

**OHIO BOARD OF TAX APPEALS**

The Andrew Jurgens Company, )  
 )  
 Appellant, ) CASE NO. 2002-P-403  
 )  
 vs. ) (PERSONAL PROPERTY TAX)  
 )  
 Thomas M. Zaino, ) DECISION AND ORDER  
 Tax Commissioner of Ohio, )  
 ) **Affirmed on Appeal June 14, 2006**  
 Appellee. ) **Ohio Supreme Court**

APPEARANCES: **109 Ohio St.3d 396, 2006-Ohio-2708**

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Entered February 18, 2005

Ms. Jackson, Ms. Margulies, and Mr. Eberhart concur.

In this matter The Andrew Jurgens Company appeals a final determination of the Tax Commissioner that finds that certain “canned” or “off-the-shelf” computer software constitutes tangible personal property within the contemplation of Ohio’s personal property tax. The record before us consists of the notice of appeal, the statutory transcript, the testimony and evidence adduced at our merit hearing, and the memoranda filed by counsel for the respective parties. Upon careful review of this record, we affirm the Tax Commissioner’s final determination.

Jurgens operates a lotion and soap manufacturing facility in Hamilton County, Ohio. The Tax Commissioner conducted an audit of its inter-county personal property tax returns for the 1996 and 1997 tax years. Upon completing the audit, the Tax Commissioner's representatives determined that the list value of Jurgens' tangible personal property was understated. Accordingly, the Tax Commissioner issued amended preliminary assessment certificates increasing the list value of Jurgens' tangible personal property for both tax years. Jurgens then filed a petition for reassessment in accordance with the provisions of R.C. 5711.31. After conducting a hearing upon the issues raised in the petition, the Tax Commissioner issued a final determination that modified in part and denied in part the objections raised. Jurgens now appeals that final determination.

Jurgens originally set forth the following specifications of error in its notice of appeal:

"1. The value of computer software is improperly included in taxable personal property.

"2. General and Administrative computers are erroneously listed as Class V and Class III property.

"3. Warehouse and non-manufacturing equipment is incorrectly taxed as Class V property.

"4. Items of real property are improperly included in the personal property assessment.

"5. The true value of idle and non-operational equipment is improperly included in the tax base.

“6. The value of exempt pollution control equipment is improperly included in taxable personal property.”

At our merit hearing we were advised by the parties that they had reached a partial settlement, and they requested that we remand certain issues to the Tax Commissioner to implement their agreement. We directed that a written motion be filed, and the parties have complied. Upon review of the “Joint Motion for Remand to Implement Partial Settlement Agreement” filed September 8, 2004, we hereby grant the parties’ joint motion, and the issues therein set forth will be remanded to the Tax Commissioner as requested in the parties’ motion.

We now turn to the question remaining. Jurgens states in its brief:

“On August 5, 2003, the Board of Tax Appeals \*\*\* convened a hearing for the purpose of receiving evidence relating to the allegations of error raised in the Notices of Appeal giving rise to the above styled cases.<sup>1</sup> During the course of the hearing the Board was advised that the parties have settled all but one of the allegations. *The remaining allegation places in issue the propriety of including in AJC’s tax base the value of application software purchased by the company.*”<sup>2</sup> (Emphasis added.)

We now consider this sole specification of error.

We begin by observing that the Supreme Court has determined that the Tax Commissioner’s findings are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is thus incumbent upon Jurgens to rebut that presumption and establish a right to the relief it requests. *Belgrade Gardens, Inc. v.*

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<sup>1</sup> This matter was heard back-to-back with *The Andrew Jurgens Company v. Wilkins*, BTA No. 2002-P-614.

<sup>2</sup> Appellant’s brief, page 1, third paragraph.

*Kosydar* (1974), 38 Ohio St.2d 135, *Ohio Fast Freight v. Porterfield* (1972), 29 Ohio St.2d 69, *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138, *National Tube v. Glander* (1952), 157 Ohio St. 407. Moreover, Jurgens is assigned the burden of demonstrating in what manner and to what extent the Tax Commissioner's determination is in error. *Federated Department Stores v. Lindley* (1983), 5 Ohio St.3d 213.

R.C. 5711.02 provided during the relevant time period:

“\*\*\* [E]ach taxpayer shall make a return annually to the county auditor of each county in which any taxable property the taxpayer must return is required by this chapter to be listed and shall truly and correctly list therein all *taxable property* so required to be listed \*\*\*.” (Emphasis added.)

R.C. 5711.01(A) states:

“*Taxable property*’ includes all the kinds of property mentioned in division (B) of section 5709.01.” (Emphasis added.)

R.C. 5709.01(B)(1) references:

“All *personal property* located and used in business in this state \*\*\*.” (Emphasis added.)

And R.C. 5701.03(A) declares:

“*Personal property*’ includes every *tangible* thing that is the subject of ownership, whether animate or inanimate, including a business fixture, and that does not constitute real property as defined in section 5701.02 of the Revised Code.” (Emphasis added.)

Jurgens asserts that the software in question is *intangible* property - - -

not tangible personal property as referenced in R.C. 5701.03(A). As such, it argues, the software in question is not properly included in Jurgens' personal property tax basis. For support, it relies upon the Tenth District Court of Appeals decision in *CompuServe, Inc. v. Lindley* (1987), 41 Ohio App.3d 260, and our decision in *The Duriron Company, Inc. v. Limbach* (Sept. 25, 1992), BTA No. 1989-M-446, unreported.<sup>3</sup> Upon careful review, however, we find a significant factual distinction between *CompuServe* and the matter now before us. In *CompuServe* the computer software at issue was *customized* software.<sup>4</sup> As such, the software in *CompuServe* was tailored to the individual user's needs and the user relied upon the personal skill of the provider in order to insure that the software was suitable for its particular requirements.

In contrast, the software in question here is garden-variety software generally found at most computer software retailers. It includes such common brand names as "Word Perfect," "Excel," "Lotus," "Windows," "DOS," "Harvard Graphics," "Powerpoint," and the like. These "canned" or "off-the-shelf" programs are designed to accommodate the general requirements of computer users at large. They are not commonly tailored to an individual user's needs. Nor do users rely upon the personal skill of the provider to insure that the software is suitable for their own requirements.

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<sup>3</sup> *Duriron* relies upon *CompuServe* as the foundation for its determination.

<sup>4</sup> The *CompuServe* court noted at page 266: "[A]ppellant obviously desired the *customized* computer information \*\*\*." (Emphasis added.)

The Tax Commissioner asserts that the Supreme Court has already determined that “canned” or “off-the-shelf” software is *tangible* personal property, noting the Supreme Court’s decision in *Community Mutual Insurance Company v. Tracy* (1995), 73 Ohio St.3d 371. The *Community Mutual* case involved software designed to accommodate Blue Cross/Blue Shield members generally. In *Community Mutual* the Supreme Court does, in fact, state: “Community Mutual received *tangible* personal property.” Id. at 378. (Emphasis added.) Jurgens argues that this proclamation is not dispositive of the issue now before us because *Community Mutual* is a sales tax case and the court, it contends, was merely conducting a personal service analysis in accordance with appropriate sales tax requirements. Jurgens states at page 6 of its reply brief:

“To put the *Community Mutual* decision in context, in 1995 \*\*\* the Court recognized that it was time to fine tune its personal or professional service analysis. In *Community Mutual*, the Court made it clear that one does not consider the consequentiality of a service rendered in a transaction in order to determine whether the transaction is excepted from tax. The first order of business is to determine whether or not a personal or professional service has been rendered. If such service has not been rendered, the personal or professional service exemption to the definition of ‘sale’ simply does not come into play.

“Because *Community Mutual* did not commission the design of the LRSP software for its own use, but rather purchased software designed and sold generally to a number of end users, the Court concluded that no personal or professional service had been rendered. Thus, it became irrelevant whether the magnetic tapes transferred to *Community Mutual* represented an inconsequential amount of tangible personal property. *Simply*

*characterizing the tapes as tangible personal property was enough to label the transaction between Community Mutual and Business Systems as a sale.”* (Emphasis added.)

But the Supreme Court appears to recognize that it has two separate and distinct questions before it in *Community Mutual*:

“Community Mutual \*\*\* maintains that it purchased a personal service to which computer tapes are an inconsequential tangible element. It *also* maintains that the computer software is intangible property.” Id. at 378. (Emphasis added.)

Thus, it would appear that the Supreme Court recognized that it not only had before it the issue of whether a personal service had been rendered to which computer tapes were an inconsequential tangible element, it also had before it the question of whether the software in that matter constituted tangible or intangible property. While the “personal service analysis” may be unique to sales and use tax, the question of what constitutes tangible property and what constitutes intangible property is a *nomen generalissimum* that concerns the basic classification of property. As such, the question of whether the software in question is tangible property or intangible property transcends the various taxing provisions. Because property classification is a more universal subject matter, it would seem to follow in logic that a Supreme Court determination that software of the type in issue in *Community Mutual* constitutes tangible property should apply equally well to similar software within the personal property tax arena.

In *Community Mutual* the Supreme Court predicates its decision in part

upon *Interactive Information Systems, Inc. v. Limbach* (1985), 18 Ohio St.3d 309. There the court specifically notes: “Under *Interactive Information Systems, Inc.* \*\*\* encoded magnetic tapes *are* tangible personal property.” Id. at 378. (Emphasis added.) And the Supreme Court observed in *Interactive Information Systems, Inc.* that: “*Prior to encoding the tape*, the appellee is dealing with intangibles - - - ideas, plans, procedures, formulas, etc. \*\*\*.” Id at 311. (Emphasis added.). The Supreme Court concludes its review in *Community Mutual* with the flat statement: “Community Mutual received *tangible* personal property.” Id. at 378. (Emphasis added.)

Under well-established principles of stare decisis it is our duty to adhere to a prior determination of the Supreme Court when it involves substantially the same question. As explained in Black’s Law Dictionary (7<sup>th</sup> Ed. 1999) 1414:

““This doctrine is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases.”

In our view, a careful reading of *Community Mutual* discloses that the Supreme Court had before it two issues:

1. Was a personal service rendered to which computer tapes were an inconsequential tangible element; and
2. Was the software tangible or intangible property.

In both *Community Mutual* and the matter sub judice the software in question was designed for multiple users. Because the Supreme Court appears to have determined in *Community Mutual* that such software constitutes *tangible* personal property, we find that the Tax Commissioner acted properly when he added these items to Jurgens' personal property tax base.

Accordingly, and for each of the foregoing reasons, the final determination of the Tax Commissioner must be, and the same hereby is, affirmed, with the exception of those matters referenced in the "Joint Motion for Remand to Implement Partial Settlement Agreement" filed September 8, 2004, which matters are remanded to the Tax Commissioner in accordance with the agreement of the parties.

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