In the Supreme Court of Ohio

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

COMBINED RESPONSE/REPLY BRIEF OF APPELLANT/CROSS-APPELLEE MARTIN MARIETTA ENERGY SYSTEMS, INC., N/K/A LOCKHEED MARTINENERGY SYSTEMS, INC.

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I. Introduction

Pike County Auditor, Teddy L. Wheeler ("Wheeler"), can offer no reasonable justification for his unilateral decision to issue 45 retroactive tax assessments totaling more than a ***Billion*** dollars against the contractors who operated the Portsmouth Gaseous Diffusion Plant ("PORTS") on behalf of the United States Department of Energy (DOE), including Martin Marietta Energy Systems, Inc.[1] ("LMES"). As both the Board of Tax Appeals ("BTA") and the Tax Commissioner ("Commissioner") held below, Wheeler's assessments directly violate Pike County's specific contractual obligations. They also contradict numerous long established and unmistakable legal principles. Under these circumstances, Wheeler's vexatious actions in levying and pursuing these illegal taxes manifestly constitute bad faith.

A. No one other that Wheeler and his Counsel support his assessments.

Wheeler attempts to excuse his conduct by insisting that others likewise concluded that the DOE contractors owed the tax. He represents to this Court that "the Tax Commissioner, the Tax Department Staff, the BTA, and even LMES believed that LMES might be responsible for the 1993 taxes assessed by the Auditor."[2] ***This claim is patently false***. Each official, entity, and body so referenced has unfailingly *repudiated* Wheeler's assessment. Wheeler's mischaracterizations of law and fact cannot mask the reality that his unilateral tax assessments were both unsupported and unsupportable.

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[1] N/k/a Lockheed Martin Energy Systems, Inc.

[2] Merit Brief of Teddy L. Wheeler ("Wheeler Brief") at 16.

II. LMES's Response to Wheeler's Brief

A. The PILOT Agreement constitutes a binding settlement releasing DOE and LMES from any potential personal property tax liabilities.

Both the Tax Commissioner and the BTA below found that, in return for the payment of hundreds of thousands of dollars, Pike County explicitly waived any right to personal property taxes on government-owned equipment used by the PORTS DOE contractors, including LMES. In addition, in the involved PILOT Agreement, the County specifically acknowledged that it had no right to collect such tax. Despite these overriding facts, Wheeler barely mentions the Agreement until page 38 of his Brief, and never acknowledges his personal involvement in negotiating for and securing the payments.[3] Instead, he cites the Agreement only to claim that the promises that he and Pike County made -- as well as the similar covenants contained in all of the other PILOT Agreements between Pike County and DOE covering every Tax Year from 1954 to 1997 -- cannot be enforced to void his assessments. Wheeler's position is untenable.

1. The PILOT Agreement is clear and unambiguous.

Beginning in at least February 1996, Wheeler requested a payment-in-lieu-of-taxes ("PILOT") from DOE for the tax year here involved (1993). In return for the payment, *inter alia*, DOE insisted that Pike County specifically release any and all claims that the County might have against DOE or its contractors for real or personal

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[3] Among the "Joint Stipulations of Fact" (Supp. 101-104) filed with the BTA below was the following:

> 7. When Auditor Wheeler assumed the Pike County Auditor's Office in 1987, he was made aware of the previous PILOT Agreements between Pike County and DOE, and between 1987 and 1998 he requested that DOE make payments in lieu of taxes to Pike County for tax years 1986 through 1997. In addition, he personally executed four such PILOT Agreements covering tax years 1986-88, 1989, 1990, and 1991 respectively. * * *

property taxes. The terms mirrored those offered in previous years, see Stip. at ¶ 6, Supp. at 102, and ultimately an agreement containing those covenants was executed covering tax years 1992 through 1997.

The PILOT Agreement (dated August 21, 1998) specifically provides:

> NOW THEREFORE, the parties hereto agree as follows:
>
> 1. For purposes of rendering financial assistance to the County, DOE will pay the County, as payment in lieu of property taxes for County government purposes, the sum of $175,546.83 for tax years 1992 through 1997 * * *.
>
> 2. Such payment shall constitute ***full satisfaction of any and all claims*** *the County may have for taxes for tax years 1992 through 1997 against DOE and DOE's contractors, of any nature whatsoever, on, with respect to, or measured by the value or use of Government-owned* real or *personal property* which is utilized in carrying on activities of DOE * * *.
>
> 3. As a further consideration for such payment, the *County agrees to and does waive and release, as to each and all of said companies and organizations, any and all claims for said taxes for tax years 1992 through 1997 * * *"* (Emphasis added.) Supp. 88-93.

2. Wheeler and Pike County thus bargained away any potential claim for the taxes they now seek to collect.

Ohio law is clear: a compromise and settlement "extinguishes or merges the original rights or claims and correlative obligations and, where the contract is executory, substitutes for the original claim the new rights and obligations agreed to." *Bd. of Commissioners of Columbiana Cty. v. Samuelson*, 24 Ohio St.3d 62 (1986), at 63. Moreover, "where a party has taken the benefits and secured the advantages of an agreement of compromise and settlement, he will be conclusively estopped from asserting any claim against that which was released or assured to the other party to such agreement. *Id.*, citing *White v. Brocaw*, 14 Ohio St. 339, 347 (1863). Similarly, the doctrine of "accord and satisfaction" establishes a contract between parties where there

is a settlement of a claim by some performance other than that which is due. *AFC Industries v. DiCello*, 46 Ohio St.3d 1,3 (1989). These principles have been recognized and applied repeatedly to the compromise and settlement of Ohio tax liabilities and, as correctly determined by both the Tax Commissioner and the BTA, are dispositive of the claims asserted by Wheeler in this case. See, *Klaben v. Tracy* (Jan. 28, 1992), Franklin App. No. 91AP-689, unreported, appeal denied, 64 Ohio St.3d 1413 (1992); *Lucas v. Limbach*, 35 Ohio St.3d 71 (1988); and, *Computer Output Microfilm Corp. v. Tracy* (June 7, 1996), BTA No. 1994-M-340.

Pike County agreed to accept, and indeed received more than $175,000 in full satisfaction of any and all personal property tax claims it could make against LMES for Tax Year 1993. The Commissioner and BTA were correct in so finding.

3. Despite the fact that Wheeler readily admits requesting the funds, negotiating the Agreement, and authorizing the waiver, he now has the temerity to claim that the County lacked the authority to waive the taxes.

Wheeler's and his attorney's argument that Pike County lacked the authority to enter into the PILOT Agreement with DOE is as brazen as it is spurious. From the moment he assumed the Auditor's office, Wheeler *personally* 1) asked for payments-in-lieu-of-taxes from the federal government, 2) negotiated the terms of those payments, specifically including the waiver of any claimed personal property taxes; and 3) either himself executed, or recommended that the Pike County Commissioners execute, the Agreements. Now, trapped by his own conduct, Wheeler asks this Court to ignore these actions as if they never occurred.

a. Pike County and Wheeler had both actual and apparent authority to enter into the PILOT Agreements.

The Auditor initially maintains that the Pike County "Commissioners have no authority under any circumstances to settle or compromise personal property tax assessments for Pike County."[4] If Wheeler really believes this, then his applying for these payments and executing the PILOT Agreements would amount to fraud on the United States government. Wheeler admits that he personally requested the payments from DOE, and that the federal government would not agree to any such payments without an explicit waiver of all claims that Pike County may have had to personal property taxes on the government-owned equipment at PORTS. See, H.R. at 112.

However, Pike County had clear legal authority to enter into agreements like the one that governs this case. *R.C. 305.26* provides:

> The board of county commissioners may compound or release, in whole or in part, a *debt*, judgment, fine, or amercement due the county and for the use thereof, except where it or any of its members is personally interested. (Emphasis added).

This Court has consistently concluded that a tax is a debt that can be compromised. See, *e.g. Cincinnati v. De Golyer*, 25 Ohio St.2d 101, 103-104 (1971), ("To the average person, an unpaid tax is a debt. ***** While a tax may not be a debt due the county by certain and express agreement between the parties, it is money due under a much stronger obligation. A tax is a liability created by statute."). *R.C. 305.26* specifically empowers a county to compromise and settle any debt. A tax being a debt, Pike County had full authority to enter into the PILOT Agreement and the County is bound by the promises and representations that it made in that Agreement.

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[4] Wheeler Brief at 39.

b. There has been no change in the law affecting these Agreements.

Wheeler also suggests that the law somehow changed since he and the county executed the PILOT Agreement. This is simply untrue. Wheeler maintains:

> The PILT Agreement was signed by the Chairman of the Board of County Commissioners, who at the time believed that the Board had the authority to waive taxes. This belief would *later* prove to be incorrect. Wheeler Brief at 10. (Emphasis added).

Tellingly, however, all of the authorities cited by the Auditor in supposed support of this claim *predate* the subject Agreement, the primary case – *State ex rel. Donsante v. Pethtel* – having been decided in 1952.

c. Wheeler is legally precluded from arguing that the PILOT Agreements are not enforceable.

Moreover, even assuming *arguendo* that a basis exists for Wheeler's argument that the PILOT Agreements are *ultra vires, i.e.,* beyond Pike County's legal authority, where an *ultra vires* transaction has been partially executed, and one party has received the benefit of that transaction, the defense of *ultra vires* is no longer available. *Murrell v. Elder-Berman Stores Corp.*, 16 Ohio Misc. 1 (1968), at 6; *Siders v. Gem City Concrete Co.*, 13 Ohio C.C. 481 (1910), affirmed, 87 Ohio St. 519 (1913). See, also, *London & Lancashire Indem. Co. v. Fairbanks Steam Shovel Co.*, 112 Ohio St. 136 (1925) ("one party cannot receive the benefits which are embraced in total performance of a contract made with it by another party and then set up the invalidity of the transaction as a defense.").

Pike County accepted the payment made under the PILOT Agreement. Having long-ago reaped the benefits of this bargain, the County and Wheeler cannot now claim, decades later, that they have no duty to comply with that Agreement.

d. Pike County is the entity that levied the subject assessments.

Wheeler next argues that the County's specific waiver of the claimed taxes is not effective because other entities, *i.e.*, school districts, are not parties to the PILOT Agreement. But such participation is not required. School districts have never been taxing authorities for purposes of Ohio's personal property tax. Rather, the districts receive a formula-based share of the state tax funds that the County receives.

Moreover none of these "other" political subdivisions have come forward to either assert a right to additional taxes, or to otherwise argue against the validity of the PILOT Agreement. The promises made by *Wheeler and Pike County* in the PILOT Agreements releasing ***their*** claims to personal property taxes are certainly binding upon ***them***.

Attempting to avoid the consequences of the PILOT Agreement, Wheeler and his counsel now ask this Court to ignore both the law and the County's settlement of his tax claims, and forgive the County's use of the money paid for that settlement. There is no legal basis for this Court to consider such an unreasonable result.

B. Wheeler's attempted assessments are contrary to long-standing Ohio law.

At the outset of their Brief, Wheeler and his counsel state that "[t]his case is about the rule of law." LMES agrees. As support for its claim that Wheeler acted in bad faith, LMES cited a plethora of Ohio "rules of law" – both administrative and judicial – establishing the fact that U.S. government-owned equipment utilized in the business of the government has never been subject to Ohio's personal property tax. (See LMES Merit Brief at pages 23-30). Conversely, Wheeler has presented no reliable authority to refute LMES's argument, or to reasonably challenge the validity of the decisions of both the Commissioner and the BTA summarily canceling his attempted assessment.

1. LMES was never a taxpayer as defined by Ohio law.

In affirming the Commissioner's *Final Determination* cancelling the Auditor's purported personal property tax assessment, the BTA found, *inter alia*, that the PORTS management contractor (LMES) was not a "taxpayer" within the meaning of *R.C. Chapter 5711*.[5] This conclusion is consistent with long-standing Ohio law recognizing that when, as in this case, the property sought to be taxed was owned by the federal government, the entity using that equipment, here LMES, was not subject to taxation.

a. LMES had no "beneficial interest" in the property sought to be assessed.

R.C. 5711.01(B) defines "taxpayer" as "any owner of taxable property, including ***every person*** having a beneficial interest in taxable personal property in this state***." Similarly, this Court has expressly held that the *only* "persons*** liable to pay personal property tax (are) those who own or have a beneficial interest in the taxable personal property." *Refreshment Service Company, Inc. v. Lindley*, 67 Ohio St.2d 400, 402 (1981). Wheeler has repeatedly, albeit grudgingly, acknowledged that the property he assessed was never *owned* by LMES or any of the other DOE contractors. Therefore, his only alternative is to argue that LMES somehow held a "beneficial interest" in the property. As established repeatedly in the record and as specifically determined by the BTA, LMES *never* held such an interest and therefore could never be considered a taxpayer for purposes of Ohio's personal property tax.

i. LMES possessed no "characteristics of ownership" in the government-owned equipment that Wheeler assessed.

For purposes of Ohio's personal property tax, this Court has defined a "beneficial interest" as "the interest of one who is in possession of all characteristics of ownership

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[5] See *Decision* at pages 3-4.

other than legal title of the taxable property." *Refreshment Service Co., supra* at 403. *LMES had no such interest in the subject property.* Citing that undeniable fact, the BTA cancelled Wheeler's attempted assessment holding:

> Herein, all personal property at PORTS, including the uranium at the plant, was owned by the federal government and MM was not permitted to utilize any of it for its own purposes. The "DOE didn't want comingling of contractor property, so it was excluded and none was provided". The property was physically "tagged" indicating that it was owned by the federal government and records were maintained tracking its status. Unauthorized use of such equipment could have resulted in criminal penalties. The maintenance/repair/purchase of equipment was subject to DOE's approval, unless of such an insignificant, day-to-day nature that it was deemed unnecessary to obtain such consent.
>
> Further, the DOE supervised, oversaw and controlled all operations of PORTS. Special clearances were required to be employed by PORTS. "[H]ardly a week went by without DOE looking over our shoulders." Language from the contract between MM and the DOE indicates that the DOE "directed" certain MM activities, while others were "subject to the control of DOE," and "[p]erformance of the work under *** [the] contract" was "subject to the technical direction of DOE *** Representatives." The DOE determined the specifications of production at PORTS. MM primarily provided the skilled staff to work at PORTS. The DOE determined all of the sales/production necessary to meet customer needs, as MM did not participate in the marketing and sales efforts. *Accordingly, we conclude that MM did not have a "beneficial interest" in the subject personal property.* While MM, of course, had its own business interests under the contract, those interests were limited by the terms of such contract which may have ceded the management of the day-to-day operations to MM, but retained the long term control over and authority for all decisions of any consequence in the DOE.

BTA *Decision* at page 3, (emphasis added), (deposition citations omitted).

ii. LMES's required use of DOE property to perform its contract in no way changes this fact.

Wheeler nevertheless asserts that LMES should be liable for the tax because it ***used*** the government's property in performing its DOE contract. This argument was

rejected by both the Commissioner and the BTA because it expressly contrdicts established Ohio law. The mere use of personal property in the operation of a business is *not* sufficient to establish that the user has a beneficial interest in the property. *Refreshment Service Co.*, *supra,* at 402-403, (equating use with beneficial interest would "abrogate the definition of taxpayer" as defined by the statute). See also, *Equilease Corp. v. Donahue*, 10 Ohio St.2d 81 (1967).

2. Wheeler's citation of a ruling issued in a *sales and use tax* case involving a previous PORTS contractor is irrelevant to this case.

Wheeler and his counsel nevertheless insistence that a 1988 Tax Commissioner ruling somehow changed this well-established law[6] is equally meritless. The Journal Entry referenced by Wheeler, (Auditor's App. 50), concerned a ***sales and use tax*** assessment against Goodyear Atomic Corporation, the preceding operator of PORTS. The cited decision *does not reference, allude to, or in any way involve an interpretation of Ohio's personal property tax law or R.C. Chapter 5711.* The Commissioner's reference to "tangible personal property used by an entity" is *solely* in the context of Ohio's sales and use tax.[7] It had nothing to do with the personal property tax assessment here under consideration.

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[6] See Wheeler Brief at 10-11.

[7] Ohio sales and use tax is fundamentally different from Ohio's personal property tax. It is a tax "not upon the property itself, but on the transactions with respect to the property.* * * [i]t is imposed 'neither on the ownership of property, nor is it with respect to such ownership. *Gen. Motors Corp. v. Lindley*, 67 Ohio St.2d 331,333 (1981). See, also, *Phillips Industries, Inc. v. Limbach*, 37 Ohio St.3d 100 (1988); *Gen. Motors v. Tracy* (Oct. 4, 2002), BTA Nos. 1997-T-168, 169, affirmed, 102 Ohio St.3d 33, 2004-Ohio-1869; *Howell Air, Inc. v. Porterfield*, 22 Ohio St.2d 32, 34 (1970) ("The Ohio sales tax is not a tax on or with respect to the *ownership* of property. It is not a *property* tax.").

a. If anything, the "Goodyear" ruling reaffirms that government-owned property is not subject to Ohio's tangible personal property tax.

The 1988 Final Determination cited by the Wheeler concluded that Goodyear was subject to Ohio sales and use tax. Although the Commissioner audited the PORTS operation at that time, he made no such finding with respect to personal property taxes. There is not the slightest inference in the Determination that the Commissioner believed that the DOE contractor (Goodyear) also was responsible for those separate taxes. The cited decision provides no support for Wheeler's claims to the contrary.

3. LMES was not a "manufacturer."

Wheeler's Brief posits the same extraneous argument to this Court that he unsuccessfully made to the BTA -- that based on *ATS Ohio, Inc. v Tracy*, 76 Ohio St.3d 297 (1996), LMES should be taxed as a "manufacturer" under *R.C. 5711.16.* Remarkably, Wheeler and his counsel even claim that the BTA agreed with his position.

a. The BTA specifically rejected this argument.

Instead, the BTA considered Wheeler's argument and found it to be legally and factually unsound:

> The auditor also contends that MM is subject to the personal property tax assessed by virtue of the provisions of R.C. 5711.16, as a manufacturer. That section specifically provides that "[a] person who purchases, receives, or holds personal property for the purpose of adding to its value by manufacturing, refining, rectifying, or combining different materials with a view of making a gain or profit by so doing is a manufacturer. **** ***By virtue of MM's restricted relationship with the DOE and its personal property at PORTS, we conclude that MM is not a manufacturer, as contemplated by R.C. 5711.16, but that the DOE, who rendered ultimate control and supervision over PORTS, was the manufacturer. Therefore, MM was not properly assessed as a manufacturer.***

BTA *Decision* at page 3-4. (Emphasis added).

The BTA's analysis is undoubtedly correct. LMES did not manufacture, own, or refine any tangible personal property on its own account, nor did it own any fixed assets or inventory as a result of, or in connection with, its activities at PORTS. There is simply no legal or factual basis for Wheeler's argument that LMES could be considered a "manufacturer" under *R.C 5711.16*.

b. This Court's discussion of a manufacturer's inventory in *ATS* has no relevance to the government-owned equipment used by LMES.

Wheeler's continued reliance upon *ATS* is utterly misplaced. The *ATS* decision did not concern contractors like LMES, nor did it expand the reach of Ohio's personal property tax. The issue in *ATS* was whether "inventory," for which the involved manufacturer was receiving periodic payments from its customer, was taxable to that manufacturer. LMES was *never* a manufacturer under Ohio law. Likewise, the government-owned equipment which Wheeler sought to tax was not inventory. Nothing in the *ATS* decision even remotely supports Wheeler's position in this case.

C. Wheeler's assessment also is precluded by both the Tax Commissioner's previous instructions to county auditors and by the opinion of the Ohio Attorney General.

Despite the fact that Ohio historically has housed numerous federal installations, including several other large DOE facilities, Wheeler has conceded that his tax assessments against the PORTS contractors were the *only* ones ever issued for federally-owned personal property in the state. H.R. at 96-97. The reason is clear. Every county auditor except Wheeler followed the explicit directive of his superior, the Ohio Tax Commissioner, and recognized that government-owned property such as that present at PORTS was not subject to taxation in Ohio.

1. The Opinion of the Attorney General and County Auditor Bulletin 126 specifically informed all county auditors that federally-owned property was not to be taxed.

Following the U.S. Supreme Court's decision in *City of Detroit v. Murray*, *supra*, the Tax Commissioner sought the advice of the Ohio Attorney General concerning whether Ohio could tax federally-owned personal property. After an exhaustive review of Ohio's Constitutional and statutory provisions, the Attorney General answered the inquiry in the negative:

> That the Ohio statutes impose an *ad valorem* property tax rather than a privilege tax appears so clear that, so far as I can find, such an issue has never been directly raised or adjudicated in our Supreme Court in a case involving tangible personal property. ***
>
> Accordingly, and in specific answer to your inquiry, it is my opinion that the Ohio property tax levied under the present provisions of Title 57 of the Revised Code on tangible personal property which is used in business is neither a possessory nor a privilege tax but an *ad valorem* tax on such property and such tax is not applicable to property possessed by a person doing business in Ohio which property is titled in the United States under the provisions of a contract with the Federal Government. *1958 Ohio Atty. Gen. Ops. No. 2471* at 466-467 & 469.

Upon receipt of the Attorney General's opinion, the Tax Commissioner issued to all county auditors *County Auditor Bulletin No. 126*. LMES App. at 34. This *Bulletin* advised each county auditor that, pursuant to the AG's opinion, Ohio law "* * * could not be construed as imposing either a possessory or privilege type tax" on tangible personal property and that, as such, *"personal property taxes could not be assessed against persons in possession of government property." Id.* (Emphasis added.)

a. The Opinion of the Attorney General and the Instructions of the Commissioner are binding on the Auditor.

R.C. 5703.05(H) imposes upon the Tax Commissioner the duty to make "all assessments * * * and orders the department of taxation is by law authorized and

required to make * * *." Under *R.C. 5703.05(G)*, the Commissioner is further directed to maintain a "continuous study of the practical operation of all taxation and revenue laws of the state." In response to the decision in *Murray*, *supra*, the Commissioner exercised his authority to review the law for purposes of determining whether Ohio was authorized to assess government owned property in the possession of another. With the advice and opinion of the Attorney General, the Commissioner determined that Ohio law precluded such an assessment.

At the time the Commissioner issued his order, *R.C. 5715.28* provided:

> The tax commissioner shall decide all questions that arise as to the construction of any statute affecting the assessment, levy, or collection of taxes, in accordance with the advice and opinion of the attorney general. ***Such opinion and the rules, orders, and instructions of the commissioner prescribed and issued in conformity therewith shall be binding upon all officers, who shall observe such rules and obey such orders and instructions, unless the same are reversed, annulled, or modified by a court of competent jurisdiction.*** (Emphasis added).

The preclusive effect of such a determination has been echoed by both this Court, see *State ex rel. Foster v. Evatt*, 144 Ohio St. 65 (1944); *Morgan Cty. Budget Commission v. Bd. of Tax Appeals*, 175 Ohio St. 225 (1963), and the BTA, see *National Petroleum Publishing Co. v. Bowers* (Nov. 4, 1954), BTA No. 26537, 73 Ohio L. Abs. 252. Thus, unless and until it is modified by a "court of competent jurisdiction," *the directive of the Tax Commissioner is the binding law of Ohio.*

County Auditor Bulletin No. 126 remains in effect to this day; it has never been rescinded, overruled, or superseded. Similarly, *1958 Ohio Atty. Gen. Ops. No. 2471* is the only Ohio Attorney General opinion dealing with the assessment of personal property tax on persons in possession of government property. In accordance with

Ohio law, the Attorney General's *Opinion* and the *County Auditor Bulletin No. 126* are the prescribed authorities on this issue, and must be followed by all county auditors, including Mr. Wheeler. See, *R.C. 5715.45* and *5715.46*.

b. Ohio law required the Commissioner to cancel the assessments.

R.C. 5715.28 and *5715.29* likewise mandate that the rules, orders and instructions of the Tax Commissioner shall be binding upon "all officers," and that the Commissioner may enforce obedience to the same. This statutory scheme applies to all county auditors. In addition, *R.C. 5715.40* states, "County auditors *** [and] assistant assessors, *** shall perform the duties relating to the assessment of property for taxation or the levy or collection of taxes which the department of taxation directs," and both this Court and the BTA have consistently held that county auditors are officers for purposes of *R.C. 5715.28* and *5715.29*.[8] See, *e.g.*, *Olmsted Falls Bd. of Edn. v. Limbach*, 69 Ohio St.3d 686 (1994); *Springfield Local School Dist. Bd. of Edn. v. Lucas Cty. Budget Comm.*, 71 Ohio St.3d 120 (1994), (county auditor must apply the reduction factor certified to the auditor by the Tax Commissioner and a county budget commission has no authority to later modify the factor); and *McCormack v. Limbach* (June 12, 1987), BTA No. 1984-A-893, (county auditor required to follow the Commissioner's order to collect outstanding taxes).

Finally, *R.C. 5715.29* provides, in mandatory language, that the Tax Commissioner "*shall cause the rules prescribed by him to be observed, the orders and instructions issued by him to be obeyed* * * *." (Emphasis added). *See, also, Zupancic v. Tracy* (Feb. 26, 1993), BTA No. 1991-D-1451, and *Ferrone v. Medina Cty. Bd. of*

[8] See, *Morgan Cty. Budget Comm.* supra, in which Court made it clear that the phrase "all officers" indicates that "the General Assembly did not contemplate 'orders' which would 'be binding' only on one or a few officers." *Id.* at 229.

Revision (Oct. 6, 1995), BTA No. 1994-T-531. In that Wheeler's actions were expressly contrary to both Ohio law and the explicit instructions of the Tax Commissioner, the Commissioner ultimately was obligated to cancel Wheeler's assessment against LMES.

2. The Auditor's claim that in 1965 Ohio changed the law with regard to the nature of its personal property tax – a change that was somehow missed by every Tax Commissioner since that time – is created out of whole cloth.

Confronted with overwhelming authority prohibiting his assessments, Wheeler and his counsel concoct a theory that in 1965 this Court fundamentally changed the scope of personal property taxation in Ohio. In doing so, they ask this Court to accept that all county auditors and Commissioners in the last 50 years missed the fact that government-owned personal property was made taxable in Ohio in 1965, and that Wheeler alone has properly interpreted the law.

Citing, totally out of context, a single phrase of *dicta* from *Doraty Rambler v. Schneider*, 4 Ohio St.2d. 37 (1965), a case that had nothing to do with taxing the "use" of personal property in Ohio, Wheeler contends that "any supposed administrative policy of the Tax Commissioner based upon County Bulletin 126's directive that personal property taxes could not be assessed against governmental contractors* * * died in 1965, if not earlier".[9] Fortunately, the relationship between Ohio and its taxpayers is governed by law and not the unrestrained enterprise of a single county auditor, fifty years after the fact.

[9] Wheeler Brief at 30.

a. The *Doraty* quote is nothing more than a preliminary sentence that the Auditor repeats out of context. The nature of Ohio's personal property tax was never an issue in the *Doraty* case.

Wheeler bases his entire claim that Ohio sanctioned the taxing of government-owned personal property on an introductory sentence of dicta in *Doraty Rambler, Inc. v. Schneider*, *supra*. That sentence states, "[t]he tangible personal property tax in Ohio is prospective in nature and is levied and assessed at the beginning of the year for the privilege of using tangible personal property in business for the duration of the coming year." For good reason, this is the only time that the phrase "privilege of using" is found in the opinion.

The scope of Ohio's personal property tax law, and particularly whether a "non-owner" could be subject to the tax, was not an issue in that case. Unlike LMES, the involved merchant in *Doraty* both *owned* the subject inventory, and had the full "authority to sell" the goods. Even the most cursory review of the opinion reveals that the cited phrase refers not to the taxability of the property, but rather to the year in which the admittedly taxable property was required to be listed.

Moreover, Wheeler's position – that *Doraty* signaled a fundamental expansion in the scope of Ohio personal property tax that was either "missed" or ignored by the then Tax Commissioner and every other Commissioner who served during the next 40 years is delusional. As the present Commissioner has expressed in this case – and as was confirmed by the BTA below – Ohio law always has precluded the taxation of personal property owned by, and used on behalf of, the federal government. Nothing in the

Doraty case, or the other "merchant inventory"[10] cases cited in Wheeler's Brief, abrogates, or even calls into question this long-established law.

b. This Court, the BTA, the Attorney General, and the Commissioner all have consistently treated Ohio's personal property tax as an *ad valorem* tax, and never altered the position that government-owned property used by a private contractor is exempt from Ohio taxation.

i. In at least three decisions subsequent to *Doraty*, this Court recognized Ohio's personal property tax as an *ad valorem* tax.

Among the authorities LMES cited regarding the fundamental differences between Ohio's sales and use tax and Ohio's personal property tax, (see page 10, fn. 7, *supra*.), were three decisions of this Court, *General Motors, Phillips Industries,* and *Howell Air.* In each of those cases, this Court characterized Ohio's personal property tax as a tax on the "property" in order to emphasize the difference between a transactional privilege tax (Ohio's sales and use tax) and an *ad valorem* ownership tax (Ohio's personal property tax).

ii. The BTA has likewise consistently held Ohio's personal property tax to be an *ad valorem* tax.

Similarly, the BTA has never wavered from its position that Ohio's personal property tax is a tax on the property owner. For instance, in *Brentwood Originals, Inc. v. Lindley* (1981), BTA No. 1979-D-493 -- sixteen years after *Doraty* -- the BTA held that "Ohio has an *ad valor*em tax on tangible personal property 'used in business'." Wheeler cannot cite a single instance where the BTA has ruled otherwise.

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[10] The government-owned equipment located at PORTS was manifestly not "inventory," and LMES was *prohibited* – backed by criminal penalties – from selling or even using the property for any purpose other than as specifically authorized by DOE.

iii. The Commissioner's position that government-owned property is not subject to Ohio's personal property tax has never changed.

Wheeler admits that *County Auditor Bulletin No. 126* and *1958 Ohio Atty. Gen. Ops. No. 2471* specifically prohibit the very assessments that he levied against LMES. He presents no evidence that these directives were either withdrawn or modified. Instead, he asks this Court to forgive his flagrant disregard of those instructions because he unilaterally believes them to be wrong! *Brentwood, General Motors, Philips Industries,* and *Howell Air, supra.,* all decided subsequent to *Doraty*, unquestionably support the conclusion that Ohio cannot place a tax on government-owned property. Wheeler's claim that *Doraty* changed this well-settled law is simply specious.

D. This Court has jurisdiction over LMES's appeal. It is absolutely the proper forum to determine the issues involved in this case.

Despite his outrageous conduct, in an attempt to avoid, or at least delay a ruling by this Court, Wheeler argues that as long as LMES received "some" of what it requested before the BTA, LMES lacks standing to appeal. Wheeler's argument was rejected both by this Court[11] and by the Fourth District Court of Appeals[12] because it is simply wrong.

1. LMES was manifestly aggrieved by the failure of the BTA to find vexatious and/or bad faith conduct.

Despite the fact that *R.C. 5717.04* invests this Court with "exclusive jurisdiction" over LMES's appeal, Wheeler maintains that the statute does not apply because "it is impossible to conclude that LMES was aggrieved by the Decision." In making this argument, Wheeler and his counsel basically ask this Court to ignore all of his

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[11] See ***Entry*** dated November 19, 2014.

[12] See ***Decision and Entry*** dated January 16, 2015, (attached as Appendix 1).

misconduct and, in effect, to hold that LMES does not even have the right to "suggest" that his actions were vexatious or done in bad faith.

Acting decades after the fact, Wheeler generated 45 frivolous tax assessments that were not only expressly contrary to Ohio law and the contractual promises that he, himself made, but also were condemned by the Tax Commissioner – the very officer for whom Wheeler claimed to be acting as "deputy." Once the "test case" (1993) assessment had been summarily cancelled, Wheeler and his counsel continued their crusade, forcing LMES to spend over a million dollars to create a record and present its case to the BTA. Nevertheless, the BTA refused to find that Wheeler's conduct was vexatious, or otherwise offer LMES an avenue to recover its costs. LMES was manifestly aggrieved by the *Decision* and had every right to bring the issue to this Court.

2. A final resolution of the involved legal issues by this Court will obviate the need for any further litigation of the 44 other pending assessments.

Now that the matter is before this Court, the Tax Commissioner has agreed to "stay" the further adjudication of the over one billion dollars in additional Wheeler-assessments currently pending before his office until there has been a final resolution of this "test" case. The pendency of those other assessments makes it all the more appropriate for this Court to decide these issues once and for all.

During the proceedings before the BTA, LMES raised the same legal and constitutional defenses to Wheeler's assessment that it has now brought to this Court. However, with a single exception – the finding that LMES was not a taxpayer – those issues were ignored by the BTA. LMES submits that its requested "modification" of the BTA *Decision* is not only sufficient to invoke the jurisdiction of this Court, see *Christian Church v. Limbach*, 53 Ohio St.3d 270 (1990); *Wheeler v. Testa*, (January 16, 2015),

Pike County Court of Appeals No. 14CA853, (Appendix 1), but also is essential to LMES's defense of the 44 other Wheeler assessments still pending before the Commissioner.

E. Pike County's repeated waivers of personal property taxes coupled with the County's and Tax Commissioner's half-century held position that government-owned property was not subject to those taxes, in and of themselves precluded Wheeler's assessments.

Consistent with his theme of ignoring virtually everything that has gone before in this case, Wheeler spends some five pages of his Brief discussing the "Administrative Procedure Doctrine" and why that doctrine cannot be applied to this case. LMES has never suggested such an application. As cited by Wheeler, this "doctrine applies against the *state* when the *state* has interpreted the law in favor of a particular taxpayer in writing and has adhered to that interpretation over an extended period of time, but *later corrects its interpretation* and attempts to assess the taxes." That is not the situation in this case.

The "state", i.e., the Commissioner, has never changed its interpretation of the law. Only Wheeler and Pike County believe that they can tax federal property. The Administrative Procedure Doctrine thus has no application in this case.

F. The Auditor has completely failed to support his valuation of the assessed property.

In addition to holding that Wheeler's assessments were unlawful, both the Commissioner and the BTA ruled that Wheeler failed to support his assessed value. Although upholding that finding is not necessary for the resolution of this case, that determination was manifestly correct.

Wheeler acknowledges that he made no review of the books and records of LMES as required by *R.C. 5711.18*, and that he had "no information" concerning what

equipment was being used by LMES at PORTS during 1992. H.R. at 143-144. Likewise, Wheeler admits that – beyond citing the federal government's acquisition cost of the original equipment at PORTS, and indicating that he applied a 30% depreciation figure -- he has no "explanation of what property he determined was taxable", or the methodology he used to value the property".[13] Finally, Wheeler admitted that he had no idea what, if any, of the assessed property was being used at PORTS during the year in question. Thus, despite the fact that this assessment was Wheeler's unilateral brainchild, he did literally nothing to determine its accuracy, and the BTA was correct in so holding.

G. The assessment falls outside of the ten-year statute of limitations. *R.C. 5703.58.*

R.C. 5703.58 establishes a ten-year statute of limitations within which the Tax Commissioner (or his deputy) may assess an unpaid tax. The ten-year period is measured from the date the unpaid report or return was due. Specifically, *R.C. 5703.58* provides: "* * * [T]he tax commissioner shall not make or issue an assessment for any tax payable to the state that is administered by the tax commissioner, * * * after the expiration of ten years * * *." Here, the Auditor issued the Assessment in December 2010. This is a span of more than seventeen years between lien date and the assessment. The BTA was therefore correct in finding that the assessment should be barred by the statute of limitations.

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[13] *Final Determination*, S.T. at 2-3.

1. Wheeler's argument that the statute of limitations does not apply because Ohio's personal property tax is not a state tax is inconsistent with Ohio law.

Wheeler incorrectly represents in his Brief that the personal property tax is not "payable to the state" and the statute of limitations contained in *R.C. 5703.58* does not apply. In *Wasteney v. Schott*, 58 Ohio St. 410 (1898), this Court recognized that the personal property tax is a state tax, even though county officials are charged with its administration. *Wasteney* noted that the personal property tax "belongs to the state's revenues" and "is in favor of the state." *Id.* Nearly a century later, the 2nd District Court of Appeals reaffirmed *Wasteney*. In *Underwood v. Yoder Brake and Manufacturing Co.*, 79 Ohio App.3d 423 (1992), the Court of Appeals held that the personal property tax is not a local tax but a tax payable over to the state for its use in support of the general good.

R.C. 5703.58 applies to all taxes "payable to the state," which includes the personal property tax. *Wasteney and, Underwood, supra.* The BTA was correct in finding that Wheeler's assessment against LMES was time-barred.

III. LMES's Reply in Support of its Bad Faith Claim

A. Auditor Wheeler's assessments against LMES and his continued pursuit of those taxes before this Court constitute bad faith and vexatious litigation. LMES is entitled to sanctions as a result.

Before the BTA, Wheeler specifically admitted that he was aware of the existence of a directive from his superior, the Ohio Tax Commissioner, that government-owned personal property was not to be taxed, at least *twenty years* before his issued the subject assessments. H.R. at 107-109. He also acknowledged that his repeated attempts to convince the Commissioner to reconsider this position, beginning in at least 1992, were uniformly rejected. Finally, Wheeler readily concedes that throughout the

entire period that the plant was in operation, he and Pike County requested and received payments from the federal government "in-lieu" of the very taxes that he now seeks to collect. See Stip. No. 6; Supp. at 102. Yet, despite these admissions, Wheeler asks this Court to find that he was completely justified in ignoring all that had gone before and, nearly two decades after it ceased operating that facility, forcing LMES to spend over a million dollars to contest his unfounded claims. In the final analysis, there simply is no justification for Wheeler's conduct, and he should be held accountable.

1. Wheeler's only avenue to explain or excuse his improper actions is to flagrantly misrepresent the position of the Department of Taxation.

Wheeler and his counsel contend that '[t]he Auditor cannot be found to have acted in bad faith when he pursued taxation only after the Ohio Department of Taxation supported his position ***."[14] In support of this claim, Wheeler represents that "*** on July 22, 2010, John Nolfi [a Department of Taxation employee] wrote to LMES on Department letterhead setting forth the analysis for the taxability of the use of personal property by LMES."[15] The Auditor then quotes portions of the letter and concludes * * * "[t]he Nolfi letter undeniably sets forth that the Department believed in 2010 that taxation (of LMES) was proper."[16] ***Wheeler's claim is an outright fabrication.***

a. The Department never made a personal property tax claim against LMES or any other PORTS operator.

No such letter was ever addressed to LMES. As the Auditor and his counsel know, the subject letter (included at page 20 of the Auditor's Supplement) was directed to Lockheed Martin Utility Services ("LMUS"), an entirely different corporation 1) that was never a DOE contractor, and 2) whose operation of the PORTS facility was not on

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[14] Wheeler Brief at 19.
[15] *Id.* at 17.
[16] *Id.*

behalf of the United States government. Instead, beginning in July, 1993, LMUS operated PORTS as a commercial venture under contract with the United States Enrichment Corporation ("USEC"). By its express terms, the Nolfi letter had nothing to do with any proposed taxation of LMES for its operation as a DOE contractor pre-1994.

b. Even then, the Nolfi letter did not notify *LMUS* that any tax was owed. It merely requested information to support *LMUS's* claim that, even under the changed operations, the government property at PORTS should remain free from taxation.

With the passage of the *Energy Policy Act of 1992, Public Law 102-486*, effective July 1, 1993, uranium enrichment operations at PORTS passed from DOE to USEC. However, the involved equipment remained the property of the federal government. Because PORTS was no longer a DOE operation, the property was *leased* from DOE by USEC for use by USEC's subcontractor, LMUS, in the new commercial venture. It was this fundamental (and not altogether understood) change in the historical operation of PORTS that spurred Nolfi's written inquiry regarding continued tax exemption. In fact, the Nolfi letter specified that the 1993 transfer of the facility operations from DOE to USEC was one of "the two most important facts" prompting the inquiry. Id. Conversely, ***nothing in the letter remotely suggested a belief by the Department that tax was owed by LMES, or any other DOE contractor***, for DOE-owned property that had been used in connection with the former DOE operation of PORTS.

c. The Nolfi letter prompted no action by the Department of Taxation against either LMES or LMUS, because the "no tax" position remained unchanged.

Finally, the Nolfi letter resulted in ***no*** assessments against either LMES or LMUS. Contrary to Wheeler's misrepresentations, the Department's unwavering position has been – and continues to be – that the DOE-owned property utilized by contractors in

operating PORTS is not subject to taxation in Ohio. The Tax Department ***never*** sanctioned Wheeler's assessments, and to now assert that they did only demonstrates Wheeler's and his counsel's continuing bad faith.

2. Wheeler's additional claim that LMES filed Ohio personal property tax returns "during its last three years as the operating contractor at PORTS" also is untrue.

Remarkably, Wheeler now claims that LMES, itself, was convinced that it owed the tax. As supposed support for this preposterous claim, Wheeler directs the Court to Tax Returns filed by LMES in 1994, 1995, and 1996, and asserts:

> Further bolstering the Auditor's belief that the DOE personal property might be taxable was the filing of tax returns by LMES *during its last three years as the operating contractor at PORTS*. Although LMES raises numerous arguments regarding its surprise that the Assessment was issued, LMES itself had determined that it was a taxpayer required to file a return. [17]

(Emphasis added). But, as Wheeler and his counsel know, in fact they make reference to it at page 13 of their Brief, *LMES was not operating the facility during that time, nor was it utilizing any of the DOE-owned equipment assessed by the Auditor.*

As a result of the 1992 legislation "privatizing" PORTS,[18] Congress removed all uranium enrichment operations from DOE effective June 30, 1993. After that date, LMES's activities at PORTS were limited to environmental restoration. Had LMES utilized its own personal property (rather than DOE's) to perform those activities, then such LMES-owned property may have been subject to Ohio taxation. To be safe, LMES filed Ohio returns for those years listing that value of LMES property at "$ -0-." However, these post-1993 Tax Returns had nothing to do with the government-owned equipment here at issue.

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[17] Wheeler Brief at 19.

[18] as well as its "sister" plant in Paducah, Kentucky

Indeed, the best evidence of the irrelevancy of these returns is that fact that not even Wheeler attempted to assess LMES for the years the returns represented. Wheeler's final assessment directed against LMES was for the Tax Year here at issue, 1993 (calendar year 1992). Nothing about LMES's filing returns for periods *after* it ceased operating that plant can serve as evidence that it somehow determined that it was liable for taxes *during* the years it served as the DOE PORTS contractor. These unconnected returns provide no excuse for Wheeler's conduct.

3. The frivolity of the Auditor's actions is exemplified by his need to twist the record and stretch the case law beyond reason in order to justify his conduct.

To misread a legal holding or to inadvertently mischaracterize a fact can occur in any case. Likewise, a party has every right to argue a position when the law is vague, or contest a fact that can be interpreted from differing points of view. However, as seen throughout this brief, Wheeler's and his counsel's representations to the Tax Commissioner, the BTA, and to this Court go well beyond the sensible and reliable. The factual record is stretched beyond reasonableness, and case authority is misrepresented and contorted, all a futile attempt to defend actions that every other tax official and tribunal in this state has held to be improper.

4. Even with his misrepresentations, Wheeler cannot overcome all of the law supporting the exempt nature of the property in issue.

a. Wheeler and his counsel cannot deny that taxation of government-owned property has never been permitted in Ohio.

As previously discussed, the taxation of federally-owned personal property has never been sanctioned in Ohio. Wheeler has not cited a single instance – other than his own 45 assessments -- where such taxation has ever been attempted, let alone permitted. Instead, the Ohio Attorney General, Ohio Tax Commissioner, officials in the

Department of Taxation, the BTA, and even the decisions of this Court, all support the conclusion that Ohio's tangible personal property tax cannot be assessed against contractors such as LMES who utilize government-owned equipment for the benefit of the United States. In this case, the evidence and law prohibiting Wheeler's assessment against LMES is vast and includes, *inter alia*:

- the assessment was barred by the express terms of a PILOT Agreement negotiated by Wheeler and under which Pike County and its subsidiaries received payment;
- the representations and covenants made in the PILOT Agreement – particularly Pike County's express waiver of the very taxes that Wheeler assessed -- had the "force and effect of law" and pre-empted state law under the Supremacy Clause;
- the assessment was in violation of a legally binding directive from Wheeler's superior, the Tax Commissioner;
- the assessment was expressly contrary to the opinion of the Ohio Attorney General;
- the assessment was contrary to the decision of the U.S. 6th Circuit Court of Appeals holding that an *ad valorem* tax, such as Ohio's personal property tax, could not constitutionally be applied to federally-owned property;
- LMES owned no property at PORTS and thus was not a taxpayer for purposes of Ohio's personal property tax;
- Wheeler lacked the authority to issue assessments for property not listed in returns under *R.C. 5711.2*; and,
- Wheeler's assessment, issued nearly two decades after the claimed tax was due, was barred by the applicable ten-year statute of limitations. *R.C. 5703.58*.

b. Wheeler and his counsel cannot explain away their simply ignoring this overwhelming authority.

In order for his assessment against LMES to be valid, Wheeler does not have to overcome one or two of the foregoing facts and authorities; ***he needs to overcome all of them***. However, the record and applicable law fail to support his position against a

single one of these legal impediments, let alone against the entire catalog. Wheeler's and his counsel's attempt to stretch and curl the key elements in this case do nothing to change this basic fact. Wheeler's and his counsel's prosecution of this claim and his other 44 assessments is legally and factually indefensible.

5. Wheeler's behavior prior and up to his issuing the assessment emphasizes the bad faith and frivolous nature of his actions. The character of his conduct is demonstrated in both the things he did and the things he failed to do.

Wheeler acknowledges in his Brief that, as early as 1992, he was convinced that Pike County had the right to collect personal property taxes from LMES. Spurred on by this belief, he made a number of requests of Ohio tax officials, and even contacted a U.S. Senator. None of Wheeler's efforts garnered any support for his position. A review of some of his actions, coupled with a list of what Wheeler could have done and did not do, clearly reveals the bad-faith nature of the tax assessment he issued some 18 years later. Among the things that Wheeler did were:

- He sent a detailed letter to the Tax Commissioner in 1992 requesting permission to assess LMES. This request was ignored and thus rejected;[19]
- He pushed the Commissioner to give in to his demands, and sought assistance from individual employees and officials of the Department of Taxation. At least three of those of officials told Wheeler that LMES could not be assessed;[20]
- He repeatedly contacted, both in writing and in person, U.S. Senator Brown requesting that he intercede on Pike County's behalf. To LMES's knowledge, no action was taken by the Senator. Certainly, there was no change in the position of either the Tax Commissioner or the DOE.
- He requested additional payments-in-lieu-of-tax from DOE, and instructed Pike County officials to enter into agreements waiving all tax claims.

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[19] H.R. at 39; Supp. at 105.

[20] H.R. at 37, 39, and 106.

Despite this admitted history, Wheeler nevertheless forged ahead with his 45 assessments.

Equally incriminating is what Wheeler failed to do:

- He continued to negotiate PILOTs with DOE, while never once advising them of his position or suggesting that the personal property taxes should be excluded from the agreements;[21]
- He never used the possibility that the property was subject to tax to push the DOE for a larger amount of funding under the PILOT program;
- He had no conversations with LMES about additional funding opportunities;
- Even though DOE has a specific program that supported additional funding to local communities that could show "special burdens" as a result of hosting a DOE facility, Wheeler neither applied for this program nor requested any other funding opportunities from the government.

Wheeler's claim that his assessments are merely an attempt to obtain for Pike County the money it deserves is all the more disingenuous when one considers this conduct.

6. Wheeler's blatant disregard for the directives of his superior officers, actions there were clearly beyond the scope of his authority as a county auditor, should not be tolerated.

a. Wheeler ignored the explicit instructions of the Tax Commissioner.

Wheeler is quick to wrap himself in the cloak of a "deputy" Tax Commissioner, yet he offers no explanation how, in doing so, he could blithely and blatantly ignore the direct instructions of his superior. In County Auditor Bulletin 126 the Commissioner expressly instructed county auditors *not* to tax federally-owned personal property. In addition, Wheeler admits that officials in the Tax Department specifically and repeatedly told him that Ohio's tax policy was not to tax such property. Yet, despite the fact that, as Auditor, he was legally required to follow these directives, see, *e.g.*, *Olmsted Falls Bd. of Edn. v. Limbach*, 69 Ohio St.3d 686 (1994); *Springfield Local School Dist. Bd. of*

[21] *Id.* at 111-113.

Edn. v. Lucas Cty. Budget Comm., 71 Ohio St.3d 120 (1994); *McCormack v. Limbach* (June 12, 1987), BTA No. 1984-A-893, Wheeler plowed forward with his illegal and improper assessments.

b. Wheeler dismissed out of hand any authority that did not conform to his personal belief that an assessment could be issued.

Certainly, it is within the scope of any official's duty to explore issues related to the law and to seek authority for a proposed action. The Tax Commissioner, the Attorney General, and the county auditors routinely discuss the taxability of specified property and reach consensus as to what action may be taken under Ohio law. However, in this case, when Wheeler received an answer that he didn't like, he merely ignored the law. Rather than accepting his role as a "deputy," Wheeler placed himself above the Tax Commissioner and the Attorney General. Concluding that he himself knew better, Wheeler rejected every authority that conflicted with his view. These actions ultimately resulted in extreme prejudice to LMES and they should not be allowed to stand unredressed.

7. Wheeler's contention that the DOE may ultimately be responsible for the tax in this case further exposes the bad faith nature of his actions.

Wheeler's assessments were reckless and single-minded. Contractual obligations, legal authorities, and the policies of his own superiors were not sufficient to choke off his desire to seek funds beyond those provided by law. Yet, he now suggests to this Court that his actions are excusable because DOE, not LMES, may ultimately be required to pay the claimed bounty. Apparently from Wheeler's perspective, everyone should simply look the other way because the federal government can easily reach into its deep pockets to remit the $1.3 Billion.

First, it does not matter who will be ultimately responsible for any tax. The issue is whether the tax can be legally assessed. *The consensus of every legal authority consulted is that the answer to this query is, "No, it cannot."* Second, Wheeler ignores the fact that DOE already paid Pike County for lost tax revenues. Instead his position is: "So what? Let's sock them again!" One can hardly imagine a more glaring example of bad faith.

B. LMES has unnecessarily been required to spend over a million dollars to defend Wheeler's unfounded assessments.

Wheeler's first assessment against LMES was issued nearly 18 years after LMES ceased operating the PORTS plant. This levy was followed shortly thereafter by 44 other assessments against LMES and the other DOE contractors, all of whom LMES had the contractual obligation to defend. Even though it was initially agreed that the 1993 assessment would be litigated as a "test case," to date LMES has been forced to spend ***$1,287,500*** to contest this case alone.

Because Wheeler's assessments were the first (and only) of their kind in the history of Ohio, LMES was required to exhaustively research Ohio and federal law, even before filing its first *Petition for Reassessment* before the Tax Commissioner. (Of course, it was also necessary for LMES to file similar *Petitions* in each of Wheeler's other 44 cases). More significantly, however, because this case did not reach the BTA until two decades after LMES ceased operating PORTS and more than ten years after the plant was permanently shut down, it was extremely difficult and expensive for LMES to create the necessary factual record. This task was all the more burdensome because Wheeler insisted – a claim to which he still clings, see, *e.g.*, Wheeler's Brief at pages 4-5 – that LMES was more than just the DOE-contract operator of PORTS. As a result,

LMES was required to literally search the country for witnesses who could present necessary testimony, interview those individuals and, with respect to those who could offer relevant historical information, conduct their videotaped depositions. The three individuals whose deposition testimony was finally presented to the BTA were, by then, resident in Oak Ridge, Tennessee, Phoenix, Arizona, and Puget Sound, Washington respectively.

None of this expense, in both time and human terms, would have been necessary had Wheeler reasonably followed the law. None of this expense would have been necessary had Wheeler followed the directives of his superiors. And remarkably, none of this expense would have been necessary had Wheeler and Pike County simply abided by the promises that they made in the PILOT Agreements.

LMES has been aggrieved and remains aggrieved. The BTA's failure to address LMES' bad faith and frivolous action claims and/or to award attorney fees has resulted in demonstrable prejudice to LMES, see *Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals*, 91 Ohio St.3d 174 (2001), at 177, for which LMES manifestly has the right to seek redress in this Court.

C. The actions of both Wheeler and his legal counsel constitute bad faith and are frivolous. This Court clearly has the authority to sanction both.

So egregious are the actions of Mr. Wheeler in this case that this Court, if so inclined, can sanction Wheeler for frivolously acting in bad faith, and otherwise abusing his authority. See, *S.Ct. Prac.R. 4.03(A)*. What Wheeler has done is wrong; it is wrong in scope, it is wrong as being beyond his authority to act as a deputy, and it is wrong in terms of the actions he undertook and pursued contrary to the his County's express promises and the applicable law.

In order to justify this conduct, Wheeler and his counsel have had to twist the facts, ignore and misrepresent the law, disregard the officials he is duty-bound to follow, and breach agreements made and followed in good faith. Under the circumstances, Wheeler's actions are not even remotely "reasonably grounded in fact" or "warranted by existing law." This is the very definition of "frivolous." *R.C. 5703.54(F)(2)*. See, also, *Ceol, supra; Wiltberger v. Davis*, 110 Ohio App.3d 46 (1996). *Cf. R.C. 2323.51*; *Schoffner v. U.S.* , 627 F.Supp. 167 (6th Cir., S.D. Ohio, 1985). The misrepresentations made, and the actions undertaken in this matter, are so outrageous that this Court could also send a message to Wheeler's attorney for pursing this frivolous matter, first to the BTA and certainly to this Court. See *R.C. 5703.54*, *S.Ct. Prac.R. 4.03(A)*, and *Edbow, Inc. v. Franklin Cty. Bd. of Revision*, 86 Ohio St.3d 1207 (1999), (where this Court sanctioned an attorney for pursing frivolous actions against a taxpayer).

Wheeler and his counsel continue to harass LMES even to this day. Despite the fact that this Court denied their motion to dismiss LMES's first-filed appeal, Wheeler and his counsel refused to abandon their later Fourth District Court of Appeals filing. As a result, LMES was forced to expend additional unnecessary attorney fees to secure that dismissal.

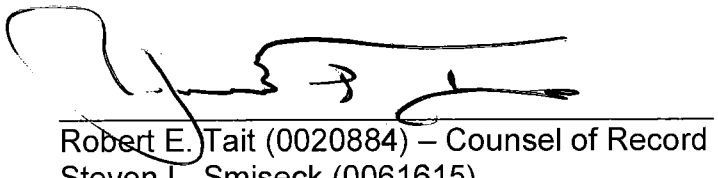
And, apparently, there is no end to this harassment. Even though the Court of Appeals has dismissed Wheeler's improper appeal, specifically holding that "[n]either the case law nor the statute support Wheelers argument," and that "Wheeler's argument that LMES lacks standing to appeal and therefore failed to invoke the Supreme Court of Ohio's jurisdiction is meritless," (see ***Decision and Judgment Entry***, Appendix 1. at ¶¶8,11), Wheeler and his counsel now have asked for "Reconsideration".

Obviously, the type and extent of any appropriate sanction in this case is within the discretion of this Court. However, LMES submits that, for no other reason than to dissuade such unrestrained conduct in the future, the Court should not allow Wheeler's actions to go unpunished, and not shy away from affording LMES at least a minimum amount of redress.

IV. Conclusion

Reduced to its simplest terms, this case is about a rogue auditor who, ignoring the law, the instructions of his superiors, and express contractual obligations that he, himself negotiated, embarked on a personal crusade to extort additional funds from the federal government. This behavior was at the expense of a private contractor (LMES) who left the state nearly two decades earlier. Not satisfied with the money that his county had already received, and encouraged by his counsel, Wheeler abused his power as Auditor and took actions that were illegal, vexatious, and done in bad faith. The Commissioner and the BTA have already summarily cancelled Wheeler's assessment, but LMES suggests that this Court should go further and sanction this egregious conduct to whatever extent and in whatever manner that the Court deems appropriate.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on this 2nd day of February 2015, a true copy of the foregoing Appellant's third merit brief combining both a reply and a response to the arguments raised in the cross-appeal, with incorporated Appendix, was sent by regular U.S. mail, postage prepaid, to the Honorable Mike DeWine, Attorney General of Ohio and Daniel W. Fausey, Assistant Attorney General, State of Ohio, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215–3428; to Kevin L. Shoemaker, Shoemaker Law Office, 8226 Inistork Court, Dublin, Ohio 43017; to William Posey, Keating, Muething & Klekamp, PLL, One East Fourth St., Suite 1400, Cincinnati, Ohio 45202; and to Sean A. McCarter, Law Office of Sean A. McCarter, 88 North Fifth St., Columbus, Ohio 43215.

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a/k/a Lockheed Martin Energy Systems, Inc.

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PIKE COUNTY

Teddy L. Wheeler, In His Official Capacity as Auditor of Pike County, Ohio, (et al.),	:	
Appellant(s)-Appellants,	:	Case No. 14CA853
v.	:	
Joseph W. Testa, Tax Commissioner of Ohio, (et al.),	:	
	:	DECISION AND JUDGMENT ENTRY
Appellee(s)-Appellees.	:	

APPEARANCES:

Kevin L. Shoemaker, Dublin, Ohio, and William Posey, Keating, Muething & Klekamp, PLL, Cincinnati, Ohio as Special Counsel to Robert Junk, Pike County Prosecuting Attorney for Appellant Teddy L. Wheeler, in his capacity as Pike County Auditor.

Michael DeWine, Attorney General of Ohio, Melissa W. Baldwin and Daniel W. Fausey, Assistant Attorney General, Columbus, Ohio, for Appellee Joseph W. Testa, Tax Commissioner of Ohio.

Robert E. Tait, Hilary J. Houston, and Steven L. Smiseck, Vorys, Sater, Seymour, and Pease LLP, Columbus, Ohio for Appellee Martin Marietta Energy Systems, Inc. a/k/a Lockheed Martin Energy Systems, Inc.

HOOVER, P.J.

{¶1} Appellant Teddy L. Wheeler, in his official capacity as the Auditor of Pike County, Ohio, filed an appeal in this court from a decision and order of the Ohio Board of Tax Appeals pursuant to R.C. 5717.04, which gives concurrent appellate jurisdiction to the Supreme Court of Ohio and the Court of Appeals for Pike County. Appellee

Martin Marietta Energy Systems, Inc. a/k/a Lockheed Martin Energy Systems, Inc. ("LMES") filed a motion to dismiss the appeal on the grounds that LMES had filed an appeal from the decision and order in the Supreme Court of Ohio before Wheeler had filed his appeal in our court. Wheeler opposed the motion to dismiss and also filed a motion for a stay of his appeal in our court. Because we find that the jurisdiction of the Supreme Court of Ohio was properly invoked first, we are without jurisdiction to consider this appeal. Appellee's motion to dismiss is **GRANTED** and this appeal is **DISMISSED.** All other pending motions are **DENIED** as **MOOT**.

I.

{¶2} Wheeler, as auditor of Pike County, Ohio issued a personal property tax assessment against LMES. The Tax Commissioner of Ohio cancelled the assessment and Wheeler appealed to the Board of Tax Appeals. The Board of Tax Appeals affirmed the decision of the Tax Commissioner, finding that the Tax Commissioner had appropriately cancelled the tax assessment at issue:

> As such, we have determined that the commissioner appropriately cancelled the assessment in question. Accordingly, based upon our conclusions, we need not address any other contentions raised by the parties hereto. The final determination of the commissioner is hereby affirmed.

Wheeler v. Testa, BTA No. 2012-2043 at 4 (August 7, 2014).

{¶3} LMES filed a notice of appeal in the Supreme Court of Ohio and the Board of Tax Appeals in accordance with R.C. 5717.04 the following day, August 8, 2014. In its notice of appeal, LMES does not contest the ultimate decision affirming the Tax Commissioner's cancellation of the tax assessment. However, LMES identifies multiple

errors in the decision, including the Board's failure to address LMES's claims concerning bad faith and frivolous conduct, the Board's failure to order the reimbursement of LMES's attorney fees and expenses, and its failure to make certain findings or address certain legal arguments raised by LMES. On September 5, 2014, Wheeler filed both a cross appeal in the Supreme Court of Ohio and a notice of appeal in the Court of Appeals for Pike County in which he identified multiple errors in the decision.

{¶4} LMES filed a motion to dismiss this appeal on the grounds that the appeal was filed first in the Supreme Court of Ohio and that Court has exclusive jurisdiction of the appeal.

II.

{¶5} The relevant provisions of R.C. 5717.04 state:

> ***The proceeding to obtain a*** reversal, vacation, or ***modification of a decision of the board of tax appeals*** shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides. * * *
>
> Such appeals shall be taken within thirty days after the date of the entry of the decision of the board on the journal of its proceedings, as provided by such section, by the filing by appellant of a notice of appeal with the court to which the appeal is taken and the board. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days of the date on which the first notice of appeal was filed or within the time otherwise prescribed in this section, whichever is later. A notice of appeal shall set forth the decision of the board appealed from and the errors therein complained of. Proof of the filing of such notice with the board shall be filed with the court to which the appeal is being taken. ***The court in which notice of appeal is first filed shall have exclusive jurisdiction of the appeal.***
>
> (Emphasis added.) R.C. 5717.04.

{¶6} LMES filed its notice of appeal in the Supreme Court of Ohio on August 8, 2014. LMES's notice complied with the provisions of R.C. 5717.04: it was timely, it was also filed with the Board, it set forth the decision and the errors complained of, and it included proof of the filing of the notice with the Board. LMES's notice seeks a modification of the decision, specifically seeking determinations of contentions that the Board decided not to address. Because LMES first filed its timely and proper notice of appeal in the Supreme Court of Ohio, the Supreme Court of Ohio has exclusive jurisdiction of the appeal.

{¶7} Wheeler argues that LMES's notice of appeal is improper because LMES does not have standing to appeal the decision. Wheeler argues that the cancellation of the assessment is a "total victory" for LMES. As a result, LMES was not aggrieved by the decision and cannot challenge any portion of it. Because LMES did not have standing to appeal, Wheeler argues that the Supreme Court of Ohio's jurisdiction was never properly invoked. He argues that his notice of appeal filed in the Court of Appeals for Pike County was the first properly filed notice of appeal and we have exclusive jurisdiction over the appeal.

{¶8} Neither the case law nor the statute supports Wheeler's argument. The statutory provisions of R.C. 5717.04 expressly allow a party to seek a modification of the Board's decision. LMES is seeking a modification of the decision, asserting that certain contentions it raised were not properly addressed by the Board.

{¶9} Additionally, the Supreme Court of Ohio has ruled that for a party to have standing to appeal an ***issue***, that party must be aggrieved by that ***error***. The focus is

not on whether a party was aggrieved by the decision as a whole, but whether a party was aggrieved by a particular issue or finding within the decision. *Dayton-Montgomery Cty. Port Auth. v. Montgomery Cty. Bd. of Revision,* 113 Ohio St.3d 281, 2007-Ohio-1948, 865 N.E.2d 22, ¶ 33 ("the Port Authority is arguably not a proper party to assert that issue in its appeal, since it was benefited, not aggrieved, by that error"). *Equity Dublin Associates v. Testa*, ___ Ohio St.3d ___, 2014-Ohio-5243, ___ N.E.2d___, ¶23 (December 2, 2014)("The BTA determined that that exemption [R.C. 3354.15] did not apply, and the BOE and the tax commissioner—who opposed exemption of the property on any basis [R.C. 3354.15, R.C. 3358.10, or R.C. 5709.07(A)(4)]—were not aggrieved by that finding. As a result, they have no standing to appeal it.").

{¶10} LMES's situation is like that of the taxpayer in *Christian Church of Ohio v. Limbach*, 53 Ohio St.3d 270, 560 N.E.2d 199 (1990). There, a taxpayer who claimed entitlement to a tax exemption under two alternative statutes received a favorable decision from the Board of Tax Appeals. The Board granted the exemption under one of the statutes, R.C. 5709.07, but "it did not pass upon the issue of exemption under R.C. 5709.12." *Id.* Because the taxpayer did not appeal the Board's failure to address its alternative contention that it was entitled to an exemption under R.C. 5709.12, the Supreme Court of Ohio held that it lacked jurisdiction to decide that issue. *Id.* at fn. 1. Thus, a party who receives a favorable overall decision from the Board of Tax Appeals, nevertheless has standing to appeal the Board's decision not to address alternative legal theories and must appeal those alleged errors. Otherwise, review of those issues is waived.

III.

{¶11} We find that LMES properly and timely first filed a notice of appeal in the Supreme Court of Ohio, thereby invoking that Court's exclusive jurisdiction. Wheeler's argument that LMES lacks standing to appeal and therefore failed to invoke the Supreme Court of Ohio's jurisdiction is meritless. As a result, we have no jurisdiction to hear this matter. LMES's motion to dismiss is hereby **GRANTED**. This appeal is **DISMISSED**. All other pending motions are hereby **DENIED** as **MOOT**. **IT IS SO ORDERED.** The clerk shall serve a copy of this entry on all counsel of record at their last known addresses by ordinary mail.

Harsha, J. & Abele, J.: Concur.

FOR THE COURT

Marie Hoover
Presiding Judge