

REPRESENTATIVES FOR PETITIONER: Brent A. Auberry, BAKER & DANIELS

REPRESENTATIVES FOR RESPONDENT: Mark E. GiaQuinta, HALLER & COLVIN

**BEFORE THE  
INDIANA BOARD OF TAX REVIEW**

In the matter of:

BANC ONE LEASING	)	Petition Nos.: 02-073-99-3-7-00175
CORPORATION,	)	02-073-00-3-7-00177*
	)	
Petitioner	)	County: Allen
	)	
v.	)	Township: Washington
	)	
WASHINGTON TOWNSHIP,	)	Personal Property
ALLEN COUNTY,	)	
	)	
Respondent	)	Assessment Years: 1999, 2000*
	)	

Appeal from the Final Determination of  
Allen County Property Tax Assessment Board of Appeals

**November 10, 2003**

**FINAL DETERMINATION**

The Indiana Board of Tax Review (Board), having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

\* The Petitioner, prior to the hearing, withdrew petition Nos. 02-073-01-3-7-00179, 02-073-01-3-7-00180, and 02-073-01-3-7-00181, which were scheduled to be heard with the above petitions. The withdrawn petitions were for the 2001 assessment year. These Findings and Conclusions, therefore, discuss only the 1999 and 2000 appeals.

## **Issues**

1. The issues presented for consideration by the Board was:
  1. *Whether the Petitioner did not own or possess alleged omitted property on the assessment dates in questions.*
  2. *Whether the penalties applied were incorrect.*

## **Procedural History**

2. Banc One filed business personal property returns (Form 103) for the March 1, 1999 and 2000 assessment dates. The Washington Township Assessor mailed Notices of Assessment/Change (Form 113/PP) to Banc One increasing its business personal property assessment by \$100,000 plus penalty for both years. The Form 113/PP for 1999 is dated December 27, 1999. The Form 113/PP for 2000 is dated November 17, 2000 (Resp. Ex. 2 and 3).
3. Pursuant to Ind. Code § 6-1.1-15-12, Banc One filed Form 133 petitions for 1999 and 2000 appealing the Township's action. The Form 133 petitions were filed on May 23, 2002. The determinations of the Property Tax Assessment Board of Appeals (PTABOA) were issued on December 20, 2002. The PTABOA upheld the Township's assessment, but decreased the penalty charged to Banc One from \$2,333 to \$1,556 (Board Ex. A).
4. Brent A. Auberry, BAKER & DANIELS, then filed Form 131 petitions on behalf of Banc One, petitioning the Board to conduct an administrative review of the above petition. The Form 131 petitions were filed on January 17, 2003 (Board Ex. A). Because Banc One began the appeal process by filing Form 133 petitions, the petitions to the Board will be considered Form 133 petitions.
5. On February 4, 2003, the PTABOA notified Banc One by mail that it did not have the authority to reduce the penalty assessed against Banc One, and increased the penalty back to \$2,333 (Board Ex. A).

6. On March 4, 2003, Mr. Auberry amended Banc One's petition to include the appeal of the penalty reassessed against Banc One (Board Ex. A).

### **Hearing Facts and Other Matters of Record**

7. Pursuant to Ind. Code § 6-1.1-15-4 a hearing was held on August 18, 2003 in Fort Wayne, Indiana before Joseph Stanford, the duly designated Administrative Law Judge authorized by the Board under Ind. Code § 6-1.5-5-2.

8. The following persons were present at the hearing:

For the Petitioner:

Brent A. Auberry, Attorney

For the Respondent:

Mark E. GiaQuinta, Attorney

Leisa Elser-Patrick, Deputy Assessor

Jacquelyn K. Mahlock, Township Assessor

F. John Rogers, PTABOA Attorney

Pat Love, County Assessor

9. The following persons were sworn in as witnesses and presented testimony:

For the Petitioner:

Brent A. Auberry

For the Respondent:

Leisa Elser-Patrick

Jacquelyn K. Mahlock

F. John Rogers

Pat Love

10. The following exhibits were presented:

For the Petitioner:

- Petitioner's Ex. 1** – Form 113/PP for 1999 assessment year.
- Petitioner's Ex. 2** – Form 133 petition.
- Petitioner's Ex. 3** – Affidavit of James M. Fergus.
- Petitioner's Ex. 4** – Affidavit of Randy D. Rine.
- Petitioner's Ex. 5** – Form 115.
- Petitioner's Ex. 6** – Letter from PTABOA reinstating penalty.
- Petitioner's Ex. 7** – Affidavit of Kitty I. Guinsler.
- Petitioner's Ex. 8** – Letter notifying assessor of consolidation.
- Petitioner's Ex. 9** – Respondent's notification of witnesses and exhibits.

For the Respondent:

- Respondent's Ex. 1** – PTABOA Amended Findings and Conclusions.
- Respondent's Ex. 2** – Form 113/PP for 1999 assessment year.
- Respondent's Ex. 3** – Form 113/PP for 2000 assessment year.
- Respondent's Ex. 4** – Form 115.

11. The following additional items are officially recognized as part of the record of proceedings:

- Board Ex. A** – Petitions and related attachments.
- Board Ex. B** – Hearing notices.
- Board Ex. C** – Banc One's pre-hearing submission of witnesses, testimony, and exhibits.

### **Objections and Evidentiary Matters**

12. At the opening of the hearing, Petitioner's attorney, Brent Auberry, objected to all testimony to be offered on behalf of the Respondent due to Respondent's failure to provide a summary of testimony as required by Ind. Code § 6-1.1-15-4(1)(1) and proposed rule 52 IAC 2-7-1.<sup>1</sup> *Auberry argument.*

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<sup>1</sup> The Board has proposed new rules, 52 IAC 2 and 52 IAC 3 concerning appeal procedures. As of this date, the Board has not formally adopted those rules. However, the hearing notice in this case (Board Ex. B) included instructions on this requirement with the notation "[p]rocedure adopted pending promulgation of the Indiana Board's procedural rules."

13. The purpose of this requirement is to allow both parties to be informed about the matters that are to transpire at the hearing, to avoid evidentiary surprises and to assure a more organized, efficient and fair discussion of the issues.
14. The township assessor's reply to the objection was a statement that everything they were presenting had already been presented at the PTABOA hearing. *GiaQuinta argument.* Auberry responded that he had not been involved in the PTABOA hearing and had no personal knowledge of matters that were discussed at that hearing. *Auberry argument.*
15. The Board takes note of the fact that its hearings frequently involve participants different than those involved in the county PTABOA hearings. Therefore, a statement that a party is presenting the same evidence and argument that was presented at the PTABOA hearing is not helpful. The Board has no means of comparing evidence and argument presented at each hearing should a dispute arise.
16. Consequently, a simple declaration that a party intends to present the same testimony or evidence as that presented at the PTABOA hearing does not sufficiently comply with Ind. Code § 6-1.1-15-4(1)(1) and 52 IAC 2-7-1. Even if a party intends to offer testimony and evidence identical to that given at the PTABOA hearing, a summary of that evidence must be exchanged.
17. Petitioner's objection is well taken, and the Board emphasizes that all parties must comply with the evidence and testimony summary exchange provisions. While the substantive decision reached by the Board in this matter renders the objection moot, the Board offers this to forewarn all parties that they run the risk of having their evidence excluded should they neglect to fulfill this procedural requirement.

## **Jurisdictional Framework**

18. This matter is governed by the provisions of Ind. Code § 6-1.1-15, and all other laws relevant and applicable to appeals initiated under those provisions, including all case law pertaining to property tax assessment or matters of administrative law and process.
19. The Board is authorized to issue this final determination pursuant to Indiana Code § 6-1.1-15-3.

## **Indiana's Personal Property Tax System**

20. Personal property includes all tangible property (other than real property) which is being:
  - (A) held in the ordinary course of a trade or business;
  - (B) held, used, or consumed in connection with the production of income; or
  - (C) held as an investment.

See Ind. Code § 6-1.1-1-11.

21. Indiana's personal property tax system is a self-assessment system. Every firm, company, partnership, association, corporation, fiduciary, or individual owning, possessing, or controlling personal property with a tax situs within Indiana must file the appropriate return reporting such property in each taxing district where property is located or held on the assessment date. See Ind. Code § 6-1.1-1-10.

## **State Review and Petitioner's Burden**

22. The State does not undertake to reassess property, or to make the case for the petitioner. The State decision is based upon the evidence presented and issues raised during the hearing. See *Whitley Products, Inc. v. State Bd. of Tax Comm'rs*, 704 N.E. 2d 1113 (Ind. Tax 1998).
23. The petitioner must submit 'probative evidence' that adequately demonstrates all alleged errors in the assessment. Mere allegations, unsupported by factual evidence, will not be

considered sufficient to establish an alleged error. See *Whitley Products, Inc. v. State Bd. of Tax Comm'rs*, 704 N.E. 2d 1113 (Ind. Tax 1998), and *Herb v. State Bd. of Tax Comm'rs*, 656 N.E. 2d 1230 (Ind. Tax 1998). [‘Probative evidence’ is evidence that serves to prove or disprove a fact.]

24. The petitioner has a burden to present more than just ‘de minimis’ evidence in its effort to prove its position. See *Hoogenboom-Nofzinger v. State Bd. of Tax Comm'rs*, 715 N.E. 2d 1018 (Ind. Tax 1999). [‘De minimis’ means only a minimal amount.]
25. The petitioner must sufficiently explain the connection between the evidence and petitioner’s assertions in order for it to be considered material to the facts. ‘Conclusory statements’ are of no value to the State in its evaluation of the evidence. See *Heart City Chrysler v. State Bd. of Tax Comm'rs*, 714 N.E. 2d 329 (Ind. Tax 1999). [‘Conclusory statements’ are statements, allegations, or assertions that are unsupported by any detailed factual evidence.]
26. Essentially, the petitioner must do two things: (1) prove that the assessment is incorrect; and (2) prove that the specific assessment he seeks, is correct. In addition to demonstrating that the assessment is invalid, the petitioner also bears the burden of presenting sufficient probative evidence to show what assessment is correct. See *State Bd. of Tax Comm'rs v. Indianapolis Racquet Club, Inc.*, 743 N.E.2d 247, 253 (Ind., 2001), and *Blackbird Farms Apartments, LP v. DLGF* 765 N.E.2d 711 (Ind. Tax, 2002).
27. The State will not change the determination of the County Property Tax Assessment Board of Appeals unless the petitioner has established a ‘prima facie case’ and, by a ‘preponderance of the evidence’ proven, both the alleged error(s) in the assessment, and specifically what assessment is correct. See *Clark v. State Bd. of Tax Comm'rs*, 694 N.E. 2d 1230 (Ind. Tax 1998), and *North Park Cinemas, Inc. v. State Bd. of Tax Comm'rs*, 689 N.E. 2d 765 (Ind. Tax 1997). [A ‘prima facie case’ is established when the petitioner has presented enough probative and material (i.e. relevant) evidence for the State (as the fact-finder) to conclude that the petitioner’s position is correct. The petitioner has proven his position by a ‘preponderance of the evidence’ when the petitioner’s evidence is

sufficiently persuasive to convince the State that it outweighs all evidence, and matters officially noticed in the proceeding, that is contrary to the petitioner's position.]

### **Discussion of Issues**

*Issue 1. Whether the Petitioner did not own or possess alleged omitted property on the assessment dates in questions.*

28. The Petitioner contends that it did not own, hold, control, or possess personal property assessed against it, that penalties should not apply, and that the PTABOA determination should be set aside because it did not include Findings of Fact and Conclusions of Law. Also, the Petitioner contends that certain Respondent witnesses and testimony should be excluded from consideration because the Respondent did not provide the Petitioner with a complete list of such witnesses and testimony prior to the hearing.
29. The Respondent contends that Banc One assumed the leases of NBD Leasing Corp. and NBD Equipment Finance, Inc. and should be assessed accordingly. The Respondent also contends that the Petitioner's appeals of the assessments made via the Form 113/PP for 1999 and 2000 were not filed timely.
30. The applicable rules and case law governing this Issue are:  
**Ind. Code § 6-1.13-15 and 50 IAC 4.2-3-1**  
**Ind. Code § 6-1.1-15-1**  
**Ind. Code § 6-1.1-15-12**  
  
*Reams v. State Board of Tax Commissioners*, 620 N.E. 2d 758, (Ind. Tax 1993)  
*Hatcher v. State Board of Tax Commissioners*, 561 N.E. 2d 852, (Ind. Tax 1990)
31. Evidence and testimony considered particularly relevant to this determination include the following:



- A. Prior to the March 1, 1999 assessment date, leased assets owned by NBD Leasing Corp. and NBD Equipment Finance Inc. were consolidated under Banc One (Pet. Ex. 8).
- B. Banc One filed Form 103 in Washington Township, Allen County for the 1999 and 2000 assessment years. These returns include all property owned by Banc One in Washington Township (Auberry testimony; Pet. Ex. 3, 4, and 7).
- C. The Washington Township Assessor increased Banc One's personal property assessment by \$100,000 for 1999 and 2000 via Form 113/PP, Notice of Assessment/Change (by an Assessing Official). Washington Township based the increase in assessment on previous years filings by NBD Leasing for capitalized leases. Washington Township attached the NBD Leasing Substitute Form 103-O from 1998 to the Form 113/PP notices sent to Banc One. (Resp. Ex. 2 and 3).
- D. Banc One did not respond to either of the Form 113/PP notices.
- E. On May 23, 2002, Banc One filed Form 133 petitions to appeal the action of the Washington Township Assessor. Banc One filed appeals for both the 1999 and 2000 assessment years (Pet. Ex. 2).
- F. The Affidavit of James M. Fergus states that all active leases were converted from NBD's lease tracking system (ALAS) to Banc One's lease tracking system (LeasePak). For the years 1999 to 2001, all equipment owned by Banc One and subject to capitalized leased was identified by the LeasePak system. (Pet. Ex. 3).
- G. The Affidavit of Randy D. Rine states that he reviewed the LeasePak system and the NBD Leasing Substitute Form 103-O(attached to the Affidavit as Exhibit 1). None of the leases referenced on the NBD Leasing Substitute Form 103-O were listed in the LeasePak system for the tax years 1999 to 2001.
- H. The Allen County PTABOA upheld Washington Township's assessment, but originally decreased the penalty assessed to Banc One. In an amended decision, the PTABOA reinstated the entire penalty.
- I. The version of the PTABOA Final Determination received by Banc One did not include written findings and conclusions (Auberry testimony, Pet. Ex. 5 and 6).

#### Analysis of ISSUE

Issue 1. Whether the Petitioner did not own or possess alleged omitted property on the assessment dates in questions.

32. Pursuant to 50 IAC 4.2-3-1(b), the assessor is required to make an assessment if they have sufficient information to indicate there is omitted property. It further states that at the time notice is given to the taxpayer, the taxpayer be informed of their opportunity for review and the procedures they must follow in order to obtain a review.
33. Ind. Code § 6-1.1-15-1 is the governing authority when a township assessor makes a change to a personal property assessment. This law, in fact, is printed at the top of the Form 113/PP, which describes the Washington Township Assessor's action that Banc One is appealing. On the Form 113/PP, taxpayers are informed "[i]f you do not agree with the action the County Property Tax Assessment Board of Appeals will review that action if you file a petition with the County Assessor of this county within forty-five (45) days of this notice. IC 6-1.1-15-1."
34. Ind. Code § 6-1.1-15-1 clearly states if the taxpayer does not agree with the action of the township assessor, the PTABOA will review the action if a petition is filed within forty-five days of the notice. Banc One missed the opportunity to appeal pursuant to Ind. Code § 6-1.1-15-1.
35. Instead, Banc One filed Form 133 petitions to appeal the assessments. Only specific types of errors are correctable using the Form 133. The procedures for the Form 133 are described in Ind. Code § 6-1.1-15-12. For the assessment years in question (1999 and 2000), Ind. Code § 6-1.1-15-12 and the Form 133 were available to appeal personal property. Beginning with the March 1, 2002 assessment date, the use of the Form 133 to correct personal property is no longer permitted.
36. The Form 133 petition is available only for those errors that can be corrected without resort to subjective judgment. *Hatcher v. State Board of Tax Commissioners*, 561 N.E. 2d 852 (Ind. Tax 1990); *Reams v. State Board of Tax Commissioners*, 620 N.E. 2d 758

(Ind. Tax 1993). The determination of whether or not Banc One omitted property does not require subjective judgment.

37. Washington Township based the assessment on the assumption that since NBD had filed on certain capitalized leases, Banc One should also file on the same leases.
38. Banc One presented three (3) affidavits stating that all equipment owned and subject to a capitalized lease was identified in the LeasePak system. The affidavits also stated that none of the leases referenced on the NBD Leasing Substitute Form 103-O were listed in the LeasePak system. Therefore, the alleged omitted property was not owned or possessed by Banc One.
39. Banc One has shown that it did not own or possess the alleged omitted property for the March 1, 1999 and 2000 assessment dates. Therefore, the assessment shall be removed.

*Issue 2. Whether the penalties applied were incorrect.*

40. Since there is no assessment, there are no penalties. Therefore, penalties are not longer an issue

**Summary of Final Determination**

41. Banc One has shown that it did not own or possess the alleged omitted property for the March 1, 1999 and 2000 assessment dates. The assessment and penalties shall be removed.

This Final Determination of the above captioned matter is issued this by the Indiana Board of Tax Review on the date first written above.

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Chairman, Indiana Board of Tax Review

## **IMPORTANT NOTICE**

### **- APPEAL RIGHTS -**

**You may petition for judicial review of this final determination pursuant to the provisions of Indiana Code § 6-1.1-15-5. The action shall be taken to the Indiana Tax Court under Indiana Code § 4-21.5-5. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice.**