REPRESENTATIVES FOR PETITIONER:
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REPRESENTATIVES FOR RESPONDENT:
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BEFORE THE
INDIANA BOARD OF TAX REVIEW

AMOCO SULFUR RECOVERY CORP. and BP PRODUCTS NORTH AMERICA, INC.,	)	Petition Nos.: 45-026-07-1-7-00002; 45-026-07-1-7-00001
Petitioners,	)	
v.	)	Parcel Nos.: 28-800256 and 28-340093
NORTH TOWNSHIP ASSESSOR, LAKE COUNTY ASSESSOR, and LAKE COUNTY PROPERTY TAX ASSESSMENT BOARD OF APPEALS[1]	)	County: Lake
	)	Township: North
	)	Assessment Year: 2007
Respondents.	)	

Appeals from Final Determinations of the Lake County Property Tax Assessment Board of Appeals

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FINAL DETERMINATION GRANTING PETITIONERS' MOTION FOR SUMMARY JUDGMENT

[1] In their filings, the parties have captioned the North Township Assessor, the Lake County Assessor, and the Lake County Property Tax Assessment Board of Appeals ("PTABOA') as respondents. Indiana Code section 6-1.1-15-3(b), however, provides that the "county assessor is the party to the review under this section to defend the determination of the [PTABOA]." I.C. § 6-1.1-15-3(b) (2009 supp.). For consistency's sake, the Board will refer to all three nominal responding parties as "Lake County," even though the Lake County Assessor is the only proper respondent.

I. Introduction

In a sense, these appeals represent the second act in an ongoing dispute between Amoco Sulfur Recovery Corp. and BP Products North America, Inc. (collectively, "BP") and Lake County assessing officials over equipment that BP claims is exempt as part of an air pollution control system. In light of that dispute, those assessing officials have repeatedly issued Form 113/PP notices increasing BP's self-reported assessments. Unfortunately, those officials issued their notices past the deadlines imposed by Ind. Code § 6-1.1-16-1 for changing a taxpayer's substantially compliant self-reported assessment. Thus, the appeals have turned on whether BP substantially complied with statutes and regulations governing reporting instead of the merits of BP's exemption claims.

In the first group of appeals, which covered assessment years 2004-06, the Board entered summary judgment for BP. The Board found: (1) that BP's returns had substantially complied with the statutes and regulations governing personal property assessments, and (2) that the Lake County Assessor and North Township Assessor had acted well beyond the statutory deadlines for changing those substantially compliant self-reported assessments. *Amoco Sulfur Recovery Corp. n/k/a BP Products North America, Inc. v. Lake County Assessor et al. ("BP I (Board)"),* Pet. Nos. 45-026-04-1-7-00002 *etc.*, p. 14 (Ind. Bd. of Tax Rev. August 19, 2009). The Tax Court affirmed the Board's determination on judicial review. *Lake County Assessor v. Amoco Sulfur Recovery Corp* ("*BP I*"), 930 N.E.2d 1248 (Ind. Tax Ct. 2010).

BP's 2007 appeals present the Board with a remarkably similar scenario. The North Township Assessor increased BP's self-reported assessments four months and one day after BP filed its returns. Unfortunately, Ind. Code § 6-1.1-16-1(a)(1)(B) imposes a four-month deadline for township assessors to change a taxpayer's substantially compliant self-reported assessment.

That four-month deadline expired on the anniversary of BP filing its returns—not one day later as Lake County argues. And in light of the decisions by this Board and the Indiana Tax Court in *BP I*, the Board finds, as a matter of law, that BP's returns substantially complied with applicable statutes and regulations. Indeed, to the extent that BP's reporting on its 2007 returns differed from its reporting in 2004-06, those differences largely involved providing more—not less—descriptive information about the equipment BP claimed as exempt. Thus, the North Township Assessor lacked the power to change BP's self-reported assessments, which became final by operation of Indiana Code § 6-1.1-16-1(b).

II. Procedural History

BP filed written notice asking for a review of the assessments reflected on the Form 113 notices. On March 19, 2008, the Lake County PTABOA issued written determinations denying BP's claims and upholding those assessments.

BP then filed Form 131 petitions with the Board. On March 30, 2010, in accordance with the parties' agreed appeal management plan, BP filed its motion for summary judgment. On July 8, 2010, the Board held a hearing on that motion through its designated administrative law judge, David Pardo ("ALJ").[2] Neither the ALJ nor the Board inspected BP's property.

The parties submitted the following materials in support of, and opposition to, BP's motion:

BP

(1) Amoco Sulfur Recovery Corp.'s and BP Products North America, Inc.'s Motion for Summary Judgment and Designation of Evidence in Support Thereof, with the following designated materials attached:

Ex. A: Affidavit of John D. Dickson, including paragraphs 1-10 thereof;

[2] That hearing also addressed two other pending motions: Petitioners' Motion for Order Assigning Burden of Proof to Respondents, and Lake County's Motion for Partial Summary Judgment. As explained below, the Board's determination on BP's summary judgment motion makes those other motions moot.

Ex. B: Affidavit of Adam Stasser, including paragraphs 1-4 thereof;
Ex. C: Copy of BP's 2007 Business Tangible Personal Property Return for parcel 28-340093, including supplemental schedules and forms attached thereto;
Ex. D: Copy of BP's 2007 Business Tangible Personal Property Return for parcel 28-800256, including supplemental schedules and forms attached thereto;
Ex. E: Letter by which North Township Assessor granted BP an extension until June 14, 2007, in which to file its 2007 personal property tax returns;
Ex. F: Copy of Form 113 Notice of Change in Assessment for the March 1, 2007 assessment date for parcel 28-340093;
Ex. G: Copy of the Form 113 Notice of Change in Assessment for the March 1, 2007 assessment date for parcel 28-800256;
Ex. H: Copy of Form 115 Notification of Final Assessment Determination for the March 1, 2007 assessment date for parcel 28-340093;
Ex. I: Copy of the Form 115 Notification of Final Assessment Determination for the March 1, 2007 assessment date for parcel 28-800256;
Ex. J: Excerpt of Respondents' Objections and Responses to BP Products North America, Inc.'s First Set of Requests for Admission and First Set of Interrogatories, including responses to Requests for Admission Nos. 10 and 11; and
Ex. K: Department of Local Government Finance's Memorandum of Law Interpreting its Rule, filed with the Indiana Tax Court December 1, 2009, in Case No. 49T0-0909-TA-58.

(2) Brief in Support of Motion for Summary Judgment of Amoco Sulfur Recovery Corp. and BP Products North America, Inc.

(3) Petitioners' Reply Brief in Support of Motion for Summary Judgment and the following exhibits attached to that reply:

Ex. 1: Affidavit of David R. Wall;
Ex. 1A: Curriculum vitae for Wall; and
Ex. 1B: Summary report prepared by Wall, including spreadsheet.

(4) Petitioners' Motion to Strike Portion of Nancy Smolen Affidavit.

Lake County

(1) Response to Petitioners' Motion for Summary Judgment

(2) Respondent's Designation of Evidence in Opposition to Petitioners' Motion for Summary Judgment, including the following exhibit:

Ex. A: Affidavit of Nancy Smolen;

(3) The following exhibits submitted with Respondent's Designation of Evidence in Support of Motion for Partial Summary Judgment and also designated by Lake County in opposition to BP's summary judgment motion:

Ex. 1: Deposition of BP Products North America, Inc. pursuant to Ind. Trial R. 30(b)(6) dated January 28, 29, and 30, 2009 ("2004-06 dep."), including errata and signature page;
Ex.2: Exhibits 4, 6, 12, 16, 17, 20, 28, 29, 37, 39, 40, 42, 43, 45, 46, 48, and 59 identified in 2004-06 dep.;
Ex. 3: Deposition of BP Products North America, Inc. pursuant to Ind. Trial R. 30(b)(6) dated December 9 and 10, 2009 ("2007 dep."), including errata and signature page;
Ex. 4: Exhibits 1-16 and 18-21 identified in 2007 dep.;
Ex. 5: Stipulation Regarding Testimony Given at Prior Deposition; and
Ex. 6: Affidavit of James Glassford Speight, with attached Exhibit A, Expert Report of Dr. James G. Speight PHD, DSC.

(4) Response to Petitioners' Motion to Strike Portion of Nancy Smolen Affidavit.

The PTABOA issued the following determinations for the two parcels:

Parcel 28-340093: $258,011,083

Parcel 28-800256: $3,552,155

BP, by contrast, claims that the following originally reported assessments should apply:

Parcel 28-340093: $132,911,620

Parcel 28-800256: $286,810

III. Motion to Strike Smolen Affidavit

Before turning to the merits of BP's summary judgment motion, the Board addresses BP's motion to strike portions of Nancy Smolen's affidavit. Smolen worked for the North Township Assessor and was responsible both for reviewing BP's returns and for preparing the Form 113 notices. *Lake County Ex. A, Affidavit of Nancy Smolen ¶¶ 1-2.* BP seeks to strike three portions of Smolen's affidavit: two separate places in paragraph 2 where Smolen says that BP "improperly claimed" and "improperly reported" equipment as exempt, and a portion of

paragraph 3 where Smolen says that BP failed to report equipment for taxation. *Motion to Strike at 2-3*. According to BP, those statements are inadmissible legal conclusions. BP further argues that Smolen did not show that she had sufficient familiarity with the law governing air pollution control exemptions or the laws and regulations governing BP's returns. *Id. at 24 n.2.*

The Board denies BP's motion to strike. Smolen's affidavit explains why the North Township Assessor changed BP's self-reported assessments. While the assessor's subjective motivation for changing the assessments may not be particularly relevant to the issues at hand—whether the assessor acted timely and whether BP's returns substantially complied with applicable statutes and regulations—it is at least helpful background information. *See McFarland v. State*, 390 N.E.2d 989, 993 (Ind. 1979) (explaining that considerable leeway should be afforded for the admission of facts that simply provide "details which fill in the background of the narrative and give it interest, color, and lifelikeness") (citing MCCORMICK, EVIDENCE, § 185, p. 434 (2d Ed. 1972)). To the extent any of Smolen's statements may also be interpreted as her opinion about the merits of BP's exemption claims or about BP's lack of compliance with reporting requirements, however, the Board does not consider those opinions in reaching its decision.

IV. Facts

With a few exceptions, the parties do not dispute the relevant underlying facts, although they disagree about the inferences that reasonably may be drawn from those facts and the legal conclusions to which those facts lead.

BP owns personal property located at its refinery in Whiting. That property has been assigned parcel numbers 28-340093 ("Parcel 093") and 28-800256 ("Parcel 256"). *BP Ex. A, Affidavit of John Dickson at ¶ 2.* As explained above, BP reported a significant amount of that

property as exempt under Ind. Code § 6-1.1-10-12 on grounds that it was part of a stationary or unlicensed mobile air pollution control system. The following is a brief description of the equipment that is at the center of the parties' dispute and a summary of the procedures that BP used to claim an exemption for that equipment.

A. BP's Equipment

The property that BP reported as exempt air pollution control equipment includes a significant amount of equipment that BP uses to remove sulfur from feedstocks and fuel components. Much of that is done through a process called "hydrotreating," which uses hydrogen in thermal processes. *Lake County Ex. 6, Affidavit of James Glassford Speight, Ex. A (Expert Report of Dr. James G. Speight PHD, DSC) p. 6.* Hydrotreating is designed to remove contaminants, including: (1) sulfur, nitrogen and other heteroatoms; and (2) condensed ring aromatics. *Id. at 6-7.*

BP has several [REDACTED] at its Whiting refinery, including the [REDACTED] *E.g. Lake County Ex. 3, 2007 dep. at 78-79, 115, and dep. Exs. 8, 9, 15-16; Speight Report at 10-11*. Hydrotreating requires a significant amount of hydrogen. Thus, in 1993, BP installed a [REDACTED] in connection with building the [REDACTED]. *Speight Report at 20-21; BP Ex. 1B, Summary Report of David Wall at 8-9.*

The Whiting Refinery also has several other units through which it removes sulfur. Those units include [REDACTED]. *E.g., Wall Report at 6-8.* Similarly, BP uses part of its [REDACTED].[3] *2007 dep. at 185-86*.

In 1990, Congress amended the Clean Air Act, which in turn led the U.S. Environmental Protection Agency to promulgate regulations limiting the sulfur content of transportation fuels. *See* 40 CFR 80. BP uses its [REDACTED] and other sulfur-removal equipment to meet those

[3] Naptha is a component used in gasoline. *2007 dep. at 77*.

regulations. BP's expert, David Wall, explained that [REDACTED] similar to BP's are the industry-wide standard for meeting federal environmental regulations and quality standards concerning fuel sulfur content. *Wall Report at 8-9, 13-14.* Similarly, by enabling BP to [REDACTED], the [REDACTED] helps BP meet the EPA's gasoline sulfur specifications. *2007 dep. at 185-86.*

There are also many valid reasons for hydrotreating other than simply to comply with EPA regulations. Those reasons include:

- Reducing or eliminating corrosion during refining, handling, or using various products;
- Avoiding contaminating catalysts used in the refining process;
- Producing products that have an acceptable odor and specification;
- Increasing the performance and stability of gasoline; and
- Improving burning characteristics.

Speight Report at 6-7, 11.

Because of the assorted benefits of hydrotreating, BP and other refiners hydrotreated fuel components long before the 1990 amendments to the Clean Air Act and subsequent EPA regulations. *Speight Report at 11*. Indeed, BP originally installed many of the [REDACTED] at issue in this case before 1990. *See, e.g., BP Exs. C-D.* Among other things, BP's [REDACTED] allow it to [REDACTED]. *2004-06 dep. at 392-93, dep. Ex. 28 at BP000323; 2007 dep. at 138-39, 199-200*. [REDACTED]. *2007 dep. at 111-12*. [REDACTED]. *See 2007 dep. at p. 106, dep. Ex. 8 at BP008388*. In addition, BP uses some of its [REDACTED] and other sulfur-removal equipment to [REDACTED], although the need to do so stems at least partly from

separate federal regulations phasing out lead additives. *Speight Report at 14-15; see also, Wall Report at 7* (explaining that the [REDACTED]).

BP similarly uses some of the disputed equipment to [REDACTED], which it then sells. *2007 dep. at 126-27; 2004-06 dep. at 205-06.* BP recovers the [REDACTED]. *Speight Report at 17-19, 21-22*. Those last [REDACTED] also serve to reduce refinery emissions, which are regulated by the EPA. *Wall Report, at 5; see also, Speight Report at 21* (explaining that [REDACTED]). In 2007, BP sold $[REDACTED] of [REDACTED] and $[REDACTED] of [REDACTED]. *BP 2004-06 dep. at 205-06 and dep. Ex. 21 at BP 800181.*

In various internal memoranda and [REDACTED] relating to capital appropriations for projects connected with BP's [REDACTED] and other sulfur-removal equipment, BP describes the purposes of those projects as [REDACTED]. *See e.g., BP 2004-06 dep. Exs. 8, 12, 20, 28, 45; BP 2007 dep. Ex. 5.* And BP's operating/training manual for the [REDACTED] describes [REDACTED]. *2007 dep. at 105, dep. Ex. 8 at BP008376.*

B. BP's Returns

After having asked for and received an extension of time, BP filed its business tangible personal property returns on June 11, 2007. *Dickson Aff. ¶4; BP Exs. C-E.* BP used return forms prescribed by the Department of Local Government Finance ("DLGF"), including Forms 103, 103-P, and 104. *BP Exs. C-D.* Significantly, BP did not omit any personal property from those returns. *See id.* (certifications of Adam Stasser)*; BP Ex. B, Affidavit of Adam Stasser ¶ 2.* In each instance, BP followed the instructions on Form 103, Schedule A and deducted from its property's total cost the cost for equipment that it claimed was exempt as part of a stationary or unlicensed mobile air pollution control system. *BP Exs. C-D.* BP therefore did not include the cost for that equipment in calculating the total assessed value of its personal property. *Id.* BP

claimed a total of $[REDACTED] of cost as exempt air pollution control equipment. *Id.* The total cost that BP reported on its returns exceeded $[REDACTED]. *Id.*

As required by the Form 103 return, BP attached Form 103-P on which BP listed the equipment that it claimed as exempt air pollution control equipment together with that equipment's cost. *BP Exs. C-D.* BP wrote [REDACTED] in the spaces for describing "Month and Year Acquired," "Tax Life," "Type of Air Control Facility," and "Total Cost." *Id.* In its attachments, BP grouped its putatively exempt equipment under various headings corresponding to units at the Whiting refinery. Those headings included broad descriptions, such as:

[REDACTED]

BP Ex. C, Form 103-P at 2 of 9. Some headings included descriptions that were more-detailed than the description for the [REDACTED] and others included descriptions that were less detailed. *See BP Exs. C-D passim.*

BP then individually described separate items of cost associated with those general headings. For the most part, the individual descriptions were less detailed than the descriptions in the general headings. Some consisted largely of abbreviations, such as [REDACTED] *BP Ex. C, Form 103-P at 2 of 9.* On the return for Parcel 093, which included the bulk of the cost that BP claimed as exempt, each item was listed under a number corresponding to a specific cost center at BP. *BP Ex. C passim.*[4] The cost centers corresponded to BP's fixed-asset ledger. *Dickson Aff. at ¶ 9.* In many instances, BP grouped several items under the same cost center. *See BP Ex. C, Form 103-P passim.*

In the vast majority of cases, BP also listed separate alpha-numeric appropriation designations for the listed items of cost. *See BP Exs. C-D.* BP used those appropriation numbers to track the acquisition of equipment as part of its accounting records. *Dickson Aff. at ¶ 9.* In 15

[4] The attachment for Parcel 256 did not include cost-centers. *BP Ex. D.*

instances, however, BP listed [REDACTED] to describe the appropriation numbers for multiple items grouped together. *BP Exs. C-D*. All told, those items represented $[REDACTED], or approximately [REDACTED]% of the total cost that BP reported as exempt under Ind. Code § 6-1.1-10-12. *See BP Exs. C-D*. Similarly, while BP listed the year of acquisition for the vast majority of items, in 14 instances it simply listed [REDACTED] to describe the acquisition dates for multiple items grouped together. *Id*.

One group for which BP did not give complete information about appropriation numbers or acquisition dates involved equipment with a total cost of $[REDACTED]. That equipment was listed under the heading and cost center for the [REDACTED] and described as [REDACTED] *BP Ex. 1, Form 103-P at 3 of 9*. During discovery, BP's designated representative testified that the expenditure included multiple items associated with constructing the [REDACTED]. *2004-06 dep. at 202-03; BP 2007 dep. at 23-24*. He appears to have based his testimony on the items' appropriation numbers. *See 2004-06 dep. at 202-03* ([REDACTED]). But he could not further identify what those specific items were. *Id.* In a report submitted with BP's summary judgment motion, however, BP's expert witness, David Wall, indicated that the project involved [REDACTED]. *Wall Report at spreadsheet line106*. According to Wall, the project [REDACTED].[5] *Id*.

On each Form 103 return, BP's representative, Adam Stasser, certified under the penalties of perjury: (1) that to the best of his knowledge and belief, the return was true, correct, and complete; and (2) that the return reported all tangible personal property subject to taxation that BP owned, held, possessed, or controlled in the township or taxing district on the assessment

[5] "VOC" stands for "volatile organic compounds." *Speight Report at 89*. Those compounds are regulated because they are precursors to ozone. *Id*.

date. *Id.* On each Form 103-P, Stasser further certified that the return reported the total cost of all personal property claimed by BP as exempt under Ind. Code § 6-1.1-10-13. *Id.*

After BP filed its returns, Lake County had Gerald Muller, a refinery engineer, review BP's exemption claim. *See Lake County Ex. A, Affidavit of Nancy Smolen* ¶ 3. On October 12, 2007, the North Township Assessor issued Form 113 notices changing BP's self-reported assessment for each parcel. *Smolen Aff. at ¶ 3*; *BP Exs. F-G.* Each Form 113 notice explains the assessor's reasons for changing BP's self-reported assessments as follows:

> The reason for the increase in assessment arises from the fact that BP's personal property return failed to comply with Article 1.1 of Title 6 of the Indiana Code and with the regulations of the department of local government finance by improperly deducting from its assessment the cost of equipment it designated as a type of air control facility even though that equipment was not part of any stationary industrial air purification system qualified for exemption from assessment. An audit has revealed that BP improperly employed the air pollution control system exemption to exclude from its assessment equipment used primarily in the production of gasoline, diesel and other saleable refinery products such as xylene and sulfur. The audit uncovered that this equipment was for the most part employed to reduce and recover for sale sulfur and other chemical by products from oil being refined at the facility rather than to prevent or eliminate air contamination caused by industrial waste or contaminants. The assessment has been increased by the reported cost of this improperly excluded equipment depreciated in accordance with Ind. Code 6-1.1-3-23.

BP Exs. F-G.

V. Conclusions of Law and Discussion

A. Summary Judgment Standard

The Board's procedural rules allow parties to file summary judgment motions. 52 IAC 2-6-8. Those motions are made "pursuant to the Indiana Rules of Trial Procedure." *Id.* Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Wittenberg Lutheran Village Endowment Corp. v. Lake County Property Tax Assessment Bd. of Appeals*, 782 N.E.2d 483, 487 (Ind. Tax Ct.

2002). The party moving for summary judgment bears the burden of making a prima facie showing of both those things. *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522, 526 (Ind. Ct. App. 2004). If the moving party satisfies its burden, the non-moving party cannot rest upon its pleadings, but instead must designate sufficient evidence to show the existence of a genuine issue for trial. *Id.* In deciding whether such an issue exists, the Board must construe all facts and reasonable inferences in favor of the non-moving party. *See Carey v. Ind. Physical Therapy, Inc.*, 926 N.E.2d 1126, 1128 (Ind. Ct. App. 2010).

B. The North Township Assessor issued the Form 113 notices one day past Ind. Code § 6-1.1-16-1(a)(1)(B)'s deadline.

BP claims that the North Township Assessor issued the Form 113 notices one day past the deadline imposed by Ind. Code § 6-1.1-16-1(a)(1)(B). Indiana Code § 6-1.1-16-1 provides, in relevant part:

> (a) Except as provided in section 2 of this chapter, an assessing official or county property tax assessment board of appeals may not change the assessed value claimed by a taxpayer on a personal property return unless the assessing official or county property tax assessment board of appeals takes the action and gives the notice required by IC 6-1.1-3-20 within the following periods:
> (1) A township assessor (if any) must make a change in the assessed value and give notice of the change on or before the later of:
> (A) September 15 of the year for which the assessment is made; or
> (B) *four (4) months from the date the personal property return is filed if the return is filed after May 15 of the year for which the assessment is made*.
> . . .
>
> (b) Except as provided in section 2 of this chapter, if an assessing official or a county property tax assessment board of appeals fails to change an assessment and give notice of the change within the time prescribed by this section, the assessed value claimed by the taxpayer on the personal property return is final.

I.C. § 6-1.1-16-1(2009 supp.)(emphasis added).[6]

BP filed its returns on June 11, 2007. Thus, the North Township Assessor had to change BP's self-reported assessments within four months from that date. By normal reckoning, October 12, 2007—the date that the township assessor issued the Form 113 notices—was four months and one day from June 11, 2007.

Lake County, however, argues that the four-month period in which the North Township Assessor could change BP's returns extended from June 12, 2007 to October 12, 2007, making the North Township Assessor's actions timely. *Lake County response at 6-7*. For support, Lake County directs the Board to Rule 6(A) of the Indiana Rules of Trial Procedure, which provides:

> In computing any period of time prescribed or allowed by these rules, by order of the court, or by any applicable statute, *the day of the act, event, or default from which the designated period of time begins to run shall not be included*. The last day of the period so computed is to be included unless it is:
> (1) a Saturday,
> (2) a Sunday,
> (3) a legal holiday as defined by state statute, or
> (4) a day the office in which the act is to be done is closed during regular business hours. . . .

Ind. Rules of Trial Procedure, Rule 6(A)(emphasis added).

One might ask whether Trial Rule 6(A) actually applies. By its terms, the rule applies only to periods prescribed or allowed by the trial rules, a court order, or an "applicable statute." To be applicable, a statute arguably would have to address actions related to court proceedings. And Ind. Code § 6-1.1-16-1's deadlines do not address actions directly related to court proceedings. Nonetheless, the Indiana Tax Court has cited to the "well-established common law rule that when a statute is silent as to how a time limitation within the statute is computed, Indiana Trial Rule 6(A) governs the computation." *Estate of Dunnick v. Ind. Dep't of State*

[6] For purposes of these appeals, the cited portions of the statute as it currently exists do not differ materially from the provisions that existed when the actions at issue occurred. In 2008, the Indiana General Assembly made technical changes that reflect the elimination of assessing duties for many township assessors. *See* P.L. 146-2008 § 144.

Revenue, 855 N.E.2d 1087, 1091(Ind. Tax Ct. 2006). And the relevant provisions of Trial Rule 6(A) themselves largely originate in common law. *See Prince v. United States*, 185 F. Supp. 269, 272 (E.D. Wisc. 1960) ([T]he weight of authority seems to favor applying [Fed. R. Civ. P.] 6(a)[7] to statute of limitations questions. . . .This is a very natural tendency for Rule 6(a) is merely an expression of the general common law rule on the subject."). Thus, the Board would apply those concepts even if Trial Rule 6(A) did not exist.

Of course, the problem at hand is that Ind. Code § 6-1.1-16-1(a)(1)(B) speaks to a deadline that is measured in months, and it does not appear that the Indiana Code defines a month as consisting of any specific number of days for the purposes of computing deadlines or limitations periods. Trial Rule 6(A) likewise does not explain how its provisions operate when the period being computed is measured in months or years instead of days. Lake County, however, points to Trial Rule 6(A)'s call to exclude the day of the act or event from which the designated period begins to run. Thus, Lake County argues that the first day of the relevant period in this case was June 12, and that October 12 was exactly four months from that day.

A few cases interpret Fed. R. Civ. P. 6(a)—the federal counterpart to Trial Rule 6(A)—in the same way as Lake County. *Paynter v. Chesapeake & Ohio Railway*, 60 F.R.D. 153, 157 (W.D. Va. 1973)*; Rodriguez v. United States*, 382 F. Supp. 1, 2 (D. P.R. 1974); *Bledsoe v. Dep't of Housing and Urban Development*, 398 F. Supp. 315, 319 (E.D. Pa. 1975). Those cases, however, are in the minority and have been largely rejected. *E.g.*, *Merriweather v. City of Memphis Police Dep't,* 107 F. 3d 396, 399-400 (6th Cir. 1997); *Vernell v. Unites States Postal Service*, 819 F.2d 108, 111 (5th Cir. 1987); *Yedwab v. United States*, 489 F. Supp. 717, 718-29 (D. N.J. 1980). Instead, when faced with limitation periods measured in months or years, most

[7] Like Trial Rule 6(A), the federal rule calls for excluding the day of the event that triggers the period and including the last day, unless that last day is a Saturday, Sunday, or legal holiday. Fed R. Civ. P. 6(a).

courts have interpreted Fed. R. Civ. P. 6(a) more straightforwardly. For example, in cases addressing a provision under the federal tort claims act ("FTCA") that requires a plaintiff to sue "within six months after" an agency mails notice denying a plaintiff's claim, several courts have held that the limitations period begins the day after the notice is mailed and runs through the day before the same calendar day six months later. *E.g. Tribue v. United States*, 826 F.2d 633, 635 (7th Cir. 1987); *Vernell*, 819 F.2d at 111-12. Put another way, the limitations period ends on the calendar anniversary of the act or event triggering the period. *See McDuffee v. United States*, 769 F.2d 492, 494 (8th Cir. 1985)("The more recent district court cases reject the theory allowing an extra day beyond the six month 'anniversary' date."). Not surprisingly, some courts refer to that method of calculation as the "anniversary method." *United States v. Marcello*, 212 F.3d 1005, 1009 (7th Cir. 2000).

Numerous courts, including the Indiana Court of Appeals in a decision that Lake County itself cites, have reached the same conclusion in interpreting limitations periods under various other statutes as well. *E.g. Jenkins v. Yoder*, 163 Ind. App. 377, 324 N.E.2d 520, 521 (1975) (holding that the two-year statute of limitations to bring a claim for a December 18, 1971, injury expired at midnight on December 18, 1973); *Merriweather* 107 F. 3d at 400 (holding that, under Tennessee's one-year statute of limitations, the deadline for bringing a claim arising from the October 19, 1994 death of the plaintiff's father was October 19, 1995); *United States v. Inn Foods, Inc*., 383 F.3d 1319, 1321-25 (Fed. Cir., 2004)(holding that two-year waiver of a statute of limitations that was entered into on December 14, 1999, expired on December 14, 2001).

The problem with Lake County's position is that it misconstrues what Trial Rule 6(A) does. As explained by the Sixth Circuit Court of Appeals in interpreting Fed. R. Civ. P. 6(a), the

rule does not enlarge statutorily prescribed periods or delay their running, but rather offers a method for how to compute those periods:

> The source of the confusion is the misinterpretation of [Fed R. Civ. P. 6(a)] as delaying the *running* of the statute of limitations. The rule does not say that a limitations period does not begin to run until the second day; indeed, it specifically refers to the "day of the act, event, or default from which the designated period of time begins to run." Instead, the rule directs that in *computing* the applicable period, the day of the relevant event is the zero point from which the days are to be counted. The rule makes sense only in the context of counting days; the problem it is intended to avoid (i.e. cutting the time too short—for instance, counting October 19, 1994 as the '1' and finding the 365th day to be October 18, 1995) should not arise in the computation of calendar months or years, in which individual days are not counted. Applying the rule to "bump" the beginning of a calendar period forward fundamentally misses the purpose of the rule.

Merriweather, 107 F. 3d at 400.

Thus, the key question is not when to start counting a period measured in months or years, but instead, when does the period end? Trial Rule 6(A) says that the last day of the period must be counted unless it falls on a weekend, holiday, or other day that the office in which the act in question is to be done is closed for business. In the case of periods measured in calendar months or years, that last day is the anniversary date of the triggering event.

The anniversary method is logical and straightforward. It becomes more complicated only when the triggering event happens on a calendar day that does not have a counterpart at the end of the statutory period. In those circumstances, the statutory period ends on the last day of the period's terminal month. *See Yadweb*, 489 F. Supp. at 719 (explaining that notices of denial mailed on March 30 or 31 would carry a deadline of April 30, etc.). At least one court has also found that a limitation period's end date falls on the last day of the period's terminal month whenever the triggering event occurs on the last day of a month, even where the terminal month has more days than the month in which the triggering event occurred. *See Tribue*, 826 F.2d at

635 (holding that six-month limitation period that was triggered by April 30 mailing ended on October 31). Of course, BP filed its return in the middle of the month, so neither of those scenarios is reflected in these appeals.

Lake County, seeks to distinguish *Tribue, McDuffee*, and like cases on grounds that they involved limitations periods requiring an action to be taken "within" a given period, while Ind. Code § 6-1.1-16-1(a)(1)(B) requires a township assessor to make any change to a taxpayer's assessment on or before four months "from" the relevant triggering event. *Tr. at 31-32.* Lake County, however, does not point to any case law to support that distinction.

Lake County's inability to point to authority supporting that distinction is not surprising; the Board's own research has not uncovered any. More importantly, by focusing solely on subsection (a)(1)(B), Lake County ignores relevant statutory language. When viewed more completely, the statute reads as follows: "[A]n assessing official . . . may not change the assessed value claimed by a taxpayer on a personal property return unless the assessing official . . . takes the action . . . *within* the following periods: (1) A township assessor (if any) must make a change . . . on or before: . . (B) [F]our (4) months *from* the date the personal property return is filed . . ." I.C. § 6-1.1-16-1(a)(2009 supp.)(emphasis added). Put more succinctly, a township assessor must act *within* four months *from* the taxpayer filing its return.

Thus, the limitation period in these appeals closely resembles the FTCA limitation period at issue in cases that Lake County seeks to distinguish. Under the FTCA, a plaintiff needed to sue "within six months after" an agency mailed notice of its determination denying the plaintiff's claim. *Tribue,* 826 F.2d at 634. One might even argue that Ind. Code § 6-1.1-16-1(a)(1)(B)'s use of the word "from" instead of "after" presents an even less compelling argument for calculating the end date as a day past the anniversary date of the triggering event. In reality,

though, using the term "from" instead of terms like "after," "beginning on," or "commencing" makes little difference; they all refer back to a triggering event. And, as explained in *Merriweather*, Trial Rule 6(A) simply directs courts to treat the day of that triggering event as the zero point in calculating the statutory period. *See Merriweather*, 107 F.3d at 400 (interpreting Fed. R. Civ. P. 6(a)).

Of course, Trial Rule 6(A)'s directive not to count the last day of a period if that day falls on a weekend, holiday, or other day that the office in which the act that is to be done is closed arguably might still apply. But in this case, October 11, 2007—the four-month anniversary of BP filing its returns—fell on a Thursday. That day was not a state holiday, and Lake County has not alleged that the North Township Assessor's office was closed during regular business hours on that day.

C. As a matter of law, BP substantially complied with the statutes and regulations governing personal property taxation and did not file fraudulent returns.

Determining that local assessing officials failed to change BP's self-reported assessment within Ind. Code § 6-1.1-16-1's deadlines does not, by itself, dispose of BP's appeals. The legislature has prescribed two situations in which those deadlines do not apply:

> (d) This section does not apply if the taxpayer:
> (1) fails to file a personal property return which substantially complies with this article and the regulations of the department of local government finance; or
> (2) files a fraudulent personal property return with the intent to evade the payment of property taxes.

I.C. § 6-1.1-16-1(d)(2009 supp.). Lake County argues that both exceptions apply, although it did not forthrightly raise a claim under the second exception until the summary judgment hearing. The Board will address each claim in turn.

1. BP substantially complied with relevant statutes and regulations.

Lake County points to three ways in which it claims that BP did not substantially comply with the statutes and regulations governing personal property taxation: (1) BP failed to report all of its property for "assessment and taxation," (2) BP failed to follow Ind. Code § 6-1.1-10-13, and (3) BP failed to disclose the nature of property that it claimed as exempt. The first two claims are closely related and the Tax Court rejected them in *BP I*. The third arguably presents the Board with slightly different facts than *BP I* and merits a more-detailed analysis.

a. BP did not fail to report its property for assessment and taxation when it followed the DLGF's directions by listing the cost for the equipment it claimed as exempt and deducting that cost in calculating its self-reported assessment.

As it did in *BP I*, Lake County argues that much of BP's supposed air pollution control equipment did not meet the statutory requirements for exemption, and that BP therefore failed to comply with statutory and regulatory reporting requirements when it excluded the equipment's cost in calculating its self-reported assessments. Specifically, Lake County points to language in 50 IAC 4.2-2-5 requiring an owner of property subject to assessment and taxation to report "such property for assessment and taxation on [its] personal property tax return on Form 102 or Form 103 . . . ." 50 IAC 4.2-2-5(b)(2010).

Lake County made a virtually identical claim in *BP I*, which the Board rejected. The Board noted that neither the property tax statutes nor the DLGF's current regulations defined "substantial compliance." *BP I (Board)*, slip op. at 14 (Ind. Bd. of Tax Rev. August 19, 2009). The Board therefore sought guidance from, among other things, 50 IAC 4.2-2-10 (2004). *BP I (Board)* slip op. at 15-17. That regulation, which has since been amended, interpreted Ind. Code 6-1.1-37-7(e)—the statute that addresses when to assess penalties against a taxpayer for undervaluing or omitting property. The regulation explained that, if a taxpayer complied with all

the requirements for claiming an exemption, an assessment increase resulting from that exemption being denied was considered an "interpretive difference" and was not subject to the penalty for omitting or undervaluing property. 50 IAC 4.2-2-10(d)(2004). Thus, reasoned the Board, where a taxpayer fully reports all the equipment that it claims as exempt together with that equipment's cost, acquisition date, and tax-life, the taxpayer substantially complies with the DLGF's disclosure rules. *BP I (Bd.),* slip op. at 17. The mere fact that an assessor later disallows some or all of the taxpayer's claimed exemption is simply an interpretive difference. *Id.*

The Tax Court agreed with the Board. The Tax Court, however, had the benefit of some additional material that was not before the Board. While *BP I* was pending before the Tax Court, the DLGF intervened to express its interpretation of "substantial compliance." *BP I,* 930 N.E.2d at 1251. Citing to *Hamill v. City of Carmel,* 757 N.E.2d 162, 165 (Ind. Ct. App. 2001), the DLGF explained that "substantial compliance with [statutory and] regulatory requirements means compliance to the extent necessary to assure the reasonable objectives of the [statute and] regulation are met." *Id*. at 1252; *see also, BP Ex. K.* Thus, the Tax Court examined whether BP's complete return package, which 50 IAC 4.2-2-10(d) defined as "the return form (Form 102 or 103). . . and all necessary supplemental forms and supporting schedules which must be filed with the return," substantially undermined the objectives of the statutes and regulations relating to claiming exemptions for air pollution control systems. *BP I*, 930 N.E.2d at 1251-52 (quoting 50 IAC 4.2-2-10(d)(2004)).

Like the Board, the Tax Court found Ind. Code § 6-1.1-37-7 and 50 IAC 4.2-2-10 helpful to its analysis, because "they both emphasize the importance of the full disclosure and accurate reporting requirements and reveal what kind of taxpayer actions or reporting errors run afoul of

those requirements." *Id*. at 1256 n.14. Thus, the Tax Court explained, "Indiana's personal property tax system is not designed to penalize those taxpayers who claim an exemption in error but have nonetheless complied with its recordation requirements." *Id*. at 1255-56. The Tax Court therefore held that, even assuming that BP's exemption claim was erroneous, BP did not fail to substantially comply with either Ind. Code § 6-1.1-3-9 or 50 IAC 4.2-2-5 simply because it excluded the cost of its purportedly exempt property in calculating its reported assessment. *Id*. at 1256. The Lake County Assessor's argument to the contrary "elevat[ed] form over substance." *Id*.

In light of the holdings of the Board and Tax Court in *BP I*, the Board finds that BP did not fail to substantially comply with Article 1.1 or 50 IAC 4.2-2-5(b) merely because BP excluded the cost of the equipment that it claimed as exempt when it calculated its personal property assessments.

b. BP substantially complied with Ind. Code § 6-1.1-10-13.

In a closely related argument, Lake County claims that BP failed to comply with Ind. Code § 6-1.1-10-13—the statute laying out the procedures for claiming an air pollution control exemption. As the Board noted in *BP I*, the regulations in effect at the time of those appeals did not exactly mirror that statute. *BP I (Board)*, slip op. at 12-13. The statute calls for a taxpayer to claim an air pollution control exemption on its return by describing the purportedly exempt property and stating its assessed value. I.C. § 6-1.1-10-13(a)(2009 supp.). The township or county assessor then reviews the taxpayer's claim and reduces the assessment by the allowed exemption amount (if any). I.C. § 6-1.1-10-13(c)(2009 supp.).

By contrast, the regulations and return forms in effect when BP filed its 2004-2007 returns did not require a taxpayer claiming an air pollution control exemption to separately list

the assessed value of its purportedly exempt property. 50 IAC 4.2-1-11-5 (2004)[8]; *BP Exs. C-D.* Instead, the regulations required a taxpayer to claim an air pollution control exemption on Form 103-P, which was defined as part of the taxpayer's return. 50 IAC 4.2-11-5(b)(2004); 50 IAC 4.2-15-11(d)(2004). That form, in turn, directed the taxpayer to list the acquisition date for each piece of air pollution control equipment along with its tax life and cost. *BP Exs. C-D.* Line 4 of Form 103, Schedule A then directed the taxpayer to deduct the cost of the air pollution control equipment listed on Form 103-P from the total cost of the taxpayer's tangible depreciable personal property. *Id.* So the cost of the air pollution control equipment was not included in what the taxpayer reported as its total assessment.

According to Lake County, by neither separately stating the purportedly exempt property's assessed value nor including that value in its reported assessment, BP failed to comply with Ind. Code § 6-1.1-10-13. In Lake County's view, BP impermissibly shifted the assessor's burden: under the statute, an assessor simply has to reduce a taxpayer's assessment if he agrees with the taxpayer's exemption claim, whereas BP's return forced the North Township Assessor to increase BP's assessment if he disagreed with that claim. Thus, contends Lake County, BP's reporting method brought Ind. Code § 6-1.1-16-1's deadlines into play in a situation where the legislature did not intend for those deadlines to apply. And because the DLGF cannot amend a statute, Lake County argues that BP's compliance with the return forms' directions does not matter.

[8] On February 26, 2010, the DLGF repealed 50 IAC 11and promulgated a new rule, 52 IAC 11.1. The first section of that new rule contains three subsections that mirror Ind. Code § 6-1.1-10-13. 50 IAC 11.1-1(c)-(e). The return forms, however, still call for a taxpayer to deduct the cost of its air pollution control equipment from the total cost of its tangible depreciable personal property and do not call for the taxpayer to separately state the equipment's assessed value. *See* http://www.in.gov/dlgf/8516.htm (accessed August 25, 2010)(copies of State Form 11405 R29/12-09 (Form 103 Long) and State Form 24056 R8/1-06 (Form 103-P)).

Lake County made the same argument to the Tax Court in *BP I*. Once again, however, the Tax Court rejected Lake County's position, explaining:

> [T]he forms streamline the statute's directives: on the one hand, an assessor need not alter the return form if he allows the exemption; on the other hand, an assessor may alter the form if he disallows any portion of the exemption. In turn, the assessed value of the non-exempt property may be ascertained from the information recorded on the forms. As a result, substantial compliance with the directives of the forms results in substantial compliance with the assessed value directives of Indiana Code § 6-1.1-10-12.[9]

BP I, 930 N.E.2d at 1256.

As it did in 2004-06, BP once again substantially complied with the directives in the DLGF's forms. The Board therefore follows the Tax Court's holding and finds that BP did not fail to substantially comply with Ind. Code § 6-1.1-10-13 simply because it failed to separately state the assessed value of its air pollution control equipment and excluded the cost of that equipment in calculating its self-reported assessment.

c. BP substantially complied with the statute and regulation requiring it to describe the nature of the equipment that it claimed as exempt.

Lake County also claims that BP failed to comply with Ind. Code § 6-1.1-3-9 and its regulatory counterpart, 50 IAC 4.2-2-5(a). Although worded slightly differently, both the statute and the regulation require a taxpayer to fully and completely disclose all information required by the DLGF relating to the value, nature, or location of personal property that the taxpayer owned, held, possessed, or controlled on the assessment date. I.C. § 6-1.1-3-9(a)(2009 supp.); 50 IAC 4.2-2-5(a)(2010).[10]

[9] Although the Tax Court cited to Ind. Code § 6-1.1-10-12 at the end of the quotation, the Board infers from context that the Court was actually referring to § 6-1.1-10-13.

[10] Subsection (a) of the current rule is materially the same as it was on the dates relevant to BP's appeals. In 2010, the DLGF amended subsection (a), making minor grammatical changes and replacing a reference to the now defunct State Board of Tax Commissioners. 50 IAC 4.2-2-5(a) (Dep't of Local Gov't Fin. filed Feb. 26, 2010, 2:43 p.m. 20100324-IR-05009058FRA).

Lake County claims that, by "employing uninformative descriptions and wrongly characterizing [REDACTED] of dollars worth of primary production equipment as exempt air pollution control equipment on the Form 103s," BP failed to fully, completely, and truthfully disclose the nature of its personal property. *Lake County Response at 14.* That argument has two related components: (1) that BP claimed as exempt equipment that did not meet the statutory elements of a stationary or unlicensed mobile air-pollution control system, and (2) that BP's returns failed to identify with particularity a substantial amount of the equipment that it claimed as exempt.

i. The mere fact that BP's equipment ultimately may not be entitled to an exemption does not equate to a failure to describe the property's nature.

The first part of Lake County's argument closely mirrors its claim that BP failed to report all of its property "for assessment and taxation." Both flow from Lake County's position on the merits of BP's exemption claim. In *BP I,* however, the Tax Court rejected the Lake County Assessor's argument that BP's exemption claim was somehow fraudulent, untruthful, or made in bad faith simply because BP might not be entitled to an exemption. *BP I,* 930 N.E.2d 1255-56. As the Tax Court explained, "a taxpayer's inaccurate determination that its personal property qualifies for an exemption, *without something more*, is insufficient to support a finding that the taxpayer's returns failed to substantially comply with the [Air Pollution Control System] statutes in general." *Id.* at 1256 (emphasis added). And the Tax Court found that the designated evidence raised no factual dispute as to the veracity of BP's returns or that BP filed its exemption claim in bad faith. *Id.* at 1255.

So the question becomes: has Lake County pointed to "something more" than BP simply having claimed an exemption to which it may not ultimately be entitled? Lake County apparently argues that BP somehow acted in bad faith or dishonestly because [REDACTED] of

dollars worth of equipment that BP claimed as exempt was really "production equipment" that BP primarily used to produce gasoline and other saleable products. *Lake County Response at 2-3, 13-15*. According to Lake County, such equipment does not meet the elements for exempt air pollution control equipment set forth in Ind. Code § 6-1.1-10-12. That statute provides, in relevant part:

> Sec. 12. (a) Personal property is exempt from property taxation if:
> (1) it is part of a stationary or unlicensed mobile air pollution control system of a private manufacturing, fabricating, assembling, extracting, mining, processing, generating, refining, or other industrial facility;
> (2) it is not primarily used in the production of property for sale;
> (3) it is employed predominantly in the operation of the air pollution control system;
> (4) the air pollution control system is designed and used for the improvement of public health and welfare by the prevention or elimination of air contamination caused by industrial waste or contaminants;
> (5) a sanitary treatment or elimination service for the waste or contaminants is not provided by public authorities; and
> (6) it is acquired for the purpose of complying with any state, local, or federal environmental quality statutes, regulations, or standards.

I.C. § 6-1.1-10-12 (2009 supp.).

Lake County's dispute with BP centers on BP's [REDACTED] and other equipment that it uses to remove sulfur from feedstocks and fuel components. There is no dispute, however, that federal regulations limit the sulfur content of fuels sold by refiners. Those regulations do so because sulfur contributes to air pollution. *See, e.g.*, 42 U.S.C. § 7545 (giving EPA Administrator the authority to control the manufacture or sale of fuel if, in the Administrator's judgment, the fuel or emission product of the fuel contributes to air or water pollution or significantly impairs the performance of emission control devices); *see also*, 65 Fed. Reg. 6698, 6703 (Feb. 10, 2000)(adopting gasoline sulfur regulations because sulfur in gasoline used by Tier 1 and LEV technology vehicles contributes to ozone pollution, air toxics, and particulate matter and because sulfur will impair the emissions control systems expected to be used in Tier 2

vehicles and LEVs). Indeed, BP's expert, David Wall, indicated that [REDACTED] is the industry-wide standard for meeting federal regulations and standards for sulfur content in fuels. *Wall Report at 8-9, 13-14.*

On the other hand, BP hydrotreated feedstocks and fuel components long before the 1990 amendments to the Clean Air Act. *E.g., 2004-06 dep. at 113; see also, BP Exs. C-D* (listing acquisition dates for various pieces of [REDACTED]). And BP continues to use its [REDACTED] and other sulfur-removal equipment, among other things, to [REDACTED]. *2004-06 dep. at 392-93, dep. Ex. 28 at BP000323; 2007 dep. at 138-39, 199-200; Speight Report at 14-15.* As Lake County pointed out, [REDACTED]. *2007 dep. at 106, 111-12; dep. Ex. 8 at BP008388*. Also, in various capital appropriation documents, BP described the purposes of projects related to its [REDACTED] and other sulfur-removal equipment in terms of [REDACTED]. *See e.g., BP 2004-06 dep. Exs. 8, 12, 20, 28, 45; BP 2007 dep. Ex. 5.* Similarly, BP's operating/training manual for the [REDACTED] describes [REDACTED]. *2007 dep. at 105, dep. Ex. 8 at BP008376.* Plus, BP uses its [REDACTED] , in part, to [REDACTED]. *E.g. 2007 dep. at 126-27; 2004-06 dep. at 205-06.*

In light of those facts, Lake County may have an argument that BP is not entitled to an exemption for much of its [REDACTED] and other sulfur-removal equipment. Indeed, Lake County filed a motion for partial summary judgment asking the Board to find that BP's [REDACTED] were not exempt as a matter of law. *See Lake County's Brief in Support of Partial Motion for Summary Judgment at 1*.

Of course, the exemption statute neither requires equipment to be used exclusively to prevent or eliminate air pollution nor prohibits a taxpayer from using the equipment to produce a product for sale, as long as that is not the equipment's primary use. *Amax, Inc. v. Sate Bd. of Tax*

Comm'rs, 552 N.E.2d 850, 852 (Ind. Tax Ct. 1990). One therefore should not be too surprised that BP's capital appropriation documents would focus on how any project was likely to affect profitability even if the project's purpose was to comply with regulations for removing contaminants. Similarly, describing [REDACTED] does not necessarily conflict with BP's position that it uses its [REDACTED] primarily to comply with sulfur regulations; absent such compliance, BP could not sell the fuel at all. In the same vein, the mere fact that BP used [REDACTED], in part, to recover and sell [REDACTED] does not automatically exclude those units from qualifying for an exemption, although the sheer level of [REDACTED] sales gives one pause.

In any event, the facts that Lake County points to do not equate to bad faith by BP. As long as BP had a good-faith belief that its equipment met Ind. Code § 6-1.1-10-12's requirements, the fact that the equipment may not ultimately be entitled to an exemption is an interpretive difference. Given the federal statutory and regulatory requirements for removing sulfur from fuel and the role of BP's equipment in removing that contaminant, Lake County has not designated any evidence to support a reasonable inference that BP was dishonest or acted in bad faith simply because BP claimed its [REDACTED] and other sulfur-removal equipment as exempt.

That is particularly true in light of the Tax Court's decision in *Amax*—the only reported decision interpreting Ind. Code § 6-1.1-10-12. In *Amax*, the Tax Court reversed the State Board of Tax Commissioners' determination and held that equipment that a coal producer used to wash its coal was exempt as part of an air pollution control system. By washing its coal, Amax removed impurities like rock and dirt. *Amax*, 522 N.E.2d at 850. The washing both increased the coal's per-unit sale price and decreased Amax's transportation costs. *Id.* And because

washing removed sulfur and ash, it produced cleaner coal. *Id*. at 851. Before 1970, Amax had sold mostly unwashed coal. That changed in the early 1970s when the federal government imposed stringent emission standards on utility companies. *Id.* One way those companies met the new standards was by burning cleaner coal. *Id*. After Amax installed new washing facilities, it no longer sold unwashed coal. And after Congress passed the Clean Air Act, Amax's customers no longer demanded unwashed coal. *Id*.

Like Lake County in this case, the State Board contended that Amax did not predominately employ its coal-washing equipment in operating an air pollution control system and that Amax instead used that equipment primarily to produce property for sale. *Id.* at 854, 856-57.

In determining whether Amax's washing equipment was predominately employed in an air pollution control system, the Tax Court looked to the following factors that the Indiana Court of Appeals had examined in construing similar language under Ind. Code § 6-1.1-10-9:[11] (1) federal law required the function, (2) the equipment was used only for pollution-control activity and not in producing coal, (3) the activity that the equipment performed was necessary to comply with federal law, and (4) the government had recognized that the activity that the equipment performed was an effective method of meeting those standards. *Id*. at 855 (citing *Dep't of Envtl. Mgm't v. Amax, Inc*., 529 N.E.2d 1209 (Ind. Ct. App. 1988)). The court also looked to two other sources: (1) Ind. Code § 6-1.1-10-36.3(a), which says that property is predominately used or occupied for one or more stated purposes when it is used or occupied for those purposes more than 50% of the time that it is used or occupied in the year that ends on the property's assessment date; and (2) case law defining the word "predominately" as "something that is 'reasonably necessary . . . and not just related to the exempt purposes.'" *Id*. at n.1 (quoting *St. Mary's*

[11] That statute provides an exemption for industrial waste control facilities.

Medical Center of Evansville, Inc. v. State Bd. of Tax Comm'rs, 534 N.E.2d 277, 279 (Ind. Tax Ct. 1989). Thus:

> [E]ven though washing coal was not required by law when the washers were installed, Amax's customers were required to meet federal emissions standards and the only manner in which they could achieve this was to burn cleaner coal. While there were some alternative means of producing cleaner coal, the only feasible and economic way for Amax to sell cleaner coal was to wash it. The only function the washing equipment performed was to wash the coal; it played no other role in the production process. In the present case, washing the coal was the precise operation that the air pollution control system performed. The washing equipment performed no other function but to clean the coal. A reasonable person could not view the record in its entirety and conclude that the coal washing equipment was not used or employed predominately in the operation of the air pollution control system because, indeed, the coal washing equipment was the air pollution control system.

Id. at 855.

Turning to the second question—whether Amax's coal-washing equipment was primarily used to produce property for sale—the Tax Court began by noting that "[w]ashing the coal increased its utility to Amax's customers; thus, the washing equipment was used in the production of property for sale." *Id*. at 857. To determine whether that was the equipment's *primary* use, the court looked to interpretations of the term "primary" in other states' air pollution control statutes. *Id*. at 858. Borrowing from a decision by the Maine Supreme Court, the Tax Court found that Amax needed to prove that its washing equipment was not "fundamental, basic, or principal to the production of property for sale, but [was] instead, merely incidental or secondarily used" in producing property for sale. *Id*. (citing *Statler Indus. v. Bd. of Envtl. Protection*, 333 A.2d 703, 706-07 (Me. 1975)).

Applying that test to the facts before it, the Tax Court found that the washing equipment was not fundamental to producing property for sale. While the State Board had relied on Amax's statement that it could not sell its coal unless it had been washed, the Tax Court noted

that Amax had produced and sold coal long before the Clean Air Act was passed and Amax installed the washers. *Id*. at 858-59. Thus, the Tax Court explained:

> The coal washing equipment has no other effect on the coal but to make it cleaner. It serves no other function in the production process such as producing steam or heat to improve productivity. The coal does become more valuable after the washing process because it contains a higher percentage of BTU's (heat units) and because Amax's utility customers are able to meet the standards set by the EPA. However, this does not mean that the washing equipment is primarily used in the production of property for sale. Almost any facet of the production process will, at least, marginally, increase the value of the end product. . . .

Id. at 859. Instead, the Tax Court found that washing equipment was fundamental, basic, principal, or primarily used to control air pollution. The court reasoned that, without the equipment, the coal would not have been washed, the impurities would not have been removed, and Amax could not have enabled its customers to meet the EPA's emissions standards. *Id.*

There are many similarities between BP's [REDACTED] equipment and the coal-washing equipment at issue in *Amax*. Both removed contaminants that cause air pollution when burned. And by removing those contaminants, both increased the value of the taxpayers' respective products. In fact, neither BP nor Amax could sell its product without removing those contaminants. Of course, there are relevant differences as well. For example, unlike Amax, which apparently did not own most of its coal washing equipment until the Clean Air Act was passed, BP hydrotreated fuels long before amendments to the Clean Air Act and corresponding regulations required refineries to remove sulfur. And much of the [REDACTED] equipment at issue predates those amendments and regulations, although BP claims that it modified or repurposed the equipment in response to the new regulations.

The Board need not decide whether *Amax* ultimately compels a decision either for or against BP on its underlying exemption claim; that question is beyond the scope of what is relevant to BP's summary judgment motion. The point is that both sides have colorable

arguments under *Amax*. Thus, the designated evidence does not support a reasonable inference that BP acted in bad faith when it claimed an air pollution control exemption for its [REDACTED] and other sulfur-removal equipment.

Nor were BP's returns "deceptive" as Lake County argues. *See Lake County Response, at 3* ("When appropriation numbers were eventually supplied during discovery, it turned out that some of BP's descriptions were simply deceptive."). To support that claim, Lake County pointed to one entry on BP's return for Parcel 093—an item with $[REDACTED] in cost described as [REDACTED] *BP Ex C, Form 103-P at 3 of 9*. Lake County contends that the description was deceptive because BP's own designated representative testified that the appropriation covered "multiple line items associated with the construction of . . . [REDACTED]." *2004-06 dep. at 202; see also 2007 dep. at 23-24*. Therefore, argues Lake County, that equipment related neither to [REDACTED] nor to [REDACTED].[12]

BP's designated representative, however, did not claim to have personal knowledge about the equipment; he instead based his testimony on the project's appropriation numbers. *See 2004-06 dep. at 202*.[13] In his expert's report, David Wall indicated that, although the project was listed under the cost center for the [REDACTED], it actually involved [REDACTED]. *Wall Report, spreadsheet at line 106*. Thus, the deposition testimony of BP's representative does not necessarily contradict the description on BP's return. In any event, Lake County has not designated any evidence to support a reasonable inference that BP intended to deceive Lake County with the listing on its return. Indeed, even if the project related solely to the

[12] NESHAP stands for "National Emissions Standards for Hazardous Air Pollutants." *Speight Aff. at 88*.

[13] "Q. And is it fair to say you can't tell me what these particular line items are?
A. No, I can't.
Q. Take a look –
A. The reference does indicate it's portions of the [REDACTED] though." *2004-06 dep. at 202-03*.

[REDACTED] as Lake County contends, BP's return listed the cost associated with the project under the heading and cost center for that unit.

ii. BP sufficiently described the kind of equipment it was claiming as exempt.

Lake County, however, also argues that BP did not give sufficient detail about the nature of the property that it claimed as exempt. Lake County points to the DLGF Memorandum interpreting what it means to substantially comply with the DLGF's rules, particularly 50 IAC 4.2-2-5(a). According to the DLGF, Form 103-P and Schedule A-3 serve two basic objectives: "(1) they are the means by which a taxpayer seeks an exemption for air pollution control equipment; and (2) they are the means by which the assessing official preliminarily evaluates whether the personal property listed on the form qualifies for the exemption." *Id*. The DLGF goes on to explain:

> Substantial compliance does not require that a taxpayer supply on the form all information necessary for the assessing official to make a determination or automatically waive the exemption. Otherwise, 50 IAC 4.2-15-11(d)(4), which allows for the assessing official to make follow-up inquiries to the taxpayer for additional information, would be a nullity. But substantial compliance *does* require that the taxpayer describe the nature of the personal property claimed for the air pollution control exemption. This can be as simple as a brief, generic description of the kind of air pollution equipment claimed for exemption, such as a filter or scrubber, in addition to an identifier such as an equipment number or other designation that identifies the equipment with particularity.

Id. at 2-3 (emphasis in original).

Lake County claims that, for a substantial amount of the equipment at issue, BP failed to include even a generic description of the kind of air pollution control equipment it was claiming as exempt. The Tax Court, however, rejected essentially the same argument in *BP I*. There, the Lake County Assessor had argued that the "unintelligible" acronyms and "cryptic codes" that BP used on its Form 103-P returns to describe its air pollution control equipment left him unable to discern the equipment's nature. *BP I*, 930 N.E.2d at 1252-53. The court pointed to the basic

function of the return forms—to provide the means for taxpayers to claim an air pollution control exemption and for assessors to "preliminarily" evaluate the propriety of those claims—and explained that a taxpayer "need not provide a description of its property that instantaneously demonstrates to the Assessor that the equipment qualifies for the exemption or how the property is used within the air pollution control system." *Id.* at 1253.

In this case, BP actually went beyond the "unintelligible" acronyms and "cryptic" codes about which the Lake County Assessor complained in *BP I*. Instead, BP grouped the items of cost that it claimed as exempt under the refinery units with which they were associated and described how those units related to the processes that BP characterized as air pollution control. *BP Exs. C-D.* BP therefore provided sufficient information about the kind of equipment at issue to substantially comply with statutory and regulatory reporting mandates.

iii. BP described its air pollution control equipment with sufficient particularity.

Lake County, however, also claims that BP did not describe the equipment at issue with particularity. Lake County points to the fact that BP did not list individual appropriation numbers for numerous items that it claimed as exempt. All told, there were 15 such instances involving a total cost of $[REDACTED], or approximately [REDACTED]% of the total cost that BP reported as exempt air pollution control equipment. Lake County similarly points to a handful of instances from the deposition taken in BP's appeal of its 2004-06 assessments where BP's own designated representatives could not identify what some of the equipment was despite having appropriation numbers and months of advance notice. *Lake County Response at 3-4 (citing 2004-06 dep. at 75, 222, 231, 241, 245, 254).*

Again, the Tax Court's holding in *BP I* guides the Board's analysis. In rejecting Lake County's claim that BP had not adequately identified its purportedly exempt air pollution control equipment, the court explained:

> BP applied a variety of descriptors to what *initially* appears to be approximately 1,478 separate pieces of [air pollution control system] equipment. BP's Returns, however, clearly demonstrate that while BP assigned different labels to this equipment, its distinct cost and acquisition date data shows that it claimed an exemption on the same pieces of equipment during the 2004 through 2006 tax years. For instance, BP's Returns for Parcel No. 28-800256 show that it claimed an exemption on the same 89 pieces of [air pollution control system] equipment for each of the years at issue. Furthermore, the fact that BP's deponent could not explain what [air pollution control system] equipment approximately 11 of its descriptors referenced (even with the aid of a "cheat sheet") does not render BP's Returns substantially non-compliant. Indeed, substantial compliance, in itself, suggests something less than full compliance. Thus, BP's failure to identify approximately 11 pieces of [air pollution control equipment] on a single Return does not mean that either that Return or its other Returns did not *substantially* comply with the "nature" requirement of both Indiana Code § 6-1.1-3-9 and 50 IAC 4.2-2-5.

BP I, 930 N.E.2d at 1253-54 (emphasis in original) (citations and footnotes omitted).

Granted, this case does not involve three years of exemption claims for the Board to cross-reference in determining how precisely BP identified the individual items that it claimed as exempt for 2007. On the other hand, by providing cost-center and appropriation designations, BP identified much of its purportedly exempt equipment more particularly than it had in 2004-06. *See Tr. at 43* (Counsel for Lake County explaining that Lake County could not match $[REDACTED] claim for [REDACTED] on BP's 2007 return to equipment claimed on earlier returns because "in 2004 through '06 . . . there were no appropriation numbers and the descriptions were just incredibly vague."). While BP did not give cost center and appropriation designations for every item, all but two groups of items—both of which appear on the return for

Parcel 256—had at least one of those designations.[14] *BP Exs. C-D.* Similarly, while BP ambiguously reported an item with $[REDACTED] in cost by listing it as part of the [REDACTED] but describing it more particularly as [REDACTED] and BP's own designated representative could not identify a handful of other items even with their corresponding appropriation numbers, those shortcomings do not amount to a lack of substantial compliance. In fact, the items that could not be identified appear to be the same items that BP's representative could not identify in BP's 2004-06 appeals. As the Tax Court pointedly explained, substantial compliance contemplates something less than complete compliance. And BP's returns met that threshold. Thus, viewing the returns as a whole, the Board finds, as a matter of law, that BP substantially complied with the requirement that it describe its purportedly exempt air pollution control equipment with particularity.

2. Lake County did not designate any evidence from which the Board could reasonably infer that BP filed fraudulent returns with the intent of avoiding property taxes.

Finally, Lake County claims that Ind. Code § 6-1.1-16-1(a)(1)(B)'s four-month deadline did not apply because BP filed fraudulent returns with the intent of evading paying property taxes. As explained above, the statute expressly provides that Ind. Code § 6-1.1-16-1's deadlines do not apply in those circumstances. I.C. § 6-1.1-16-1(d)(2). As also explained above, Lake County did not even cite to that statutory exception in its written response to BP's summary judgment motion. At most, Lake County claimed that some of BP's descriptions of its

[14] There were also 14 instances where BP listed [REDACTED] for the acquisition year. Lake County, however, does not raise that as a compliance issue. Indeed, it does not appear that the absence of that information hindered the North Township Assessor. Instead, the Form 113s indicate that he was able to assess the property that he did not believe was exempt by using the costs that BP reported for that equipment and depreciating those costs in accordance with Ind. Code § 6-1.1-3-23. *BP Exs. F-G.* In any event, BP acquired all of the equipment for which it failed to report acquisition dates before 1998. *2007 dep. at 20-21, 24, 29, 30, 33-34, 36, 41, 42-45, 59, 93, dep. Ex. 3.* Thus, all of that equipment would have been entitled to the maximum amount of depreciation. *See* I.C. § 6-1.1-3-23(b) (providing for the true tax value of equipment that is eight years old or older to be determined by multiplying its adjusted cost by 10%).

purportedly exempt equipment were "deceptive." *Lake County Response, at 3.* Beyond that, Lake County did not point to any evidence to support its fraud claim, arguing instead that BP had failed to meet its burden on summary judgment of negating fraud. *Tr. at 44.*[15]

BP, however, did designate evidence negating fraud. On the Form 103-P returns, BP's representative, Adam Stasser, certified under the penalties perjury that those returns were true, correct, and complete to the best of his knowledge and belief. *BP Exs. C-D.* And in a separate designated affidavit, Stasser affirmed that none of the returns were fraudulent or filed with the intent to avoid paying property taxes. *Stasser Aff. at ¶ 4.* Thus, to avoid summary judgment, Lake County needed to point to some evidence creating a material issue of fact as to whether BP's returns were fraudulent.

Lake County failed to do so. As the Board has already explained, the only allegedly deceptive listing that Lake County identified was the item described as [REDACTED]. And as the Board also explained, Lake County has not designated any evidence to support a reasonable inference that BP intended to deceive assessing officials with that listing. Thus, as a matter of law, BP did not file fraudulent returns with the intent to evade paying property taxes.

VI. Other Arguments and Motions

Because the Board's determination that the North Township Assessor's failure to act timely is dispositive, the Board need not decide BP's alternate arguments: (1) that the PTABOA

[15] The ALJ and counsel for Lake County had the following colloquy:

> "MR. PARDO: Is Lake County making a claim under that subsection [Ind. Code § 6-1.1-16-1(d)(2)]?
> MR. BUTLER: Here is our claim on that subsection right now. For purposes of summary judgment, BP has not established that there is no set of facts under which that could be proven, and I think on BP's summary judgment motion, it is their burden to establish that there are no set of facts under which a fraud in this instance could be proven. They have not established that in light of the evidence."

Tr. at 44.

acted beyond the deadline set forth in Ind. Code § 6-1.1-16-1(a)(2) when it issued its Form 115 determinations, and (2) that the North Township Assessor and the PTABOA's untimely actions violated BP's due process rights. Similarly, the Board's determination renders moot the following pending motions: Lake County's Motion for Partial Summary, Petitioners' Motion for Order Assigning Burden of Proof to Respondents, Lake County's Objection and Brief to Exclude BP's Evidence Containing Legal Conclusions, and Petitioners' Motion to Limit or Preclude Certain Testimony by James Speight.

VII. Conclusion

The North Township Assessor issued its Form 113 notices one day past Ind. Code § 6-1.1-16-1(a)(1)(B)'s deadline for changing BP's self-reported assessments. While the statute makes exceptions to that deadline where a taxpayer fails to substantially comply with the statutes and regulations governing personal property assessments or files a fraudulent return, neither exception applies in this case. BP's returns included all of its personal property and cost and identified the nature of the property that BP claimed as exempt. While Lake County disputes the merits of BP's exemption claim, that an interpretive difference rather than a question of reporting compliance, Lake County pointed to no facts from which the Board could reasonably infer that BP acted deceptively, fraudulently, or in bad faith in claiming an exemption on its returns. And to the extent that BP failed to provide all of the information requested by the DLGF's return forms, those departures were minor and did not render BP's returns substantially non-compliant. Thus, under Ind. Code § 6-1.1-16-1(b), the assessments reflected on BP's returns are final.

VIII. Order

The Board grants BP's Motion for Summary Judgment and issues its final determination in favor of BP. The Board therefore ORDERS that each assessment be changed to the amount reported on BP's Business Tangible Personal Property Return.

ORDERED this ___ day of _____, 2010.

_____
Chairman, Indiana Board of Tax Review

_____
Commissioner, Indiana Board of Tax Review

_____
Commissioner, Indiana Board of Tax Review

IMPORTANT NOTICE

- Appeal Rights -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5, as amended effective July 1, 2007, by P.L. 219-2007, and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice. The Indiana Tax Court Rules are available on the Internet at <http://www.in.gov/judiciary/rules/tax/index.html>. The Indiana Code is available on the Internet at <http://www.in.gov/legislative/ic/code>. P.L. 219-2007 (SEA 287) is available on the Internet at <http://www.in.gov/legislative/bills/2007/SE/SE0287.1.html>

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