal for lack of jurisdiction; the taxpayer failed to identify a specific error in its notice of appeal regarding the tax commissioner's final determination. The tax commissioner had dismissed the taxpayer's application for final assessment because the taxpayer failed to file the petition within the time limitation set forth in R.C. 5711.25. However, the taxpayer's notice of appeal did not contest the tax commissioner's dismissal of the petition, but instead addressed the correct taxable value of the taxpayer's personal property. Therefore, the BTA dismissed the appeal due to the taxpayer's failure to specify any error associated with the tax commissioner's dismissal of the taxpayer's application.

In *Progressive Plastics, Inc. v. Levin,* (Sept. 20, 2011), BTA No. 2008-A-241, the BTA affirmed the tax commissioner's personal property tax assessments against Progressive Plastics, Inc. ("PPI"). PPI, a plastic bottle manufacturer, contended that the tax commissioner improperly and unreasonably increased its personal property tax by increasing its listed value of inventory, manufacturing machinery, and equipment, and its furniture, fixtures, and others personal property not used in manufacturing. First, the BTA determined that when taxpayer information has been requested but is not supplied, as with the taxpayer here, the tax commissioner "shall inform himself as best as he can on the matters necessary to be known in order to discharge his duties," as provided by R.C. 5703.36. The tax commissioner had the 2004 and 2005 tax information available to him when making his final determination. The BTA rejected the taxpayer's argument that the tax commissioner's use of the prior-year information was improper since the taxpayer did not provide any evidence of how the amounts assessed were incorrect or had changed. Next, the BTA affirmed the tax commissioner's use of the FIFO inventory method, reasoning that the taxpayer—not the tax commissioner—bears the burden of showing that its inventory method reflects true value. PPI contended that LIFO reflected a substantial part of how its inventory moved, based upon its business practices; however, this was insufficient evidence that LIFO accurately reflected the true value of PPI's inventory. The BTA determined that the taxpayer's method of moving inventory was a hybrid method of both FIFO and LIFO; the BTA therefore affirmed the tax commissioner's use of the FIFO method. Further, collateral estoppel precluded PPI from raising this issue because it had already been raised in PPI's tax year 2003 case. Finally, the BTA determined that it lacked jurisdiction to consider whether Progressive's extrusion heads and/or screws qualified as dies that are exempt from taxation under R.C. 5701.03(A), or whether particular software packages should have been removed from the assessment, because neither was specified as error in PPI's petition for reassessment or in its notice of appeal, as required by R.C. 5717.02.

Miscellaneous

In *Omkar Enter., Inc. v. Levin,* (May 2, 2011), BTA 2008-M-1631, the BTA denied the taxpayer's appeal from the tax commissioner's final determination, which partially abated a

$500 penalty. This penalty was imposed on the taxpayer for failing to timely file its 2006 employer annual reconciliation of income tax withheld return (Form IT-941). Pursuant to R.C. 5747.15, a penalty may be imposed upon an employer who fails to file the required return; however, the tax commissioner may partially or wholly abate the penalty. Here, the taxpayer failed to show that the tax commissioner abused his discretion in denying the taxpayer's request to abate the penalty fully.

In *Lincoln Twp. v. Levin,* (Oct. 18, 2011), BTA No. 2009-M-693, the BTA affirmed the tax commissioner's final determination, which denied a request for transfer of funds pursuant to R.C. 5705.15. The Board of Trustees of Lincoln Township passed a resolution and sought to transfer funds from its "road and bridge fund" to its "general fund," because the necessary expenses of the township were greater than the available funds to pay such expenses. However, the receipts held by the road and bridge fund were received from a levy pursuant to R.C. 5575.10, which allows townships to create a fund for dragging, maintenance, and repair of roads and to levy upon all the taxable property of the township outside of any municipal corporation. The tax commissioner determined that, because the township could not assess a general operating levy upon all taxable property within the township that is outside the village, it therefore could not levy the tax for road maintenance outside the village, and then transfer the revenue to the general fund. The BTA evaluated the tax commissioner's denial under an abuse-of-discretion standard, finding that R.C. 5705.16 grants the tax commissioner broad authority to make such determinations, so long as the tax commissioner's attitude is not "unreasonable, arbitrary, or unconscionable." Further, with the absence of statutory criteria for the tax commissioner to base his decision, the final determination was within his authority and the BTA did not find an abuse of discretion.

In *HBD Industries, Inc. v. Levin,* (June 14, 2011), BTA No. 2008-M-1018, the BTA affirmed the tax commissioner's final determination in which he affirmed pass-through entity tax assessments. Specifically, the tax commissioner determined that directors' fees paid to out-of-state shareholders holding greater than 20 percent interest in a resident S corporation are includable in the shareholders' distributive shares for purposes of assessing each shareholder's income tax due to the State of Ohio. The tax commissioner held that these fees were compensation for personal services as defined by R.C. 5747.01(D); therefore, they were properly includable income, although the out-of-state shareholders took no active part in the business affairs of the corporation.

Sales & Use

In *Destiny's Auto Sales, LLC v. Levin*, (Feb. 8, 2011), BTA No. 2008-M-1773, the appellant auto sales dealer sought a refund for the sales tax paid on a car that was later exchanged. Due to mileage incurred on the car prior to the exchange, the appellant deducted $100 from the down-payment returned to the buyer as a credit. Ohio Adm. Code 5703-9-11 requires that a vendor must refund or credit "the full purchase price and applicable tax" to receive a sales tax refund from the state. Because the appellant failed to give the buyer credit for the full down-payment amount, the BTA denied the appellant's claim for failing to comply with Ohio Adm. Code 5703-9-11.

In *Satisfaction Charter Services v. Levin,* (Mar. 15, 2011), BTA Nos. 2008-M-940 and 2008-M-1157, the appellant appealed the final determinations of the tax commissioner, who had found that the appellant should have been collecting sales tax on river cruise packages and also should have been paying use tax on certain purchases. The appellant was operating a yacht operation and the Department of Taxation conducted an audit after discovering that the appellant did not have a vendor's license. Under R.C. Chapter 5739, exceptions and exemptions exist to the collection of sales tax. However, the exceptions and exemptions that exist in R.C. Chapter 5739 did not apply to the food sold for consumption on the yacht; neither did it apply to the sale and repair of tangible personal property. Therefore, the taxpayer failed to meet its burden of showing the manner and extent to which tax commissioner's determination was in error and the BTA affirmed both final determinations.

In *Cottonwood, Inc. v. Levin,* (Apr. 19, 2011), BTA No. 2009-K-5, the BTA affirmed the tax commissioner's final determination of assessments which included taxes, penalties, and additional charges regarding past sales tax owed by appellant. Although the validity of penalties assessed was not disputed, the appellant still filed a notice of appeal seeking waiver of the penalties and interest due to financial hardship. However, the BTA applied previous law from *J.M. Smucker, LLC v. Levin* (2007), 113 Ohio St. 3d 337, 2007-Ohio-2073, which provides that "it is [an appellant's] burden to show 'more than an error of law or judgment'; the appellant must show that… the tax commissioner's 'attitude is unreasonable, arbitrary or unconscionable.'" Therefore, the appellant failed to prove there was an abuse of discretion in the tax commissioner's final determination.

In *Hetrick v. Levin,* (May 17, 2001), BTA No. 2009-K-885, the BTA dismissed the taxpayer's appeal for lack of

jurisdiction due to the taxpayer failing to comply with R.C. 5717.02. The taxpayer did not file a copy of the notice of appeal with the tax commissioner within sixty days after service of the tax commissioner's final determination. Therefore, the BTA lacked jurisdiction to hear the matter due to the taxpayer's lack of timely filing the notice of appeal with both the tax commissioner and the BTA. *See also Tittle's Auto Wrecking & Recycling, Inc. v. Levin,* (May 17, 2011), BTA No. 2009-A-908; *Columbus Automatic Sprayer Co., v. Levin,* (Mar. 4, 2011), BTA No. 2010-K-3559; *Hetrick v. Levin,* (Mar. 4, 2011), BTA No. 2010-K-2753.

In *Ganley Akron, Inc. v. Levin,* (May 17, 2011), BTA No. 2010-K-3675, the BTA dismissed the taxpayer's appeal for lack of jurisdiction because the tax commissioner had yet to issue a final determination; the taxpayer had only received a notice of assessment. Therefore, the taxpayer's appeal was premature and jurisdictionally deficient.

In *Simpson v. Levin,* (June 14, 2011), BTA No. 2011-A-441, the BTA dismissed the appellant's appeal due to lack of jurisdiction because the appellant failed to specify an error in the final determination issued by the tax commissioner, as required under R.C. 5717.02. The appellant filed a notice of appeal seeking that credit be applied against the corporate assessment for sales tax previously paid and that the assessed penalty be reduced. However, the appellant did not address the tax commissioner's finding that appellant was a responsible party liable for payment of the corporate assessment. Therefore, the BTA determined that the appellant was a responsible party for purposes of the sales tax assessment at issue and the tax commissioner lacked jurisdiction to review the merits of the matter since the taxpayer had failed to specify an error in the tax commissioner's final determination. *See also Schaeffer v. Levin,* (June 14, 2011), BTA No. 2011-A-442.

In *Sinclair Media II, Inc. v. Levin,* (June 14, 2011), BTA Nos. 2010-A-3009 through 2010-A-3011, and 2010-A-3088, the BTA granted the tax commissioner's motion to dismiss, because the taxpayer failed to file notices of appeal with both the BTA and tax commissioner within sixty days after service of notice, as required by R.C. 5717.02. Also, the BTA dismissed the taxpayer's appeal as premature and remanded it to the tax commissioner for proper certification, because the tax commissioner did not perfect service of process with his final determinations, pursuant to R.C. 5703.37. The tax commissioner attempted to send the final determinations affirming sales tax assessments to the taxpayers by certified mail, but the U.S. Postal Service returned the determinations to the tax commissioner undelivered. The tax commissioner then emailed copies of the final determinations to the taxpayers in response to the taxpayers' email requests for documentation calculating the amount of tax due. However, the tax commissioner's attempt to serve the final determinations by email was insufficient because R.C 5703.39 requires the tax commissioner to serve final determinations by personal service or certified mail. R.C. 5703.37 requires that if some other means of service is to be used, there must be "a written agreement to deliver a notice or order by alternative means." The parties had not entered into such agreement in this case, the tax commissioner did not inform the taxpayer of the failure of certified mail service, and the tax commissioner did not inform the taxpayers that the email response constituted the official electronic service of the final determinations. Because the tax commissioner initially used an undeliverable address, he should have adjusted the address and should have resent the final determinations by certified mail, as provided in R.C. 5703.37(B)(1)(a). Thus, the BTA remanded the matter to the tax commissioner, with instructions for the tax commissioner to recertify notice of his final determinations, which would restart the time for the taxpayers to file timely appeals.

In *Helmbrecht v. Levin,* (June 14, 2011), BTA No. 2010-K-3034, the BTA affirmed the tax commissioner's final determination denying the taxpayer's petition for reassessment regarding a use tax assessment associated with the taxpayer's initial purchase and subsequent storage and use of a boat in Cuyahoga County. The taxpayer purchased a boat in Lake County, Ohio, for $872,500, with a $300,000 trade-in allowance. The taxpayer paid sales tax on the difference between the price and the allowance. The taxpayer paid this sales tax at a rate of 6.75%, which was the applicable rate in effect in Lake County at the time of purchase. However, the Cuyahoga County Auditor learned that the boat was being stored at a yacht club in Cuyahoga County, which was the taxpayer's county of residence; thus the Cuyahoga County Auditor credited the taxpayer for the 6.75% county sales tax paid on the boat, but also assessed the difference between the Lake County tax rate of 6.75% and the Cuyahoga County use tax rate of 8%. The taxpayer alleged that the tax commissioner was unaware that the boat had been stored in Lake County for 7-8 months of each year; however, the BTA found that the taxpayer did not satisfy his burden of showing in "what manner and to what extent the commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect." Therefore, the BTA determined that an excise tax was required upon the storage, use, or other consumption of the boat in Cuyahoga County because the boat was stored and

used in Cuyahoga County after the taxpayer learned to operate the boat, undertake sea trials, and have final commissioning work completed on the boat.

In *Armrel Byrnes Co. v. Levin,* (July 12, 2011), BTA No. 2008-A-1261, the BTA affirmed the tax commissioner's final determination denying the taxpayer's objections to a use tax assessment against it relating to several of the taxpayer's purchases. The taxpayer, a producer of asphalt and a paving construction contractor, contested the assessment of use taxes on natural gas and part purchases and costs for the repair of parts used in its asphalt batch plant. The company sought exemption under R.C. 5739.02(B)(42)(g), which provides an exemption from sales or use tax in "sales where the purpose of the purchaser is to…use the thing transferred,...primarily in a manufacturing operation to produce tangible personal property for sale." The tax commissioner determined that although the company produced tangible personal property to sell to third parties, the majority of the asphalt was used by the company in performing its construction contracts. Thus, the company qualified as a construction contractor, which is not subject to the exemption, rather than as a manufacturer, because the transfer of asphalt from the manufacturing division to the construction division of the company did not constitute a sale of the asphalt. OAC Rule 5703-9-14(D)(1) provides that a construction contractor that purchases material which becomes incorporated into realty is the consumer of that material, even if it performs contracts with governmental entities, as this company did. Further, pursuant to OAC Rule 5703-9-14(H), machinery and equipment, including the repair of them, and the supplies consumed in a construction contract, are taxable. Therefore, the machinery parts and natural gas in question were properly taxable because they were used and consumed in the performance of the construction contracts.

In *Berheide v. Testa,* (Oct. 4, 2011), BTA No. 2011-A-744, the BTA dismissed the taxpayer's appeal from a final determination of the tax commissioner in which the commissioner affirmed a sales tax assessment against the taxpayer, as a responsible officer of a company, pursuant to R.C. 5739.33. The taxpayer's petition for reassessment did not raise the issue of responsibility, instead it contested the accuracy of the underlying corporate assessment, which is an improper objection pursuant to the holding in *Rowland v. Collins* (1976), 48 Ohio St.2d 311 (holding that a petitioner may not challenge the merits of an assessment against a corporation in a proceeding pursuant to R.C. 5739.33). Although the taxpayer actually admitted to being a responsible party in his petition, the taxpayer contended to the BTA that the commissioner was in error by finding that the taxpayer was a responsible party for the assessment at issue. The BTA precluded the taxpayer from raising the issue of party responsibility on appeal because the taxpayer failed to raise the issue in his initial petition to the tax commissioner. Therefore, the BTA determined that it lacked jurisdiction to consider party responsibility and the accuracy of the underlying assessment.

Work Product & Privilege

In *U.S. v. Richey,* No. 09-35462, (9th Cir. Jan. 21, 2011), the Internal Revenue Service ("IRS") sought to compel access to the work files of an appraiser who had appraised a real estate easement at the request of certain taxpayers. The taxpayers attached the appraiser's appraisal report to their tax returns, claiming a significant charitable contribution deduction for the appraised easement. Citing the attorney-client privilege and work product doctrine, the district court refused to compel the appraiser to provide his files to the IRS. Reversing, the Ninth Circuit held that the IRS had acted in good faith, and held that the district court had erred in finding that the appraiser's easement appraisal file was protected by the attorney-client privilege and the work-product doctrine. The appellate court determined that the attorney-client privilege was inapplicable because the appraisal was conducted for the purpose of determining the value of the easement and not for providing legal advice. Also, the work-product doctrine was inapplicable because the defendant was hired to prepare an appraisal report for the taxpayers to attach to their tax return, and not in anticipation of litigation. Thus, the IRS summons was issued in good faith, and the district court erred by finding that the defendant's entire appraisal work file was protected by the attorney-client privilege and the work-product doctrine.