

ORIGINAL

# 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

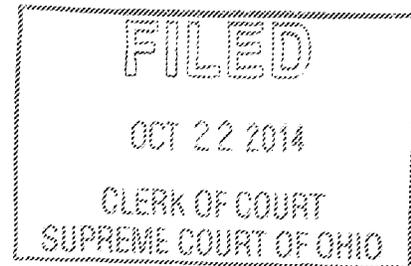
Martin Marietta Energy Systems, Inc.,  
n/k/a Lockheed Martin Energy Systems, Inc.

Appellant/  
Cross-Appellee

Case No. 2014-1362

Appeal from the Ohio  
Board of Tax Appeals

BTA Case No. 2012-2043



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**MERIT BRIEF OF APPELLANT MARTIN MARIETTA ENERGY SYSTEMS, INC.,  
N/K/A LOCKHEED MARTIN ENERGY SYSTEMS, INC.**

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## INTRODUCTION AND STATEMENT OF FACTS

1. **Although it had clear jurisdiction over the issue, the Board of Tax Appeals erred in failing to address LMES' claim seeking redress for the Pike County Auditor's frivolous and bad faith conduct, conduct which resulted in an unlawful assessment of personal property tax against LMES and which has materially injured LMES.**
  - a. **Acting nearly 18 years after the fact, the Pike County Auditor intentionally and recklessly disregarded all case, statutory, and administrative law to issue a large assessment of personal property tax against a non-owner of the property.**

On December 23, 2010, Teddy L. Wheeler ("Wheeler" or "Auditor Wheeler"), as Auditor of Pike County, issued a personal property tax assessment against Appellant Martin Marietta Energy Systems, Inc., n/k/a/ Lockheed Martin Energy Systems, Inc. ("LMES"). The assessment crudely estimates delinquent personal property taxes on certain U.S. government-owned equipment located at the Portsmouth Gaseous Diffusion Plant ("PORTS") for tax year 1993. Coming nearly 18 years after the tax year in issue, the assessment was in the amount of \$23,244,789, including \$7,513,468 in tax, \$3,756,734 in penalties, and \$11,974,587 in pre-assessment interest. Auditor Wheeler issued this assessment on his own without the assistance, support, agreement, or consent of the Ohio Tax Commissioner ("Commissioner"), the official under whom Wheeler statutorily serves as a deputy in local tax matters.

- b. **Federal and Ohio law exempt LMES and U.S. government owned property located at a federal facility from state and local property tax assessment. Wheeler assessed tax in violation of these laws.**

The Portsmouth Gaseous Diffusion Plant ("PORTS") was constructed in the early 1950s as part of our national defense program. PORTS was one of three facilities commissioned by the United States government for the enrichment of uranium. By the early 1960s, PORTS was the only facility capable of producing the supply material necessary to construct nuclear weapons and to power the U.S.' nuclear navy and space programs. The post-World War II science of uranium enrichment was in its infancy. The U.S. government needed technical

expertise and management skills that it could only find in the private sector. Consequently, the government created the Management and Operation (“M&O”) contract. See, Deposition of Harry R. Nestruck (“Nestruck Dep.”) at 8-10. LMES operated PORTS for the DOE under such a contact between November 1986 and July 1993. LMES is a successor to an earlier contractor.

To fulfill its contract with the DOE, LMES used certain U.S. government-owned machinery, equipment, fixtures and supplies (hereinafter referred to as “government property” or “government-owned property”). *All property utilized in those operations, from the processing equipment to the paperclips, was owned by the U.S. government, and the contractor was explicitly forbidden to utilize any of that property for its own purposes.* *Id.* at 18-19; Deposition of Ralph G. Donnelly (“Donnelly Dep.”) at 11; Deposition of Peter Dayton (“Dayton Dep.”) at 11. To assure compliance, all appropriate items were specifically “tagged” as property owned by the government, and there were criminal penalties for the unauthorized use of any such equipment. See, Donnelly Dep. at 16, 18; Nestruck Dep. at 20-21, 24. Finally, all of the enriched uranium produced at PORTS was owned and controlled by the government. LMES was prohibited from any activities that were not specifically performed on behalf of the U.S. government. See, Dayton Dep. at 12. This relationship between DOE and LMES – specifically the fact that LMES owned none of the equipment utilized at PORTS – was long known by Auditor Wheeler and other Pike County officials and was, in fact, *stipulated* to the BTA. See, Joint Stipulation of Facts at ¶6; Supp. at 102. *In short, LMES never owned, legally or beneficially, any property in the State of Ohio. LMES’ books and records further reflect no such ownership.* See, also, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, at 181 (1981) (in which the United States Supreme Court stated that PORTS is “authorized by statute to carry out a federal mission, with federal property, under federal control”).

LMES was never assessed for its use of the government property during its operation of the PORTS facility. From the 1950s, Ohio's chief attorney and its most senior tax officials assured the M&O contractors that the government property was exempt from Ohio personal property tax. See, "Grannen Trip Report to Ohio Tax Commission on July 30, 1959," Statutory Transcript (S.T.) at 622; Supp. at 153. See, also, 1958 Ohio Atty. Gen. Ops. 2471, Appendix at 30; and County Auditor Bulletin No. 126, Appendix at 34. Nevertheless, in 2010, Auditor Wheeler, acting outside of his statutory authority and contrary both to the opinion of the Ohio Attorney General and the instructions of the Department of Taxation, unilaterally issued a personal property tax assessment against LMES for its use of the government property.

**c. The assessment is the frivolous product of bad faith. Wheeler generated the assessment out of a legally groundless, personal crusade to force payment of more tax.**

Wheeler's assessment, coming nearly two decades after the tax year in question, was not the product of a change in federal or state statute. It was not based on a modification of Ohio tax policy or a court's fresh interpretation of Ohio's personal property tax law. In fact, Ohio had repealed its personal property tax *five years prior* to the assessment. Rather, this assessment is the outcome of Wheeler's single-minded desire to extract tax from a government facility he hoped would pay rather than fight.

**d. The assessment was issued contrary to statutes, known precedent, and clear instructions available and communicated to Wheeler.**

The assessment – the only one of its kind ever attempted by anyone in the State of Ohio – was issued without the approval or concurrence of the Tax Commissioner. There are many reasons why his assessment began and remains a "solo venture." Wheeler's assessment directly contradicted:

- The terms of a "Payment-in-Lieu-of-Tax" agreement negotiated by and between Pike County and the Department of Energy ("DOE"), pursuant to which Pike

County agreed that it would not assess LMES for personal property tax on the government owned property at issue;

- County Auditor Bulletin No. 126, the only instruction ever issued by the Ohio Department of Taxation on the subject, which expressly stated that personal property tax could not be assessed against an operator using government property;
  - An Opinion of the Ohio Attorney General, which specifically found that personal property tax could not be assessed against an operator using U.S. government-owned property. 1958 Ohio Atty. Gen. Ops. 2471;
  - The ten-year statute of limitation on tax assessments contained in R.C. 5703.58;
  - This Court's holding in *Refreshment Services Company, Inc. v. Lindley*, 67 Ohio St.2d 400 (1981), which declared that Ohio's now-defunct personal property tax "indicates an intent to tax the **ownership** of personal property used in business rather than the **use** of personal property in business." *Id.* at 402.
  - The binding decision of the U.S. 6<sup>th</sup> Circuit Court of Appeals, finding that statutes similar to Ohio's imposed an *ad valorem* tax rather than a privilege tax, precluding a government contractor's liability for tangible personal property tax based upon its use of federally-owned property. See *Union Carbide Corp. v. Alexander*, 679 S.W.2d 938 (1984), reviewing *U.S. v. Anderson County, Tenn.* (E.D. Tenn. 1983), 575 F.Supp. 574, affirmed (6<sup>th</sup> Circuit 1985), 761 F.2d 1169, cert. denied (1983), 474 U.S. 919, 106 S.Ct. 248, 88 L.Ed.2d 256.
- e. **Wheeler's assessment knowingly breached the terms of a "Payment-in-Lieu-of-Tax" agreement negotiated by and between Pike County and the Department of Energy ("DOE"), pursuant to which Pike County agreed that it would not assess LMES for personal property tax on the government owned property at PORTS.**

U.S. government-owned property, both real property and tangible personal property, is exempt from state and local property tax because of the sovereignty of the U.S. government. See, U.S. Const., Art. VI, cl. 2 (the "Supremacy Clause"). Nevertheless, the U.S. government recognizes that its ownership of property can reduce tax revenue to state and/or local governments. Congress authorized the DOE to make payments-in-lieu-of-tax ("PILOTs") to local governments for some federally owned property. See 42 U.S.C. §2208; Appendix at 29. But, payments are not mandatory and amounts vary. They are made only when an eligible local

government applies for the funds. PILOTs are made pursuant to contracts (commonly known as “PILOT agreements”) entered into by the DOE and the local government. The local governments distribute the PILOTs to schools and agencies that otherwise would have received property tax. That is what happened in Pike County.

The DOE and Pike County have entered into several PILOT agreements during PORTS’ more than fifty-year existence. These agreements cover tax years back to 1952 when PORTS was founded. In 1998, DOE and Pike County entered into a PILOT agreement that covered tax year 1993. LMES BTA Exhibit 4; Supp. 88-93. The agreement expressly precluded the assessment of personal property tax on LMES. Specifically, under the terms of the PILOT:

- The DOE agreed to pay \$175,546.383 for tax years 1992-1997;
- In exchange, Pike County agreed to not assess real or personal property tax against government contractors like LMES; and,
- Pike County expressly admitted that government-owned personal property used by a government contractor was not subject to Ohio personal property tax. *Id.*

Although Pike County accepted the PILOT from DOE and distributed the payment to the various eligible subdivisions, Pike County willfully disregarded its promise to not assess.

- f. The Tax Commissioner cancelled the 1993 assessment based upon the binding concessions made in the PILOT agreement, as well as Auditor Wheeler’s failure to demonstrate any factual evidence supporting the assessment.**

LMES filed a timely Petition for Reassessment seeking cancellation of the assessment. Both LMES and Wheeler submitted materials and written legal argument for the Tax Commissioner’s review. On May 25, 2012, the Commissioner issued a Final Determination cancelling Wheeler’s assessment against LMES. S.T. at 1; Appendix at 25. The Commissioner reasoned that the PILOT agreement between DOE and Pike County contractually precluded Wheeler from making any claim for personal property taxes against LMES as a DOE contractor.

However, the Commissioner ignored LMES' claim that Wheeler acted in bad faith when he unilaterally issued the assessment after executing the PILOT agreement and accepting DOE's payment. Further, the Commissioner did not rule on any other legal or constitutional defenses raised in LMES' petition.

**g. The Board of Tax Appeals affirmed the Tax Commissioner's Determination based upon the binding PILOT agreement and other legal grounds.**

Both parties appealed the Commissioner's Final Determination to the Ohio Board of Tax Appeals ("BTA"). After extensive briefing and a full evidentiary hearing, the BTA affirmed the Commissioner's Final Determination, finding that the PILOT agreement contractually foreclosed Wheeler and Pike County from making the assessment. The PILOT agreement released the DOE and LMES from all potential property tax liabilities. The BTA further noted that Pike County received a payment from the DOE, which Pike County accepted (and spent) in full satisfaction of any and all tax claims that could arguably be made against LMES as a DOE contractor.

The BTA also: 1) ruled that that LMES was not a taxpayer for personal property tax purposes because, under Ohio statutes, it was not the "beneficial owner" of the property sought to be assessed; 2) ruled that LMES could not be considered a "manufacturer" under R.C. 5711.16 and therefore could not be assessed as a manufacturer; and 3) commented, without specifically holding as dispositive, that the assessment failed the ten-year limitation period provided by R.C. 5703.58. In reaching its decision, the BTA declined to rule upon the issue of whether Ohio law permitted the taxation of U.S. government-owned personal property. See *Wheeler v. Testa* (Aug. 7, 2014), BTA No. 2012-2043, at Appendix 22-25.

- h. The BTA did not address LMES' bad faith and frivolous conduct specifications even though LMES had been materially injured by Wheeler's actions. LMES has expended over \$1.0 million to defend against an assessment that Wheeler knew was precluded by the PILOT agreement and by Ohio law.**

LMES recognizes that the assessment was cancelled by Wheeler's direct superior -- the Tax Commissioner of Ohio. The BTA upheld that cancellation on several legal and factual grounds. But, despite the manifest unlawfulness of the assessment, both the Commissioner and the BTA ignored LMES' claim that the assessment was the result of bad faith and frivolous behavior. LMES requested the BTA to award it litigation costs, including attorney fees, as a consequence of Wheeler's and Pike County's conduct. The BTA's failure to acknowledge the claim and rule upon it constituted error and is a reason for LMES' appeal to this Court. See, e.g., *Oberlin Manor v. Lorain Cty. Bd. of Revision*, 69 Ohio St.3d 1 (1994) (wherein the Court considered the merits of a claim for attorney fees even though the party "chose not to challenge the substantive issues raised" by the opposing party); *Health Care Reit, Inc. v Cuyahoga Cty. Bd. of Revision*, Sup. Ct. Slip Op. 2014-Ohio-2574; and *Salem Med. Arts & Dev. Corp. v. Columbiana Cty. Bd. of Revision*, 82 Ohio St.3d 193 (1993). Indeed, Ohio law makes clear that LMES' appeal of the BTA's failure to rule upon its claims of bad faith stands on its own and may be appealed on its own.

LMES' appeal is one that should not exist. If all involved had (1) honored the obligations they voluntarily entered into by contract, (2) acted according to the prevailing law, (3) adhered to the binding instructions handed down from state's chief tax official, or (4) took seriously the counsel provided regarding the exempt nature of the property, LMES would not have expended over *one million dollars* and countless related resources on a frivolous matter pertaining to work it did decades in the past. Likewise, this Court would not now have before it the obligation to review the bad faith actions of a rogue county auditor.

**2. Although LMES' appeal is premised on the BTA's error to address the fact that LMES has been aggrieved by Auditor Wheeler's conduct, the true extent of the Wheeler's bad faith is best revealed through the merits that preclude assessment.**

Necessarily entwined in LMES's bad faith claims are the underlying merits that support the unlawfulness of the assessment. Although neither the Commissioner nor the BTA found that the assessment was illegal as a matter of law, considering the merits is essential for evaluating LMES' bad faith claim because the merits establish the seriousness of the bad faith conduct. The extent of the bad faith cannot be determined without understanding all of the legal reasons prohibiting the assessment.

**a. The underlying merits of this appeal also have far-reaching impact on dozens of similar cases now on appeal.**

The underlying merits also should be addressed in the context of this bad faith claim because Wheeler issued dozens of other personal property tax assessments against LMES and other operators of PORTS for their use of government-owned property. These 44 assessments are still pending before the Tax Commissioner upon petitions for reassessment.

**b. Wheeler compounded his breach of promise and bad faith dealings by issuing additional assessments totaling \$1,343,462,620 for tax years 1955-1999. These forty-four (44) assessments are currently working their way to the Ohio Supreme Court.**

The 1993 assessment is one of *forty-five* separate assessments that Wheeler eventually issued against the various entities that managed PORTS under contract with the United States Department of Energy ("DOE")<sup>1</sup> from 1955 to 1999. These tax assessments total more than *\$1.3 billion dollars* and, in some cases, were *not issued until more than a half-century* after any tax was allegedly due. See, LMES BTA Exhibit 7. Specifically, the assessments total \$1,343,462,620, including:

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<sup>1</sup> Or eventually, the United States Enrichment Corporation ("USEC").

- \$296,389,230 in tax;
- \$148,194,973 in penalties; and,
- \$898,878,417 in pre-assessment interest.
  - Interest accounts for 67% of the assessments.

As with the 1993 tax year, these assessments were issued contrary to established law and precedent. Although it was originally understood among the parties that the 1993 tax year would serve as a “test case,” the Department of Taxation later indicated, in July 2014, that Final Determinations would be issued in due course on each of the remaining tax years, providing an additional 44 cases to be litigated on appeal.<sup>2</sup>

**c. An understanding of the illegality of the assessments provides finality to all 44 tax years on appeal, especially for the two years (1998 and 1999) for which there are no PILOT agreements.**

LMES presumes that Wheeler will continue to pursue all his assessments through 44 appeals to the BTA and 44 appeals that will eventually reach this Court. Although the majority of the assessed years are covered by PILOT agreements, the last two years that were assessed were not covered by an agreement.<sup>3</sup> Thus, a look at all aspects of the 1993 assessment will ultimately serve judicial economy. Rather than facing 44 additional appeals on the subject, this Court’s decision here can put an end to all of the proceedings. The Court also can put an end to Wheeler’s misuse of his delegated power to tax and his attempt to use LMES as the county’s personal ATM.

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<sup>2</sup> LMES has asked this Court to stay the Commissioner’s determinations on the 44 petitions for reassessment.

<sup>3</sup> The various PILOT Agreements, which were executed and effective for every tax year from 1952 to 1997 are part of the BTA record filed herein on August 27, 2014. S.T. at 601, 609, 613, 617, and 626; Supp. 63-93.

## ARGUMENT

### **Proposition of Law No. 1: The Ohio Supreme Court may impose litigation costs, including legal fees, against Wheeler for his bad faith and frivolous conduct.**

It is axiomatic that tribunals “possess inherent power to do all things necessary to the administration of justice and to protect their own powers and processes.” *Slabinski v. Servisteel Holding Co.*, 33 Ohio App.3d 345, 346 (1986). This inherent power includes imposing sanctions against parties or their attorneys when the judicial process is abused. *Id.* *Ceol v. Zion Indus., Inc.*, 81 Ohio App.3d 286 (1992). Attorney fees may be sought in response to a frivolous or bad faith complaint in accordance with these inherent powers. *Id.* *Oberlin Manor, Ltd., supra*; *Durkin v. Ungaro*, 39 Ohio St.3d 191 (1988). “The general rule in Ohio is that, absent a statutory provision allowing attorney fees as costs, the prevailing party is not entitled to an award of attorney fees unless the party against whom the fees are taxed was found to have acted in bad faith.” *State ex rel. Crockett v. Robinson*, 67 Ohio St.2d 363, 369 (1981). See, also, *Oberlin Manor, Ltd.*, and *Durkin, supra*. Moreover, legal fees may be sought against the government where bad faith is alleged. See, generally, *Linden Med. Pharmacy, Inc. v. State Bd. of Pharmacy*, 2005-Ohio-6961.

**a. “Bad Faith” encompasses many facets of behavior, including behavior that is vexatious, wanton, obdurate or oppressive.**

Bad faith, generally, refers to an intentional act of not fulfilling legal or contractual obligations, misleading another, entering into an agreement without the intention or means to fulfill it, or violating basic standards in dealing with others. See, *Black’s Law Dictionary* at 166 (10<sup>th</sup> Ed. 2009).<sup>4</sup> Bad faith is not the same as a mistake or lack of judgment. Anyone can make a mistake about his or her duties. But when one intentionally ignores a duty

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<sup>4</sup>See, also, [www.freelibrary.com/badfaith](http://www.freelibrary.com/badfaith) (accessed Oct. 15, 2014); <http://dictionary.law.com> (accessed Oct. 15, 2014).

or infringes upon the rights of another or stubbornly continues on a course of action despite authority to the contrary, that person acts in bad faith. Bad faith also includes the “evasion of the spirit of the bargain” and the “willful rendering of imperfect performance.” *Black’s Law Dictionary* at 166, quoting Restatement (Second) of Contracts §205 cmt. d (1979). For purposes of legal fees, Ohio has recognized that “bad faith” includes behavior that is vexatious, wanton, obdurate or oppressive. *Sorin v. Bd. of Edn.*, 46 Ohio St.2d 177 (1976).

**b. Although the BTA possesses the authority to find that a party has acted in bad faith or with frivolity, the BTA failed in its duty because it did not address such issues in its Decision and Order.**

The BTA has recognized its innate authority to determine — for purposes of imposing sanctions — whether a party has acted in bad faith. See, e.g., *Duquesne Light Co. v. Tracy* (Nov. 6, 1998), BTA Nos. 1995-K-40, 71, 72; *Beatley, et al. v. Franklin Cty. Bd. of Revision* (May 24, 1996), BTA Nos. 1995-D-646, et seq.; and *Bd. of Edn. of the South-Western City Schools v. Franklin Cty. Bd. of Revision* (Dec. 9, 2008), BTA No. 2006-N-1760 (holding that “if it is established that there is not a good faith basis for an appeal, sanctions may be appropriate”). The BTA also possesses the authority to issue sanctions (including attorney fees) where it believes a party’s actions are frivolous. See Ohio Adm. Code 5717-1-14. See, also, *Leach v. Hamilton Cty. Bd. of Revision* (Jan. 5, 2001), BTA Nos. 2000-M-1049, et seq.; and *Lemmon v. Belmont Cty. Bd. of Revision* (May 2, 2014), BTA No. 2013-L-4996.

Nevertheless, the BTA failed to address bad faith and frivolity in the context of this appeal. The BTA’s failure to find such bad faith and to award attorney fees is an error for which LMES has the right to seek redress upon appeal. See, e.g., *Oberlin Manor, supra* (wherein the Court considered the merits of a claim for attorney fees even though the party “chose not to challenge the substantive issues raised” by the opposing party); *Health Care Reit, Inc. v Cuyahoga Cty. Bd. of Revision*, Sup. Ct. Slip Op. 2014-Ohio-2574; and *Salem Med. Arts &*

*Dev. Corp. v. Columbiana Cty. Bd. of Revision*, 82 Ohio St.3d 193 (1993); *Ceol, supra* (prevailing party on summary judgment may, as a defendant-appellant, appeal entry denying frivolous/bad faith conduct claim even when plaintiff-appellee made no appeal from the adverse summary judgment).

**Proposition of Law No. 2: Auditor Wheeler’s inconsistent behavior prior to assessment evidences his lack of good faith in his dealings with the DOE, PORTS and LMES. In particular, Wheeler’s actions demonstrate that he maintained a private agenda regarding PORTS that is not compatible with his public conduct.**

A significant part of this brief outlines Wheeler’s wanton disregard for the good faith promises exchanged in the PILOT agreement. Nonetheless, other elements of his behavior also must be considered. These acknowledged actions, all occurring prior to the assessments and concurrent with the PILOT agreements entered into from the time Wheeler entered office in 1987, demonstrate, first, that Wheeler habitually ignored the Department of Taxation’s continued refusal to authorize an assessment of tax against LMES for its use of government owned property. They also expose Wheeler’s continued negotiations and execution of PILOT agreements, *even after he personally concluded that the property was taxable*, suggests that Wheeler maintained a personal agenda that was contrary to the public actions he undertook as Auditor.

- a. **Wheeler’s motivation to assess LMES grew out of his personal opinion that Pike County was not receiving the same level of funds that other local governments received from Department of Energy sites located in other states.**

Wheeler testified before the BTA that he first became interested in seeking additional funds associated with government owned property located at PORTS as a result of a Nuclear Regulatory Commission meeting he attended in March 1992. H.R. at 27; Supp. at 8.

There, he learned from assessors from other states that their local governments were receiving more from DOE than was Pike County. *Id.*

Wheeler has obstinately refused to recognize that differences in the level of federal assistance among the various communities that host a DOE facility is a result of “consideration to local circumstances under different state statutes.” See S.T. at 626, 539.

Wheeler nevertheless chose to ignore whatever differences that existed in state law and in the size, location, and operations of the various DOE facilities discussed. Wheeler saw only an opportunity to, as he put it, seek “equities.” H.R at 28; Supp. at 8. Wheeler felt that Pike County was being treated unfairly, and he sought a way to acquire additional funding. This hunt for a “pay day” seems to be Wheeler’s ultimate ambition, even if he did not fully understand in March 1992 how he was going to get there.

**b. Auditor Wheeler decided almost immediately to find a way to wrest tax monies from the PORTS facility, ignoring any other avenue under which the county might benefit.**

Wheeler testified that he made a cursory call to the DOE on the issue, but, not having immediate satisfaction, he set off on a different strategy. Wheeler admits that he had no conversations with LMES or its predecessor, Martin Marietta Corporation, about additional funding opportunities. *Id.* There is no evidence that Wheeler pushed the DOE for a larger amount of funding under the PILOT program. Wheeler also failed to pursue another source of funding available to him. For example, the DOE is authorized to provide, upon application, additional funding to local communities that show “special burdens” as a result of hosting a DOE facility. See S.T. at 587-595; Appendix at 36-45. Wheeler has provided nothing to show that he ever inquired into, or applied for, “special burdens” funding for his county. This is at odds with Wheeler’s belief that the PORTS is a burden on Pike County. See LMES BTA Exhibit 3 at AUD1403-AUD1404; Supp. 151-152.

- c. Auditor Wheeler acted obdurately (and thus in bad faith) by deciding to assess LMES without the approval of the Department of Taxation and in contradiction to information received from the Department.**

Wheeler quickly settled on seeking funds by assessing LMES for U.S. government-owned property located at PORTS. In December 1992, Auditor Wheeler sent a letter to then Tax Commissioner Roger Tracy. LMES BTA Exhibit 3; Supp. at 105. The letter outlined Wheeler's rationale for a personal property tax assessment against contractors using government owned property at PORTS. The letter also called upon the Commissioner to initiate an assessment against PORTS contractors going back to 1952. Commissioner Tracy neither acknowledged nor responded to the letter. H.R. 105-106; Supp. at 27-28. Other officials within the Department of Taxation who received a copy of the letter also declined to respond. H.R. 106; Supp. at 28. No assessment was forthcoming from the state. Wheeler stated that around this same period, he did speak with a Department employee in the Division of Tax Equalization. This employee, supposedly while indicating a personal agreement with Wheeler's position, ultimately informed him of the Department's legal interpretation that government property used by LMES was not subject to tax. It was at this time that Wheeler was made aware of County Auditor Bulletin No. 126 and the Ohio attorney general's opinion setting forth the exempt nature of the property in question. H.R. at 106-109; Supp. at 28.

Despite the lack of action of the part of the Department of Taxation, its decision to not respond to Auditor Wheeler, and the provision of information from the Department supporting the tax exempt status of the property in question, Wheeler was not dissuaded from his pursuit of an assessment against LMES. Apparently having determined – at least in his own mind – that PORTS was not paying its fair share, he was going to find a way to get additional funds out of the facility despite now having personal knowledge of an instruction (County Auditor Bulletin No. 126) from his superior official – the Tax Commissioner of Ohio – stating

that a county auditor cannot not assess personal property tax on government-owned property used by a contractor. See LMES BTA Ex. 6; Appendix at 34.

- d. Although Auditor Wheeler retrieved some information about the government-owned property located at PORTS, he did nothing with it for almost 18 years. His disregard for his own perceived authority resulted in the accumulation of interest on the assessments eventually issued.**

During this same period, Wheeler made a “Freedom of Information Act” request from the DOE asking for a listing of personal property located at PORTS that was owned by DOE or any of its contractors. Auditor BTA Exhibit 10. The DOE responded with a list of DOE owned personal property as of September 30, 1992. What Wheeler did with this information is amazing. He did nothing! For nearly 18 years (eight more than the statute of limitations) this information sat. Despite his self-asserted conviction that LMES could be assessed on its use of government-owned personal property, Wheeler has offered no compelling reason for not pursuing an assessment in 1993 when the assessment – however tenuous – at least would have been timely and any pre-assessment interest would have been millions of dollars less.

- e. Auditor Wheeler’s bad faith dealing with the DOE was unrelenting. He continued to negotiate PILOT agreements during a period he believed the government property was subject to tax.**

During this same period, Wheeler continued to request that the DOE make payments to Pike County in lieu of taxes. Wheeler *personally negotiated* each PILOT agreement. He *personally executed* the PILOT agreement covering tax year 1991, just as he had previously done on PILOT agreements for tax years 1986-88, 1989, and 1990. See Stipulations of Fact at ¶¶ 6-7, 9; Supp. at 102-103. In February 1996, Wheeler, requested a PILOT from the DOE for tax years 1992 through 1994. After various communications between Wheeler and the DOE concerning the appropriate payment formula, a PILOT agreement was executed by the Pike

County Commissioners *upon Wheeler's recommendation* (dated August 21, 1998), covering tax years 1992 through 1997. *Id.*

In each instance, the DOE paid Pike County the amounts called for in the particular agreement, and Wheeler's office distributed the amounts to the various taxing authorities in Pike County based on that authority's percentage of the total millage for the taxing district. Moreover, each PILOT contained the same language by which the County agreed to waive all tax claims (specifically including personal property tax) against the DOE and its contractors. Finally, each PILOT contained the same admission by the County that the personal property located at PORTS was not subject to Ohio personal property tax.

**f. In light of the waiver of personal property tax and the admission that government property was not subject to the tax, Wheeler's subsequent assessment of personal property tax against LMES is a patent act of bad faith.**

Given that Wheeler claimed he believed that government property used by private contractors at PORTS was subject to assessment of Ohio's personal property tax, see, *e.g.*, LMES BTA Exhibit 3; Supp. at 105, his "double-mindedness" in pursuing additional PILOTs is disturbing. There is nothing in the record to indicate that Wheeler ever (1) made the DOE aware of his position; (2) used his belief in the taxability of the property as a way to negotiate a higher payment; (3) objected to the language of the PILOT agreements; or (4) advised the county commissioners to not enter into the agreements until the issue of taxability was finally resolved. He did none of these things. ***Rather, he signed the agreements and accepted the money.*** It is nearly impossible to not conclude that these actions were conducted in bad faith. One thing is certain. Although the DOE believed that the PILOT agreements created finality with regard to tax issues, the other party – Pike County – cared nothing for the covenants it made. Through

Wheeler, it willfully disregarded (over a decade later!) the admissions and promises it made and assessed the very taxes it bargained away.

**Proposition of Law No. 3: Auditor Wheeler’s assessment constitutes bad faith because he knowingly issued the assessment in direct contradiction to the contractual agreement Pike County had with the DOE.**

- a. Pike County entered into a compromise and settlement that released the DOE and its contractors, including LMES, from all potential personal property tax liabilities for tax year 1993.**

As part of the Atomic Energy Act of 1946, the Atomic Energy Commission and its successor agencies, including the DOE, were authorized to make payments to communities for the possible loss of tax revenue associated with U.S. government owned property. See Appendix at 29; S.T. at 537, et seq. Numerous communities, including Pike County, have taken advantage of these payments-in-lieu-of-taxes.<sup>5</sup> Pike County received PIOLTs for tax years from 1953 to 1997. A portion of these PIOLTs and the 1993 tax year assessed by Wheeler at issue here.

- b. Under the PILOT agreement applicable to the assessed tax year (1993), Pike County expressly waived any and all tax claims in exchange for the DOE’s \$175,456 payment.**

In February 1996, Pike County, acting through Auditor Wheeler, made another request to the DOE for a PILOT payment for PORTS property. This request covered tax years 1992 through 1994. S.T. at 572. Subsequent amended requests were filed by Wheeler between May 1996 and early summer 1998, which ultimately extended the PILOT request to cover the period of 1992 through 1997. LMES BTA Exhibit 4; S.T. at 578; Supp. 88-93.<sup>6</sup> Ultimately,

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<sup>5</sup> For example, in 1979, the DOE approved Pike County’s request for PIOLTs for Government property located at the PORTS. S.T. at 562. The DOE also approved a retroactive payment to Pike County for the 24-year period that the Government property was absent from the county’s tax list. *Id.*

<sup>6</sup> Questions arose as to both the retroactive tax years included in the request as well as the methodology used by the County to determine the amount of PILOT requested. It took several months to resolve these issues, which resulted in the additional tax years coming under the request.

Pike County and the DOE executed an agreement, dated August 21, 1998, which provides, in part:

“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 \*\*\*. The term ‘contractors’ means and includes the companies and organizations listed in the schedule attached hereto, designated as Exhibit No. 2 \*\*\*.<sup>7</sup>

“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* and agrees further that, if requested by DOE, the County will join in friendly litigation before a court having jurisdiction of the parties and subject matter and in the entry of a consent judgment in keeping with the spirit and intent of this Agreement.\*\*\*” (Emphasis added.)<sup>8</sup>

- c. **Under the PILOT applicable to the assessed tax year (1993), Pike County expressly admits that U.S. government-owned property used by DOE contractors is not subject to personal property tax.**

The Agreement further confirms that “Government-owned land, facilities, and other personal property by reason of Federal ownership **are not subject to taxation** by the

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<sup>7</sup> The referenced Exhibit No. 2 specifically lists LMES as contractor for purposes of the agreement.

<sup>8</sup> The Agreement is signed by Charles Osborne, Chairman of the Pike County Board of Commissioners. The Board of County Commissioners further passed a resolution formally adopting the agreement, accepting payment, and authorizing Auditor Osborne to execute the contract on the County’s behalf. LMES BTA Exhibit 4; Supp. at 93. In that resolution, the Board approved its acceptance “from DOE payment-in-lieu-of-taxes for tax years 1992 through 1997 in the sum of \$175,546.83 *in full satisfaction and release of any claims for taxes for tax years 1992 through 1997 against DOE and its contractors based on or measured by the value of Federal property utilized by such contractors in the performance of activities of the DOE in Pike County \*\*\*.*” *Id.* (Emphasis added.)

County under the Constitution **and laws of the United States and the State of Ohio** \*\*\*,” and that “it is the opinion of Counsel for DOE **and Counsel for the County** that such contractors [LMES] are not liable for taxes on, with respect to, or measured by the value or other use of such Government-owned real **and personal property under existing State and Federal law** \*\*\*,.”

*Id.* (Emphasis added.) Wheeler was well aware of the admission and concessions made in the PILOT agreement. See H.R. 111-133; Supp. at 30-34. However, he purposefully disregarded them by issuing his assessment in an obvious attempt to skirt the promises made.

**d. The County’s compromise and settlement, as set forth in the PILOT agreement, is binding upon Auditor Wheeler. His intentional breach of the agreement’s terms constitutes bad faith.**

Ohio law is clear that 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. 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. Satisfaction takes place when the party possessing the claim accepts the accord, *i.e.*, accepts the lesser amount with the intention that the payment constitutes a settlement of the claim. *AFC Interiors v. DiCello*, 46 Ohio St.3d 1 (1989), at 3; *Lebold v. State of Ohio, Dept. of Taxation* (May 15, 2000), Tuscarawas App. No. 1999AP080049, unreported.

The County benefitted from the compromise agreement by receiving immediate payment of revenue when it was not legally entitled to property tax. The County understood that upon acceptance of the payment it would release and waive **any and all** potential tax claims against the DOE and LMES for tax years 1992-1997. It was only in exchange for the County’s assurances that it would **not** attempt to assess DOE or its contractors for property tax - real or

personal - that the DOE provided any funding in lieu of taxes. Wheeler acknowledged as much at the BTA hearing. H.R. 112-113; Supp. at 29. Yet, Wheeler felt himself above the terms of the PILOT, even though he himself negotiated the agreement and has signed similar agreements with the DOE. In a serious breach of contract and good faith, Wheeler tucked the DOE's check in his pocket, stuck out his hand, and said, "More, please."

**e. Auditor Wheeler's breach is an extremely egregious form of bad faith.**

Both before and after this assessment, Wheeler simply ignored the agreement in an effort to use PORTS for a shakedown of LMES. His actions constitute perfidy, a particularly nasty form of bad faith. Perfidy is the act of one who has engaged his faith to do a thing, and does not do it, but does the contrary. In other words, it is a ruse. *Black's Law Dictionary* at 1319. Perfidy is universally acknowledged as a repugnant act, such as (for example), where one army attacks under color of a white flag of truce. See, 1977 Protocol I Addition to the Geneva Conventions of 12 August 1949, Art. 37. Here, however, Wheeler expressed the mind-boggling view that Pike County simply need not comply with the PILOT agreement. The decisions of the Tax Commissioner of Ohio and the Board of Tax Appeals say otherwise, and his act of perfidy is an act of bad faith that carries legal consequences.

**f. By accepting the PILOT payment from the DOE, Auditor Wheeler is precluded from advancing any legal or equitable justification for ignoring the promises made in the PILOT.**

"[W]here 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." *Bd. of Commissioners of Columbiana Cty. v. Samuelson*, 24 Ohio St.3d 62, 63 (1986), citing *White v. Brocaw*, 14 Ohio St. 339, 347 (1863). These principles have been repeatedly recognized and applied to the compromise and settlement of Ohio tax liabilities. 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.

Having accepted the benefits of the PILOT agreement, there is absolutely no legal justification for the County, via Auditor Wheeler, to assert that it has no duty to comply with the remaining provisions of the bargain. LMES reported no taxable property based upon assurances it had from both Pike County and the State that it had no liability. Coming forward decades later and saying, not that the authorities and rules have changed, but that they never applied, is egregious.

- g. Auditor Wheeler's bad faith did not end with assessing government property. Pike County further refused to comply with the provisions of the PILOT under which Pike County agreed to join in litigation to prevent any breach of the agreement.**

Pike County further promised to join the DOE in any potential subsequent "friendly" litigation on the issue of property tax in order to see that a consent agreement would be issued in accordance with the PILOT agreement. LMES BTA Exhibit 4 at page 2, ¶3; Supp. at 89. The DOE exercised these PILOT agreement provisions by writing to the Pike County Commissioners and requesting that the County join this litigation against Wheeler's assessment. The County promptly declined to join the proceedings. Despite the fact that Wheeler's actions constitute an abandonment of the PILOT agreement's accord, entered into in good faith and backed by the resolute word of the parties, the County refused to act. This was an opportunity for the County to take a breath, to reevaluate and to check the legal authorities. The fact is, there is *nothing* under the law that permits the Wheeler and the County to ignore the provisions of the PILOT agreement after accepting payment. Yet, Wheeler continued blindly on his crusade,

hoping that LMES would provide him some form of pay-off. And, Pike County, as a whole, gives credence to his actions by refusing to get involved.

**h. It was an act of bad faith and frivolity for Auditor Wheeler to ignore the PILOT agreement in violation of federal law under the supremacy clause.**

42 U.S.C. § 2208 specifically provides that the Atomic Energy Commission “is authorized to make payments to State and local governments in lieu of property taxes. *Such payments may be made in the amounts, at the times, and upon the terms the Commission deems appropriate \* \* \**” (Emphasis added). S.T. at 586; Appendix at 29. DOE Order 2100.12A sets forth the DOE’s “terms” for a PILOT S.T. 587-595; Appendix 35-45. Section 7g, prescribes that PILOTs “shall be made only after a valid and binding release or settlement of claims for payments related to the Department’s *land or property* is obtained from the taxing authority.” (Emphasis added). S.T. at 590; Appendix at 39. DOE Order 2100.12A has the “force and effect of law” and pre-empts state law under the Supremacy Clause. *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-296 (1978). See, also, *Batterton v. Francis*, 432 U.S. 416, at fn. 9 (1977); *Foti v. U.S.*, 375 U.S. 217, 223 (1963); *Paul v. U.S.*, 371 U.S. 245 (1963); *Free v. Bland*, 389 U.S. 663 (1962).

It is obvious that the federal government declared a policy that PILOTs impose a finality on the issue of local taxes and foreclose the ability of a local government to assess additional tax after accepting the payment. Wheeler’s actions directly contravene that federal policy, and any claims that Pike County now may have to the contrary must give way to the agreement under the Supremacy Clause of the U.S. Constitution. *U.S. Const., Art. VI, cl. 2*. Wheeler cannot accept payment under the agreement with a wink in the front and a shove in the back. He knew the agreement foreclosed the assessment at issue, as well as the other 44 assessments still pending below.

**Proposition of Law No. 4: Auditor Wheeler’s assessment is precluded because LMES is not a taxpayer under Ohio personal property tax law.**

The BTA made clear in its Decision and Order that Wheeler’s assessment is unlawful because LMES is not a “taxpayer” for Ohio personal property tax purposes.

R.C. 5711.01(B) defines “taxpayer” as follows:

“‘Taxpayer’ means any owner of taxable property, including property exempt under division (C) of section 5709.01 of the Revised Code, and includes every person residing in, or incorporated or organized by or under the laws of this state, or doing business in this state, or owning or having a beneficial interest in taxable personal property in this state and every fiduciary required by sections 5711.01 to 5711.36 of the Revised Code, to make a return for or on behalf of another. \* \* \*”

- a. LMES is not a taxpayer for personal property tax purposes because it does not hold legal title to the assessed property.**

In its review of R.C. 5711.01(B), this Court has held that the “legislative intent, as reflected by the plain language of the above statute, is to limit those persons or organizations liable to pay personal property tax to those who own or have a beneficial interest in the taxable personal property.” *Refreshment Service Company, Inc. v. Lindley*, 67 Ohio St.2d 400 (1981), at 402. There is no claim here that LMES ever held legal title to the property assessed by the Auditor.

- b. LMES is not a taxpayer for personal property tax purposes because it does not hold a beneficial interest in the assessed property.**

The Auditor’s only possible argument is that LMES somehow held a beneficial interest in the property. But the authorities and the record do not support a finding of beneficial interest. In *Refreshment Services*, this Court explained that for a person to have a beneficial interest in property and be liable for property tax the person must possess all the characteristics of ownership without having legal title. In that case, the Court held that the assessee did not

have a taxable beneficial interest in the improvements because the assessee (1) did not hold legal title to the improvements, (2) was prohibited from creating a lien, assignment, mortgage or creating any security interest in a third party in the equipment, and (3) agreed to take only its property when it vacated the center, i.e., the improvements were to remain. Relying upon *Refreshment Services*, the BTA found that LMES did not hold a beneficial interest in the government property because LMES' contract with DOE expressly provided that: (1) title to all property used by it in its business of managing, operating, and maintaining PORTS passed directly from the vendor to the government; (2) LMES' use of such property was limited to fulfilling its obligations under the DOE contract and LMES was subject to criminal penalties if it used the personal property in any other manner; (3) LMES was prohibited from giving a lender a security interest in the property; (4) the contract was not a lease, either a financing lease or a capital lease; (5) LMES was not liable for the loss, destruction, or damage to personal property; and, (6) LMES had no purchase option or similar rights to take either title to or possession of the government property upon termination of the contract. In other words, the BTA correctly found that LMES' interest in the assessed property falls far short of having "all characteristics of ownership other than legal title." In fact, LMES has none of the characteristics of beneficial ownership. Accordingly, LMES is not a taxpayer under Ohio statute with regard to government-owned property at PORTS.

**c. Under long-standing Ohio law, the mere use of property does not establish a beneficial interest in that property.**

Despite these undisputed facts, Wheeler nevertheless believes that LMES is responsible for the tax because it *used* the government's property in performing the contract. However, this Court has held specifically that 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 Services, supra*, at 402. Relying upon its earlier decision in *Equilease Corp. v. Donahue*, 10 Ohio St.2d 81(1967), a case in which this Court rejected a claim that the lessee of personal property was a fiduciary having possession of the property and therefore a taxpayer under R.C. 5711.01(B), this Court also rejected the proposition equating use with beneficial interest because it would “abrogate the definition of taxpayer” as defined by the statute. *Refreshment Service Co., supra*, at 403. Wheeler’s ostensible justification of treating a party that uses property as a taxpayer contradicts unmistakable precedent and is not rational except as an excuse to abuse the taxing power.

**Proposition of Law No. 5: The Auditor acted in bad faith because he issued the assessment outside of the statute of limitations.**

R.C. 5703.58 establishes a ten-year statute of limitations beyond which the Tax Commissioner may not assess unpaid tax. See Appendix at 35. There is no dispute that the assessment in this matter was issued nearly 18 years after the date any return would have been due.<sup>9</sup> Wheeler concluded as early as March 1992 that he believed the subject property was subject to taxation. By his own admission, he allowed 18 years to pass. Moreover, the 44 assessments still pending at the Department were issued anywhere from 12 to an unbelievable 56 years after the fact! The BTA was clear and correct when it opined that Wheeler, as the Tax Commissioner’s designated deputy, pursuant to R.C. 5711.11 and 5715.40, issued the assessment in question clearly outside of the ten year limitation. Wheeler knew this ten-year statute existed. He cannot now ignore the statute and place LMES in the position of having to defend an untimely -- and unlawful -- assessment.

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<sup>9</sup> Every taxpayer owning taxable personal property must file an annual personal property tax return with the county auditor of each county in which the property is located. See R.C. 5711.02. Returns must be filed, annually, between the fifteenth day of February and the thirtieth day of April. R.C. 5711.04.

**Proposition of Law No. 6: In a blatant act of bad faith, Auditor Wheeler willfully disregarded binding Ohio authorities that precluded the assessment of personal property tax against LMES.**

Despite the fact that Ohio historically has housed numerous federal installations, Wheeler conceded that his tax assessments against the PORTS contractors were the only ones ever issued for U.S. government-owned personal property in the state. H.R. 96-97; Supp. at 25. The reason is clear. Ohio law has never supported such claims, and both the Tax Commissioner and the Ohio Attorney General explicitly determined that such tax was “not applicable” to any property “titled in the United States.” LMES BTA Exhibit 5; Appendix at 33. Wheeler admits that he was aware of these authoritative prohibitions. Nevertheless, he ignored them. And, this is not a case of Ohio law being unclear. This is a flat out disregard for legal precedent that he deemed unsuited to his vision of the financial equities.

**a. The Ohio Attorney General has issued a binding opinion declaring that Ohio may not tax the use of government property.**

On March 3, 1958, the Supreme Court of the United States decided *City of Detroit v. The Murray Corporation of America*, 355 U.S. 489 (1958), in which the Court determined that Michigan’s personal property tax statutes permitted local subdivisions to tax a government contractor for government-owned work in progress and inventory in the contractor’s possession on tax day.<sup>10</sup> The Court held that the Michigan statutes imposed the tax upon the privilege of possessing or using the personal property involved rather than upon the property itself, i.e., an *ad valorem* tax. In reaching this decision, the Court cited *United States v. City of Detroit*, 355 U.S. 466 (1958) – a holding issued the same day – for the proposition that a “tax on

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<sup>10</sup> Commenting on the Michigan statutes in effect at the time, the Court noted: “The relevant statutory provisions are set forth in full in 6 Mich Stat Anno, 1950, §§ 7.1, 7.10, 7.81, and Tit VI, ch II, § 1, and Tit VI, ch IV, §§ 1, 7, 26, 27, of the Charter of the City of Detroit. They provide in part that ‘The owners or persons in possession of any personal property shall pay all taxes assessed thereon \* \* \*. In case any person by agreement or otherwise ought to pay such tax, or any part thereof, the person in possession who shall pay the same may recover the amount from the person who ought to have paid the same \* \* \*.’” *Id.* at fn. 1.

the beneficial use of property, as distinguished from a tax on the property itself, has long been commonplace in this country.” *Id.* at 470.

Subsequent to the Court’s pronouncement, Ohio Tax Commissioner Stanley Bowers sought the advice of the Ohio Attorney General concerning whether Ohio could tax similarly held property. See R.C. 109.12 and former R.C. 5715.28. After an exhaustive review of Ohio’s Constitutional and statutory provisions, the Attorney General answered the Tax Commissioner’s 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.<sup>11</sup>  
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“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 2471, 446-467, 469. See LMES BTA Exhibit 5; Appendix at 30-33.

**b. Based Upon the Attorney General’s Opinion, the Tax Commissioner instructed all county auditors that government property in the hands of private contractors is not subject to Ohio’s personal property tax.**

Upon receipt of the Attorney General’s opinion, the Tax Commissioner issued to all county auditors County Auditor Bulletin No. 126. LMES BTA Exhibit 6; Appendix at 34.

The Bulletin advised each county auditor that, pursuant to the AG’s opinion, Ohio law

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<sup>11</sup> LMES’ review of case law since 1958 discloses no subsequent Ohio case directly on point with regard tangible personal property. However, see *Refreshment Service Company supra*, in which the Supreme Court of Ohio declared that R.C. 5711.01(B), which defines who is a taxpayer for purposes of the personal property tax “\*\*\* indicates an intent to tax the ownership of personal property used in business rather than the use of personal property in business.” *Id.* at 402. See, also, *Equilease Corp. v. Donahue*, 10 Ohio St.2d 81(1967). Moreover, as pointed out by the Attorney General in his opinion, the Court has concluded that the tax upon tangible personal property is without question an *ad valorem* tax. *Id.* at 467.

“\* \* \* could not be construed as imposing either a possessory or privilege type tax” on tangible personal property. As such, Ohio “*personal property taxes could not be assessed against persons in possession of government property.*” *Id.* (Emphasis added.)

**c. Subsequent federal case law has confirmed the validity of the Attorney General’s Opinion and the Tax Commissioner’s County Bulletin.**

Additional subsequent to the authority exists that supports the Tax Commissioner’s County Auditor Bulletin No. 126. In *U.S. v. Anderson County, Tenn.* (E.D. Tenn. 1983), 575 F.Supp. 574, affirmed (6<sup>th</sup> Circuit 1985), 761 F.2d 1169, cert. denied, 474 U.S. 919 (1983), a federal court reviewed Tennessee’s *ad valorem* statute as to real property, and concluded that a “mere license,” i.e., the use of federally-owned real property by a contractor, did not amount to an incident of ownership necessary for the assessment of the tax. In concurrent litigation involving the same parties, the Tennessee Supreme Court agreed with the federal courts, holding that the Tennessee statutes imposed an *ad valorem* tax rather than a privilege or use tax. As such, a government contractor was not liable for property tax based upon its use of federally-owned property. *Union Carbide Corp. v. Alexander*, 679 S.W.2d 938 (1984). The Sixth Circuit Court of Appeals relied upon the Tennessee decision in its subsequent review of the district court’s decision in *Anderson County*, *supra*.

These decisions are entirely consistent with the Attorney General’s pronouncement that Ohio’s tax, too, is an *ad valorem* tax rather than a tax on the privilege of use. Ohio also lies within the Sixth Judicial Circuit. The decisions in *Anderson County* and *Union Carbide Corp.* are binding authority to which the Tax Commissioner and the Pike County Auditor must adhere.

**d. The Opinion of the Attorney General and the Instructions of the Commissioner are binding authorities.**

Ohio Courts have specifically determined that once the Tax Commissioner decides a question of statutory construction in accordance with the advice and opinion of the Attorney General, the Commissioner is bound by such construction. *State ex rel. Foster v. Evatt*, 144 Ohio St. 65 (1944), at paragraph 10 of the syllabus; *Morgan Cty. Budget Commission v. Bd. of Tax Appeals*, 175 Ohio St. 225 (1963); and *National Petroleum Publishing Co. v. Bowers* (Nov. 4, 1954), BTA No. 26537, 73 Ohio L.Abs. 252.

**e. Ohio law requires Auditor Wheeler to follow County Auditor Bulletin No. 126. It is not a matter for his discretion, and his conscious decision to unlawfully ignore the Commissioner’s instructions constitutes bad faith.**

R.C. 5715.28 mandates 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.<sup>12</sup> (Emphasis added.) Indeed, Ohio tribunals have consistently held that county auditors are officers for purposes of R.C. 5715.28; consequently, the Tax Commissioner’s orders and instructions have been held applicable to county auditors in the exercise of their various duties. See, e.g., *Olmsted Falls Bd. of Edn. v. Limbach*, 69 Ohio St.3d 686 (1994), and *Springfield Local School Dist. Bd. of Edn. v. Lucas Cty. Budget Comm.* (1994), 71 Ohio St.3d 120.

County Auditor Bulletin No. 126 remains in effect to this day; it has never been rescinded, overruled, or superseded. Likewise, 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. The Attorney General’s Opinion and the County Auditor

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<sup>12</sup> At the time the Commissioner issued County Auditor Bulletin 126, 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.”

Bulletin No. 126 are the prescribed legal authorities on this issue. They must be observed and adhered to by all taxing authorities in this State, including Wheeler.

Yet, Wheeler chose to not follow the clear precedent handed down by the Attorney General and Ohio's Chief tax official, the Tax Commissioner. Wheeler never asked the Tax Commissioner to review or rescind County Auditor Bulletin No. 126. He never inquired about whether an updated Attorney General Opinion should be sought. Rather, Wheeler paid no heed to these authorities. Instead, believing himself to know better, he willfully violated the specific instructions given to him so that he could make the assessment.

**f. Auditor Wheeler's wanton disregard for the Commissioner's instructions constitutes a bad faith dereliction of his duties as an Auditor.**

Without question, county officials must follow the law, whether that law be state law or applicable federal law. With respect to a county auditor, R.C. 5715.45 requires that such officers "shall not fail to perform any duty imposed upon such officer by law \* \* \*." R.C. 5715.46 further provides that a county auditor shall not "refuse or knowingly neglect to perform any duty enjoined on him by law." The performance of a duty would also include the duty to refrain from action where the law clearly prohibits such action. See, generally, *State ex rel. Lorain v. Stewart*, 119 Ohio St.3d 222, 2008-Ohio-4062, (holding that a county auditor's authority is not "so expansive" as to authorize him to basically rewrite the law by essentially adding provisions to a statute that are not contained in the plain language thereof).

Here, Wheeler abandoned his duties as a county auditor in an effort to meet his personal agenda. Wheeler instigated the proceedings that resulted in the PILOT payment covering the 1993 tax year but has now failed to perform duties imposed by law, *i.e.*, the terms of the PILOT agreement. His conduct in issuing the assessment also violates state law because he failed to adhere to the binding orders and instructions of the Tax Commissioner. It is not for

Wheeler to decide for himself what laws and instructions he is to enforce. Even in the absence of statutory and supporting case law making the opinion of the Attorney General and the instructions of the Tax Commissioner legally binding upon him, Ohio law provides that Wheeler is nevertheless bound by the longstanding administrative interpretation of the personal property tax laws. *State ex rel. Automobile Machine Co. v. Brown*, 121 Ohio St. 73 (1929), quoting *Industrial Comm. v. Brown*, 92 Ohio St. 309 (1916), at 311 (“administrative interpretation of a given law, while not conclusive, is, if long continued, to be reckoned with most seriously and is not to be disregarded.”) *UBS Financial Services, Inc. v. Levin*, 119 Ohio St.3d 286, 2008-Ohio-3821, ¶ 34; *National Petroleum Publishing, supra, Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403 (1975), and *Consumers Counsel v. Public Util. Comm.*, 10 Ohio St.3d 49 (1984). Wheeler’s wanton behavior cannot go without redress. His conscious decision to ignore instructions handed to him is an act of bad faith that directly resulted in LMES having to defend against the assessment at great cost.

**Proposition of Law No. 7: Auditor Wheeler did not concern himself with assessing taxed based upon LMES’ books and records. Rather he impermissibly used records of the DOE.**

Wheeler’s enthusiasm to assess LMES was so great that he created an unsupportable value of personal property that he assigned to LMES despite the fact that he never reviewed – and did not use – LMES’ books and records.

It is axiomatic that, for personal property tax purposes, a corporation is bound by its books and records, as kept in the ordinary course of business. *Natl. Tube Co. v. Peck*, 159 Ohio St. 98 (1953). See, also, *Shook Natl. Corp. v. Tracy* (Dec. 23, 1992), BTA No. 1990-X-1596. Pursuant to R.C. 5711.18, the true value of business assets is the depreciated book value

as determined from the accounting books of the assessee itself. *Rickenbacker Holding Corp. v. Tracy* (Apr. 12, 1993), BTA No. 1991-Z-709.

Here, Wheeler's assessment was not based upon book value determined from LMES' accounting records. There is no indication that LMES' accounting books and records were examined at all. Wheeler made no attempt to determine the accuracy of LMES' records by verifying that such records were kept in accordance with generally recognized methods of accounting, nor did he make the determination that LMES' books were otherwise not properly prepared. In fact, the assessment was not based upon any records or reports prepared by LMES in the ordinary course of its operations. While showing a great deal of activity in terms of intangibles, LMES' records establish that LMES had no fixed tangible assets or inventory related to PORTS. S.T. at 504-508.

**a. The Auditor incorrectly used the books and records of the DOE to assess LMES.**

Instead, Wheeler reviewed the books and records of the DOE and assigned a value of DOE property to LMES – property which is not owned by LMES and which, would not be properly carried on its books according to standard accounting methodology. The Assessment is simply not based upon the books and records of the assessee, LMES. Rather, it was based upon the books and records of an unaffiliated entity, the DOE, which *did carry* the property on its books. See Wheeler BTA Exhibit 10; Supp. at 94-97. This does not provide the book value of LMES, as required by R.C. 5711.18.

**b. It is inconceivable that the DOE's records from 1992 can reflect the value of government owned personal property in the preceding decades.**

The fact that Wheeler did not have books and records for LMES has not stopped him from issuing 44 additional assessments against PORTS operators going back to 1955. *All* of these assessments are based on a value of personal property that the DOE reported in 1992. How

Wheeler was able to use this information to determine what equipment was at PORTS, who used the equipment, and the value of that equipment in any given year is beyond logic. However, because his goal was the assessment of tax no matter what, Wheeler basically fabricated information to apply back over more than 50 years.

### CONCLUSION

As set forth throughout this brief, Auditor Wheeler's actions in assessing LMES on property it did not own was both frivolous and in bad faith. Wheeler chose to ignore the state's taxing authority, 50 years of precedent and law, a decision of the Ohio Attorney General and an instruction of the Tax Commissioner of Ohio – all of which Wheeler was legally bound to follow. Most egregious of all, Auditor Wheeler disregarded his lawful obligations under the PILOT agreement after accepting and distributing the payment received from the DOE. He did all of this in spite of admissions made by Pike County and Auditor Wheeler that LMES was not subject to personal property tax on its use of government-owned property. As a result of Wheeler's behavior, LMES has to date expended over \$1.0 million to defend against an assessment that has no basis in law.

#### **a. Request for Relief.**

Despite all of the evidence presented by LMES, the BTA erroneously ignored LMES' claim that Wheeler acted in bad faith and that the assessment was frivolous. The BTA further erred in not awarding litigation costs as a result of the bad faith behavior. Accordingly, LMES respectfully asks this Court to:

- 1) Expressly find that Auditor Wheeler's actions in this matter constitute bad faith and that the assessment was a frivolous act; and,
- 2) Following a finding of bad faith, remand this matter to the Board of Tax Appeals with orders to conduct an evidentiary hearing on the amount of litigation costs, included attorney fees, to be awarded as a result of this Court's findings.

- 3) Expressly hold that Ohio law never permitted the taxation of U.S. government-owned personal property, thereby resolving the 44 remaining assessments still pending below.

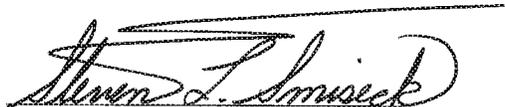
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**CERTIFICATE OF SERVICE**

This is to certify that on this 22<sup>nd</sup> day of October, 2014 a true copy of the foregoing Appellant's Merit Brief, 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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ORIGINAL

NOTICE OF APPEAL FROM THE OHIO BOARD OF TAX APPEALS

In the Supreme Court of Ohio

Teddy L. Wheeler,  
In his Capacity of Pike County Auditor,

Appellee,

v.

Joseph W. Testa,  
Tax Commissioner of Ohio,

Appellee,

And

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

Appellant.

14-1362

Case No. \_\_\_\_\_

Appeal from the Ohio  
Board of Tax Appeals

BTA Case No. 2012-2043

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**NOTICE OF APPEAL OF APPELLANT MARTIN MARIETTA ENERGY SYSTEMS,  
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Appellant, Martin Marietta Energy Systems, Inc., a/k/a Lockheed Martin Energy Systems, Inc. L.L. Bean, Inc. ("MMES/LMES") hereby gives notice of its appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from the Decision and Order ("Decision") of the Board of Tax Appeals ("Board") journalized on August 7, 2014, in *Teddy L. Wheeler in his Capacity as Pike County Auditor v. Joseph W. Testa, Tax Commissioner of Ohio*, et al., being BTA Case No. 2012-2043. A true copy of the Decision being appealed is attached hereto and incorporated by reference herein.

**INTRODUCTION**

In this case, the Pike County Auditor issued a Tangible Personal Property Tax Preliminary Assessment Certificate of Valuation for tax year 1993 for an amended value of \$158,512,000. The corresponding tax assessment was in the amount of \$23,244,789, including tax, penalty, and interest. MMES/LMES filed a testimony petition for reassessment, and upon review, the Tax Commissioner cancelled the assessment in its entirety. Upon appeal to the Ohio Board of Tax Appeals ("BTA") the BTA affirmed the Tax Commissioner Final Determination, finding that Pike County and the Pike County Auditor were contractually foreclosed from making the assessment based upon an agreement between Pike County and the United States Department of Energy ("DOE"), which released the DOE and MMES/LMES from all potential tax liabilities, specifically personal property taxes, for various tax years including tax year 1993. As part of the compromise and settlement, Pike County received from the DOE certain payments known as payments-in-lieu-of-taxes ("PILOTs"), which Pike County accepted in full satisfaction

of any and all tax claims that could arguably be made against MMES/LMES. The BTA also found: 1) that MMES/LMES was not the “beneficial owner” of the property sought to be assessed; 2) that MMES/LMES could not be considered a “manufacturer” as contemplated by R.C. 5711.16, and therefore could not be assessed as a manufacturer; and 3) that the Pike County Auditor, as the Tax Commissioner’s deputy, did not issue the subject assessment within the ten-year limitation period provided by R.C. 5703.58. Although MMES/LMES does not contest the BTA’s decision with respect to any of its stated reasons for affirming the Commissioner, MMES/LMES raised before the BTA numerous dispositive legal and jurisdictional issues that should have been part of the BTA’s Decision.

#### ERRORS TO BE REVIEWED

MMES/LMES complains that the BTA acted unlawfully and unreasonably based upon the following errors in the Decision:

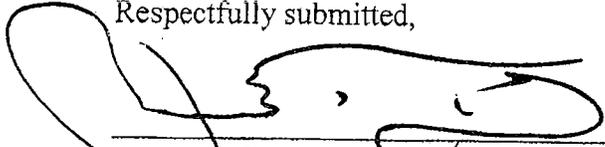
1. The BTA erred by failing to find that the underlying Assessment was issued in bad faith and that Pike County and the Pike County Auditor acted in bad faith in both their actions related to the PILOT agreements and in pursuing such an Assessment.
2. The BTA erred by failing to find that Pike County and the Pike County Auditor’s actions related to the Assessment were frivolous, for purposes of establishing a claim for redress under R.C. 5703.54.
3. The BTA erred by failing to order Pike County and the Pike County Auditor to reimburse MMES/LMES for all attorney fees and associated expenses related to MMES/LMES’ defense against the Assessment as a consequence of the frivolous and bad faith actions of Pike County and the Pike County Auditor.

4. The BTA erred by failing to find that the Assessment is void because the Auditor lacks the authority to issue assessments for property not listed in returns. See R.C. 5711.24, which provides in pertinent part that only “[t]he tax commissioner shall assess all taxable property, except property listed in returns which the county auditor is required to assess as his deputy, and shall list and assess all such property which is not returned for taxation \*\*\*.” See, also, R.C. 5711.11 and the “Guidelines for Filing Ohio Personal Property Tax Returns.”
5. The BTA erred by failing to find that the Assessment is contrary to the Tax Commissioner’s interpretation of Ohio law and binding instructions regarding the taxability of Government property for purposes of Ohio personal property tax. County Bulletin from Stanley J. Bowers, Tax Commissioner, No. 126, dated August 7, 1958.
6. The BTA erred by failing to find that the Assessment is contrary to the binding opinion of the Ohio Attorney General regarding the taxability of Government property for purposes of Ohio personal property tax. See 1958 Ohio Atty. Gen. Ops. 2471.
7. The BTA erred by failing to find that the Assessment is contrary the binding decision of the U.S. 6<sup>th</sup> Circuit Court of Appeals, finding that statutes similar to Ohio’s imposed an ad valorem tax rather than a privilege tax, precluding a government contractor’s liability for tangible personal property tax based upon its use of federally-owned property. See *Union Carbide Corp. v. Alexander* (1984), 679 S.W.2d 938, reviewing *U.S. v. Anderson County, Tenn.* (E.D. Tenn. 1983), 575 F.Supp. 574, affirmed (6<sup>th</sup> Circuit 1985), 761 F.2d 1169, cert. denied (1983), 474 U.S. 919, 106 S.Ct. 248, 88 L.Ed.2d 256.

8. The BTA erred by failing to find that the Assessment is barred by Ohio's long-standing tax policy treating as exempt the Government-owned personal property at issue. See, generally, *NLO, Inc. v. Limbach* (1993), 66 Ohio St.3d 389, *The Recording Devices, Inc. v. Bowers* (1963), 174 Ohio St. 518, and *Ormet Corp. v. Lindley* (1982), 69 Ohio St.2d 263.
9. The BTA erred by failing to find that the Assessment is contrary to the manifest intent of the General Assembly to not tax Government-owned tangible personal property under any circumstance. See R.C. 5705.61.
10. The BTA erred by failing to find that the Assessment erroneously considers property of the DOE to be used in business in Ohio. See R.C. 5701.08.
11. The BTA erred by failing to find that MMES/LMES' ownership of "records and files" does not qualify it as a "taxpayer" for Ohio's personal property tax. R.C. 5711.01(B).
12. The BTA erred by failing to find that the Assessment does not reflect the accounting books and records that MMES/LMES maintained in the ordinary course of its operations during the period in question, i.e., the period ending December 31, 1992, or thereafter. See R.C. 5711.18. Instead, the Assessment purportedly reflects the books and records of DOE, contrary to R.C. 5711.18.
13. The BTA erred by failing to find that the Assessment reflects an inaccurate computation of true values of personal property allegedly used in business in Ohio, and therefore allegedly taxable in Ohio. R.C. 5711.18.

14. The BTA erred by failing to apply by the doctrines of estoppel and laches as a bar to the Assessment.

Respectfully submitted,



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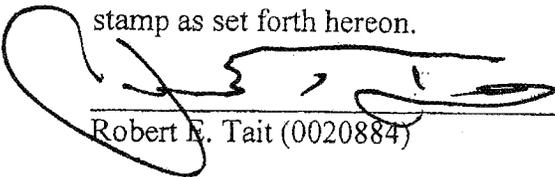
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*Legal Counsel for, Martin Marietta Energy Systems, Inc.,  
a/k/a Lockheed Martin Energy Systems, Inc.*

PROOF OF SERVICE UPON OHIO BOARD OF TAX APPEALS

This is to certify that the Notice of Appeal of Martin Marietta Energy Systems, Inc., a/k/a Lockheed Martin Energy Systems, Inc., was filed with the Ohio Board of Tax Appeals, State Office Tower, 30 East Broad Street, 24th Floor, Columbus, Ohio as evidenced by its date stamp as set forth hereon.



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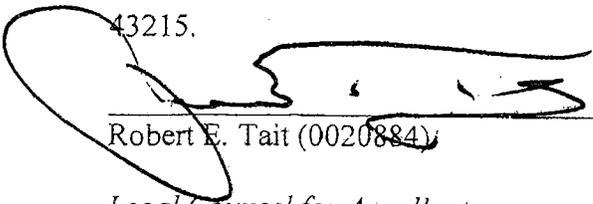
Robert E. Tait (0020884)

*Legal Counsel for Appellant  
Martin Marietta Energy Systems, Inc.,  
a/k/a Lockheed Martin Energy Systems, Inc.*

CERTIFICATE OF SERVICE

This is to certify that on this 8th day of August, 2014 a true copy of the foregoing Notice of Appeal of Appellant Martin Marietta Energy Systems, Inc., a/k/a Lockheed Martin Energy Systems, Inc., was sent by certified U.S. mail to Appellee Joseph W. Testa, Tax Commissioner of Ohio, 30 East Broad Street, 22nd Floor, Columbus, Ohio 43215; to counsel of record for Appellee Tax Commissioner, 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 Teddy L. Wheeler, Pike County Auditor, 230 Waverly Plaza, Suite 200, Waverly, Ohio 45690-1222; and to counsel for the Pike County Auditor, Kevin L. Shoemaker, Shoemaker & Howarth, LLP, 471 East Broad Street, Suite 2001, Columbus, Ohio

43215.



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Robert E. Tait (0020884)

*Legal Counsel for Appellant  
Martin Marietta Energy Systems, Inc.,  
a/k/a Lockheed Martin Energy Systems, Inc.*



OHIO BOARD OF TAX APPEALS

TEDDY L. WHEELER, IN HIS OFFICIAL  
CAPACITY AS AUDITOR OF PIKE COUNTY, )

OHIO, (et. al.), )

Appellant(s), )

vs. )

JOSEPH W. TESTA, TAX COMMISSIONER OF )  
OHIO, (et. al.), )

Appellee(s). )

CASE NO(S). 2012-2043

(PERSONAL PROPERTY TAX)

DECISION AND ORDER

APPEARANCES:

For the Appellant(s)

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For the Appellee(s)

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MARTIN MARIETTA ENERGY SYSTEMS, N/K/A  
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P.O. BOX 1008  
COLUMBUS, OH 43216-1008

Entered Thursday, August 7, 2014

Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

This matter is considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above-named appellant ("Auditor") from a final determination of the Tax Commissioner wherein the commissioner cancelled the personal property tax assessment issued by appellant to appellee Martin Marietta Energy Systems, n/k/a Lockheed Martin Energy Systems, Inc. ("MM"), relating to tax year

1993. We make our determination based upon the notice of appeal, the statutory transcript ("S.T.") certified to this board by the Tax Commissioner, the record of this board's hearing ("H.R."), the parties' joint stipulations of fact ("Stip"), the depositions submitted in lieu of live testimony ("Dep."), and the written arguments of counsel.

There is a presumption that the findings of the Tax Commissioner are valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is therefore incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Kern v. Tracy* (1995), 72 Ohio St.3d 347; *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213. Where no competent and probative evidence is presented to this board by the appellant to show that the Tax Commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Kern*, supra; *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Alcan*, supra.

Through the notice of appeal, the Pike County Auditor contests the Tax Commissioner's cancellation of a personal property tax assessment issued by the auditor to MM based upon the value of tangible personal property located at the Portsmouth Gaseous Diffusion Plant ("PORTS"), a uranium enrichment plant. For the tax year in question, i.e., 1993, PORTS, and the equipment that is the subject of the instant assessment, were owned by the United States Department of Energy ("DOE"), "because of the extra hazardous nature of it that no contractor would build the facilities or have the capital investment for it." *Nesteruk Dep.* at 8-9; MM acted as the contract operator of PORTS that managed, operated and maintained the buildings and facilities at PORTS. *Stip 1*; *Ex. 39*.

Specifically, for tax year 1993, the Pike County Commissioners entered into an agreement with the DOE for payments in lieu of taxes ("PILOT agreement"). Such agreement, authorized under the Atomic Energy Act of 1946, i.e., 42 U.S.C. 2208, provided that "the County has requested financial assistance from DOE, and has stated that it will waive and release any claims for tax years 1992 through 1997 for taxes against DOE and its contractors on, with respect to, or measured by the value or use of Government-owned real and personal property." *Auditor Ex. 20 at 1*; *MM Ex. 4 at 1*. The agreement indicated that DOE's payment of \$175,546.83 would "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." *Auditor Ex. 20 at 2*; *MM Ex. 4 at 2*. Similar agreements were in effect for tax years 1952 through 1997. *Stip 6*. Thereafter, in December 2010, the auditor, although aware of the PILOT agreement in place for tax year 1993, issued a preliminary assessment certificate of valuation to MM for tax year 1993, resulting in a personal property delinquent tax liability of \$23,244,789. *S.T. at 443-449*. Upon MM's petition for reassessment, the commissioner took action, pursuant to R.C. 5711.31, to cancel such assessment issued by the auditor. For the reasons stated herein, we find that the subject assessment was properly cancelled.

At the outset, the auditor contends that the commissioner did not have the statutory authority to cancel the assessment in question. We disagree. Pursuant to R.C. 5703.05, generally, and R.C. 5711.31, more specifically, the commissioner could take whatever action was necessary to "correct" the assessment. Clearly, if the commissioner determines that an assessment has been issued by an auditor in error, the commissioner has the authority to cancel such assessment, i.e., to review the acts of his deputies, including county auditors as designated in R.C. 5711.11 and 5715.40, and take whatever action is necessary to correct any errors made, including cancellation.

Every taxpayer engaged in business in Ohio was required to annually file a personal property tax return with the county auditor of each county in which property used in the taxpayer's business was located. R.C. 5711.02. On that return, the taxpayer listed "all taxable property \*\*\* as to ownership or control, valuation, and taxing districts." R.C. 5711.03. A "taxpayer," was defined in R.C. 5711.01(B) as "any owner of taxable property \*\*\* and includes every person \*\*\* doing business in this state, or owning or having a beneficial interest in taxable personal property in this state \*\*\*."

Clearly, MM did not own the subject personal property, as title to it was retained by the DOE. MM also does not stand in the stead of an owner, by virtue of having a "beneficial interest" in the subject property, pursuant to R.C. 5711.01(B). In *Refreshment Service Co. v. Lindley* (1981), 67 Ohio St.2d 400, 403; the court "construe[d] the term 'beneficial interest' to include the interest of one who is in possession of all characteristics of ownership other than legal title of the taxable property. Such a definition prevents one from escaping the incidence of the personal property tax by transferring legal title to the taxable property while keeping the benefits of its ownership. The determination of whether a person has a 'beneficial interest' in an article of personal property requires an examination of the rights and privileges that person has in the property in question. If in fact this person is found to possess all the characteristics of ownership without having legal title to the property, then the person must be found to have a beneficial interest in the property and liable for any personal property tax assessed." 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 a comingling of contractor property, so it was excluded and none was provided." Nesteruk Dep. at 43. The property was physically "tagged" indicating 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. Nesteruk Dep. at 18-21, 24; Donnelly Dep. at 11, 16, 18-19; Dayton Dep. at 11-12. 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. Dayton Dep. at 16; Donnelly Dep. at 30-32, 43.

Further, the DOE supervised, oversaw and controlled all operations of PORTS. Dayton Dep. at 17. Special clearances were required to be employed by PORTS. Donnelly Dep. at 11. "[H]ardly a week went by without DOE looking over our shoulders." Donnelly Dep. at 15. 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." Donnelly Dep., Ex. A, at 11-12, 18. The DOE determined the specifications of production at PORTS. Donnelly Dep. at 17-18. MM primarily provided the skilled staff to work at PORTS. Nesteruk Dep. at 39. The DOE determined all of the sales/production necessary to meet customer needs, as MM did not participate in the marketing and sales efforts. Dayton Dep. at 13-14; Donnelly Dep. at 74. 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.

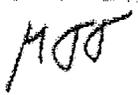
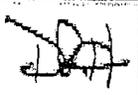
The auditor also contends that MM is subject to the personal property tax assessed by virtue of the provisions of R.C. 5711.16, as a manufacturer. That section specifically provides that "[a] person who purchases, receives, or holds personal property for the purpose of adding to its value by manufacturing, refining, rectifying, or combining different materials with a view of making a gain or profit by so doing is a manufacturer. \*\*\* A manufacturer shall also list all engines and machinery, and tools and implements, of every kind used, or designed to be used, in refining and manufacturing, and

owned or used by such manufacturer." The auditor cites *ATS Ohio, Inc. v. Tracy* (1996), 76 Ohio St.3d 297, in support of such proposition. In *ATS*, the court addressed ownership of "inventory in the process of manufacture." *Id.* at syllabus. In analyzing the provisions of R.C. 5711.16, the court held that "[t]he final sentence of the second paragraph states the rule for treatment of property other than inventory, including engines, machinery, tools, and implements on the tax return. Instead of taxing only the items of property from this category that are owned by the taxpayer, R.C. 5711.16 provides that tax must be paid on items from the category that are "owned or used by such manufacturer." *Id.* at 299-300. 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.

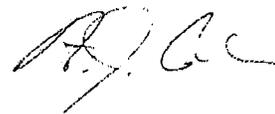
In addition, beyond the foregoing, we find that the PILOT agreement, in effect for the tax year in question and actively negotiated by the auditor, himself, by its very terms, "preempted and foreclosed the Auditor's ability to issue any preliminary assessment certificate of valuation or accompanying assessment." *Comm. Reply Brief* at 1. Neither the commissioner nor this board has the statutory authority to void the PILOT agreement or alter or interpret its terms, and therefore, we conclude that the parties' have executed their obligations under the agreement, as written.

Finally, we question the propriety of the auditor's actions in assessing MM for tax year 1993, some seventeen years after the tax year in question. R.C. 5703.58 provides that no assessment shall be issued "after the expiration of ten years \*\*\* from the date the tax return or report was due when such amount was not reported and paid." The auditor, as the commissioner's designated deputy, pursuant to R.C. 5711.11 and 5715.40, issued the assessment in question, clearly outside of the ten year limitation.

Thus, based upon the foregoing, we have determined that the appellant auditor improperly assessed personal property tax against MM; MM did not own the personal property in question, nor was MM a manufacturer. Further, pursuant to the terms of a PILOT agreement, the county was precluded from assessing personal property tax against MM for the year in question. 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.

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

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



\_\_\_\_\_  
A.J. Groeber, Board Secretary

ORIGINAL

AMENDED NOTICE OF APPEAL FROM THE OHIO BOARD OF TAX APPEALS

In the Supreme Court of Ohio

Teddy L. Wheeler,  
In his Capacity of Pike County Auditor,

Appellee,

v.

Joseph W. Testa,  
Tax Commissioner of Ohio,

Appellee,

And

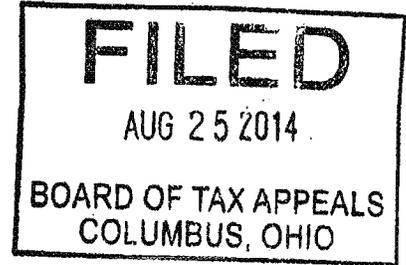
Martin Marietta Energy Systems, Inc.,  
a/k/a Lockheed Martin Energy Systems, Inc.

Appellant.

Case No. 14-1362

Appeal from the Ohio  
Board of Tax Appeals

BTA Case No. 2012-2043



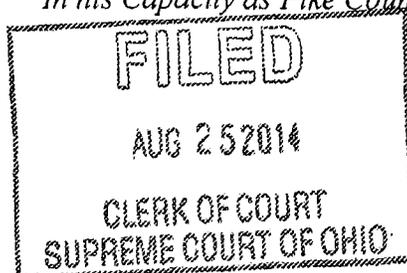
AMENDED NOTICE OF APPEAL OF APPELLANT MARTIN MARIETTA ENERGY SYSTEMS, INC., a/k/a LOCKHEED MARTIN ENERGY SYSTEMS, INC.

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*Counsel for Appellee, Joseph Testa,  
Ohio Tax Commissioner*

**NOTICE OF APPEAL OF APPELLANT MARTIN MARIETTA ENERGY SYSTEMS, INC., a/k/a LOCKHEED MARTIN ENERGY SYSTEMS, INC.**

Appellant, Martin Marietta Energy Systems, Inc., a/k/a Lockheed Martin Energy Systems, Inc. L.L. Bean, Inc. (“MMES/LMES”) hereby gives notice of its appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from the Decision and Order (“Decision”) of the Board of Tax Appeals (“Board”) journalized on August 7, 2014, in *Teddy L. Wheeler in his Capacity as Pike County Auditor v. Joseph W. Testa, Tax Commissioner of Ohio*, et al., being BTA Case No. 2012-2043. A true copy of the Decision being appealed is attached hereto and incorporated by reference herein.

**INTRODUCTION**

In this case, the Pike County Auditor issued a Tangible Personal Property Tax Preliminary Assessment Certificate of Valuation for tax year 1993 for an amended value of \$158,512,000. The corresponding tax assessment was in the amount of \$23,244,789, including tax, penalty, and interest. MMES/LMES filed a testimony petition for reassessment, and upon review, the Tax Commissioner cancelled the assessment in its entirety. Upon appeal to the Ohio Board of Tax Appeals (“BTA”) the BTA affirmed the Tax Commissioner Final Determination, finding that Pike County and the Pike County Auditor were contractually foreclosed from making the assessment based upon an agreement between Pike County and the United States Department of Energy (“DOE”), which released the DOE and MMES/LMES from all potential tax liabilities, specifically personal property taxes, for various tax years including tax year 1993. As part of the compromise and settlement, Pike County received from the DOE certain payments known as payments-in-lieu-of-taxes (“PILOTs”), which Pike County accepted in full satisfaction

of any and all tax claims that could arguably be made against MMES/LMES. The BTA also found: 1) that MMES/LMES was not the “beneficial owner” of the property sought to be assessed; 2) that MMES/LMES could not be considered a “manufacturer” as contemplated by R.C. 5711.16, and therefore could not be assessed as a manufacturer; and 3) that the Pike County Auditor, as the Tax Commissioner’s deputy, did not issue the subject assessment within the ten-year limitation period provided by R.C. 5703.58. Although MMES/LMES does not contest the BTA’s decision with respect to any of its stated reasons for affirming the Commissioner, MMES/LMES raised before the BTA numerous dispositive legal and jurisdictional issues that should have been part of the BTA’s Decision.

#### **ERRORS TO BE REVIEWED**

MMES/LMES complains that the BTA acted unlawfully and unreasonably based upon the following errors in the Decision:

1. The BTA erred by failing to find that the underlying Assessment was issued in bad faith and that Pike County and the Pike County Auditor acted in bad faith in both their actions related to the PILOT agreements and in pursuing such an Assessment.
2. The BTA erred by failing to find that Pike County and the Pike County Auditor’s actions related to the Assessment were frivolous, for purposes of establishing a claim for redress under R.C. 5703.54.
3. The BTA erred by failing to order Pike County and the Pike County Auditor to reimburse MMES/LMES for all attorney fees and associated expenses related to MMES/LMES’ defense against the Assessment as a consequence of the frivolous and bad faith actions of Pike County and the Pike County Auditor.

4. The BTA erred by failing to find that the Assessment violates federal law in that it fails to adhere to the conditions the DOE requires for all PILOT payments, requirements that are based upon rules and regulations that are entitled to the full force of law and that, pursuant to the Supremacy Clause of the U.S. Constitution, pre-empt state law. U.S. Const., Art. VI, Cl. 2; 42 U.S.C. § 2208; DOE Order 2100.12A; R.C. 5715.45 and 5715.46.
5. The BTA erred by failing to find that the Assessment is void because the Auditor lacks the authority to issue assessments for property not listed in returns. See R.C. 5711.24, which provides in pertinent part that only “[t]he tax commissioner shall assess all taxable property, except property listed in returns which the county auditor is required to assess as his deputy, and shall list and assess all such property which is not returned for taxation \*\*\*.” See, also, R.C. 5711.11 and the “Guidelines for Filing Ohio Personal Property Tax Returns.”
6. The BTA erred by failing to find that the Assessment is contrary to the Tax Commissioner’s interpretation of Ohio law and binding instructions regarding the taxability of Government property for purposes of Ohio personal property tax. County Bulletin from Stanley J. Bowers, Tax Commissioner, No. 126, dated August 7, 1958.
7. The BTA erred by failing to find that the Assessment is contrary to the binding opinion of the Ohio Attorney General regarding the taxability of Government property for purposes of Ohio personal property tax. See 1958 Ohio Atty. Gen. Ops. 2471.
8. The BTA erred by failing to find that the Assessment is contrary the binding decision of the U.S. 6<sup>th</sup> Circuit Court of Appeals, finding that statutes similar to Ohio’s imposed an

ad valorem tax rather than a privilege tax, precluding a government contractor's liability for tangible personal property tax based upon its use of federally-owned property. See *Union Carbide Corp. v. Alexander* (1984), 679 S.W.2d 938, reviewing *U.S. v. Anderson County, Tenn.* (E.D. Tenn. 1983), 575 F.Supp. 574, affirmed (6<sup>th</sup> Circuit 1985), 761 F.2d 1169, cert. denied (1983), 474 U.S. 919, 106 S.Ct. 248, 88 L.Ed.2d 256.

9. The BTA erred by failing to find that the Assessment is barred by Ohio's long-standing tax policy treating as exempt the Government-owned personal property at issue. See, generally, *NLO, Inc. v. Limbach* (1993), 66 Ohio St.3d 389, *The Recording Devices, Inc. v. Bowers* (1963), 174 Ohio St. 518, and *Ormet Corp. v. Lindley* (1982), 69 Ohio St.2d 263.
10. The BTA erred by failing to find that the Assessment is contrary to the manifest intent of the General Assembly to not tax Government-owned tangible personal property under any circumstance. See R.C. 5705.61.
11. The BTA erred by failing to find that the Assessment erroneously considers property of the DOE to be used in business in Ohio. See R.C. 5701.08.
12. The BTA erred by failing to find that MMES/LMES' ownership of certain unrelated "records and files" does not qualify it as a "taxpayer" for Ohio's personal property tax. R.C. 5711.01(B).
13. The BTA erred by failing to find that the Assessment does not reflect the accounting books and records that MMES/LMES maintained in the ordinary course of its operations during the period in question, i.e., the period ending December 31, 1992, or thereafter.

See R.C. 5711.18. Instead, the Assessment purportedly reflects the books and records of DOE, contrary to R.C. 5711.18.

14. The BTA erred by failing to find that the Assessment reflects an inaccurate computation of true values of personal property allegedly used in business in Ohio, and therefore allegedly taxable in Ohio. R.C. 5711.18.

15. The BTA erred by failing to apply by the doctrines of estoppel and laches as a bar to the Assessment.

16. The BTA erred in finding that the Final Determination was subject to an appeal to the Ohio Board of Tax Appeals under R.C. 5717.02. The cancellation of an assessment through a Final Determination is not subject to appeal. R.C. 5703.60(A)(2).

Respectfully submitted,



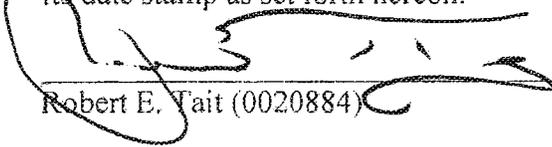
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*Legal Counsel for, Martin Marietta Energy Systems, Inc.,  
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**PROOF OF SERVICE UPON OHIO BOARD OF TAX APPEALS**

This is to certify that the Amended Notice of Appeal of Martin Marietta Energy Systems, Inc., a/k/a Lockheed Martin Energy Systems, Inc., was filed with the Ohio Board of Tax Appeals, State Office Tower, 30 East Broad Street, 24th Floor, Columbus, Ohio as evidenced by its date stamp as set forth hereon.

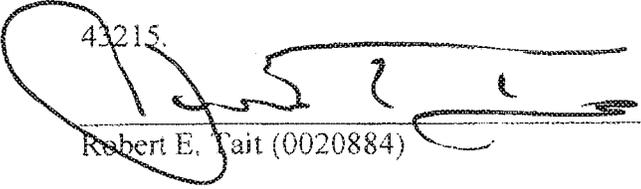
  
Robert E. Tait (0020884)

*Legal Counsel for Appellant  
Martin Marietta Energy Systems, Inc.,  
a/k/a Lockheed Martin Energy Systems, Inc.*

**CERTIFICATE OF SERVICE**

This is to certify that on this 25<sup>th</sup> day of August, 2014 a true copy of the foregoing Amended Notice of Appeal of Appellant Martin Marietta Energy Systems, Inc., a/k/a Lockheed Martin Energy Systems, Inc., was sent by certified U.S. mail to Appellee Joseph W. Testa, Tax Commissioner of Ohio, 30 East Broad Street, 22nd Floor, Columbus, Ohio 43215; to counsel of record for Appellee Tax Commissioner, 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 Teddy L. Wheeler, Pike County Auditor, 230 Waverly Plaza, Suite 200, Waverly, Ohio 45690-1222; and to counsel for the Pike County Auditor, Kevin L. Shoemaker, Shoemaker & Howarth, LLP, 471 East Broad Street, Suite 2001, Columbus, Ohio

43215.

  
Robert E. Tait (0020884)

*Legal Counsel for Appellant  
Martin Marietta Energy Systems, Inc.,  
a/k/a Lockheed Martin Energy Systems, Inc.*

OHIO BOARD OF TAX APPEALS

TEDDY L. WHEELER, IN HIS OFFICIAL  
CAPACITY AS AUDITOR OF PIKE COUNTY, )  
OHIO, (et. al.), )  
Appellant(s), )  
vs. )  
JOSEPH W. TESTA, TAX COMMISSIONER OF )  
OHIO, (et. al.), )  
Appellee(s).

CASE NO(S). 2012-2043

(PERSONAL PROPERTY TAX)

DECISION AND ORDER

APPEARANCES:

For the Appellant(s)

- TEDDY L. WHEELER, IN HIS OFFICIAL  
CAPACITY AS AUDITOR OF PIKE COUNTY,  
OHIO  
Represented by:  
KEVIN SHOEMAKER  
SHOEMAKER & HOWARTH, LLP  
471 EAST BROAD STREET  
SUITE 2001  
COLUMBUS, OH 43215

For the Appellee(s)

- JOSEPH W. TESTA, TAX COMMISSIONER OF  
OHIO  
Represented by:  
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30 EAST BROAD STREET, 25TH FLOOR  
COLUMBUS, OH 43215-3428

MARTIN MARIETTA ENERGY SYSTEMS, N/K/A  
LOCKHEED MARTIN ENERGY SYSTEMS, INC.  
Represented by:  
ROBERT TAIT  
VORYS, SATER, SEYMOUR AND PEASE, LLP  
52 EAST GAY STREET  
P.O. BOX 1008  
COLUMBUS, OH 43216-1008

Entered Thursday, August 7, 2014

Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

This matter is considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above-named appellant ("Auditor") from a final determination of the Tax Commissioner wherein the commissioner cancelled the personal property tax assessment issued by appellant to appellee Martin Marietta Energy Systems, n/k/a Lockheed Martin Energy Systems, Inc. ("MM"), relating to tax year

1993. We make our determination based upon the notice of appeal, the statutory transcript ("S.T.") certified to this board by the Tax Commissioner, the record of this board's hearing ("H.R."), the parties' joint stipulations of fact ("Stip"), the depositions submitted in lieu of live testimony ("Dep."), and the written arguments of counsel.

There is a presumption that the findings of the Tax Commissioner are valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is therefore incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Kern v. Tracy* (1995), 72 Ohio St.3d 347; *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213. Where no competent and probative evidence is presented to this board by the appellant to show that the Tax Commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Kern*, supra; *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Alcan*, supra.

Through the notice of appeal, the Pike County Auditor contests the Tax Commissioner's cancellation of a personal property tax assessment issued by the auditor to MM based upon the value of tangible personal property located at the Portsmouth Gaseous Diffusion Plant ("PORTS"), a uranium enrichment plant. For the tax year in question, i.e., 1993, PORTS, and the equipment that is the subject of the instant assessment, were owned by the United States Department of Energy ("DOE"), "because of the extra hazardous nature of it that no contractor would build the facilities or have the capital investment for it." Nesteruk Dep. at 8-9; MM acted as the contract operator of PORTS that managed, operated and maintained the buildings and facilities at PORTS. Stip 1; Ex. 39.

Specifically, for tax year 1993, the Pike County Commissioners entered into an agreement with the DOE for payments in lieu of taxes ("PILOT agreement"). Such agreement, authorized under the Atomic Energy Act of 1946, i.e., 42 U.S.C. 2208, provided that "the County has requested financial assistance from DOE, and has stated that it will waive and release any claims for tax years 1992 through 1997 for taxes against DOE and its contractors on, with respect to, or measured by the value or use of Government-owned real and personal property." Auditor Ex. 20 at 1; MM Ex. 4 at 1. The agreement indicated that DOE's payment of \$175,546.83 would "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." Auditor Ex. 20 at 2; MM Ex. 4 at 2. Similar agreements were in effect for tax years 1952 through 1997. Stip 6. Thereafter, in December 2010, the auditor, although aware of the PILOT agreement in place for tax year 1993, issued a preliminary assessment certificate of valuation to MM for tax year 1993, resulting in a personal property delinquent tax liability of \$23,244,789. S.T. at 443-449. Upon MM's petition for reassessment, the commissioner took action, pursuant to R.C. 5711.31, to cancel such assessment issued by the auditor. For the reasons stated herein, we find that the subject assessment was properly cancelled.

At the outset, the auditor contends that the commissioner did not have the statutory authority to cancel the assessment in question. We disagree. Pursuant to R.C. 5703.05, generally, and R.C. 5711.31, more specifically, the commissioner could take whatever action was necessary to "correct" the assessment. Clearly, if the commissioner determines that an assessment has been issued by an auditor in error, the commissioner has the authority to cancel such assessment, i.e., to review the acts of his deputies, including county auditors as designated in R.C. 5711.11 and 5715.40, and take whatever action is necessary to correct any errors made, including cancellation.

Every taxpayer engaged in business in Ohio was required to annually file a personal property tax return with the county auditor of each county in which property used in the taxpayer's business was located. R.C. 5711.02. On that return, the taxpayer listed "all taxable property \*\*\* as to ownership or control, valuation, and taxing districts." R.C. 5711.03. A "taxpayer," was defined in R.C. 5711.01(B) as "any owner of taxable property \*\*\* and includes every person \*\*\* doing business in this state, or owning or having a beneficial interest in taxable personal property in this state \*\*\*."

Clearly, MM did not own the subject personal property, as title to it was retained by the DOE. MM also does not stand in the stead of an owner, by virtue of having a "beneficial interest" in the subject property, pursuant to R.C. 5711.01(B). In *Refreshment Service Co. v. Lindley* (1981), 67 Ohio St.2d 400, 403, the court "construe[d] the term 'beneficial interest' to include the interest of one who is in possession of all characteristics of ownership other than legal title of the taxable property. Such a definition prevents one from escaping the incidence of the personal property tax by transferring legal title to the taxable property while keeping the benefits of its ownership. The determination of whether a person has a 'beneficial interest' in an article of personal property requires an examination of the rights and privileges that person has in the property in question. If in fact this person is found to possess all the characteristics of ownership without having legal title to the property, then the person must be found to have a beneficial interest in the property and liable for any personal property tax assessed." 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 a comingling of contractor property, so it was excluded and none was provided." Nesteruk Dep. at 43. The property was physically "tagged" indicating 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. Nesteruk Dep. at 18-21, 24; Donnelly Dep. at 11, 16, 18-19; Dayton Dep. at 11-12. 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. Dayton Dep. at 16; Donnelly Dep. at 30-32, 43.

Further, the DOE supervised, oversaw and controlled all operations of PORTS. Dayton Dep. at 17. Special clearances were required to be employed by PORTS. Donnelly Dep. at 11. "[H]ardly a week went by without DOE looking over our shoulders." Donnelly Dep. at 15. 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." Donnelly Dep., Ex. A, at 11-12, 18. The DOE determined the specifications of production at PORTS. Donnelly Dep. at 17-18. MM primarily provided the skilled staff to work at PORTS. Nesteruk Dep. at 39. The DOE determined all of the sales/production necessary to meet customer needs, as MM did not participate in the marketing and sales efforts. Dayton Dep. at 13-14; Donnelly Dep. at 74. 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.

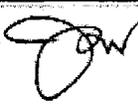
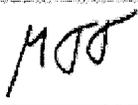
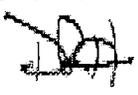
The auditor also contends that MM is subject to the personal property tax assessed by virtue of the provisions of R.C. 5711.16, as a manufacturer. That section specifically provides that "[a] person who purchases, receives, or holds personal property for the purpose of adding to its value by manufacturing, refining, rectifying, or combining different materials with a view of making a gain or profit by so doing is a manufacturer. \*\*\* A manufacturer shall also list all engines and machinery, and tools and implements, of every kind used, or designed to be used, in refining and manufacturing, and

owned or used by such manufacturer." The auditor cites *ATS Ohio, Inc. v. Tracy* (1996), 76 Ohio St.3d 297, in support of such proposition. In *ATS*, the court addressed ownership of "inventory in the process of manufacture." Id. at syllabus. In analyzing the provisions of R.C. 5711.16, the court held that "[t]he final sentence of the second paragraph states the rule for treatment of property other than inventory, including engines, machinery, tools, and implements on the tax return. Instead of taxing only the items of property from this category that are owned by the taxpayer, R.C. 5711.16 provides that tax must be paid on items from the category that are "owned or used by such manufacturer." Id. at 299-300. 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.

In addition, beyond the foregoing, we find that the PILOT agreement, in effect for the tax year in question and actively negotiated by the auditor, himself, by its very terms, "preempted and foreclosed the Auditor's ability to issue any preliminary assessment certificate of valuation or accompanying assessment." Comm. Reply Brief at 1. Neither the commissioner nor this board has the statutory authority to void the PILOT agreement or alter or interpret its terms, and therefore, we conclude that the parties' have executed their obligations under the agreement, as written.

Finally, we question the propriety of the auditor's actions in assessing MM for tax year 1993, some seventeen years after the tax year in question. R.C. 5703.58 provides that no assessment shall be issued "after the expiration of ten years \*\*\* from the date the tax return or report was due when such amount was not reported and paid." The auditor, as the commissioner's designated deputy, pursuant to R.C. 5711.11 and 5715.40, issued the assessment in question, clearly outside of the ten year limitation.

Thus, based upon the foregoing, we have determined that the appellant auditor improperly assessed personal property tax against MM; MM did not own the personal property in question, nor was MM a manufacturer. Further, pursuant to the terms of a PILOT agreement, the county was precluded from assessing personal property tax against MM for the year in question. 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.

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

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



\_\_\_\_\_  
A.J. Groeber, Board Secretary



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# FINAL DETERMINATION

Date: MAY 25 2012

Martin Marietta Energy Systems, Inc.  
aka Lockheed Martin Energy Systems, Inc.  
c/o Mr. Stephen M. Piper  
Vice President and General Counsel  
Lockheed Martin Electronic Systems  
6801 Rockledge Drive – MP 365  
Bethesda, MD 20817

Re: Case No. 11-12028  
Personal Property Tax  
Pike County  
Tax Year: 1993

This is the final determination of the Tax Commissioner on a petition for reassessment filed pursuant to R.C. 5711.31 for tax year 1993. The subject assessment was issued by the Pike County Auditor on December 23, 2010<sup>1</sup>. In response to the assessment, the petitioner timely filed a petition for reassessment, and a hearing was held on the petition.

The petitioner did not file a personal property tax return for tax year 1993. The county auditor based his assessment on his conclusion that the petitioner was required to file a return listing taxable property for tax year 1993 and that the petitioner failed to file such return. Through its petition, the petitioner makes several contentions, including that the county auditor is barred from making the subject assessment due to an agreement between Pike County and the United States Department of Energy (“DOE”) dated August 21, 1998. The agreement contains the following acknowledgements:

WHEREAS, said Government-owned land, facilities, and other personal property by reason of Federal ownership are not subject to taxation by the County under the Constitution and laws of the United States and the State of Ohio; and the County has suffered the loss of the ad valorem property tax for County government purposes on the land acquired by the Government; and

\* \* \*

---

<sup>1</sup> On December 23, 2010 the county auditor issued the subject assessment against the petitioner, Martin Marietta Energy Systems, Inc. and Martin Marietta Utility Services, Inc. Subsequent to the filing of petitions by both entities, the county auditor requested the Tax Commissioner cancel the assessment as it relates to Martin Marietta Utility Services, Inc. The decision regarding Martin Marietta Utility Services, Inc. will be made through a separate final determination in case number 11-12029. Since the issuance of the subject assessment, the Pike County Auditor has issued forty-four additional assessments beginning with tax year 1955.

WHEREAS, it is the opinion of Counsel for DOE and Counsel for the County that such contractors are not liable for taxes on, with respect to, or measured by the value or other use of such Government-owned real and personal property under existing State and Federal law; and

\* \* \*

Pursuant to the agreement, Pike County agreed to accept certain payments from the DOE in exchange for the following concession:

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; provided, that the acceptance of this payment shall not prejudice eligibility for any payment in lieu of taxes based on the benefits and burdens test prescribed in Section 168 of the Atomic Energy Act. The term "contractors" means and includes the companies and organizations listed in the schedule attached hereto, designated as Exhibit No. 2, and such other contractors and subcontractors as the parties may agree are in this category. [Emphasis added].

Exhibit No. 2 lists the petitioner, Martin Marietta Energy Systems, Inc., as a DOE contractor.

Based on the language of this contract, Pike County agreed to accept a payment from the DOE in resolution of any potential tax liability for personal property taxes owed by the petitioner for tax years 1992 through 1997, thereby precluding the subject assessment. Pike County received the requested payments-in-lieu of taxes from the DOE under this agreement. The subject assessment represents amounts unrelated to the amounts sought from DOE as payments-in-lieu of taxes. Additionally, the benefits and burdens test of the Atomic Energy Act<sup>2</sup> is not relevant to this determination as this decision is made by DOE based on information provided to the DOE by Pike County. There is no evidence that Pike County has requested or qualified for these additional benefits for these tax years.

Assuming *arguendo* that the county was not contractually foreclosed from making this assessment or that the county auditor was without authority to enter into the contract, the county auditor has not submitted any evidence establishing that the assessment is based on any reliable listing of personal property, nor any evidence supporting his calculation of the assessed value of the personal property.

The evidence that is in the record reveals that on November 18, 1992 the DOE responded to the county auditor's October 28, 1992 Freedom of Information Act request and provided the county auditor with, among other items, "a list of personal property owned by the Department of Energy" at the Piketon Gaseous Diffusion Plant. This list, titled "DOE-OWNED PERSONAL PROPERTY ASSETS," lists items classified as "STORES INVENTORIES," "CAPITAL EQUIPMENT," and "NON-CAPITAL SENSITIVE EQUIPMENT." The record also includes a

<sup>2</sup> Section 9(b) of DOE Order 2100.12A issued June 9, 1992 provides that, "[r]equests for new or revised payments based on special burdens that are in excess of any benefits derived from the Department's activities by the taxing jurisdictions are reviewed by the cognizant DOE Field Office to assure that Departmental policies are complied with and that the requests are complete and adequately supported."

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Preliminary Assessment Certificate of Value issued on December 23, 2010 reflecting an amended value of \$158,512,000. Finally, the record includes a Personal Property Delinquent Tax Statement reflecting an amount owed by the petitioner and Martin Marietta Utility Services, Inc. of \$23,244,789.00 for tax year 1993.

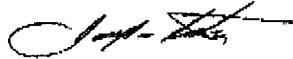
The record does not include, and the county auditor has not provided, any explanation of what property he determined was taxable, the methodology he used to value the property, or any schedules calculating the \$158,512,000 amended value. Without such evidence, the assessment cannot be given a presumption of correctness; without any supporting evidence of taxability or value, the assessment cannot be affirmed.

Pike County contractually ceded its right to assess personal property tax in this matter; therefore the Tax Commissioner finds that the assessment, in so far as it relates to the petitioner, must be canceled. Cancellation of the assessment renders moot the petitioner's remaining contentions.

**THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND NOTICE WILL BE SENT PURSUANT TO R.C. 5711.31 TO THE APPROPRIATE COUNTY AUDITOR, WHO SHALL PROCEED IN ACCORDANCE WITH R.C. 5711.32(C).**

I CERTIFY THAT THIS IS A TRUE AND ACCURATE COPY OF THE FINAL DETERMINATION RECORDED IN THE TAX COMMISSIONER'S JOURNAL

/s/ Joseph W. Testa



JOSEPH W. TESTA  
TAX COMMISSIONER

Joseph W. Testa  
Tax Commissioner

**§ 2208. Payments in lieu of taxes**

In order to render financial assistance to those States and localities in which the activities of the Commission are carried on, and in which the Commission has acquired property previously subject to State and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired, except in cases where special burdens have been cast upon the State or local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment.

(Aug. 1, 1946, ch. 724, title I, § 168, as added Aug. 30, 1954, ch. 1073, § 1, 68 Stat. 952; renumbered title I, Pub. L. 102-486, title IX, § 902(a)(8), Oct. 24, 1992, 106 Stat. 2944.)

**PRIOR PROVISIONS**

Provisions similar to this section were contained in section 1809(b) of this title, prior to the general amendment and renumbering of act Aug. 1, 1946, by act Aug. 30, 1954.

**§ 2209. Subsidies**

No funds of the Commission shall be employed in the construction or operation of facilities licensed under section 2133 or 2134 of this title except under contract or other arrangement entered into pursuant to section 2051 of this title.

(Aug. 1, 1946, ch. 724, title I, § 169, as added Aug. 30, 1954, ch. 1073, § 1, 68 Stat. 952; renumbered title I, Pub. L. 102-486, title IX, § 902(a)(8), Oct. 24, 1992, 106 Stat. 2944.)

**§ 2210. Indemnification and limitation of liability****(a) Requirement of financial protection for licensees**

Each license issued under section 2133 or 2134 of this title and each construction permit issued under section 2235 of this title shall, and each license issued under section 2073, 2093, or 2111 of this title may, for the public purposes cited in section 2012(i) of this title, have as a condition of the license a requirement that the licensee have and maintain financial protection of such type and in such amounts as the Nuclear Regulatory Commission (in this section referred to as the "Commission") in the exercise of its licensing and regulatory authority and responsibility shall require in accordance with subsection (b) of this section to cover public liability claims. Whenever such financial protection is required, it may be a further condition of the license that the licensee execute and maintain an indemnification agreement in accordance with subsection (c) of this section. The Commission may require, as a further condition of issuing a license, that an applicant waive any immunity from public liability conferred by Federal or State law.

**(b) Amount and type of financial protection for licensees**

(1) The amount of primary financial protection required shall be the amount of liability insurance available from private sources, except that the Commission may establish a lesser amount on the basis of criteria set forth in writing, which it may revise from time to time, taking into consideration such factors as the following: (A) the cost and terms of private insurance, (B) the type, size, and location of the licensed activity and other factors pertaining to the hazard, and (C) the nature and purpose of the licensed activity: *Provided*, That for facilities designed for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more, the amount of primary financial protection required shall be the maximum amount available at reasonable cost and on reasonable terms from private sources (excluding the amount of private liability insurance available under the industry retrospective rating plan required in this subsection). Such primary financial protection may include private insurance, private contractual indemnities, self-insurance, other proof of financial responsibility, or a combination of such measures and shall be subject to such terms and conditions as the Commission may, by rule, regulation, or order, prescribe. The Commission shall require licensees that are required to have and maintain primary financial protection equal to the maximum amount of liability insurance available from private sources to maintain, in addition to such primary financial protection, private liability insurance available under an industry retrospective rating plan providing for premium charges deferred in whole or major part until public liability from a nuclear incident exceeds or appears likely to exceed the level of the primary financial protection required of the licensee involved in the nuclear incident: *Provided*, That such insurance is available to, and required of, all of the licensees of such facilities without regard to the manner in which they obtain other types or amounts of such primary financial protection: *And provided further*, That the maximum amount of the standard deferred premium that may be charged a licensee following any nuclear incident under such a plan shall not be more than \$95,800,000 (subject to adjustment for inflation under subsection (t) of this section), but not more than \$15,000,000 in any 1 year (subject to adjustment for inflation under subsection (t) of this section), for each facility for which such licensee is required to maintain the maximum amount of primary financial protection: *And provided further*, That the amount which may be charged a licensee following any nuclear incident shall not exceed the licensee's pro rata share of the aggregate public liability claims and costs (excluding legal costs subject to subsection (o)(1)(D) of this section, payment of which has not been authorized under such subsection) arising out of the nuclear incident. Payment of any State premium taxes which may be applicable to any deferred premium provided for in this chapter shall be the responsibility of the licensee and shall not be included in the retrospective premium established by the Commission.

I direct particular attention to the provisions of above paragraph (4) to the effect that such compensation is to be "deducted from the *shares or portions* of the revenue payable to the \* \* \* townships \* \* \*." This language makes it very clear that the total amount of the taxes collected on behalf of the township includes the compensation that is to be deducted and paid to the county auditor. In other words, it is plainly a part of the total income from taxation which the township must have estimated in its budget as necessary for its operation and it must follow that every payment or deduction from such total income must be considered a part of the "total expenditure." I do not think it can be claimed that the income of the township from taxes, which must be estimated in advance, can be confused with the *net income* which it *actually receives after the deduction* is made for the compensation of the auditor in connection with the same. If for instance the township finds in making its budget that it will require \$100,000.00 for its current operations, it would not be sufficient for it to estimate and report that amount and then have it reduced by deduction for the auditor's compensation. In order that it may provide for the payment of that compensation, whether paid by it directly or withheld from it by the provision of the law, it must estimate and levy a tax for the amount which it will require for its operation, plus the percentage which it will have to bear in paying the compensation of the auditor.

In Section 321.26, Revised Code, we find similar provisions for the payment of the compensation allowed the county treasurer for the collection of these taxes. It is there provided that such treasurer shall be allowed certain percentages, the section reading in part:

"The county treasurer, on settlement with the county auditor, shall be allowed as fees on all moneys collected by him on any tax duplicates other than the inheritance duplicate and on all moneys received by him as advance payments of personal and classified property taxes, the following percentages:

"\* \* \* Such compensation shall be apportioned ratably by the auditor and deducted from the *shares or portion of the revenue payable to the state* as well as to the county, *township*, corporations, and school districts. \* \* \*" (Emphasis added)

This language again shows clearly the recognition by the legislature that the *total amount* of taxes which the treasurer collects belong to and is a *part of the income of the township*, but is subject to a deduction for the compensation allowed to the treasurer. Accordingly I can see no reason why the deductions from the "revenue payable to the township," and

withheld for the compensation of the auditor and treasurer, should not be regarded in precisely the same light as those deductions that were mentioned in the 1954 opinion.

It is accordingly my opinion and you are advised that under the provisions of Section 507.09 (C), Revised Code, relating to the compensation of the township clerk in townships having a budget of five thousand dollars or more, the "total expenditures" of such township upon which the compensation of the township clerk is to be calculated, include the compensation of the county auditor and county treasurer in collecting the township's taxes and withheld from the amount due the township from such tax collections and paid to said auditor and treasurer, respectively, pursuant to the provisions of Sections 319.54 and 321.26, Revised Code. Opinion No. 525, Opinions of the Attorney General for 1954, p. 59, approved and followed.

Respectfully,

WILLIAM SAXBE  
Attorney General

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TAXATION, DEPT OF—OHIO TANGIBLE PERSONAL PROPERTY TAX—TAX ON SUCH PROPERTY ON AD VALOREM BASIS—NOT APPLICABLE TO PROPERTY. TITLE TO WHICH IS IN THE UNITED STATES.

SYLLABUS:

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.

Columbus, Ohio, July 30, 1958

Hon. Stanley J. Bowers, Tax Commissioner of Ohio  
Department of Taxation, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"Under date of March 3, 1958, the Supreme Court of The United States issued its decision with respect to the case of City of Detroit v. The Murray Corporation of America wherein the Court upheld taxes assessed by the City of Detroit and the County of Wayne, Michigan, against Murray which in part were based on the value of materials and work in process in its possession to which the United States held legal title under the title-vesting provisions of the sub-contract.

"Inasmuch as the taxes imposed on Murray were styled a personal property tax by the Michigan statutes, we respectfully request your opinion as to whether or not this Department could assess personal property in the possession of private corporations doing business in Ohio under the terms of similar contracts with the United States under the present provisions of Title 57 of the Revised Code."

The majority opinion in the case of *City of Detroit v. The Murray Corporation of America*, 355 U. S., 489, held that the Michigan and Detroit statutory provisions imposed a tax upon the privilege of possessing or using the personal property involved rather than an *ad valorem* tax upon the property. The contract between Murray and the Federal Government contained a title-vesting clause which provided that:

"\* \* \* upon the making of any partial payments to Murray under the subcontracts 'title to all parts, materials, inventories, work in process and nondurable tools theretofore (and thereafter, upon acquisition) acquired or produced by the (sub)contractor for the performance of (the) contract(s), and property chargeable thereto . . . shall forthwith vest in the Government.' \* \* \*"

The crux of the majority opinion reads as follows:

"\* \* \* As applied—and of course that is the way they must be judged—the taxes involved here imposed a levy on a private party possessing government property which it was using or processing in the course of its own business. It is not disputed that Michigan law authorizes the taxation of the party in possession under such circumstances. \* \* \*"

Title VI, Chapter IV, Sections 1 and 7, of the Charter of the City of Detroit provided, *inter alia*:

"The owners or persons in possession of any personal property shall pay all taxes assessed thereon. \* \* \* In case any person by agreement or otherwise ought to pay such tax, or any part thereof, the person in possession who shall pay the same may recover the amount from the person who ought to have paid the same \* \* \*"

If the Ohio personal property tax law can properly be characterized as a possessory or privilege tax, then it would seem to follow that your department could assess personal property in the possession of private corporations doing business in Ohio under contracts with the United States Government similar to that involved in the *Murray* case. On the other hand, if the Ohio tax can only correctly be described as an *ad valorem* tax upon the property itself, then it follows that there would be no authority for assessing such property.

In 1859, the General Assembly enacted the following statute:

"Section 1. \* \* \* all property, whether real or personal, in this state \* \* \* except such property as is hereinafter expressly exempted, shall be subject to taxation; \* \* \*" (56 Ohio Laws, 175, Section 2731, Revised Statutes).

The pertinent provisions of this enactment remained substantially unchanged until 1931. In that year the legislature amended the law to provide for the taxation of tangible personal property only when used in business in Ohio.

Section 5709.01, Revised Code, the present provision, reads in part as follows:

"All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in business in this state \* \* \* are (is) subject to taxation, regardless of the residence of the owners thereof. \* \* \* All property mentioned as taxable in this section shall be entered on the general tax list and duplicate of taxable property."

Section 5711.18, Revised Code, provides that personal property be listed at its true value in money. These two sections clearly demonstrate that it is the property which is taxed and that it is taxed according to value. Moreover, this is re-emphasized in other provisions.

Section 5705.03, Revised Code, provides in pertinent part:

"The taxing authority of each subdivision may levy taxes annually \* \* \* on the real and personal property within the subdivision \* \* \* All taxes levied on the property shall be extended on the tax duplicate by the county auditor of the county in which the property is located \* \* \*." (Emphasis added.)

Section 5719.01, Revised Code, which establishes a lien for taxes, provides in part:

"\* \* \* All personal property subject to taxation shall be liable to be seized and sold for taxes. \* \* \*"

Section 5711.05, Revised Code, relating to listing, provides that:

"Each person shall return all the taxable property of which he is the owner, except property required by this section or the regulations of the tax commissioner to be returned for him by a fiduciary; \* \* \*." (Emphasis added.)

The listing requirements are consistent with the statutory provision defining "taxpayer." That provision, Section 5711.01, Revised Code, states that:

"'Taxpayer' means any owner of taxable property and includes every person residing in, or incorporated or organized by or under the laws of this state, or doing business in this state, or owning or having a beneficial interest in taxable personal property in this state and every fiduciary required by sections 5711.01 to 5711.41, inclusive, of the Revised Code to make a return for or on behalf of another. \* \* \*"

It will be observed that the procedural provisions of the personal property tax law follow the pattern of the substantive provisions relating to the subject matter of the tax, i. e., the property itself. That the owner of the property is ultimately the person upon whom the tax falls, regardless of whether it is listed by or for him, is established by Section 5719.14, Revised Code, which provides in part:

"A person against whom taxes, except those levied upon real estate, are assessed as fiduciary for another person \* \* \* shall, upon payment of such taxes, have a claim against such person \* \* \* for reimbursement of the taxes paid, with legal interest, and a lien upon all funds and property of such person \* \* \* in his possession or which come into his possession. \* \* \*"

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. However, the Ohio tax upon intangible personal property has been on several occasions characterized as an ad valorem property tax. The Supreme Court of Ohio in the case of *Bennett, et al., v. Ewatt*, 145 Ohio St., 587 (1945), stated:

"The Constitution of Ohio \* \* \* provides for the taxation of property, and authorizes the General Assembly to 'determine the subjects and methods of taxation or exemptions therefrom,' \* \* \*"

"Concededly a tax based on the income yield of intangible property is not an income tax, an excise tax or a franchise tax. It necessarily is a tax upon property, and authority for this tax must be found in Section 2 of Article XII.

"The word 'subjects,' as used in the constitutional provision, connotes and includes all kinds and classes of property upon which a tax may be imposed. 'Methods' means the manner of the assessment or imposition of the tax. The tax in question here is clearly authorized, and the method adopted is the application of a 'yardstick of value' in that the amount of income realized from an investment is a potent if not a controlling factor in fixing the value of the stock \* \* \*"

"The conclusion seems inescapable that the assessment of a tax upon intangible property under these statutes is made according to value." (Emphasis added.)

The Supreme Court of the United States in commenting upon the Ohio intangible personal property tax in *Wheeling Steel Corp. v. Glender*, 337 U.S., 562 (1949), stated, at page 572:

"\* \* \* Ohio holds this tax on intangibles to be an ad valorem property tax, *Bennett v. Ewatt*, 145 Ohio St., 587, 62 N.E. 2d 345, and in no sense a franchise, privilege, occupation or income tax." (Emphasis added.)

At page 218 of the opinion in *Smilack v. Bowers*, 167 Ohio St., 216 (1958), the following language appears:

"As a preliminary observation, it is important to note that the taxes levied on intangible property defined in Sections 5707.03 and 5707.04, Revised Code, inclusive of investments, are not taxes levied on income or income yield but are taxes levied directly on the kinds of property designated at a rate based on income yield. Plainly, the tax is one on the property itself and not on income as such."

The problem of taxation of property utilized by a company in connection with the performance of a government contract has been previously subject to judicial interpretation in this state. In the case of *Herring Hall Marvin Safe Company v. Ewalt*, 32, O.O., 555 (BTA 1945), there was involved a contract between a manufacturer and the Navy Department. That contract contained a provision vesting title in the Government upon final inspection and delivery of the completed items. A tax was assessed upon the property in the possession of the manufacturer prior to delivery of the property to the Government. The Board of Tax Appeals, in passing upon this problem, observed that the determination turned upon the issue of who owned the property at the time of the assessment. The Board then observed, at page 559, of the opinion:

"\* \* \* When the government has desired to have title to property vested in it upon delivery to its contractors it so provided in its contracts. There is no such provision in this contract."

Thus the tax was upheld by the Board upon a finding that the manufacturer had not divested itself of the ownership of the property.

In *Wright Aeronautical Corp. v. Glander*, 151 Ohio St., 29 (1949), a situation very similar to the one presented in your request was involved. Under the terms of the contract between Wright and the Government, upon partial payment title to the property in the possession of Wright vested in the Government. In filing its personal property tax returns for the years in question, the corporation included the value of the tangible personal property titled in the Government, of which it has possession, but neglected to make an application for adjustment on the basis that such property was owned by the Government. Thus the matter was presented to the Supreme Court essentially as a problem of procedure. As stated by Judge Stewart, at page 44, of the opinion:

"In two cases which are not in the briefs of either party in the present case, no taxes were finally assessed on goods claimed to belong to the government under contracts similar to the ones involved herein. Those cases are *Craig, Tax Collector, v. Ingalls Shipbuilding Corp.*, 192 Miss., 254, 5 So. (2d), 676, and *Douglas Aircraft Co., Inc., v. Byram, Tax Collector*, 57 Cal. App. (2d), 311, 134 P. (2d), 15.

"In both those cases, however, the assessments of taxes against those who had construction contracts with the government were disrupted from the start, and no returns of claimed government owned property were ever made by the contractors.

In the present case, if Wright had omitted from its return the property which it now claims belonged to the government, or had filed a '902 claim' with its return, a different question would be presented to us."

The inference to be drawn from the court's opinion is that if the correct procedural steps had been taken by the taxpayer no problem would have been presented as to exemption of the property owned by the Government.

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.

Respectfully,

WILLIAM SAXBE  
Attorney General

2479

ELECTIONS—CANDIDATES—DEFEATED FOR PARTY NOMINATION, §3513.04 R.C. FORBIDS CANDIDACY AT GENERAL ELECTION IN THAT SAME YEAR FOR "ANY OFFICE TO BE FILLED AT SUCH GENERAL ELECTION"—JUDGE, COUNTY COURT; §1907.051 R.C.

SYLLABUS:

Where an individual has unsuccessfully sought his party's nomination for the office of county commissioner in the May 1958 primary, the provisions of Section 3513.04, Revised Code, forbid his candidacy in the 1958 general election for "any office" whether a primary election is provided by law to choose candidates therefor or whether nomination is achieved only by petition as in the case of county judge elections as provided in Section 1907.051, Revised Code.

## County Bulletin

TO: ALL COUNTY AUDITORS - Bulletin No. 126

FROM: Stanley J. Bowers, Tax Commissioner

DATE: August 7, 1958

RE: Taxable Status of Personal Property in the Possession of Private Contractors but Belonging to the Federal Government.

Under date of March 3, 1958, the Supreme Court of the United States in the case of City of Detroit v. The Murray Corporation of America, 355 U.S. 489 determined that the corporation was liable for personal property taxes on personal property in its possession but belonging to the Federal Government under the title vesting provisions of a contract between the Federal Government and the corporation.

Subsequent to this decision we requested the opinion of the Attorney General as to whether or not we could assess comparable personal property located in this state in the possession of private contractors.

In response to our request the Attorney General, under date of July 30, 1958, rendered his opinion, No. 2471, wherein he concluded that existing provisions of the Ohio personal property tax law could not be construed as imposing either a possessory or privilege type tax such as was involved and approved in the Murray Corporation case. Accordingly, he determined that personal property taxes could not be assessed against persons in possession of government property.

## **5703.58 Time limit for assessments - extension by lawful stay.**

(A) Subject to divisions (B) and (D) of this section, the tax commissioner shall not make or issue an assessment for any tax payable to the state that is administered by the tax commissioner, or any penalty, interest, or additional charge on such tax, after the expiration of ten years, including any extension, from the date the tax return or report was due when such amount was not reported and paid, provided that the ten-year period shall be extended by the period of any lawful stay to such assessment. As used in this section, "assessment" has the same meaning as in section 5703.50 of the Revised Code.

(B) Subject to division (D) of this section, the tax commissioner shall not make or issue an assessment against any person for any tax due under Chapter 5741. of the Revised Code, or any penalty, interest, or additional charge on such tax, after the expiration of seven years, including any extension, from the date the tax return or report was due if the amount of tax due was not reported and paid, provided that the seven-year period shall be extended by the period of any lawful stay to the assessment. The commissioner shall not make or issue an assessment against a consumer for any tax due under Chapter 5741. of the Revised Code, or for any penalty, interest, or additional charge on such tax, if the tax was due before January 1, 2008.

(C) This section does not apply to either of the following:

(1) Any amount collected for the state by a vendor or seller under Chapter 5739. or 5741. of the Revised Code or withheld by an employer under Chapter 5747. of the Revised Code.

(2) Any person who fraudulently attempts to avoid such tax.

(D) This section does not authorize the assessment or collection of a tax for which the applicable period of limitation prescribed by law has expired and for which no valid assessment has been made and served as prescribed by law.

Amended by 129th General Assembly File No.28, HB 153, §101.01, eff. 9/29/2011.

Effective Date: 09-28-2006

U.S. Department of Energy  
Washington, D.C.

ORDER

DOE 2100.12A

6-9-92

SUBJECT: PAYMENTS FOR SPECIAL BURDENS AND IN LIEU OF TAXES

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1. PURPOSE. To establish the Department of Energy policy for making payments in lieu of taxes to certain State and local governments under the provisions of Title 42, United States Code (U.S.C.), Section 2201 et. seq., and Section 2208 of the Atomic Energy Act of 1954, as amended.
2. CANCELLATION. DOE 2100.12, PAYMENTS FOR SPECIAL BURDENS AND IN LIEU OF TAXES, of 11-16-87.
3. EXCLUSIONS. This Order does not apply to sites: where payments are made to State and local governments under the Atomic Energy Community Act of 1955, as amended; the Uranium Mill Tailings Radiation Act of 1978, as amended; or the Nuclear Waste Policy Act of 1982.
4. REFERENCES.
  - a. Atomic Energy Act of 1954, as amended, 42 U.S.C. 2201 et. seq., and 2208, which provides for payments in lieu of taxes to State and local governments.
  - b. Atomic Energy Community Act of 1955, as amended, 42 U.S.C. 2301 et. seq., and 2391, which provides for payments to communities to facilitate an orderly transition from Federal to local control.
  - c. Nuclear Waste Policy Act of 1982, 42 U.S.C. 10199, which provides for payments equal to taxes to jurisdictions affected by proposed or selected nuclear waste sites.
  - d. Uranium Mill Tailings Control Act of 1978, as amended (Public Law 95-604), 42 U.S.C. 7901 et. seq., and 7942 which authorizes a program of assessment and remedial action at inactive uranium mill tailings sites.
  - e. Public Law 81-874, 20 U.S.C. 631-647, which provides for payments to Federally impacted school districts.
  - f. Office of Management and Budget Circular A-34, "Instructions on Budget Execution," of 8-26-85, which contains instructions relating to apportionments and reports on budget execution.

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**DISTRIBUTION:**

All Departmental Elements

**INITIATED BY:**

Office of Chief Financial Officer

5. DEFINITIONS.

- a. Any Benefit is used in determining eligibility for payments in lieu of taxes and the amount to be paid based on special burdens incurred by a State or local government. Any benefit includes all benefits accruing to the State or local government by reason of the Department's activities at the site being considered under a request for payment based on special burdens. The benefits and burdens used to determine payments based on claims of special burdens will be determined on a case-by-case basis.
- b. Payments in Lieu of Taxes are discretionary payments made to render financial assistance to those States and local governments in which the Department or one of its predecessor agencies has acquired property previously subject to State or local taxation and on which the Department carries on activities authorized by the Atomic Energy Act of 1954, as amended.
- c. Property in the Condition it was Acquired is the physical description/definition and classification of the subject real property used to determine the real property's assessed valuation the last year the property was on the tax rolls prior to being acquired by the Government.
- d. Property Eligible for Payments in Lieu of Taxes are real properties that are currently used for activities authorized by the Atomic Energy Act of 1954, as amended, that were on the tax rolls immediately prior to being acquired by the government. In cases where activities are carried on that may create payments to State and local governments, based on legislation other than the Atomic Energy Act, such as the Nuclear Waste Policy Act, those parcels of land used for such other purposes shall be excluded from the computation of a payment in lieu of taxes, as prescribed by Section 168 of the Atomic Energy Act of 1954, as amended.
- e. Property Tax Loss to State or local government is considered to be taxes that would have been payable on such real property, based on the condition of the property when acquired by the Government.
- f. Revised Payments are proposed changes in payments that are based on a reclassification of the land to a new tax category, an increase or decrease in the amount of the land used to compute the payment, or other major changes in the method of computing the payments. Changes in the amounts to be paid that are based on jurisdiction wide adjustments to tax assessments or tax rates are not considered to be revised payments.
- g. Special Burdens are unusual or substantial burdens placed on a State or local government by Atomic Energy Act related activities of the Department. Special burdens are incurred by extraordinary services that are not normally required by a community on a

routine basis. The mere fact that a State or local government is burdened by the activities of the Department does not constitute a special burden.

- h. Taxing Authority is an entity empowered to render a separate tax bill based on the value of real property.
6. BACKGROUND. The Atomic Energy Act of 1954 gives the Secretary of Energy (S-1) broad authority in making payments in lieu of taxes. The amount, the timing, and the terms of the payments are at the discretion of the Secretary. The only limits contained in the Act are that the Department shall be-guided by the policy of not making payments in excess of the taxes that would have been payable for such property in the condition in which it was acquired, except in cases where special burdens have been cast upon the State or local government by reason of activities of the Department or its agents. In such cases, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment.
  7. POLICY.
    - a. Only designated properties are eligible for support payments in lieu of taxes. To be eligible, the property must currently be used for activities authorized by the Atomic Energy Act of 1954, as amended, and must have been on tax rolls immediately prior to being acquired by the Government.
    - b. If it is demonstrated that the imputed tax loss is greater than the benefits derived from the Department's activities, the amount of the payment to be made in lieu of taxes shall be calculated by applying the current tax rate to the current assessed valuation of the property in the condition in which it was acquired and reducing the result of that calculation by the value of direct tax benefits that accrue to the community as a result of the Department's activities. The direct tax benefits that accrue to a community as a result of the Department's activities include payments to federally impacted school districts under Public Law 81-874, and sales, franchise, inventory use, or other taxes levied on the Department or its contractors by State or local taxing jurisdictions. This test and calculation of amounts to be paid are required only for new or revised payments. They are not required for continuing payments approved in prior years.
    - c. The Department shall not make retroactive payments in lieu of taxes.
    - d. Payments that have been approved will begin when funds have been appropriated for that purpose and are contingent on funds being available for such purposes. Furthermore, the amounts available

for such payments are subject to the same reductions or other budgetary restrictions that may be applied to other Departmental programs.

- e. New or revised payments in lieu of taxes and payments based on special burdens require the advance approval of the Chief Financial Officer (CR-1).
- f. Payments in lieu of taxes being made at the time this Order is approved shall continue under the existing terms and conditions until a specific request to change the basis of the payment is received. Such requests shall be considered the same as new requests.
- g. Payments in lieu of taxes shall be made only after a valid and binding release or settlement of claims for payments related to the Department's land or property is obtained from the taxing authority.
- h. Payments shall be suspended when a taxing authority asserts a claim through the courts for real property taxes or their equivalent. If the courts rule in favor of the plaintiff, payments will be made in accordance with the terms set by the court, but no retroactive payment will be made for the period during which the tax was contested unless so directed by the court.
- i. Nothing in this Order modifies the discretionary authority given to the Secretary by Section 168 of the Atomic Energy Act of 1954, as amended, and such payments are not construed as entitlements.
- j. All payments in lieu of taxes must be supported by a duly executed intergovernmental agreement. This agreement serves as the obligating document.
- k. This Order does not affect existing agreements between DOE and State and local governments that preclude payments in lieu of taxes on all or part of real property owed by the Department.
- l. Payments in lieu of taxes made by the Department shall not exceed the tax payment had the real property remained on the tax rolls in the condition it was acquired unless the payment is based on a special burden.
- m. Payments in lieu of taxes will not be made where other, direct or indirect, Federal payments are made to the taxing jurisdiction that are based on the activities of the Department or other Federal agencies carried out on DOE property, e.g., payments levied on DOE contractors that are tantamount to property taxes.

- n. Once authorized, payments shall continue subject to the availability of funds or modifications by intergovernmental agreement.

8. RESPONSIBILITIES.

a. Chief Financial Officer (CR-1) shall:

- (1) Authorize, for the Secretary, new and revised payments in lieu of taxes;
- (2) Develop and update, as required, Departmental policies and procedures related to making payments in lieu of taxes;
- (3) Ensure that funding for approved payments in lieu of taxes, as requested by the cognizant Program Secretarial Officer (PSO), is included in the Department's budget submission to OMB and to Congress; and
- (4) Ensure that appropriated and apportioned funds for payments in lieu of taxes are properly allotted.

b. Director of Administration and Human Resource Management (AD-1), through the Office of Organization, Resources and Facilities Management (AD-10), shall:

- (1) Maintain an inventory and description of Departmental real estate that is subject to the provisions of Section 168;
- (2) Independently review requests for new and revised payments in lieu of taxes for accuracy, completeness, and reasonableness and recommend concurrence or nonconcurrence to CR-1; and
- (3) Provide advice and consultation to CR-1 based on the independent review of new and revised payment requests and recommendations received from PSOs.

c. General Counsel and Field Counsel shall:

- (1) Review and concur or nonconcur on the eligibility of the State or local government or taxing authority requesting payments in lieu of taxes to receive such payments; and
- (2) Provide legal advice on other matters that should arise relating to payments in lieu of taxes.

d. Managers of DOE Field Offices shall:

- (1) Manage the administration of existing payments;
- (2) Analyze requests for new or revised payments;

- (3) Prepare recommendations on new or revised payments and submit the recommendations to the cognizant PSO which is responsible for budgeting for the payment; and
  - (4) Ensure that payments in lieu of taxes are made in accordance with duly executed intergovernmental agreements.
- e. Cognizant Program Secretarial Officers shall:
- (1) Review and forward recommendations regarding applications for new and revised payments in lieu of taxes to CR-1; and
  - (2) Ensure that funding for approved payments is included in their budget submissions.

9. PROCEDURES.

- a. Requests for revised or new payments in lieu of taxes, not based on an analysis of special burdens versus any benefits, are handled as follows:
- (1) The cognizant DOE Field Office will review these requests to ensure that the requests comply with Departmental policy. The requests should describe the basis for computing amounts claimed and at least contain the following information:
    - (a) Description of property, including non-Federal government improvements at the time of acquisition and which still exist (initial requests only);
    - (b) Date removed from tax rolls (initial requests only);
    - (c) Federal agency initially acquiring property (initial requests only);
    - (d) Classification of property by taxing authority (if applicable) and zoning of property the last year it was on the tax rolls (initial requests only);
    - (e) Tax rate, assessment, and total payment in lieu of tax proposed;
    - (f) Current assessment placed on property of the same zoning and/or class, as reported under 9a(1)(d) above, by the taxing authority;
    - (g) Current tax rate applicable to the same class and/or zoning of property as reported under paragraph 9a(1)(d) above;

- (h) The tax rate and assessment applied to similar properties elsewhere in the same tax jurisdiction;
  - (i) A description and valuation of all the benefits accruing to the community as a result of the Department's activities; and
  - (j) Information about payments received by the taxing jurisdiction(s) from the Federal governmental organizations that are based on the Department's property and activities.
- (2) The cognizant DOE Field Office is responsible for evaluating the request and preparing a recommendation for action. The evaluation will include:
- (a) A determination whether or not the subject property meets the criteria of eligibility for payments in lieu of taxes established by the Atomic Energy Act of 1954, as amended.
  - (b) An assessment of direct cash benefits to the taxing jurisdiction that are a result of the Department's activities. This will include payments to affected school districts, under Public Law 81-874 and 20 U.S.C. 631-647, and tax payments by DOE contractors to a State or local taxing authority that is requesting a new or revised payment in lieu of taxes. Other payments made by a DOE contractor that are based on property or equipment that are in lieu of taxes normally paid by a property owner will also be evaluated in recommending the amounts to be paid in lieu of taxes.
  - (c) An examination of the tax rate and assessment applied to similar properties elsewhere in the same tax jurisdiction to assure that payment requests are fair and consistent.
  - (d) A report of the assessment and recommendations forwarded to the cognizant PSO. The recommendations will be accompanied by workpapers and other information sufficient to support the recommendation made. The information will include:
    - 1 Recommendation of approval or disapproval.
    - 2 If approval is recommended:
      - a The amount to be paid;

- b The date first payment is to be made;
  - c Legal opinion from field counsel containing an analysis of relevant facts and law regarding the eligibility of the property under the Atomic Energy Act of 1954, as amended; and
  - d A comparative analysis of the imputed tax loss and all benefits accruing to the community as a result of the Department's activities.
- (3) Each request for new or revised payment will be reviewed by the cognizant PSO and forwarded to CR-1 with a recommendation.
  - (4) CR-1 will evaluate the recommendation in consultation with General Counsel and other staff, as appropriate, and determine if it is in the best interest of the Department to make the payment.
  - (5) When notified of approval by CR-1, the PSO will include funding for approved payments in the Department's next budget cycle.
  - (6) The cognizant procurement office will execute a separate intergovernmental agreement between the Department and each taxing authority designated to receive payments in lieu of taxes. The agreement will set forth the terms and procedures for billing, making payments, and revisions. The agreement must contain provisions that: (a) the payments are being conditioned on the availability of funds; (b) the date the first payment is due is indicated; and (c) explain that such funds are subject to legislative or administrative reductions in funding levels. Furthermore, agreements shall state that payments in lieu of taxes are not entitlements.
- b. Requests for new or revised payments based on special burdens that are in excess of any benefits derived from the Department's activities by the taxing jurisdictions are reviewed by the cognizant DOE Field Office to assure that Departmental policies are complied with and that the requests are complete and adequately supported. At a minimum, requests shall contain the following information:
- (1) The information described in paragraph 9a(1)(a) through 9a(1)(g);

- (2) A description of special burden(s) incurred as a result of the Department's activities and the dollar cost of these burdens to the taxing jurisdiction; and
  - (3) Benefits derived from the activities of the Department. Such benefits include, but are not limited to, all local taxes paid by employees at the DOE site and economic activity created by DOE contractors and suppliers.
- c. The evaluation of the requests and recommendations will follow the procedures outlined in paragraphs 9a(2) thru 9a(6).
  - d. Funds budgeted for payments in lieu of taxes must be specifically identified in the documentation supporting budget requests. Payments that have been approved will begin when funds have been appropriated for that purpose. In accordance with Office of Management and Budget Circular A-34, payments in lieu of taxes are recorded as an obligation in the period in which they are authorized to be paid and due.

BY ORDER OF THE SECRETARY OF ENERGY:



DONALD W. PEARMAN, JR.  
Acting Director  
Administration and Human  
Resource Management

DOE 2100.12A  
6-9-92

This page must be kept with DOE 2100.12A, PAYMENTS FOR SPECIAL BURDENS AND IN LIEU OF TAXES. DOE 2100.12A revises DOE 2100.12 to reflect organizational titles, routing symbols, and other editorial revisions required by SEN-6. No substantive changes have been made.