

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

REPRESENTATIVES FOR RESPONDENT: Rick Freeman, Supervisor of Business Personal  
Property, Center Township, Marion County

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**BEFORE THE  
INDIANA BOARD OF TAX REVIEW**

BANC ONE LEASING CORPORATION,	)	Petition No.:	49-101-02-3-7-00003
	)		
Petitioner,	)	County:	Marion
	)		
v.	)	Township:	Center
	)		
CENTER TOWNSHIP ASSESSOR,	)	Parcel No.:	A127977
	)		Personal Property
Respondent.	)		
	)	Assessment Year:	2002

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

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**May 14, 2004**

**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**

**Issues**

1. The issues presented for consideration were:
  1. *Whether the error described is correctable on a Form 133; and*
  2. *Whether the Petitioner was correctly assessed for the personal property in question.*

## **Procedural History**

2. Pursuant to Ind. Code § 6-1.1-15-12, Banc One Leasing Corporation (Petitioner) filed a Form 133 Petition for Correction of an Error petitioning the Board to conduct an administrative review of the above petition. The Form 133 petition was filed with the Board on August 6, 2003. The Marion County Property Tax Assessment Board of Appeals (PTABOA) issued a Final Determination on July 25, 2003.
3. On the Form 133 petition, the Petitioner claims the PTABOA determination was incorrect because the agreement with Design Printing is a financing agreement and that Design Printing held title to the equipment and was responsible for filing and paying the property taxes. The PTABOA denied the Form 133 petition stating that the Petitioner did not respond to the Form 113 notice within 45 days.
4. On December 9, 2003, the Board dismissed the Form 133 petition for failure to follow statutory procedure.
5. The Petitioner filed a request for rehearing on the matter on December 10, 2003.
6. On December 23, 2003, the Board issued an order granting the rehearing request. The Board decided to confine its review to the written record and ordered additional documents be provided.
7. On January 20, 2004, the Petitioner responded requesting a hearing before the Board and providing the additional documents.
8. The Board issued a Notice of Hearing scheduling a hearing on the Form 133 petition for March 22, 2004.

## Hearing Facts and Other Matters of Record

9. Pursuant to Ind. Code §§ 6-1.1-15-4 and 6-1.5-4-1, a hearing was held on March 22, 2004, in Indianapolis, Indiana before Beth Hammer, the duly designated Administrative Law Judge (ALJ) authorized by the Board under Ind. Code § 6-1.5-3-3.
10. The following persons were present at the hearing:
- For the Petitioner:  
Mr. Brent Auberry, BAKER & DANIELS
- For the Respondent:  
Mr. Rick Freeman, Supervisor of Business Personal Property, Center Township
11. The following person was sworn in as a witness and presented testimony:
- For the Petitioner:  
Mr. Brent Auberry
- For the Respondent:  
Mr. Rick Freeman
12. The following exhibits were presented at the hearing:
- For the Petitioner:
- A brief containing the following Exhibits:
- 1 – Contract with Design Printing Company
  - 2A – Affidavit of Kitty I. Guinsler dated March 3, 2004
  - 2B – Affidavit of Kitty I. Guinsler dated January 16, 2004
  - 3 – Form 113 Notice of Assessment
  - 4 – Form 133 petition
  - 5 – Rehearing Request
  - 6 – Response to Rehearing Request – *contains confidential information*
  - 7 – Notice of Hearing on Petition – Board Rehearing
  - 8 – List of Witnesses & Exhibits

For the Respondent:

None

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

Board Exhibit A - Form 133 Petition  
Board Exhibit B - Notice of Appearance for Mr. Auberry  
Board Exhibit C - Order of Dismissal and Final Determination  
Board Exhibit D - Rehearing Request by Petitioner  
Board Exhibit E - Order to grant rehearing request  
Board Exhibit F - Response to order to grant rehearing request - *contains confidential information*  
Board Exhibit G - Notice of Hearing and order to set hearing date  
Board Exhibit H - List of Witnesses & Exhibits  
Board Exhibit I - Witness testimony & Exhibits

14. The subject property is personal property located at 626 N. Illinois Street, Center Township, Marion County. The ALJ did not view the subject property.

### **Objections and Evidentiary Matters**

15. 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(l)(1) and rule 52 IAC 2-7-1. *Auberry argument.*
16. 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.
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, 6-1.5 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 Ind. Code § 6-1.1-15-4.

### **Indiana's 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 person, including any firm, company, partnership, association, corporation, fiduciary, or individual owning, holding, possessing, or controlling personal property with a tax situs within Indiana on March 1 of any year is required to file a personal property tax return on or before May 15 of that year unless an extension of time to file is obtained. *See* 50 IAC 4.3-2-2.

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

22. The Board does not undertake to reassess property, or to make the case for the petitioner. The Board bases its decision upon the evidence presented and the issues raised during the hearing. *See Whitley Products, Inc. v. State Bd. of Tax Comm'rs*, 704 N.E.2d 1113, 1118-1119 (Ind. Tax Ct. 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*, 704 N.E.2d at 1119 (Ind. Tax. Ct. 1998); *Herb v. State Bd. of Tax Comm’rs*, 656 N.E.2d 890, 893 (Ind. Tax Ct. 1995). [‘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, 1024-1025 (Ind. Tax Ct. 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 Board in its evaluation of the evidence. *See generally, Heart City Chrysler v. State Bd. of Tax Comm’rs*, 714 N.E.2d 329, 333 (Ind. Tax Ct. 1999). [‘Conclusory statements’ are statements, allegations, or assertions that are unsupported by any detailed factual evidence.]
26. The Board will not change the determination of the County Property Tax Assessment Board of Appeals unless the petitioner has established a ‘prima facie case’ and proven, by a ‘preponderance of the evidence,’ both the alleged error(s) in the assessment and specifically what the assessment should be. *See Clark v. State Bd. of Tax Comm’rs*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998); *North Park Cinemas, Inc. v. State Bd. of Tax Comm’rs*, 689 N.E.2d 765 (Ind. Tax Ct. 1997). [A ‘prima facie case’ is established when the petitioner has presented enough probative and material (i.e. relevant) evidence for the Board (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 Board that it outweighs all evidence, and matters officially noticed in the proceeding, that is contrary to the petitioner’s position.]

## Discussion of the Issues

27. The Petitioner contends that they are being assessed for property that they do not own, hold, possess, or control. The Petitioner also contends that a Form 133 petition can be used to correct the described error.
28. The Respondent contends that Design Printing disclosed the property in question on a Form 103-N as being assessable to the Petitioner. The Respondent sent a Form 113 notice to the Petitioner for the property located at Design Printing. The Respondent contends that the Petitioner did not respond to the Form 113 notice within the 45-day time limitation.
29. The applicable statutes and rules governing these Issues are:  
**Ind. Code § 6-1.1-15-1**  
**Ind. Code § 6-1.1-15-12**  
**Ind. Code § 6-1.1-2-4**  
**Ind. Code § 6-1.1-3-9**  
**50 IAC 4.3-8**
30. Evidence and testimony considered particularly relevant to this determination include the following:
- A. The Petitioner entered into a contract with Design Printing on January 19, 2000. *Pet Ex. 1*. The terms of the contract state that it is a secured debt financing transaction; Design Printing is the lawful owner of the equipment; and title to the equipment shall remain with Design Printing at all times. *Pet. Ex. 1 at 2*.
- B. The Petitioner did not report or disclose the equipment in question on its 2002 personal property tax return. *Pet. Ex 6 at attached Ex. 4*. However, the Petitioner did report other equipment that was leased to Design Printing. *Id.*
- C. Design Printing disclosed on its personal property tax return that it was in possession of the equipment in question, but that Banc One was liable for the taxes on the equipment. *Freeman testimony*.

- D. On December 27, 2002, the Respondent sent a Form 113 Notice of Assessment to the Petitioner. The Form 113 notice increased the Petitioner's assessment by \$400,000. *Pet. Ex. 3.* The Form 113 notice states "LEASED EQ TO DESIGN PRINTING ADDED." *Id.*
- E. The Petitioner did receive the Form 113 notice. *Pet. Ex. 2B.* The Petitioner responded to the Form 113 notice by filing a Form 133 petition on April 8, 2003.
- F. The Petitioner provided two affidavits from Kitty Guinsler, Property Tax Supervisor for Banc One Leasing. One affidavit states that the equipment in question is the subject of a financing agreement, not a true lease. *Pet. Ex. 2B.* Both affidavits state that Banc One did not own, hold, possess, control, or occupy the equipment as of the March 1, 2002 assessment date. *Pet. Ex. 2A & 2B.*
- G. The PTABOA denied the Form 133 petition stating that the Petitioner failed to respond to the Form 113 notice within 45 days. *Pet. Ex. 4.*

### **Analysis**

#### *Issue 1 - Whether the error described is correctable on a Form 133*

- 31. 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. 50 IAC 4.2-3-1(b). It further states that at the time notice is given to the taxpayer, the taxpayer shall be informed of their opportunity for review and the procedures they must follow in order to obtain a review. *Id.*
- 32. The Respondent determined that property had been omitted and assessed the property to the Petitioner using a Form 113 Notice of Assessment. *Freeman testimony.*
- 33. Ind. Code § 6-1.1-15-1 is the governing authority when a township assessor makes a change to a personal property assessment. The appeal rights are printed at the top of the Form 113 notice, which describes the action of the Center Township Assessor that the Petitioner is appealing. *Pet. Ex. 3.*



34. Ind. Code § 6-1.1-15-1 clearly states that 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 45 days of the notice. The Petitioner neglected to appeal pursuant to Ind. Code § 6-1.1-15-1.
35. Instead, Petitioner filed a Form 133 petition to appeal the assessment by the Center Township Assessor. *Pet. Ex. 4*. Ind. Code § 6-1.1-15-12 describes the procedures and specific types of errors that are correctable using the Form 133 petition. The Form 133 petition is available only for those errors that can be corrected without resort to subjective judgment. *Hatcher v. State Bd. of Tax Comm'rs*, 561 N.E.2d 852 (Ind. Tax 1990); *Reams v. State Bd. of Tax Comm'rs*, 620 N.E.2d 758 (Ind. Tax 1993).
36. While the Petitioner contends that the Form 133 petition can be used to correct an “error made by the township,” the proper procedure for appealing the action of the township assessor is found in Ind. Code § 6-1.1-15-1, as stated above. The fact that a taxpayer neglected to appeal pursuant to Ind. Code § 6-1.1-15-1 does not allow a second chance to appeal using the procedures found in Ind. Code § 6-1.1-15-12. A Form 133 petition can only be used in the very limited circumstances described in Ind. Code § 6-1.1-15-12 that can be corrected without resort to subjective judgment.
37. Pursuant to Ind. Code § 6-1.1-15-12(c), the following errors are correctable on the Form 133 petition:
- (6) The taxes, as a matter of law, were illegal
  - (7) There was a mathematical error in computing an assessment
  - (8) Through an error of omission by any state or county officer the taxpayer was given credit for an exemption or deduction permitted by law
- Ind. Code § 6-1.1-15-12(a).
38. On the Form 133 petition, the Petitioner checked the box claiming that the taxes, as a matter of law, were illegal. *See Pet. Ex. 4*. The Petitioner contends that they were assessed for property that Petitioner did not own, hold, possess, or control. *Auberry argument; Pet. Ex. 2B*. Petitioner contends that Design Printing was the owner of the subject property and was responsible for the taxes. *Auberry argument*.

39. Ind. Code § 6-1.1-15-12 also lists five other errors that are correctable by the county auditor when the county auditor finds that error exists. *See* Ind. Code § 6-1.1-15-12(a)(1)-(5). One of the errors correctable by the county auditor is “the assessment was against the wrong person,” which applies to this situation. The Petitioner did not say whether or not there had been any attempt to correct the error with the county auditor.
40. The error described by the Petitioner – being assessed for property they did own, hold, possess or control, would fall into the category of taxes that, as a matter of law, were illegal. Therefore, the error described by the Petitioner is correctable on a Form 133 petition.

*Issue 2 – Whether the Petitioner was correctly assessed for the personal property in question.*

41. The Respondent assessed the Petitioner for the property in question that was located at Design Printing. The Respondent based the assessment on the personal property filing of Design Printing, which indicated that the Petitioner was responsible for taxes on property located at Design Printing. *Freeman testimony.*
42. Petitioner did report other property located at Design Printing. Petitioner testified that the reported property is leased property. The Petitioner testified that the property in question is not a lease, but a financing agreement. *Auberry testimony.*
43. The Petitioner presented a copy of the agreement with Design Printing that is titled Financing Lease. *See Pet. Ex. 1.* The Petitioner stated that even though the contract refers to the Petitioner as the “Lessor” and Design Printing as the “Lessee,” the contract is a security interest. The Petitioner stated that it is the substance of the contract not the form that matters. *Pet. Ex. 1; Auberry argument.*
44. Paragraph 6 of the contract states “[t]his Schedule is intended to be a secured debt financing transaction, not a true lease.” *Pet. Ex. 1 at 2.* Paragraph 7 states that Design Printing is the lawful owner of the equipment, and good and marketable title to the equipment shall remain with Design Printing at all times. *Pet. Ex. 1 at 2.*

45. Paragraph 11 of the contract clearly states that Design Printing shall pay any and all taxes. *Pet. Ex. 1 at 3*. It also states that Design Printing shall file all reports or returns concerning any taxes. *Id.*
46. The Board finds that based on the contract, Petitioner has shown that they did not own, hold, possess, or control the property in question. Respondent did not present evidence rebutting this evidence.
47. The Petitioner cannot be assessed for property that it did not own, hold, possess, or control. Ind. Code § 6-1.1-2-4 states that a person holding, possessing, controlling, or occupying any personal property is liable for the taxes, unless the property is assessed in the name of the owner, or the owner is liable for the taxes under contract. In the case at hand, Design Printing was the owner, holder, possessor and controller of the equipment in question, not the Petitioner. As the owner, holder, possessor, and controller, Design Printing is liable for the taxes and should have been assessed. Ind. Code § 6-1.1-2-4.
48. The Respondent contends that the Petitioner should have disclosed the property in question on their personal property return. *Freeman argument*.
49. 50 IAC 4.3-8-1 defines leased property as property that is leased, rented, or otherwise made available to a person other than the owner under a bailment agreement. The subject property does not fit the definition of leased property. *See id.* The subject property is not leased or rented to Design Printing. The agreement is not a lease, but a secured debt financing transaction. Design Printing is the owner of the subject property. *Pet. Ex. 1*.
50. Pursuant to Ind. Code § 6-1.1-3-9(b), the owner of any personal property subject to assessment has the responsibility for reporting such property for assessment. The Petitioner did not own the subject property and was not required to report the subject property. The Petitioner did properly report other property that they did own and which was leased to Design Printing. *See Pet. Ex. 6*.

51. Pursuant to Ind. Code § 6-1.1-3-9(c), the person holding, possessing or controlling any property that is subject to assessment is required to file and attach with the return a complete listing of all not owned property. The Petitioner did not hold, possess, or control the subject property. Therefore, the Petitioner was not required to disclose the property.
52. The Petitioner has shown that they did not own, hold, possess, or control the subject property. Therefore, the Petitioner cannot be assessed for the subject property.

### **Summary of Final Determination**

#### *Issue 1 - Whether the error described is correctable on a Form 133*

53. The Board finds that the error described by the Petitioner is correctable on a Form 133 petition.

#### *Issue 2 – Whether the Petitioner was correctly assessed for the personal property in question.*

54. The Petitioner has shown that they did not own, hold, possess, or control the property in question. Therefore, the Petitioner should not have been assessed for the property in question. The Board hereby orders the added assessment of \$400,000 to be removed and the Petitioner's assessed value to be changed to \$1,668,280 as reported on the return.

The 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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Commissioner, 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.