

**INDIANA BOARD OF TAX REVIEW**  
**Small Claims**  
**Final Determination**  
**Findings and Conclusions**

**Petition No.:** 57-008-09-1-7-00008  
**Petitioner:** Cinema Associates, Inc. and Bruce Babbitt  
**Respondent:** Noble County Assessor  
**Parcel No.:** Business Tangible Personal Property  
**Assessment Years:** 2002, 2003, and 2004

The Indiana Board of Tax Review (“Board”) issues this determination in the above matter, and finds and concludes as follows:

**Procedural History**

1. On August 4, 2009, Cinema Associates, Inc. and Bruce Babbitt filed a Form 130 petition contesting business personal property assessments for 2001-2005. Mr. Babbitt, however, did not form Cinema Inc. until 2007, well after the assessment years at issue in these appeals. *Babbitt testimony; Pet’r Ex. 10*. So the Board will largely refer to Mr. Babbitt as the petitioner throughout these findings and conclusions.
2. On October 28, 2009, the Noble County Property Tax Assessment Board of Appeals (“PTABOA”) issued a determination finding that the taxes were already past the time for which the PTABOA could make any adjustments. *Board Ex. A*. Although the PTABOA appeared to address the assessment years listed on Mr. Babbitt’s Form 130, the front page of the Form 115 determination lists the assessment date at issue as March 1, 2009. *Id.*
3. On December 9, 2009, Mr. Babbitt filed a Form 131 petition with the Board challenging personal property assessments for 2002-2004. Mr. Babbitt elected to have the appeal heard under the Board’s small claims procedures.
4. On June 28, 2011, the Board held an administrative hearing through its designated administrative law judge, Joseph Stanford (“ALJ”).
5. The following people were sworn in and testified:
  - a) Bruce Babbitt<sup>1</sup>
  - b) Kim Gephart, Noble County Assessor
6. Neither the Board nor the ALJ inspected any property at issue in this appeal.

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<sup>1</sup> J. Daniel Brinkerhoff appeared as counsel for Mr. Babbitt and Cinema Associates.

## Findings of Fact

7. On April 23, 2001, Mr. Babbitt entered into a Contract for Conditional Sale of Real Estate under which he agreed to buy real estate and improvements located at 221 Main Street in Kendallville from Northway Cinema, Inc. and David and Cheryl Ann John. *Babbitt testimony; Pet'r Ex. 25; Pet'r Ex. 18.* The contract called for Mr. Babbitt to make a down payment upon executing the contract and to pay the balance of the sale price in installments. *Id.* The sellers agreed to convey title to Mr. Babbitt when he paid the balance of the sale price. *Id.; see also Pet'r Ex. 1.*
8. The sellers had operated the property as a theater, and Mr. Babbitt continued to operate the property as the Strand Theater. *Babbitt testimony.* In April 2007, shortly before he received title to the theater, Mr. Babbitt formed Cinema Associates, Inc. *See Babbitt testimony; Pet'r Exs. 1, 10.*
9. Mr. Babbitt did not buy any personal property, although the sellers left a couple of projectors that were not usable and some display cases that Mr. Babbitt removed shortly after he bought the property. *Pet'r Ex. 2; Babbitt testimony.* The sellers also left some seats that Mr. Babbitt used for awhile, although they were not in good condition and he eventually replaced them. *Id.* Under the contract, Mr. Babbitt agreed to pay real estate taxes beginning with the installment payable in November 2002, and the sellers agreed to pay all real estate taxes due before that installment. *Pet'r Ex. 25 at 2.* But the contract says nothing about personal property taxes. *See Pet'r Ex. 25.*
10. Mr. Babbitt did not file tax returns for 2001 through 2004. *Babbitt testimony.* Neither, apparently, did the sellers. In June of each year from 2001 through 2003, Patricia Wade, the then Wayne Township Assessor, issued a Form 113 Notice of Assessment/Change to "Northway Cinema Inc. (Strand)" at P.O. Box 388, Auburn, Indiana. *Pet'r Ex. 13.* In June 2004, Ms. Wade issued a Form 113 notice to Northway Cinema Inc. at the same address but without any reference to the Strand. *Id.* All of the notices refer to the assessed property being in Wayne Township and two of the notices contain an incomplete street address for the property ("Main St. Kendallville, IN 46755" and "S. Main St. Kendallville 46755"). *Id.*
11. Ms. Wade listed the reason for issuing each Form 113 notice as the failure to file personal property tax forms. *Id.* Ms. Wade estimated the assessed value of the taxpayer's business personal property at steadily increasing amounts: \$66,000 in 2001, \$132,000 in 2002, \$364,000 in 2003, and \$960,000 in 2004. *Id.* Mr. Babbitt did not receive those Form 113 notices. *Babbitt testimony.* Indeed, the taxpayer's address listed on those notices matches neither Mr. Babbitt's business address nor the Strand's address.
12. Mr. Babbitt first discovered something was wrong when he received a tax bill in late 2004 or early 2005. *See Babbitt testimony; see also, Resp't Ex. 2.* It was around that time that Mr. Babbitt also began receiving demand notices. *Babbitt testimony.* Although Mr. Babbitt did not offer copies of the bill or demand notices from 2005, the fact that

later tax bills and demand notices were in the names of Northway Cinema, Inc. or Northway Deli, Inc. leads the Board to find that any bills or notices he received in 2005 were in the name of one of those two entities.

13. On January 26, 2005, Mr. Babbitt's lawyer, Daniel Brinkerhoff, wrote Ms. Wade a letter in which he said the following:

Mr. David John, the principal in Northway Cinema, Inc., was obligated to forward all tax documents that he received in connection with the Strand Theater but obviously failed to do so. Mr. John never forwarded to Mr. Babbitt any of the Form 103-104[s] that you furnished to Mr. John nor did Mr. John forward any of the real estate tax duplicates to Mr. Babbitt. Late last year, Mr. Babbitt after being in touch with the County Treasurer, cleaned up all of the delinquent real estate taxes including penalties and intends to do the same with regard to the Personal Property Tax.

*Resp't Ex. 2.* Mr. Brinkerhoff noted that it appeared that Mr. Babbitt would need to file returns for 2000 through 2004 and indicated that taxes could be adjusted based on those accurate assessed values. *Id.* Ms. Wade responded, among other things, that she had "talked to the State" and that there was nothing Mr. Brinkerhoff could do for the years 2000 to 2004. *Resp't Ex. 1.*

14. Mr. Babbitt filed a business tangible personal property return for 2005, and he filed returns for each year thereafter. *Babbitt testimony; see also, Resp't Ex. 5.* Mr. Babbitt, however, continued to receive documents associated with personal property assessments from earlier years. Thus, for example, he received a tax statement on Treasurer Form TS-1A for 2007 payable 2008 and another tax bill for the same year at his business address. *Pet'r Exs. 20, 22.* That statement includes a substantial amount for "prior year overdue taxes" and the tax bill includes a similar amount for delinquent taxes and penalties. *Id.* Both documents list the taxpayer's name as "Northway Cinema Inc Strand Theater," but they are addressed to 111 Randolph Street, Garrett, Indiana—Mr. Babbitt's business address. *Id.*
15. Mr. Babbitt later received two collection notices from American Financial Credit Services, Inc. *Pet'r Ex. 27.* Both notices are dated May 27, 2009 and demand payment of delinquent personal property taxes. *Id.* One notice is addressed to "Northway Cinema Inc Strand Theater" at Mr. Babbitt's business address and lists an amount due of \$79,380.95. *Id.* The other is addressed to "Northway Deli Inc. The Strand" at the same address and lists a total amount due of \$2,363.14. *Id.* The Noble County Treasurer then filed a record of the delinquencies with the Noble Circuit Court clerk and, on July 29, 2009, American Financial sent follow-up notices threatening to pursue writs of execution to satisfy those judgments. *See Resp't Ex. 11; Pet'r Ex. 18;* Ind. Code § 6-1.1-23-9(c) (2010 repl. vol.) (explaining that when a county treasurer files a record of delinquencies with the circuit court clerk, the record becomes a debt and has the same force and effect as a judgment).

16. Both Northway Cinema and Northway Deli have been administratively dissolved. *Pet'r Exs. 11-22*. Mr. Babbitt has never been a shareholder, officer, agent, or employee of either entity. *Babbitt testimony*. Nonetheless, in response to the collection notices, Mr. Babbitt told Mr. Brinkerhoff to contact the Noble County Treasurer. *Id.* As a result, the Treasurer and American Financial corrected the addresses for Northway Cinema, Inc. and Northway Deli, Inc. in their records. *Id.*; *Pet'r Ex. 18*; *see also, Resp't Ex. 11*.
17. Because of the apparent efforts to collect from Mr. Babbitt, he filed a Form 130 petition with the Assessor to address the 2001-2005 assessments. *See Babbitt testimony; Pet'r Ex. 18*. The PTABOA held a hearing in which the parties addressed the assessment years referenced in that Form 130 petition. *Pet'r Ex. 17*. On the front page of its Form 115 determination, however, the PTABOA listed March 1, 2009, as the assessment year. *Pet'r Ex. 24; Board Ex. A*. And the PTABOA did not identify what it determined the property's assessed value to be. *Id.* On December 18, 2011—after Mr. Babbitt had filed his Form 131 petition with the Board—the PTABOA issued an “Amended” Form 115 determination, in which it identified the assessment year as “March 1, 2001/05” and determined an assessed value of \$664,930. *Pet'r Ex. 16*. The amended determination, however, does not break that number down between years. *Id.*
18. The official record for this matter is made up of the following:
  - a) The Form 131 petition,
  - b) A digital recording of the hearing,
  - c) Exhibits:
    - Petitioner's Exhibit 1: Warrantee Deed
    - Petitioner's Exhibit 7: Proffered 2004 business personal property tax return
    - Petitioner's Exhibit 8: Proffered 2003 business personal property tax return
    - Petitioner's Exhibit 9: Proffered 2002 business personal property tax return
    - Petitioner's Exhibit 10: Information from the Indiana Secretary of State regarding Cinema Associates, Inc.
    - Petitioner's Exhibit 11: Information from the Indiana Secretary of State regarding Northway Cinema, Inc.
    - Petitioner's Exhibit 12: Information from the Indiana Secretary of State regarding Northway Deli, Inc.
    - Petitioner's Exhibit 13: 2001-2004 Form 113/PP assessment notices
    - Petitioner's Exhibit 16: “Amended” Form 115, dated December 18, 2009
    - Petitioner's Exhibit 17: PTABOA Board Hearing Minutes October 14, 2009
    - Petitioner's Exhibit 18: Form 130 petition
    - Petitioner's Exhibit 19: Tax statement dated August 18, 2008 on Treasurer Form TS-1A addressed to Northway Deli, Inc.
    - Petitioner's Exhibit 20: Tax statement dated August 18, 2008 on Treasurer Form TS-1A addressed to Northway Cinema, Inc.
    - Petitioner's Exhibit 21: 2007-pay-2008 property tax bill addressed to Northway

- Deli
- Petitioner's Exhibit 22: 2007-pay-2008 property tax bill addressed to Northway Cinema
- Petitioner's Exhibit 23: Correspondence between Mr. Brinkerhoff and Micah Vincent
- Petitioner's Exhibit 24: Form 115 determination, dated October 28, 2009
- Petitioner's Exhibit 25: Contract for Conditional Sale of Real Estate
- Petitioner's Exhibit 26: August 24, 2009 letter from Mr. Brinkerhoff to Diann Bortner
- Petitioner's Exhibit 27: E-mails between Jamie May and Diann Bortner; two copies of Demand Notice Personal Property Taxes dated May 27, 2009 addressed to Northway Deli; two copies of Demand Notice Personal Property Taxes dated May 27, 2009 addressed to Northway Cinema
- Petitioner's Exhibit 28: Affidavit of Jerry E. Boyd; Bruce A. Babbitt Schedule of Depreciable Assets
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- Respondent's Exhibit 1: January 31, 2004 letter from Kim Gephart to J. Daniel Brinkerhoff
- Respondent's Exhibit 2: January 26, 2005 letter from Brinkerhoff to Patricia G. Wade
- Respondent's Exhibit 3: August 4, 2009 letter from Brinkerhoff to Gephart
- Respondent's Exhibit 4: 2001-2004 Form 113/PP assessment notices
- Respondent's Exhibit 5: 2005-2006 business tangible personal property returns for Bruce Babbitt
- Respondent's Exhibit 6: August 13, 2009 letter from Brinkerhoff to Gephart; August 10, 2009 e-mail from Micah Vincent to Brinkerhoff; two-page document summarizing events leading to appeal; July 29, 2009 Personal Property Tax Writ of Execution Notice to Northway Cinema, Inc; July 29, 2009 Personal Property Tax Writ of Execution Notice to Northway Deli, Inc
- Respondent's Exhibit 7: Memorandum of Contract and Warranty Deed
- Respondent's Exhibit 8: PTABOA Hearing Minutes October 14, 2009
- Respondent's Exhibit 9: "Amended" Form 115 determination, dated December 18, 2009
- Respondent's Exhibit 10: Ind. Code § 6-1.1-3-15; 50 IAC 4.2-2-2
- Respondent's Exhibit 11: Packet (51 pages) with e-mails between Jamie May and Diann Bortner, Noble Circuit Court judgment docket, and computer screenshots regarding Northway Cinema, Northway Deli, Inc., Hudson Enterprises, Inc., Bruce Babbitt, David John, and Cinema Associates
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- Board Exhibit A: Form 131 petition
- Board Exhibit B: Notice of hearing
- Board Exhibit C: Hearing sign-in sheet

d) These Findings and Conclusions.

### Conclusions of Law and Analysis

19. This appeal presents unique and convoluted procedural questions. There are plenty of reasons for the confusion, beginning with Mr. Babbitt failure to file personal property returns for 2002 through 2004 and continuing with local officials' refusal to take corrective action. At the end of the day, the Board concludes that Mr. Babbitt was not validly assessed for personal property located at the Strand Theater for 2001 through 2004.<sup>2</sup>
20. To explain why, the Board turns to the statutes and regulations governing business tangible personal property assessments. Unlike real estate assessments, Indiana's scheme for assessing personal property relies on self-reporting. Thus, every person "owning, holding, possessing, or controlling personal property with a tax situs within the state on March 1 of any year" must file a personal property tax return on or before May 15 of that year unless he gets an extension. 50 IAC 4.2-2-2. If no return is filed, assessors have two options:
- (a) In connection with the activities required by section 14 of this chapter, [regarding verification of returns] or if a person owning, holding, possessing, or controlling any personal property fails to file a personal property return with the township or county assessor as required by this chapter, the township or county assessor may examine:
    - (1) the personal property of the person;
    - (2) the books and records of the person; and
    - (3) under oath, the person or any other person whom the assessor believes has knowledge of the amount, identity, or value of the personal property reported or not reported by the person on a return.
  - (b) After such an examination, the assessor shall assess the personal property to the person owning, holding, possessing, or controlling that property.
  - (c) As an alternative to such an examination, the township or county assessor may estimate the value of the personal property of the taxpayer and shall assess the person owning, holding, possessing, or controlling the property in an amount based upon the estimate. Upon receiving a notification of estimated value from the township or county assessor, the taxpayer may elect to file a personal property return, subject to the penalties imposed by IC 6-1.1-37-7.

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<sup>2</sup> Mr. Babbitt did not own, possess, or occupy the Strand Theater in 2001. And his Form 131 petition lists only 2002-2004 as the assessment years under appeal. Nonetheless, the parties have disputed the 2001 Form 113 notice at various times during the appeal process, as evidenced by Mr. Babbitt's Form 130 petition and the PTABOA's amended Form 115 determination. The Board therefore includes the 2001 assessment year in its discussion.

I.C. § 6-1.1-3-15 (2010 repl. vol.)<sup>3</sup>

21. In any case, an assessor must give the taxpayer notice when she assesses previously un-assessed property:

If a township assessor (if any), county assessor, or county property tax assessment board of appeals believes that any taxable tangible property has been omitted from or undervalued on the assessment rolls or the tax duplicate for any year or years, the official or board shall give written notice under IC 6-1.1-3-20 or IC 6-1.1-4-22 of the assessment or increase in assessment. The notice shall contain a general description of the property and a statement describing the taxpayer's right to a review with the county property tax assessment board of appeals under IC 6-1.1-15-1

I.C. § 6-1.1-9-1 (2010 repl. vol.)<sup>4</sup>; *see also*, I.C. § 6-1.1-9-3(b) (2010 repl. vol.) (“If a taxpayer fails to file a personal property return for a particular year, the taxpayer's personal property may be assessed for that year *only if the notice required by section 1 of this chapter is given* within ten (10) years after the date on which the return for that year should have been filed.”) (emphasis added).

22. To date, there is no evidence that personal property situated at the Strand Theater from 2001 to 2004 has ever been assessed to Mr. Babbitt. And while personal property was assessed to Mr. Babbitt for 2005, it was for the amount reported on his return rather than on any Form 113 notice. True, the Wayne Township Assessor issued Form 113 notices assessing unidentified personal property each year from June 2001 through June 2004. But she assessed that property to Northway Cinema, Inc. and sent the notices to that entity's corporate address. She, therefore, did not assess any property to Mr. Babbitt. Mr. Babbitt ultimately did receive tax bills and collection notices at his business address. But once again, those bills and notices were directed to Northway Cinema and Northway Deli. The Assessor's position that those tax bills and collection notices contain a reference to the “Strand Theater” does not change the fact that the property was assessed to entirely different entities in which Mr. Babbitt has no interest.
23. While the PTABOA's Form 115 determination at least lists Mr. Babbitt as the taxpayer, that determination does not suffice to assess Mr. Babbitt's personal property in the first instance. The PTABOA was acting in its capacity as a quasi-judicial body reviewing a

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<sup>3</sup> The current version of the statute is substantially the same as it was when the Wayne Township Assessor issued the Form 113 notices. The prior version of the statute, however, referred only to a township assessor's authority. A 2008 amendment added references to the county assessor. 2008 Ind. Acts. 146, § 57.

<sup>4</sup> This is the statute's current version. It has been amended several times since 2002. *See* 2004 Ind. Acts. 1, § 12; 2004 Ind. Acts 23, § 13; 2007 Ind. Act § 219, §23; 2008 Ind. Acts 146, § 102. Those amendments, however, addressed what the notice had to say about the taxpayer's appeal rights and, in the case of the 2008 amendment, inserted language recognizing that many townships no longer have township assessors. *See id.* The amendments did not change the basic requirement for an assessor to give the taxpayer notice.

purported assessment, not as a primary assessor. More importantly, the PTABOA's power to assess omitted or undervalued property is limited to "tangible property assessments made with respect to the last preceding assessment date." I.C. § 6-1.1-13-1. And the PTABOA did not issue its determination until more than five years after any of the assessment dates at issue in this appeal. In any case, the Form 115 determination does not even list the amount for which Mr. Babbitt was assessed. While the amended Form 115 determination does at least contain an amount for the purported assessment—\$664,930—the same shortcomings prevent that amended determination from serving as notice of an original assessment. Plus, the PTABOA lost its authority to substantively amend its original determination when Mr. Babbitt filed his appeal with the Board. The amended determination is therefore a nullity.

24. There was no need for the issue to have come this far. An assessor has at least 10 years to assess the personal property of a taxpayer who fails to file a return. *See* Ind. Code § 6-1.1-9-4(b) – (c). Thus, the Wayne Township Assessor could have issued accurate assessment notices as early as January 2005, when Mr. Babbitt's lawyer tried to file belated returns. And the Noble County Assessor similarly could have corrected the problem at any other point along the way. Instead, both assessors chose to stand on patently inflated estimates assessed to an unrelated taxpayer—Northway Cinema. Stuningly, both assessors apparently have taken the position: (1) that it is proper to continually double or triple estimated assessments each year in order to get a recalcitrant taxpayer's attention, (2) that an entirely different taxpayer should simply figure out that he was really the target of the inflated assessments even though that taxpayer was not named in the assessment notices and the notices were not sent to an address where he operated his business or had any connection to, and (3) that the unrelated taxpayer's failure to appeal within 45 days of the date that the assessment notices were issued deprives him of the right to challenge the inflated assessments. The Board has little trouble rejecting that position.
25. The Board hastens to note that it only decides the issue of whether Mr. Babbitt was validly assessed for personal property during the years at issue in this appeal. The Assessor might still be able to assess Mr. Babbitt for the personal property he owned, possessed, or controlled from 2002 through 2004. The Board will address the propriety of such an assessment if, and when, that question comes before it. Given Mr. Babbitt's apparent willingness to pay taxes and penalties on what he acknowledges to be the personal property he owned during 2002 through 2004,<sup>5</sup> one hopes that the parties can resolve that question without resorting to further litigation.

### **Conclusion**

26. To date, Mr. Babbitt has not been validly assessed for business tangible personal property for the years 2001 through 2004. To the extent that the PTABOA determined otherwise, it is wrong.

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<sup>5</sup> At the Board's hearing, Mr. Babbitt's counsel expressed Mr. Babbitt's willingness to pay taxes and penalties based on accurate assessments.



## Final Determination

In accordance with the above findings and conclusions, the Indiana Board of Tax Review now determines that neither Bruce Babbitt nor Cinema Associates has been validly assessed for any business tangible personal property for the 2001 through 2004 assessment years. To the extent the PTABOA determined otherwise, that determination is wrong, and the Board finds for Mr. Babbitt and Cinema Associates.

DATE ISSUED: September 23, 2011

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Chairman, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

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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>>.