

REPRESENTATIVE FOR PETITIONER: Russell D. Millbranth, Attorney at Law,  
MILLBRANTH & BUSH, Valparaiso, Indiana

REPRESENTATIVE FOR RESPONDENT: John Scott, Portage Township Assessor

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**BEFORE THE  
INDIANA BOARD OF TAX REVIEW**

In the matter of:

JACK GRAY TRANSPORT, INC.	)	
	)	Petition No.: 64-008-90-OCI-00005
Petitioner,	)	County: Porter
	)	
v.	)	Township: Portage
	)	
PORTAGE TOWNSHIP ASSESSOR	)	Parcel No.: 08-000288118
	)	
Respondent.	)	Assessment Year(s): 1990
	)	

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Appeal from the Final Determination of the  
Porter County Property Tax Assessment Board of Appeals (PTABOA)

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**September 30, 2002**

**FINAL DETERMINATION**

The Indiana Board of Tax Review assumed jurisdiction of this matter as the successor entity to the State Board of Tax Commissioners, and the Appeals Division of the State Board of Tax Commissioners. For convenience of reference, each entity is without distinction hereafter referred to as the "Board".

The 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 by the Board were:

ISSUE ONE - Whether the assessment is in violation of Ind. Code § 6-1.1-4-4 and, as such, should be determined to be null and void as a matter of law.

ISSUE TWO - Whether the improvements are assessable to the Petitioner.

ISSUE THREE - If the improvements are assessable to the Petitioner, is it correct that the Township Assessor based the assessment on the value of the property rather than the interest the Petitioner held which was a leasehold interest.

OTHER ISSUES - Remaining issues listed on the Form 131 Petition are either incorporated into the issues above, such as issue 4, which reads “the assessment is too high; the assessment must be zero”; or issue 6 which deals with same issues raised for issue 2 above; or issues 3 and 7 which allege discriminatory treatment vis-à-vis other assessments which are similar. At hearing, the Petitioner presented no evidence as to the alleged similarities so the nature of the circumstances surrounding the other assessments can not be compared with the case at bar. However, a failure to assess similar properties would not allow the Petitioner to escape an assessment of this leasehold interest, if such an assessment was required under the law.

### **Procedural History**

2. Pursuant to Ind. Code § 6-1.1-15-3 Russell D. Millbranth, attorney at law, filed a Form 131 on behalf of Jack Gray Transport, Inc. petitioning the Board to conduct an administrative review of the above petition. The Form 131 Petition was filed on October 19, 1992. The determination of the PTABOA was issued on September 11, 1992.

## Hearing Facts and Other Matters of Record

3. Pursuant to Ind. Code § 6-1.1-15-4, a hearing was held on January 11, 1993 before Hearing Officer Ed Bisch. Testimony and exhibits were received into evidence. Russell D. Millbranth, attorney at law, appeared for the Petitioner. Appearing for Portage Township were John Scott and Lou Stahl. The PTABOA did not appear. Senior Administrative Law Judge Tim Rider prepared this document after examination of the hearing record, evidence presented at hearing, and applicable statutes and legal precedent.
4. At the hearing, the subject Form 131 Petition was made a part of the record and labeled Board Exhibit A. Notice of Hearing on Petition is labeled Board Exhibit B.
5. During the hearing no exhibits were submitted as evidence. The Petitioner's counsel alluded throughout his testimony to attachments to the Form 131 Petition. Both Petitioner's counsel and Portage Township Assessor cited various sections of the Indiana Code in their presentations. Applicable attachments to the Form 131 petition and statutory cites will be mentioned in this document when appropriate.
6. The record indicates that the material facts of this case are not in dispute
7. On August 1, 1989, Jack Gray Transport, Inc., a for-profit corporation, entered into a lease with the Indiana Port Commission concerning "a certain area of real estate situated at and upon the Port of Indiana/Burns International Harbor, in Porter County State of Indiana."
8. The description of the property was cited as "Dry-Bulk warehouse on Port of Indiana property" and carried parcel no. 08-000288118.
9. The lease indicates that it begins on the same date as the completion of the warehouse facility as certified by the Indiana Port Commission Chief Engineer.

10. The evidence does not clearly define who built the warehouse. Testimony indicated that a contractor built the warehouse for the Port Commission. However, on the record the hearing officer indicated he would verify that information but no such verification is present in the file.
11. Later added to the file was an affidavit executed by Jack Gray, President of Jack Gray Transport, Inc., which detailed the total costs related to the construction of the Dry-Bulk Handling Facility. This affidavit indicated that the Petitioner might have been involved in the warehouse construction.
12. However, the warehouse was constructed before the effective date of the lease so regardless of who was involved in the construction, the warehouse belonged to the Indiana Port Commission and was leased by the Petitioner.
13. At page 26 and 27 of the lease, the parties contemplate a tax liability for the lessee against "...Lessee's owned improvements, additions, fixtures, or otherwise, ...".
14. An examination of the evidence and documentation presented at hearing reveals that the Leasehold estate included no improvements owned by the Lessee.
15. The Petitioner takes the position that since the Indiana Port Commission owns the improvements, said improvements are not subject to property tax. The Township Assessor disagrees and contends that land, as excepted by statute from taxation, does not include improvements.

### **Jurisdictional Framework**

16. This matter is governed by the provisions of Ind. Code § 6-1.1-15, and all other laws relevant and applicable to appeals initiated under those provisions, including all case law pertaining to property tax assessment or matters of administrative law and process.

17. The Board is authorized to issue this final determination pursuant to Indiana Code § 6-1.1-15-3.

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

18. The Indiana Constitution requires Indiana to create a uniform, equal, and just system of assessment. See Ind. Const. Article 10, §1.
19. Indiana has established a mass assessment system through statutes and regulations designed to assess property according to what is termed “True Tax Value.” See Ind. Code § 6-1.1-31, and 50 Ind. Admin. Code 2.2.
20. True Tax Value does not precisely equate to fair market value. See Ind. Code § 6-1.1-31-6(c).
21. An appeal cannot succeed based solely on the fact that the assessed value does not equal the property’s market value. See *State Board of Tax Commissioners v. Town of St. John*, 702 N.E. 2d 1034, 1038 (Ind. 1998) (*Town of St. John V*).
22. The Indiana Supreme Court has said that the Indiana Constitution “does not create a personal, substantive right of uniformity and equality and does not require absolute and precise exactitude as to the uniformity and equality of each individual assessment”, nor does it “mandate the consideration of whatever evidence of property wealth any given taxpayer deems relevant”, but that the proper inquiry in tax appeals is “whether the system prescribed by statute and regulations was properly applied to individual assessments.” See *Town of St. John V*, 702 N.E. 2d at 1039 – 40.
23. Although the Supreme Court in the *St. John* case did declare the cost tables and certain subjective elements of the State’s regulations constitutionally infirm, it went on to make clear that assessment and appeals must continue to be determined under the existing rules until new regulations are in effect.

24. New assessment regulations have been promulgated, but are not effective for assessments established prior to March 1, 2002. See 50 Ind. Admin. Code 2.3.

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

25. The State does not undertake to reassess property, or to make the case for the petitioner. The State decision is based upon the evidence presented and issues raised during the hearing. See *Whitley Products, Inc. v. State Bd. of Tax Comm'rs*, 704 N.E. 2d 1113 (Ind. Tax 1998).
26. The petitioner must submit 'probative evidence' that adequately demonstrates all alleged errors in the assessment. Mere allegations, unsupported by factual evidence, will not be considered sufficient to establish an alleged error. See *Whitley Products, Inc. v. State Bd. of Tax Comm'rs*, 704 N.E. 2d 1113 (Ind. Tax 1998), and *Herb v. State Bd. of Tax Comm'rs*, 656 N.E. 2d 1230 (Ind. Tax 1998). ['Probative evidence' is evidence that serves to prove or disprove a fact.]
27. The petitioner has a burden to present more than just 'de minimis' evidence in its effort to prove its position. See *Hoogenboom-Nofzinger v. State Bd. of Tax Comm'rs*, 715 N.E. 2d 1018 (Ind. Tax 1999). ['De minimis' means only a minimal amount.]
28. The petitioner must sufficiently explain the connection between the evidence and petitioner's assertions in order for it to be considered material to the facts. 'Conclusory statements' are of no value to the State in its evaluation of the evidence. See *Heart City Chrysler v. State Bd. of Tax Comm'rs*, 714 N.E. 2d 329 (Ind. Tax 1999). ['Conclusory statements' are statements, allegations, or assertions that are unsupported by any detailed factual evidence.]
29. Essentially, the petitioner must do two things: (1) prove that the assessment is incorrect; and (2) prove that the specific assessment he seeks, is correct. In addition to demonstrating that the assessment is invalid, the petitioner also bears the burden of presenting sufficient probative evidence to show what assessment is correct. See *State*

*Bd. of Tax Comm'rs v. Indianapolis Racquet Club, Inc.*, 743 N.E.2d 247, 253 (Ind., 2001), and *Blackbird Farms Apartments, LP v. DLGF* 765 N.E.2d 711 (Ind. Tax, 2002).

30. The State will not change the determination of the County Property Tax Assessment Board of Appeals unless the petitioner has established a 'prima facie case' and, by a 'preponderance of the evidence' proven, both the alleged error(s) in the assessment, and specifically what assessment is correct. See *Clark v. State Bd. of Tax Comm'rs*, 694 N.E. 2d 1230 (Ind. Tax 1998), and *North Park Cinemas, Inc. v. State Bd. of Tax Comm'rs*, 689 N.E. 2d 765 (Ind. Tax 1997). [A 'prima facie case' is established when the petitioner has presented enough probative and material (i.e. relevant) evidence for the State (as the fact-finder) to conclude that the petitioner's position is correct. The petitioner has proven his position by a 'preponderance of the evidence' when the petitioner's evidence is sufficiently persuasive to convince the State that it outweighs all evidence, and matters officially noticed in the proceeding, that is contrary to the petitioner's position.]

### **Discussion of Issues**

**ISSUE ONE – Whether the assessment is in violation of Ind. Code § 6-1.1-4-4 and, as such, should be determined to be null and void as a matter of law.**

#### Analysis of ISSUE 1

31. Ind. Code § 6-1.1-4-4 is the statute that orders assessors to conduct a "general reassessment." It gives them until March 1<sup>st</sup> of the general reassessment year to reassess all property and that reassessment will be the basis for taxes due in the year following the year of reassessment.
32. The lease in question was executed on August 1, 1989. Although 1990 was not a general reassessment year, the Petitioner maintains that since the property was not assessed by March 1, 1990, the assessment in question is null and void. The Petition further maintains that the property cannot be assessed until 1993, which is the year of the next general reassessment.

33. This logic would indicate that any new building built shortly after a reassessment deadline would escape property taxes for several years until the next general reassessment. This, of course, is incorrect.
34. Ind. Code § 6-1.1-4-30 applies to interim assessment or reassessments. It reads “In making any assessment or reassessment of real property in the interim between general reassessments, the rules, regulations, and standards for assessment are the same as those used in the preceding general reassessment.”
35. There is no evidence that the Township Assessor used anything but “the rules, regulations, and standards for assessment” that were used in the preceding general reassessment.
36. Accordingly, the assessment does not violate the law and is not null and void.

**ISSUE TWO – Whether the improvements are assessable to the Petitioner.**

Analysis of ISSUE 2

37. The Petitioner contends that the improvements in question are owned by the Indiana Port Commission and, therefore, are not subject to property tax.
38. Indeed, as previously stated, the lease contemplates the Petitioner being liable for local taxes against improvements “owned” by the Petitioner.
39. The Township Assessor and the PTABOA take the position that only the land is exempted by statute and the leasehold interest held by the Petitioner in the improvements is assessable and taxable.
40. The Petitioner cites Ind. Code § 8-10-1-27(c) to support its position that the entire parcel is not assessable. Sec. 27(c) reads “Notwithstanding any other statute, a lessee’s



leasehold estate in **land** that is part of a port and that is owned by the state or the commission is exempt from property taxation.” (emphasis added).

41. Clearly, Sec 27(c) cited above exempts from taxation any **land** that is part of the leasehold in question. That Section does not mention improvements. The key to this question is examination of the meaning of the word “land” in the context presented by this statutory cite.
42. Further, Sec 27(c) appears to create an “exemption” from property taxation not a situation where property is not assessable.
43. An examination of the assessment methods for public properties begins with Ind. Code § 6-1.1-11-9 that reads as follows:
  - (a) Except as provided in subsection (b) of this section, all property otherwise subject to assessment under this article shall be assessed in the usual manner, whether or not it is exempt from taxation.
  - (b) No assessment shall be made of property, which is owned by the government of the United States, this state, an agency of this state, or a political subdivision of this state if the property is **used**, and in the case of real property **occupied**, by the owner. (emphasis added).
44. Since the property is **used** and **occupied** by the Petitioner and not the owner, the Township Assessor properly assessed this parcel.
45. Several references were made to Ind. Code § 6-1.1-10-37(b) which reads: “If real property that is exempt from taxation is leased to another **whose property is not exempt** and the leasing of the real property does not make it taxable, the leasehold estate and the appurtenances to the leasehold estate shall be assessed and taxed **as if they were real property owned by the lessee or his assignee.**” (emphasis added).
46. Another applicable statute cited at hearing was Ind. Code § 8-10-2-2, which gives

Indiana Port Commission the power to “acquire, construct, maintain, repair, police and **lease** to others” (emphasis added) various facilities at the port. This section further states “Any such facilities and the site thereof shall not be exempt from property taxation, and the lessee in any lease thereof shall agree to pay all property taxes levied on such facilities and the site thereof.”

47. In 1990 by Public Law 21-1990, Section 39, the Indiana Legislature added subparagraph (c) to Ind. Code § 8-10-1-27. As indicated in Conclusions 40 and 41 above, both parties rely on this section of the Indiana Code in support of their positions.
48. Clearly, prior to the introduction of Section 27(c), the other statutes cited above allowed the Township Assessor to tax the Petitioner’s leasehold estate.
49. Subsequent to the addition of Section 27(c), the Township Assessor exempted the land while the Petitioner maintains that entire leasehold estate is exempt.
50. The question to be answered is “what did the Indiana legislature intend when it exempted ‘land that is part of a port’?”
51. In the vernacular of the Township Assessor, land and improvements are two different things. This is because the value of the land is contained in a Land Order and is stated separately from the assessment of the improvements usually made by reference to the Assessment Manual.
52. However the legal definition of land can be found in West Publishing Company’s *Black’s Law Dictionary* at page 360 (1996) and reads as follows:

“1. An immovable and indestructible three-dimensional area consisting of a portion of the earth’s surface plus the space above and below the surface, and including everything growing or **constructed on it**. 2. An estate or interest in real property.”

53. In determining the intent of the Legislature when it added Sec 27(c), we first note that Title 8 regulates Utilities and Transportation and Article 10 deals with Ports. Law governing assessment of real property is contained in different Title of the Indiana Code.
54. Further, the rest of Ind. Code § 8-10-1-27 refers to the Indiana Port Commission’s exercising its powers “for the benefit of the people of the state” by operation and maintenance of a port project. Section 27 further alludes to this operation being an essential governmental function, which is free of any taxes or assessments.
55. It appears that the addition of paragraph (c) in 1990 was designed to encourage the leasing of port property to further that essential governmental function. That being the case it is most likely that the legislature meant to apply the legal definition of land, which includes land plus what is constructed on it.
56. Clearly, by including the clause in the lease which required the Petitioner to pay taxes on any improvements it owned, the Indiana Port Commission indicates its understanding that what is Commission-owned is not taxable.

**ISSUE THREE – If the improvements are assessable to the Petitioner, is it correct that the Township Assessor based the assessment on the value of the property rather than the interest the Petitioner held which was a leasehold interest?**

57. This issue need not be addressed based on the finding in Issue Two.

**Summary of Final Determination**

Determination of ISSUE 1

58. The assessment in question does not violate the law and is not null and void.

Determination of ISSUE 2

59. The improvements in question are not assessable to the Petitioner.

Determination of ISSUE 3:

60. Based on the finding for issue two this issue is not applicable.

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

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Chairperson, 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.**