Indiana Real Property Tax Appeals: 2012 Update on Procedural, Jurisdictional, Burden-Shifting, & Exemption Issues

December 6, 2012

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INDIANA TAX COURT DECISIONS[1]

1. **Tax Court analyzes Ind. Rule of Professional Rule of Conduct 3.7 in dismissing Department of Revenue's request to re-open discovery.** (originally posted at *www.taxhatchet.com* on April 13, 2012).

   Indiana Department of Revenue may not use Rule of Professional Conduct as a "procedural weapon"

   It's rare to find a rule of professional conduct at the heart of a tax ruling. But that was the case when the Indiana Tax Court rejected the Department of Revenue's efforts to disqualify counsel for the taxpayer (Utilimaster) as "necessary witnesses" in a sales and use tax refund appeal. *See Utilimaster Corp. v. Indiana Department of State Revenue*, Cause No. 71T10-1008-TA-43 (April 17, 2012). The Court rebuked the Department's efforts to invoke a rule of professional conduct as a thinly veiled effort to overcome the Department's failure to conduct depositions in the time allotted under the Court's case management plan. The Court admonished: "The Department has invoked Professional Conduct Rule 3.7 in an attempt to conceal its failure to timely pursue discovery as well as to remove Utilimaster's attorneys from the case, calling their professionalism into question." Slip op. at 9-10.

   Utilimaster manufactures commercial vehicles, using sealants and adhesives in its manufacturing process during the refund period that required an ambient air temperature

[1] Opinions of the Indiana Supreme Court, Indiana Court of Appeals, and the Indiana Tax Court can be viewed at: *http://www.in.gov/judiciary/2730.htm* (last visited November 3, 2012).

of between 60 and 80 degrees Fahrenheit to properly cure. That required the purchase of natural gas. Essentially, Utilimaster claimed a refund of sales and use tax paid on its purchases of natural gas that it asserted was predominantly used for manufacturing. To support its request, Utilimaster's refund claim relied upon a consultant's report (a "utility study") showing that production equipment used more than one-half of the natural gas purchased. The refund claim was signed by the consultant's president. The Department granted a partial refund, and Utilimaster appealed. Utilimaster's counsel on appeal to the Tax Court had served as president and vice-president for the consultant.

The Department's counsel served written discovery but conducted no depositions. More than a month following the close of discovery, the Department filed a motion to reopen discovery, claiming that three days earlier Utilimaster's counsel had admitted to preparing the utility study. The Department wanted an opportunity to depose Utilimaster's counsel/consultants. One day later – and without giving the Court a chance to rule on the motion to reopen discovery – the Department filed a motion to disqualify Utilimaster's counsel under Indiana Professional Conduct Rule 3.7, which provides that a lawyer shall not act as an advocate at a trial in which he or she is likely to be a necessary witness (unless one of three factors irrelevant to this decision are present).

Rule 3.7's purpose is to reduce the potential of confusing the trier of fact, which may have difficulty determining whether statements by an advocate-witness should be taken as proof or as an analysis of the proof. Slip op. at 5. But that concern, the Court explained, is "more appropriate in the context of a jury trial than in a bench trial." *Id.* The Court further noted that "courts have recognized that litigants sometimes improperly use the rule as a means to gain a tactical advantage in litigation." *Id.* (citing *Beller v. Crow*, 742 N.W.2d 230, 234 (Neb. 2007)).

The Tax Court first explained that the threshold question under Rule 3.7 is whether Utilimaster's attorneys are likely to be "necessary" witnesses. Slip op. at 6. That requires a two-prong showing: (1) the Department must show that the testimony it seeks from taxpayer's counsel "is more than marginally relevant to the issue or issues being litigated"; and (2) "it must show that [counsel's] testimony will result in evidence that cannot be obtained elsewhere." *Id.* Neither prong was met. The Department argued that it needed to call counsel to elicit testimony about their "subjective mindset" in preparing the utility study and that this evidence could not be obtained from any other source. This argument, the Court observed, "misses the mark." Slip op. at 7. The utility study provided the square footage of Utilimaster's facility and the portion thereof used in manufacturing – "information [that is] readily ascertainable, objective numbers." *Id.* Sources other than taxpayer's counsel/consultants, such as knowledgeable company employees, could prove the accuracy of this information. Slip op. at 8. Thus, the counsel/consultants are "not necessary witnesses pursuant to Professional Conduct Rule 3.7." *Id.* (emphasis in original).

The Court also concluded that the Department's motion to disqualify counsel must fail because Rule 3.7 "has not been used for its intended purpose of preventing the Court from being misled or confused about Utilimaster's attorneys' role." Slip op. at 8. Rather,

the Department's argument focused on how the Department had been "ambushed" and "unfairly prejudiced" by the counsel/consultants. The facts, however, did not support these claims: the refund claim *had been signed* by one of the counsel/consultants, and the refund claim was accompanied by a power of attorney granting the counsel/consultants authority to act on Utilimaster's behalf. Slip op. at 9. The Department's counsel "had ample evidence to alert him that he may want to conduct depositions to know more." *Id.* The Department chose not to pursue depositions until after discovery closed, and the Court would not allow the Department to correct its mistake through re-opening discovery or disqualifying Utilimaster's counsel.

2. **Indiana Tax Court grants assessor's motion to dismiss due to taxpayers' failure to timely file the agency record under Ind. Tax Court Rule 3(E)** (originally posted at *www.taxhatchet.com* on June 19, 2012).

Indiana Tax Court dismisses real property tax appeal due to taxpayers' failure to timely file the agency record, where agency issued sufficient notice and taxpayers' "own inaction" was not "excusable neglect"

Indiana Tax Court Rule 3(E) requires the appealing party to request a certified copy of the agency record from the Indiana Board of Tax Review within thirty days of filing the petition. And the rule further directs: "The petitioner shall transmit a certified copy of the record to the Tax Court within thirty (30) days after having received notification from the Indiana Board of Tax Review that the record had been prepared." *Id.* In *Bosamia v. Marion County Assessor*, Cause No. 49T10-1108-TA-52 (Ind. Tax Ct., June 19, 2012) (*see* http://1.usa.gov/NfTxv6), the relevant events unfolded in 2011 as follows:

1. **August 24th** – The Bosamias (Husband and Wife) filed their original tax appeal and paid a $50 deposit to the Indiana Board towards payment of the copying cost for the administrative record. (They challenged the Indiana Board's final determinations upholding the March 1, 2007 and 2008 real property tax assessments of their commercial property.)

2. **September 8th** – The Indiana Board mailed an invoice to the Bosamias, stating that that record was prepared and that a balance of $161.00 was due.

3. **October 2d** – "[Husband] learned that [a family member was] gravely ill, and he traveled to England to visit her. [Wife] remained in Indianapolis to manage their restaurant and to care for their family." Slip op. at 2.

4. **October 18th** – Husband returned to Indianapolis.

5. **October 21st** – The Bosamias paid the balance due to the Indiana Board.

6. **October 22d** – The Bosamias traveled to England due to the family member's illness, returning on November 3d.

7. **November 7th** – The Assessor moved to dismiss the appeal, claiming that the Bosamias failed to comply with Tax Court Rule 3(E).

8. **November 9th** – The Bosamias filed the agency record with the Tax Court.

The parties agreed that, if the Indiana Board's invoice constituted adequate notice, the Bosamias had until October 11th to file the record with the Court. Conceding that they missed this deadline, the Bosamias nevertheless argued that the motion to dismiss should be denied for two reasons. First, they argued that their October 21st payment – not the invoice, which they claimed was inadequate – triggered the thirty-day filing deadline under Tax Court Rule 3(E), and their November 9th filing was timely. The Indiana Board's invoice stated that the agency record "has been prepared." Slip op. at 5. That alone was sufficient to trigger the thirty-day filing period, the Court reasoned. *Id.* (*citing Wayne County PTABOA v. United Ancient Order of Druids-Grove #29*, 847 N.E.2d 924, 929 (Ind. 2006)). But the Board's invoice went "even further by stating 1) how the Bosamias could obtain the record (payment of the invoice) and 2) that their receipt of the invoice triggered their thirty days to file the record." *Id.* The invoice was "sufficient notice." *Id.*

Second, the Bosamias argued that their failure to timely file the record should be excused under Ind. Trial Rule 6(B)(2) as the result of "excusable neglect." That phrase, the Court noted, is not defined by the trial rule or its federal counterpart. Slip op. at 6. And Indiana case law interpreting the phrase is "scarce." The available authority suggests that "excusable neglect" applies when a failure to act is due to "some unexpected or unavoidable hindrance or accident" or is "caused by some event or action outside a party's control." *Id.* (quotations and citations omitted). In this case, the Bosamias filed the record more than three weeks passed when they learned of the family member's illness. Moreover, Wife had nearly another week to file the record before the October 11th deadline. *Id.* The Court explained that it "sympathizes with the unfortunate circumstances that befell the Bosamias; however, the failure to timely file was not because of [the family member's] illness, but was the result of their own inaction." Slip op. at 7. The Court concluded: "Given these facts and circumstances, the Court cannot employ its discretion to enlarge the Bosamias' time to file" the agency record. *Id.* The Court granted the motion to dismiss. *Id.*

As a silver lining to the taxpayers' stormy cloud, however, the Court in a footnote observed: "Each tax year stands alone. Consequently, the Bosamias may protest their property assessment next year." Slip op. at 7 n.10 (citations omitted).

3. **Tax Court refused to dismiss Taxpayer's original tax appeal petition, where Taxpayer's officer filed the petition.** In *Wireless Advocates, LLC v. Indiana Dep't of State Revenue*, Cause No. 49T10-1109-TA-60 (August 17, 2012), the Taxpayer appealed the Department's denial of its adjusted gross income tax refund claim. The petition was filed by the Taxpayer's vice-president and chief financial officer, who also was a member of the limited liability company. The Department of Revenue filed a motion to dismiss

for failure to state a claim upon which relief can be granted, arguing that the company could not initiate the appeal itself. The Department did so while acknowledging that Indiana does not require limited liability companies to be represented in court by counsel.

The Court declined the invitation to "invent such a rule where one does not currently exist." Slip op. at 3. The Court noted that, when a corporation prosecutes or defends a case *pro se*, Indiana courts generally have given the corporation an opportunity to retain counsel, which the corporation must refuse before dismissal of the action. *Id.* (citation omitted). Appeal by a non-attorney on a corporation's behalf is a curable procedural defect. Slip op. at 4. (citation omitted). The Court further explained that dismissal is not a remedy favored in Indiana. Slip op. at 5 (citation omitted). The Court further reasoned: "[Taxpayer's] petition reveals nothing to defeat an equitable result – there is no evidence of undue delay, bad faith, or dilatory motive on either [Taxpayer's] or [the corporate member's and officer's] part in obtaining counsel." Slip op. at 5. Taxpayer had retained counsel only nine business days after the Department filed its motion.

Moreover, the Court held that the Department's administrative review of Taxpayer's refund claim was "not a substitute for [Taxpayer's] right to be heard in this Court." Slip op. at 5.

4. **Tax Court dismisses income tax refund claim that was filed eleven days too late** (originally posted at *www.taxhatchet.com* on November 1, 2012).

Hoosier Taxpayer's "honest mistake" on personal income tax returns was insufficient grounds to allow her late-filed refund claim.

While sympathetic to an Indiana taxpayer's plight, the Tax Court dismissed her refund claim because it was not timely filed. The taxpayer (Gibson) erroneously reported her personal income tax for a dozen years, improperly adding back certain local property tax payments following a 1999 change of law. Gibson discovered the error in 2011 and was told by the Department of Revenue that she could seek a refund "going back three years." On April 26, 2011, she filed refund claims by submitting amended returns for the 2007 through 2009 tax years. The Department rejected the 2007 refund claim as untimely.

The Tax Court in a decision issued November 1st concurred and granted summary judgment in favor of the Department. The refund statute required a person to file the claim with the Department within three years after the latter of the return's due date or the date of payment. *See* Ind. Code 6-8.1-9-1. For the 2007 tax year, Gibson's return was due on April 15, 2008. Accordingly, to be timely Gibson's refund claim for 2007 was due on or before April 15, 2011. But Gibson's amended returns (serving as her refund claims) were filed eleven days later – too late for the 2007 tax year.

Gibson argued that "principles of equity rather than the strict letter of the law should guide the Court in resolving this matter." Slip op. at 3. She should not be punished for making an "honest mistake in attempting to comply with Indiana's ever-evolving tax

laws." *Id.* Line 2 of the tax return (for the add-back) had not materially changed since 1993, so Gibson contended the Department had not provided sufficient notice of the 1999 change of law (even though the Department's income tax instruction booklet stated, "Do not add back any property taxes on this line"). And this lack of notice was "even more egregious" because the Department failed to identify Gibson's reporting error for twelve years. Slip op. at 4. She asked the Court to refund her income tax overpayments for the 1999 through 2007 tax years.

The Court dismissed the appeal. Acknowledging the "challenges Indiana citizens have in understanding the changes to, and complexities of, our tax system" and expressing sympathy for Gibson's situation, the Court nevertheless held "it must apply the laws as they are written." Slip op. at 5 (citation omitted). Moreover, "courts of equity aid the vigilant, not those who have slept upon their rights." *Id.* (citation omitted). Gibson's 2007 refund claim was untimely, and she provided no excuse for her late filing. *Id.*

The Tax Court's decision in *Gibson v. Indiana Department of State Revenue*, Cause No. 49T10-1204-TA-20, can be viewed at http://www.in.gov/judiciary/opinions/pdf/11011201tgf.pdf.

INDIANA BOARD OF TAX REVIEW – FINAL DETERMINATIONS[2]

1. **Indiana Board lacked jurisdiction to hear complaint about property tax amount (as opposed to assessed value).** *Milo v. Starke County Assessor*, Pet. No. 75-002-09-1-5-00001 (Jan. 1, 2012) (March 1, 2009 assessment) [Small Claims Docket]. "To the extent that the Milos contest the taxes, as opposed to the property's assessment, the Board lacks jurisdiction to hear their claim. . . . [N]o statute authorizes the Board to review the propriety of local tax rates." (Page 6, ¶ 15(i).)

2. **Location of comparable properties goes to weight of testimony, not its admissibility.** *Short Homeplace Family LTP v. Delaware County Assessor*, Pet. No. 18-017-08-1-5-00001 (Jan. 11, 2012) (March 1, 2008 assessment) [Small Claims Docket]. "Mr. Short objected to the Assessor's exhibits on grounds that the Assessor's purportedly comparable properties are not located anywhere near Mount Pleasant Township. The Board overrules Mr. Short's objection because it goes to the weight rather than the admissibility of the Assessor's evidence." (Page 5, ¶ 12.)

3. **Form 133 can be used to challenge removal of developer's discount.** *Throgmartin Henke Development, LLP v. Hamilton County Assessor*, Pet. Nos. 29-015-08-3-5-00010 and -11 (Jan. 24, 2012) (March 1, 2008 assessment). Taxpayer claimed that the assessor erroneously removed the developer's discount allowed under Indiana Code § 6-1.1-4-12 from two vacant lots. Indiana Code § 6-1.1-4-12(h) states in part, "[L]and in inventory may not be reassessed until the next assessment date following the earliest of: (1) the date on which title to the land is transferred by: (A) the land developer; or (B) a successor land developer that acquires title to the land; to a person that is not a land developer; (2) the date on which construction of a structure begins on the land; or (3) the date on which a building permit is issued for construction of a building or structure on the land." The purpose of the discount was described as: "encouraging developers to buy farmland, subdivide it into lots, and resell the lots." (Page 10, ¶ 29) (citations omitted.) Here, the builders erroneously had applied for building permits without the developer's permission. The Indiana Board concluded that the builders had neither actual nor apparent authority to apply for building permits for the lots owned by the developer. (Page 14, ¶ 39.)

   The Indiana Board concluded that the developer could use a Form 133 petition to claim that the developer's discount was improperly removed from its land. (Page 15, ¶ 42.) Form 133 petitions are governed by Indiana Code § 6-1.1-15-12, and Indiana Code § 6-1.1-15-12(a)(6) provides taxpayers with a remedy when their "taxes, as a matter of law, [are] illegal." (Page 14, ¶ 41.) The Board explained: "To determine something 'as a matter of law' simply means to apply the law to undisputed, material facts." *Id.* (citation omitted). The facts in this appeal were undisputed, and the Board held, *see* Page 15, ¶ 42:

[2] Final Determinations of the Indiana Board can be viewed at *http://www.in.gov/ibtr/2332.htm* (last visited November 3, 2012).

> Where property in inventory has not been transferred to a non-developer, where no construction has begun and where no valid building permit has been issued, it is improper for an assessor to reassess a property on a lot basis. Therefore, the taxes on the [Taxpayer's] properties were illegal as a matter of law and a Form 133 was a proper vehicle for the [Taxpayer] to bring its appeals.

4. **Objection regarding realtor listing went to weight of evidence, not its admissibility; Indiana Board admits "merely cumulative hearsay" evidence; credibility of non-appraiser valuation witness hurt by his status as taxpayer's vice-president**. *K L Presnell Companies Office Building LLC v. Johnson County Assessor*, Pet. Nos. 41-026-07-1-4-40163 *et al.* (Jan. 31, 2012) (March 1, 2007 assessment date) [Small Claims Docket]. "The Petitioner objected to the 2008 realtor listing, claiming it is not relevant to the 2007 assessed value or the valuation date of January 1, 2006. This objection, however, goes more to the weight of the evidence, not its admissibility. Accordingly, this exhibit is admitted into the record." (Page 3, ¶ 10(c) n.1).

   The assessor objected to testimony regarding plans or rumors about renovations to the main street making it difficult to get and keep tenants, pointing out that no city official was available for cross examination on that point. The testimony involved matters that are hearsay and matters that are not. The Indiana Board observed that some of the testimony was not sufficiently clear to distinguish one from the other. (Page 3, ¶ 11(c) n.2). But hearsay evidence may be admitted. *Id.* (citing 52 IAC 2-7-3). Moreover, the assessor did not object to Petitioner Ex. A, which the Board noted contained substantially the same kind of hearsay. The Board ruled, "This objection went to evidence that is merely cumulative. Therefore, the Respondent's hearsay objection is overruled." *Id.*

   The Indiana Board rejected the owner's income capitalization approach. The witness who performed the calculation was the owner's vice-president and not a certified appraiser. That undercut the credibility of his work and valuation opinion. (Page 6, ¶ 14(e).) Further, the owner did not show that its evidence – the effective gross income, the net operating income, and the 12% capitalization rate – conformed with generally accepted appraisal principles. (Page 7, ¶ 14(f)). Specifically, the owner failed to show that its historical income and expenses represented market data. (Page 7, ¶ 14(g)). And its capitalization rate was supported only by a "limited, conclusory explanation." (Page 8, ¶ 16(j).) The owner's failure to relate 2001 and 2004 data to the valuation date at issue "entirely destroys the probative value" of the witness's income capitalization approach. *Id.*

5. **Taxpayer failed to show it was entitled to homestead credit or standard deduction; Indiana Board warns that their arbitrary removal "might violate due process"**. *DNK2 Properties LLC – Dan Estes v. St. Joseph County Assessor*, Pet. No. 71-018-07-1-5-01986 (Jan. 31, 2012) (March 1, 2007 assessment) [Small Claims Docket]. The Indiana Board held that the taxpayer failed to make a prima facie showing that it was entitled to the homestead credit or standard deduction. (Page 5, ¶ 17.) The Board relied on its decision in *Fuller v. Cass County Assessor*, Pet. No. 09-014-08-1-5-00001 (Ind.

Bd. Tax Rev. Nov. 10, 2010), *aff'd Fuller v. Cass County Assessor*, Cause No. 49T10-1011-TA-68 (Ind. Tax Ct. Nov. 9, 2011). The Board further noted that the taxpayer did not buy the subject property until after the assessment date for which it sought a homestead credit and standard deduction, and it never used the property as a homestead. But the IBTR further stated: "The Board does not mean to imply that local officials can arbitrarily and without notice rescind an owner's homestead credit or standard deduction once that credit or deduction has been granted for a given assessment year. Doing so might violate due process." (Page 5, ¶ 17 n.3.)

6. **Indiana Board allows public records into evidence not provided to assessor in advance of hearing, where Board saw no prejudice to the assessor; Board finds that taxpayers responsible for paying tax bill had "sufficient interest" to appeal the disputed assessment.** *Tate v. Delaware County Assessor*, Pet. No. 18-017-08-1-5-00002 (Feb. 10, 2012) (March 1, 2008 assessment). The assessor objected to all of the Tates' exhibits because the Tates did not provide the assessor with copies of those exhibits before the Indiana Board's hearing. The Board noted that it may exclude evidence based on a party's failure to meet the pre-hearing disclosure deadlines found in 52 IAC 2-7-1. (Page 3, ¶ 11.) But the Board may waive those deadlines for materials that were submitted at the PTABOA hearing. *Id.* Here, three of the taxpayer's exhibits were offered at the PTABOA hearing. Regarding the last two documents (Exhibits D and E), the Board explained, *see* Page 4, ¶ 14:

> It, however, does not appear that the Tates offered Exhibit D, Form 115 determinations for 2008-2010, or Exhibit E, assessment and tax information for a neighboring property, at the PTABOA hearing. Nonetheless, it is difficult to see how the Assessor could be prejudiced by the Tates failing to provide her with those documents. Those documents are public records that the Assessor either maintains or at least can easily access. The Board therefore overrules the Assessor's objection to Petitioner's Exhibits D-E.

The assessor claimed that taxpayers did not have authority to appeal the assessment because they did not own the property on the assessment date. Board disagreed, reasoning that the taxpayers "paid the taxes that were based on the subject property's March 1, 2008, assessment . . . [and] therefore have sufficient interest in the subject property's March 1, 2008, assessment to appeal that assessment." (Page 8, ¶ 28.)

7. **Indiana Board lacked authority to hear Form 132 petitions filed more than 45 days after receipt of tax bill.** In *GCH, LLC v. St. Joseph County Assessor*, Pet. No. 71-018-09-2-8-00004 (Ind. Bd. Tax Rw., March 19, 2012) (March 1, 2008 and 2009 assessment dates), the Indiana Board of Tax Review considered the application of a property exemption in a case with a "convoluted history." (Page 1, ¶ 1.) The property was transferred to the owner GCH, LLC (GCH) sometime after August 2008. During the relevant periods at issue, the property was leased to the United States Social Security Administration. It had received the exemption for several years. Only upon receipt of the November 2009 tax bill did GCH receive notice that the exemption had been

removed. On March 17, 2010, GCH filed a Form 132 petition with the Assessor. In November 2010, GCH mailed a Form 132 petition to the Indiana Board. GCH's filings, the Board noted, "have caused much confusion," and "other things have contributed to the procedural morass" facing the Board. (Page 6, ¶¶ 18 & 19.) Those "other things" included" (1) the property's exemption had been removed without notice to the taxpayer; (2) the property tax appeal statutes "do not spell out how a taxpayer should challenge such an action"; (3) GCH initially filed Form 132 petitions in different places and did not fill in the assessment date at issue on one petition; and (4) GCH ignored the Board's notice of defects regarding the Form 132 petitions.

The Indiana Board dealt only with the procedural issue before it, i.e. whether procedural defects prevented the Board from reaching the merits of GCH's exemption claim. The Board observed that it knew of no statute which excused GCH from filing an exemption application. (Page 8, ¶ 24.) And GCH could not rely upon the apparent errors of local officials in applying the exemption without an application. (Page 8, ¶ 25.) While GCH's failure to file Form 136 applications for 2008 and 2009 "might be a good defense" to its claims for exemption, the Board concluded that GCH was required to – and failed – to file its Form 132 petition within 45 days of receipt of the tax bill showing removal of the exemption. (Pages 11 & 12, ¶¶ 31 & 33.)

At the time of the Indiana Board hearing, GCH had pending at the local level a Form 133 petition regarding its exemption claims. The Board may yet reach the merits of GCH's exemption claims on appeal of the Form 133 petitions, but that was a "question for another day." (Pages 11-12, ¶ 32.)

8. **Board addresses "advocate as witness" rule of professional conduct.** *Linda L. Miller Trust v. Kosciusko County Assessor*, Pet. No. 43-028-09-1-5-00035 (April 3, 2012) (March 1, 2009 assessment) [Small Claims Docket]. The Board was troubled by the fact that counsel for each party chose to act simultaneously as an advocate and a witness. The Board noted that Rule 3.7 of the Indiana Rules of Professional Conduct "appears to include" IBTR proceedings because, while the rule refers to a "trial," the comments refer to a "tribunal" rather than a "court" or "judge." However, neither side objected to the other attorney's testimony, and because the Board did not rely significantly on either attorney's testimony, the Board did not decide whether the Rule applied and whether the attorneys violated it.

9. **Indiana Board had jurisdiction to consider proper application of property "tax caps." Homeowner could use Form 133 to challenge application of the "tax caps".** *Fred W. Heaney v. St. Joseph County Assessor*, Pet. No. 71-001-08-3-5-00001 (April 19, 2012) (March 1, 2008 assessment). Heaney applied for a "mortgage exemption" for the subject property, his primary residence. Although he had no receipt, Heaney claimed that he applied for what he alternatively called a "homestead exemption," "homestead deduction," and "homestead credit." Because the assessor did not receive an application for the standard deduction for the property's 2008 assessment, Heaney did not receive the homestead "tax cap," and the property was taxed at more than 2% of its assessed value.

The "tax cap" is a credit equaling the amount that the property taxes exceeded 1.5% of a homestead's assessment. (Page 5, ¶ 9.)

Heaney filed a Form 133 petition for correction of error. The assessor, auditor, and PTABOA all denied the petition because Heaney did not apply for the credit. The assessor argued that because Heaney did not apply for the standard deduction, the auditor had no way to know whether a property qualifies as a homestead.

The Indiana Board disagreed with the assessor's position. (Page 8, ¶ 16.) A homestead under the tax cap statute is simply a homestead that is eligible for the standard deduction, not a homestead that is the subject of an application for, or that has been granted, the standard deduction. *Id.* A homeowner's failure to apply for a standard deduction can lead to an auditor erroneously failing to apply the tax cap, but if a taxpayer brings that error to the auditor's attention, the auditor can and must correct the error. (Page 9, ¶ 17.) Because Heaney's property qualified for the homestead tax cap, the Board held that the credit must be applied in determining Heaney's 2008-pay-2009 tax bill. (Page 9, ¶ 19.)

Additional jurisdictional note: The Board held that it had jurisdiction because it has statutory jurisdiction over property tax credits, and because the correction of error statute allows for review of any credit permitted by law. Although "tax cap" suggests that it is a limit on property taxes, the cap is actually a credit for all taxes above a certain percentage. *See* (Pages 5-6, ¶¶ 10-12.)

10. **Appraisals were "hearsay" and could not, standing alone, support reduction in home's assessed value.** In *Thiry v. Dearborn County Assessor*, Pet. No. 15-020-10-1-5-0001 (May 17, 2012) [Small Claims Docket], the Indiana Board considered the assessor's objection to the admission of the homeowners' two appraisals as "hearsay." Indiana Rule of Evidence 801(c) defines "hearsay" as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay can be either oral or written statements. (Page 3, ¶ 14.) By rule, hearsay evidence "*may* be admitted." *Id.* (quoting 52 IAC 3-1-5(b) (emphasis added)). It "may form the basis for a determination," but "if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting [assessment appeal] determination may not be based solely upon the hearsay evidence." *Id.* The Board observed that the word "may" is "discretionary, not mandatory" and that the Board "can permit hearsay evidence to be entered in the record, but it is not required to allow it." (Page 4, ¶ 14.)

The appraisals were hearsay, the Board concluded. (Page 4, ¶ 16.) The Board admitted them into evidence "subject to the limitations in the Board's procedural rules." *Id.* The valuation date for the first appraisal was April 19, 2010 – less than two months after the March 1st assessment date. The appraisal concluded to a value of $353,000, which was lower than the $388,500 assessed value but higher than the $324,000 requested by the owner. While the appraisal "might support" a reduction in value, there was "no non-hearsay evidence in this record that supports a valuation of $353,000." (Page 5, ¶ 20(c).)

The appraisal thus stood alone and could not support a reduction of the home's assessed value. *See id.*

The Board did not consider the second appraisal, which valued the property at $357,410 as of February 24, 2012 – almost two years after the assessment date at issue.

The Board further observed that the home's 2007 purchase price of $376,000 was not helpful, because "[n]othing in the record establishes how that price relates to value as of [the valuation date,] March 1, 2010." (Page 5, ¶ 20(d).) For a sale to be a reliable indicator of market value, the buyer and seller must be typically motivated, well informed and acting in their own best interests. (Page 5, ¶ 20(d) n.1) (citing the Indiana Assessment Manual, at 10.) The record failed to show that the owners' purchase price was a "reliable indication of the market value in this case." *Id.*

And one owner's conclusory testimony that the home should be valued at $324,000 was not probative evidence supporting a reduction in value. (Page 5, ¶ 20(e).)

Because the owners produced no substantial evidence, the assessor's duty to support the contested assessment with his own substantial evidence was not triggered. (Page 5, ¶ 21.)

11. **Indiana Board finds that date on tax notice trumped unsworn testimony of deputy treasurer in finding that appeal was timely filed** (originally posted at *www.taxhatchet.com* on June 6, 2012).

Taxpayer wins battle of dueling dates - Indiana Board of Tax Review finds that date on property tax bill notice (and not the unsworn testimony of deputy treasurer) supports ruling that appeal was timely filed

Regardless of tax type, appeal deadlines are important. A taxpayer must meet its appeal deadline or risk losing the right to challenge an assessment. But what happens when the "trigger date" for the appeal deadline is in dispute? A newly issued decision from the Indiana Board of Tax Review addresses that question.

In *Universal Forest Products v. Elkhart County Assessor*, Pet. No. 20-009-07-1-3-00221 (Ind. Bd. Tax Rw., May 18, 2012), *see* http://1.usa.gov/JXHi6o, Universal Forest Products (Universal) challenged the assessments of several light manufacturing and storage structures for the March 1, 2007 assessment date. The valuation was not at issue. If Universal had filed its appeal on time at the local level, the parties agreed that the property's value should be reduced from $1,790,000 to $1,056,000. Universal appealed from the tax bill and the Form TS-1A that accompanied its tax bill. That form included the following statement: "DATE OF NOTICE FOR 2007 PAY 2008 TAXES 12/2/2008." Based on that entry, Universal filed its appeal on January 16, 2009 – 45 days after December 2, 2008.

To rebut the date on Form TS-1A, the assessor submitted an unsworn letter from a deputy treasurer stating that the 2007-pay-2008 tax bills were mailed on November 14, 2008.

The assessor also submitted a copy of the property's tax bill showing that the first of two installments was due December 2, 2008. Because the tax bill would not have been mailed on the same day that taxes were due, the date on Form TS-1A was a misprint. Consequently, the assessor argued that Universal was required to file its appeal within 45 days of November 14, 2008.

Under the statutes in effect, Universal was required to file its appeal "not later than forty-five (45) days after" it received a notice of assessment change. *See* Ind. Code § 6-1.1-15-1(c). If no notice was issued, Universal had to file the appeal within 45 days of "receipt by the taxpayer of the tax bill resulting from" the assessment change. *See* Ind. Code § 6-1.1-15-13. The Indiana Board presumed that Form TS-1A and the tax bill were mailed on December 2, 2008. (Page 7, § 20, *citing Tibero v. Allergy Asthma Immunology of Rochester*, 664 F.3d 35, 37 (2nd Cir. 2011) ("There is a presumption that a notice provided by a government agency was mailed on the date shown on the notice.")). The Board concluded that the deputy treasurer's unsworn letter was not proof of mailing, explaining: "[The deputy's] assertions were unsworn and she was not subject to cross examination. Moreover, [the deputy] did not claim to have personally mailed any of the tax bills, much less Universal's bill, or that the treasurer followed routine business practices in mailing Universal's tax bill by a given date." (Page 8, § 22) (citations omitted).

But what if the assessor had clearly established that the tax bill and Form TS-1A had been mailed on November 14th? Could Universal have then been permitted to rely on the December 2d date included on Form TS-1A? The Board reserved that question for another day. (Page 8, § 23.)

Because the parties disputed only the timeliness of the appeal, the Board accepted the stipulated assessed value for the property and reduced the assessment to $1,056,000.

12. **Proceed with Caution, Part II (August, 2012): Indiana Board of Tax Review rulings - standing and procedure in real property tax appeals** (originally posted at *www.taxhatchet.com* on September 25, 2012).

The Indiana Board of Tax Review issued the following three decisions discussing standing, limits on the assessor's authority, and restrictions on raising new issues in small claims cases.

Buyer had standing to appeal property taxes. *Masterson v. Tippecanoe County Assessor*, Pet. No. 79-156-10-1-5-00001 (August 24, 2012) (March 1, 2010 assessment) [Small Claims]. Masterson did not own the home under appeal on the assessment date. The estate had paid a portion of the property taxes, which were pro-rated at the date of sale. But the taxes were pro-rated based on the prior year's assessment, which was 10% less than the current assessment. The purchase agreement recognized that Masterson "might be responsible for unreimbursed taxes for the 2010 assessment year." (Page 6, ¶ 17). By rule, a "party" to an Indiana Board of Tax Review appeal includes the property's owner *or* the "taxpayer responsible for the property taxes payable on the subject

property." (Page 6, ¶ 16) (citing 52 IAC 2-2-13). Masterson was responsible for a portion of the March 1, 2010 unreimbursed property taxes, he received the bill for those taxes, and "ultimately paid" the taxes. (Page 6, ¶ 17). The Board, therefore, held that he had standing to bring the appeal. *Id.* *See* http://1.usa.gov/OQu26I.

Assessor lacks authority to change assessment unilaterally on appeal. *Smith v. Allen County Assessor*, Pet. No. 02-075-11-1-5-00027 (August 30, 2012) (March 1, 2011 assessment). At the administrative hearing, the Assessor submitted a property record card showing an assessed value of $139,400, a value lower than the $140,800 determined by the County Board (the "PTABOA"). The Indiana Board observed, "It is unclear whether the Assessor actually intended to change the assessment to that amount or is merely conceding that the assessment should be lowered. Regardless, the Assessor lacks the authority to unilaterally change a determination of the PTABOA." (Page 5, ¶ 9 n.3). But the Board agreed to change the property's value to the $139,400 conceded by the Assessor. (Page 15, ¶ 33). *See* http://1.usa.gov/UkbSai.

Trust could not raise new issue in small claims action, but Board orders Assessor to consider issue on remand. *Richard G. Robinson Irrevocable Family Trust v. Carroll County Assessor*, Pet. No. 08-011-10-1-5-00007 (August 6, 2012) (March 1, 2010 assessment) [Small Claims]. The Trust claimed that the Assessor incorrectly assessed the home under appeal for a basement when, in fact, it was located on a crawl space. But the Trust had not raised that issue in front of the PTABOA or its Form 131 petition. "By electing to proceed in small claims, the parties agreed that the issues were substantially the same as those presented to the PTABOA and that no new issues would be raised before the Board." (Page 5, ¶ 14(g) n.2) (citing 52 IAC 3-1-2(b)). While not formally objecting, the record showed that the Assessor did not consent to try that issue. The Board concluded, "Given the lack of notice to the Assessor, the issue of whether the home is incorrectly assessed as having a basement is not before the Board." (Page 5, ¶ 14(g)). However, because of the Assessor's agreement to do so, the Board ordered her to inspect the property to determine if it has a basement or crawl space and to make the appropriate corrections. *Id.* *See* http://1.usa.gov/VF4etN.

13. **Proceed With Caution, Part III (August, 2012): Indiana Board of Tax Review rules on objections regarding hearsay, statements in settlement discussions, and the use of multiple listing sheets in property tax appeals** (originally posted at *www.taxhatchet.com* on September 28, 2012).

The Indiana Board of Tax Review ruled on the following evidentiary questions in final determinations issued in August.

Statements made in settlement discussions omitted from evidence. *Schafer v. Porter County Assessor*, Petition Nos. 64-002-07-1-3-00001 and 64-002-07-1-4-00004 (August 8, 2012) (March 1, 2007 assessment). The owner of two adjacent lots in an industrial park testified that the assessor considered lowering the value of the improvements on one

lot during an informal meeting. The Indiana Board sustained the Assessor's objection, holding "Statements made in settlement negotiations should not be in evidence." (Page 5, ¶ 14(C) n.1) (citing Ind. Evidence Rule 408, which states "Evidence of conduct or statements made in compromise negotiations is . . . not admissible."). *See* http://1.usa.gov/QAyGSs.

Hearsay evidence can't be sole basis for decision if party properly objects to it. *Smith v. Allen County Assessor*, Pet. No. 02-075-11-1-5-00027 (August 30, 2012) (March 1, 2011 assessment). The Assessor objected to two of the homeowners' exhibits, claiming they should not be admitted on hearsay grounds. The Indiana Board noted that it may admit hearsay; but, if a party objects, the Board may not base an order *solely* on that evidence. (Page 3, ¶ 5 n.1) (citing 52 IAC 2-7-3). The Board explained: "Consequently, because the Assessor properly objected, Petitioners Exhibits 33 and 34A and Mr. Smith's related testimony, while admitted into the record, cannot serve as the sole basis for the Board's determination." *Id. See* http://1.usa.gov/UkbSai. The Board made the same observation in *Lach Living Trust v. Porter County Assessor* Petition No. 64-005-10-1-5-00007, Page 5, ¶ 14(B) n.1 (Aug. 29, 2012) (March 1, 2010 assessment), and *Robinson v. Monroe County Assessor*, Petition No. 53-013-08-1-5-00001, Pages 4-5, ¶ 13 (August 23, 2010) (March 1, 2008 assessment), overruling the assessors' objections and admitting the disputed evidence. *See* http://1.usa.gov/TsyPgU and http://1.usa.gov/Qfrheg.

Multiple listing sheet went to weight of testimony. *Hukill v. Monroe County Assessor*, Petition No. 53-005-06-1-4-00076 (August 23, 2012) (March 1, 2006 assessment). Owner's representative objected to the 2011 multiple listing sheet for the commercial property under appeal, because the owner was contesting the March 1, 2006 assessment. The objection goes to the weight of the evidence rather than its admissibility, the Board ruled. (Page 4, ¶ 7 n.2) (citing 52 IAC 2-7-2). *See* http://1.usa.gov/TsBW8y.

14. **Holders of tax sale certificates lacked standing to bring real property tax appeals** (originally posted at *www.taxhatchet.com* on November 3, 2012).

Indiana Board of Tax Review rules that holders of tax sale certificates lacked standing to bring real property tax appeals

In *Tom Terry et al. v. Delaware County Assessor*, Pet. Nos. 18-003-06-1-5-01316 *et al.* (September 4, 2012) (March 1, 2006 assessment), several appeals were consolidated for the Indiana Board of Tax Review to consider one issue: "whether tax sale purchasers who hold a tax sale certificate but who do not hold title to a property as of the applicable assessment date or tax billing date have standing to appeal the 2006 assessment" of the property. (Page 5, ¶ 3.) The Assessor sought to dismiss the appeals, arguing that the petitioners lacked standing and were not the real parties in interest because they (a) did not own the appealed properties as of the assessment date, (b) were not billed for the

2006 taxes payable in 2007, and (c) were not responsible for making the 2007 tax payments under any contract with the owners.

The tax sale process. Petitioners acquired the properties in tax sales. They were required to pay the taxes due on the properties. Following a tax sale, the purchaser holds a certificate of sale – not a deed. The property owner may redeem the property within one year of the tax sale. The tax sale purchaser acquires a lien against the real property for the entire amount paid. Once the redemption period expires and the property has not been redeemed, the tax sale purchaser has six months to file a verified petition asking a court to direct the county auditor to issue a tax deed. (Pages 8-10, ¶ 11.)

Property tax appeal triggers. A taxpayer may appeal under Ind. Code § 6-1.1-15-1(a)(1) the "assessment of the taxpayer's tangible property." The taxpayer must appeal within 45 days of the Assessor's notice of the property's assessment. *See* Ind. Code § 6-1.1-15-1(b) & (c). Under Ind. Code § 6-1.1-15-13, the "receipt by the taxpayer of the tax bill resulting from [the assessment] is the taxpayer's notice for the purpose of determining the taxpayer's right to obtain a review or initiate an appeal." Thus, if an assessor does not issue a notice of assessment (usually a Form 11 notice), then a taxpayer may appeal from receipt of the tax bill.

The Indiana Board first concluded that the term "taxpayer" under Ind. Code § 6-1.1-15 must be given its commonly understood meaning, i.e. a "person or entity who pays or is liable for a tax." (Page 13, ¶ 16.) The Board further noted that its procedural rules define a "party" as the property owner or the taxpayer responsible for the property taxes. *Id.* (citing 52 IAC 2-2-13.) In this appeal, a petitioner is a "taxpayer" if the petitioner "paid the 2006 pay 2007 taxes on the property he, she or it bought at tax sale." *Id.*

Being a "taxpayer" is not enough. The appeal statutes provide for a review of the "taxpayer's tangible property." Holding a tax sale certificate "does not constitute an interest in tangible property." (Page 13-14, ¶ 18.) The person holding a tax sale certificate during the redemption period "is not a legal or equitable owner of the property." (Page 14, ¶ 19) (citation omitted.) "The tax sale creates a lien against the property that may ripen into full ownership at some later time by the issuance of a tax deed." *Id.* (citation, quotation omitted.) Here, for all cases but two, the record established that the appeals were filed *before* the petitioners acquired tax deeds for the properties. In the majority of cases, the Assessor demonstrated that petitioners lacked an interest in tangible property and therefore had no standing to appeal. (Page 14, ¶ 20.)

Finally, the Assessor submitted a declaration stating that the petitioners were neither responsible for nor billed for the 2006 pay 2007 taxes for the properties. Petitioners did not contest this statement. Consequently, the Board held that Ind. Code § 6-1.1-15-13 did not provide a basis for the petitioners' standing. (Pages 14-15, ¶ 21.)

Additional procedural note: In footnote no. 2, the Board stated that the cases should not have been consolidated, because the Assessor claimed that some of the appeals were not filed by the entity who was the tax sale purchaser and that some of the appeals were

untimely. The Board explained: "At this point a single, across-the-board determination about those issues is impossible in the context of the pending motions on the consolidated cases. This order does not preclude the [Assessor] from raising those issues in regard to the specific facts of any individual case where the standing issue is not dispositive." (Page 8, ¶ 10 n.2.)

The Board's final determination can be viewed at http://bit.ly/U1OT31.

15. **Property taxes are a lien against the property. Owners of home purchased after assessment date were responsible for taxes on the value of previously omitted improvements.** *McElwee and Hale v. Marion County Assessor*, Pet. Nos. 49-800-07-3-5-00095 and 49-800-07-1-5-01873 (Sept. 7, 2012) (March 1, 2007 assessment). In this appeal, Owners purchased a home in 2008 that was constructed in 2004. They did not own the as of the March 1, 2007 assessment date. Owners filed a Form 133 Petition for Correction of an Error claiming the 2007-pay-2008 property taxes for the home as applied against them were illegal as a matter of law.

The Indiana Board noted that property taxes are a lien on the property that attaches as of the assessment date and that the sale or the property does not affect the lien. (Page 14, ¶ 62) (citing Ind. Code § 6-1.1-22-13(a)). Owners may have a possible claim against the prior owner of the home for the amount of taxes paid, but that was not an issue for the Board. (Page 15, ¶ 63.)

Owners claimed that they were "bona fide purchasers" and therefore not liable for the 2007-pay-2008 taxes under Ind. Code § 6-1.1-9-4(b), which provides: "With respect to real property which is owned by a bona fide purchaser without knowledge, no lien attaches for any property taxes which result from an assessment or an increase in assessed value, made under this chapter for any period before his purchase of the property." But Owners were aware that the home had not been assessed, having called the assessor about the omission. Owners had knowledge of the oversight and therefore were responsible for the taxes. (Page 18, ¶ 74.)

Additional note regarding rejection of amended petition. Owners had also filed a Form 131 appeal petition. They submitted an amended appeal petition less than 15 days before the administrative hearing. "The Board will not approve an amended appeal filed fewer than 15 days before the hearing unless the opposing party agrees." (Page 2, ¶ 7) (citing 52 IAC 2-5-2). Because the Assessor objected to the amended petition, the Indiana Board refused to consider it as evidence.

Additional note regarding rejection of exhibit that was not timely exchanged. Owners did not provide a copy of its Exhibit 12 (2006 – 2008 Price Analysis Reports and Trend Charts) before the administrative hearing. The Indiana Board's rule requires that copies of documentary evidence must be exchanged at least five business days before the hearing. *See* 52 IAC 2-7-1(b)(1). The purpose of the rule "is to allow parties to be informed, avoid surprises, and promote an organized, efficient, fair consideration of

cases." (Page 4, ¶ 15.) The Board sustained the Assessor's objection to Exhibit 12 and refused to consider it in determining the outcome of the case. *Id.*

16. **"Marginally relevant" exhibits admitted; property record cards relating to "waived claim" excluded but cards relating to burden-shifting question admitted; "beyond the scope" testimony struck from record.** *Waterford Development Corp. and Hoogenboom Nofziger Realty Corp. v. Elkhart County Assessor*, Pet. Nos. 20-015-08-1-4-00241 and -00242 (Sept. 25, 2012) (March 1, 2008 assessment). The parties made several objections in this appeal of Owners' "big box" building and "in-line" retail centers. Owners used the two parcels together as the Goshen Commons Shopping Center and jointly contested the parcels' values for the March 1, 2008 assessment date. The Board concluded:

    - **Exhibits admitted but given no weight.** A 1998 settlement statement and 2010 property analysis for the property were found to be "marginally relevant, at best." (Page 5, ¶ 13.) Owners failed to show how the exhibits related to the parcels' January 1, 2007 valuation date. The Board assigned the exhibits "no weight" but allowed them into evidence, since they were fully addressed at the hearing. (Page 6, ¶ 13.)

    - **Property record cards relating to waived issue excluded.** The Board excluded property record cards offered to support the Owners' contention that the property was not assessed uniformly and equally with other properties in the county. "Nothing in the [Owners'] Form 131 petitions even remotely refers to constitutional or statutory requirements for uniformity and equality. [Owners] have therefore waived that claim." (Page 6, ¶ 15.)

    - **Exhibits belatedly offered into evidence admitted into record, where they had been discussed during the hearing.** Owners offered an aerial map into evidence after resting their case. The Assessor did not offer a property record card into evidence until after the close of evidence. The Board allowed both exhibits. (Page 6,7, ¶ ¶ 16, 18.) In both cases, witnesses had testified to the documents during the hearing without objection. *Id.* The property record card was relevant to the issue of burden of proof, because it showed the increase of the property's value between 2007 and 2008. The Board reasoned that the card, "relates to an important procedural question about which the Board should be fully informed." (Page 7, ¶ 18.)

    - **Expert testimony excluded.** The Board struck testimony of the Assessor's expert that went beyond the scope of the Assessor's question on cross examination. (Page 7, ¶ 17.)

17. **Indiana Board admits property record cards as exhibits, where parties failed to offer them into evidence but discussed them at length during hearing; unsubstantiated value in appraisal was not probative evidence.** *Fuller v. Cass County Assessor*, Pet. Nos. 09-014-10-1-5-00001 *et al.* (Oct. 3, 2012) (March 1, 2010 assessment). Neither party offered the property record cards as exhibits. "But in an extended colloquy, both the ALJ and [Owner] repeatedly referred to information on those cards. The Indiana Board therefore includes them as a Board Exhibit." (Page 3, ¶ 7 n.2.)

    In this appeal, the Owners offered a farm appraisal with a line item stating the homesite's value. The underlying analysis for that value was contained in another appraisal not submitted as evidence. The Board explained:

    > The Board is therefore left with [the appraiser's] entirely conclusory assertion about the homesite's market value, without any evidence to show that he arrived at his opinion by applying generally accepted appraisal principles. Such conclusory assertions, even when made by an appraiser, lack probative value.

    (Page 7, ¶ 20.)

18. **Indiana Board would not make case for Taxpayer who presented no substantial argument regarding his contention that Assessor failed to properly recognize a withdrawal of its appeal.** *Jackson Leasing Co. v. Clark County Assessor*, Pet. No. 10-005-09-1-4-10005 (Oct. 17, 2012) (March 1, 2009 assessment) [Small Claims Docket]. Owner filed an appeal of the 2009 assessment of its nursing home on May 7, 2010. He attempted to withdraw his appeal on or about July 30, 2010. The Assessor did not recognize the validity of the withdrawal and argued on appeal to the Indiana Board that the Owner had no "absolute right" to withdraw its appeal. (Page 4, ¶ 13.) The Assessor relied upon the Tax Court's 1997 decision in *Joyce Sportswear Co. v. State Bd. of Tax Commissioners*, 684 N.E.2d 1189 (Ind. Tax Ct. 1997) to support her position. The Board opined, "[T]hat decision may not establish the clear, absolute rule against voluntary withdrawal as suggested" by the Assessor. (Page 5, ¶ 13.) The Board explained that in *Joyce Sportswear* the Court found that the taxpayer had no absolute right to withdraw its petition, but a substantial part of the Court's reasoning "was tied to the advanced stage of the proceedings—two evidentiary hearings had been held." *Id.* Neither party addressed whether the relevant statutes and administrative rules had changed since 1997. In the present case, the Owner's attempted withdrawal took place at a much earlier stage. The Court refused to do the Owner's work, explaining: "[Owner] offered no substantial argument on the point and we will not make a case for either party. In the absence of substantial, relevant facts and argument related to withdrawal of the appeal, [the Board] make[s] no determination on that point." *Id.*

19. **Relying on not-for-publication opinions from the Tax Court, Indiana Board states it will not reject appraisals because they value just the land or improvements.** *Kooshtard Property I, LLC v. Monroe County Assessor*, Pet. No. 53-017-08-1-4-00002 *et al.* (Oct. 19, 2012) (March 1, 2008, 2009 and 2011 assessment appeals). For the three assessment dates at issue, the Owner challenged only the land value – not the value of the improvements comprising its gas station and convenience store. The Assessor argued that offering an appraisal that values only the land and then adds the assessed value of the improvements is "mixing and matching techniques" – an approach which the Board has previously rejected. (Page 1, ¶ 31) (citations omitted.) While conceding to its prior treatment of the issue, the Board observed, "[T]he Tax Court has expressed in several opinions that a taxpayer may solely challenge the land value or the improvement value of a property." *Id.* (citations omitted). The Board relied on two 2009 not-for-publication opinions from the Tax Court in reaching its decision, reasoning that the Court's position is "clear that a taxpayer's evidence should not be rejected simply because it values only a part of the property." *See id.* (citations omitted).

20. **Indiana Board disfavors attorneys serving as witnesses and advocates.** *Fisher v. Carroll County Assessor*, Pet. No. 08-011-10-1-4-00001 (Oct. 22, 2012) (March 1, 2010 assessment). The Indiana Board observed, "The Board has several times noted that it disfavors attorneys acting as both a witness and advocate at the Board's hearings. Nonetheless, the Assessor neither objected to [counsel's] testimony nor moved to disqualify him, and the Board ultimately does not rely on [counsel's] testimony in reaching its decision." (Page 2, ¶ 4 n.1.)

Additional notes on hearsay objection and the Board's *de novo* review: The Board admitted, over taxpayer's hearsay objections, an appraisal report and an email from an appraiser, as well as the Assessor's testimony reading from the email. Hearsay is "a statement, other than one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ind. Evid. R. 801. The Board's regulation provides, "[I]f the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the Board's final determination cannot be based solely upon the hearsay evidence." (Page 5, ¶ 12) (quoting 52 IAC 2-7-3). The Board found the exhibits and testimony to "fit squarely within the definition of hearsay." (Page 5, ¶ 13.) The Board allowed the evidence, observing that it "frequently deals with [this type of] evidence" but further noting that its "determination cannot be based solely on those exhibits or on the Assessor's testimony in which she read from one of those exhibits." *Id.*

That the taxpayer had presented the very appraisal report to the County Board that she was now objecting to before the Indiana Board did not alter the Board's ruling on taxpayer's hearsay objection. The Board's proceedings are *de novo*, so the "Board will only base its decisions on evidence offered in its own proceedings." (Page 5, ¶ 14.) Because the taxpayer objected to the evidence at the Board's hearing, the Board "must abide by the limitations in its procedural rules on how it may treat that evidence." *Id.*

21. **Owner of vacant lot could not later object to photograph that was previously offered and admitted without objection.** *Hudson v. Jennings County Assessor*, Pet. Nos. 40-004-08-1-4-00001 and 40-004-09-1-4-00001 (Oct. 30, 2012) (March 1, 2008 and 2009 assessments). The Indiana Board explained,:

> All of Respondents Exhibits 1-9 were offered and admitted without objection. Later in the hearing, [Petitioner's tax representative] attempted to object to Exhibit 9 because the date the photograph was taken was not specified. [The representative] claimed he previously had reserved the right to object after hearing the testimony, but that claim is not accurate. He did not. Exhibit 9 was already admitted without objection. The admissibility of that photograph will not be reopened because of [the representative's] question about when it was taken.

(Page 2, ¶ 9 n.1.)

22. **Indiana Board excludes from evidence a stipulation agreement regarding the prior year's assessment of property under appeal.** *Coutar Remainder VI LLC v. Johnson County Assessor*, Pet. No. 41-009-09-1-4-01392 (Oct. 30, 2012) (March 1, 2009 assessment) [Small Claims Docket]. The Assessor objected to a stipulation agreement for the property's assessment as of March 1, 2008 being entered into the record and to the tax representative's testimony regarding the stipulation. The representative had been involved in a prior case where use of a settlement agreement as evidence was rejected by the Indiana Board. The representative was "fully aware" that he could not use the stipulation agreement as evidence in the present case. (Page 2, ¶ 10 n.1.) The objection was sustained, and the Board refused to consider the stipulation. *Id.*

Additional note on burden of proof: In this appeal, the parties agreed that the Assessor had the burden of proof. (Page 4, ¶ 14.). The Board further explained:

> Initially it was Respondent's burden to prove the 2009 assessment was correct given that the assessment increased by more than 5%. Respondent, however, agreed that the 2009 assessment was excessive and should be reduced to the prior year's assessed value. Then, because Petitioner requested a lesser value than the prior year's assessment, it became Petitioner's burden to establish a lesser amount by making a prima facie case.

(Page 5, ¶ 16.)

23. **Owner of Gas Station / Convenience Store failed to submit copies of property record cards for alleged comparable properties and thus could not prove property's value was excessive in comparison under Ind. Code 6-1.1-15-18.** *Fleetwood v. Monroe County Assessor*, Pet. Nos. 53-005-08-1-4-00021 and 53-005-09-1-4-00012 (Oct. 30, 2012) (March 1, 2008 and 2009 assessment dates). Property owner challenged the 100% positive influence factor applied to land assessment for the property, a "Big Foot" gas station and convenience store. The owner's tax representative argued that the subject land was over-valued compared to the land value on seven properties located in the same area. To support this argument, the representative submitted an assessment analysis, a map of the properties' locations, and a property assessment detail report for each property. But he did not submit property record cards for the comparables.

Ind. Code § 6-1.1-15-18 provides in part, "To accurately determine market-value-in-use, . . . a taxpayer . . . may in a proceeding concerning property that is not residential property, introduce evidence of the assessments of any relevant, comparable property." The Indiana Board held: "To compare the assessed values of comparable properties, however, at a minimum the proponent must provide property record cards to show how the various properties were assessed in the years at issue." (Page 9, ¶ 27.) The evidence submitted by the tax representative was "not the kind of report that would allow the Board to determine how a property was assessed and whether the subject property was assessed differently." *Id.* The representative "failed to present any evidence to show what base rate was applied to each parcel and what adjustments were applied to that base rate for each property." *Id.* The Board had "no means of comparing" the disputed land's assessment to the comparable properties' assessments. *Id.* The owner failed to make a prima facie case that his property was over-valued for either assessment date. (Page 10, ¶ 30.)

24. **Tax Representatives may not practice law before the Indiana Board of Tax Review.**

A. **Evidentiary objections may cross the line into the unauthorized practice of law.** *Parker-Hannifin Corporation v. Allen County Assessor*, Pet. Nos. 02-047-10-1-3-00002 etc. (September 5, 2012) (March 1, 2010 and 2011 assessment dates). In this appeal of a manufacturing facility's assessment, the Tax Representative objected to an appraisal introduced by the Assessor on grounds the appraisal stated that its use was limited to a specific person. The Indiana Board observes that "by making an evidentiary objection, [Tax Representative] at least approached the line demarcating the practice of law, and may have crossed over that line." (Page 10, ¶ 24 n.3) (citing 52 IAC 1-2-1(b)(4).) The Board overruled the objection. (Page 10, ¶ 24.) The Tax Representative identified no authority "to support the proposition that a document that is being used for something different than its originally intended purpose, or by someone different than its originally intended user, is not admissible as evidence." *Id.* And the Tax Representative made no argument that the appraisal was confidential or constituted any "privileged communication" under Ind. Evidence Rule 501(b). *Id.*

B. **Arguing lack of uniformity and equality of assessments "clearly getting close" to the unauthorized practice of law.** *Coutar Remainder VI LLC v. Johnson County Assessor*, Pet. No. 41-009-09-1-4-01392 (Oct. 30, 2012) (March 1, 2009 assessments)

[Small Claims Docket] and *Coutar Remainder VI LLC v. Johnson County Assessor*, Pet. Nos. 41-037-08-1-4-01438 & 41-037-09-1-4-01388 (Oct. 30, 2012) (March 1, 2008 and 2009 assessments) [Small Claims Docket]. In these appeals involving the assessments of
gas stations / convenience stores, the Tax Representative failed to prove that the properties' assessments must be reduced based on a lack of uniformity and equality. The Board notes that "its rules concerning tax representatives . . . also apply to small claims procedures." (Page 5, ¶ 18 n.2; Page 6, ¶ 20 n.3) (citing 52 IAC 3-1-4(b)). Next, the Board states, "A tax representative cannot practice before the board regarding claims of the constitutionality of an assessment or any other representation involving the practice of law." *Id.* (citing 52 IAC 1-2-1(b)(3) & (4)). And the Tax Representative's uniformity argument, the Board explains, "appears to be in reference to the Indiana Constitution." *Id.* Finally, the Board concludes that it "is not saying whether [Tax Representative's] argument does or does not cross the line of the illegal practice of law, but it is clearly getting close." *Id.*

25. **The Indiana Board of Tax Review's application of the 5% burden shifting rule at Ind. Code § 6-1.1-15-17.2 (formerly 6-1.1-15-17, which was repealed because two different provisions had been codified under the same code section).**

A. **Board accepts agreement that assessor has burden and adds admitted value of new "special features" to prior assessment, where the assessor failed to meet her burden.** *Indiana Bank & Trust Company v. Scott County Assessor*, Pet. No. 72-003-09-1-4-00001 (Jan. 20, 2012) (March 1, 2009 assessment) [Small Claims Docket]. Taxpayer challenged the 2009 assessment of its bank. The property record card showed an increase of the property's assessment of more than 5% between the March 1, 2008 and 2009 assessment dates. Taxpayer claimed that the assessor had the burden of proof. (Page 1, ¶ 9.) The assessor agreed and presented her case first. *Id.* The Board accepted the parties' agreement. The assessor failed to make a prima facie case. (Page 5, ¶ 15.) But the bank had added special features to the property between the assessment dates. Taxpayer agreed that the value of these features should be added and admitted that an assessment of approximately $250,000 would be appropriate. "Lacking probative, market-based evidence about what the actual market value-in-use really is, the Board will accept the value admitted by the Petitioner." (Pages 5-6, ¶ 16.)

B. **Taxpayer had the burden to support a value lower than the prior year's assessed value.** *Robison v. Steuben County Assessor*, Pet. Nos. 76-011-07-1-5-00067 *et al.* (Feb. 28, 2012) (March 1, 2007 and 2008 assessment) [Small Claims Docket]. Taxpayer challenged the March 1, 2007 and 2008 assessments of three parcels. The parties both addressed the parcels as two separate economic units: (1) the home site (consisting of two parcels); and (2) a stand-alone vacant parcel.

i. Neither unit's value changed from the 2007 to the 2008 assessment dates. Accordingly, taxpayer had the burden to prove she was entitled to a reduction for the March 1, 2008 assessments. (Page 8, ¶ 14.)

ii. The units' values increased well above 5% between the March 1, 2006 and 2007 assessment dates. Thus, the assessor had the burden of proof for the March 1, 2007 appeals, "at least to the extent that Ms. Robison sought to have those assessments returned to their 2006 levels." *Id.*

iii. But taxpayer sought an even greater reduction, so "she bore the burden of proving that the parcels assessments should be reduced below their 2006 levels." *Id.*

Taxpayer used an appraisal to reduce the home site's March 1, 2008 assessment to $260,000. (Page 13, ¶ 20.) But the appraisal was insufficient to show that the home site's value for March 1, 2007 should be less than its assessed value for March 1, 2006. *Id.* Thus, when the assessor failed to justify the 2007 assessment, the Board reduced the assessment to its 2006 level of $315,700. *Id.*

As to the vacant parcel, taxpayer failed to meet her burden of proof concerning the parcel's March 1, 2008 assessment. (Page 13, ¶ 21.) So the Board therefore affirmed that assessment. *Id.* But, based on the taxpayer's appraisal, taxpayer proved that the vacant parcel's March 1, 2007 assessment should be reduced. *Id.*

C. **Indiana Board declines to address how change of property's use impacts application of 5% rule.** *Edward Wineinger v. Dubois County Assessor*, Pet. No. 19-006-09-1-5-00019 (April 12, 2012) (March 1, 2009 assessment) [Small Claims Docket]. The Indiana Board first found that the Assessor had the burden of proof, because the property's valuation increased more than 5%. (Page 6, ¶ 18.) Though the Assessor argued that the property's use had changed between 2008 and 2009, and thus the burden-shifting rule would not apply, the Board noted that the Assessor did not show that the use had changed, so it need not answer the question of whether a change in use affects whether the burden shifts. (Page 6, ¶ 19(c).)

D. **Assessor had the burden to support the contested value, where the property's assessment had increased by more than 5%.** *CVS Corporation #6252-02 v. Vanderburgh County Assessor*, Pet. No. 82-020-09-1-4-07415 (April 12, 2012) (March 1, 2009 assessment). The taxpayer filed a pre-hearing motion to determine which party had the burden of proof. The Indiana Board found that the assessed value increased by more than 5% over the previous year, so the Assessor had the burden of proving that the assessment was correct. (Page 3, ¶ 9.)

Additional Note: As to the Assessor's use of CVS' valuation opinion, the Board noted that an expert's valuation analysis is not purely mathematical, and that a party cannot merely "plug in" different data to show what would have been the expert's result by using that different data. (Page 11, ¶ 26.) Therefore, the Assessor failed to show that the assessment was correct, and the assessment was reduced to the prior year's assessed value. (Page 11, ¶ 28.)

E. **5% burden-shifting rule applied to two contiguous parcels effectively used as one property.** *Grabbe v. Carroll County Assessor*, Pet. Nos. 08-002-10-1-1-00001 and -00002 (May 10, 2012) (March 1, 2010 assessment) [Small Claims Docket]. The properties under appeal were two contiguous parcels containing agricultural land, three hog confinement barns and a utility shed. The Indiana Board held: "Here, both parcels were purchased together and are effectively used together. Therefore, the Board views the two parcels as a single property. . . . Thus, the value of the two parcels together increased [over 11%] between 2009 and 2010. . . . The Assessor therefore has the burden of proving the assessment was correct for 2010." (Page 7, § 15.)

F. **5% burden-shifting rule did not apply after developers sold property to non-developer and lost "developer's discount"** (originally posted at *www.taxhathet.com* on June 25, 2012).

"Fiction" trumps "facts" in the application of the 5% burden-shifting rule. Once sold by developer, subdivided lots were not the "same property," so buyers had the burden to prove the lots' property tax assessments were incorrect

Indiana Assessors have the burden of proof on appeal to show that their assessments are correct, "if the assessment that is the subject of the review or appeal increased by more than five percent (5%) over the assessed value determined by the [assessor] for the immediately preceding assessment date for the same property." Ind. Code § 6-1.1-15-17.2 (formerly Ind. Code § 6-1.1-15-17, emphasis added). This is a relatively new provision, becoming effective nearly a year ago. As I have posted (*see* April 22, 2012 post at http://bit.ly/MhkYWd), this burden-shifting rule applies to any appeals pending before the Indiana Board of Tax Review as of July 1, 2011. The Indiana Board of Tax Review has frequently analyzed the provision over the last several months (*see e.g.* http://bit.ly/PVmV9M), and last month in two final determinations the Board considered the 5% rule's application to an assessment increase caused by removal of the developer's discount.

Both cases involved vacant lots in Howard County acquired from a developer at auction by non-developers. In *Paul B. and Mirella A. Markiewicz Revocable Living Trust v. Howard County Assessor*, Pet. Nos. 34-002-10-1-5-00020 and -00021 (May 31, 2012), the properties under appeal were two vacant lots bought for a total of $6,000 but assessed at $52,800 as of the March 1, 2010 assessment date. *See* http://1.usa.gov/MJDotA. In *Norris v. Howard County Assessor*, Pet. Nos. 34-002-10-1-5-00149 and -00151 (May 31, 2012), the two lots were bought for a total of $4,500 but assessed at $71,000 for this same assessment date. *See* http://1.usa.gov/LNEnrG.

In both cases, the Indiana Board resolved the lots' disputed assessments by relying on their purchase prices. The Board's analysis in *Norris* is explained at http://bit.ly/PVqahr. The evidence and analysis were substantially similar in *Markiewicz*, and the results in the two appeals were the same. In *Markiewicz*, the Indiana Board identified the key facts as: (1) the developer's inability to sell a single lot for construction in five years; and (2) the high number of lots – 144 – offered for sale in the auction. (Page 9, ¶ 19(c).) The Board

also referenced hearsay testimony by the Trust's witness in *Markiewicz* that three brokers had listed lots in the neighborhood for sale for as little as $5,000 without success. The "totality of the circumstances" indicated that the purchase price was "some evidence of the properties' market value-in-use." *Id.*

In both cases, the purchase prices supported reductions in the contested values. In both cases, the lots' 2010 values were more than 5% above their 2009 values. But the Board concluded in both cases that the property owners – not the assessor – had the burden of proof on appeal. I will cite to the paragraphs in *Markiewicz*, but both decisions apply the same reasoning, focusing on the requirement in the burden-shifting statute that the "same property" be at issue.

The Indiana Board characterized the "developer's discount" as a "fiction" that allows developers to maintain the lower, agricultural land base rate for farmland that the developer acquires, subdivides into lots and then resells for residential purposes. (Pages 7-8, ¶ 16) (citing Ind. Code § 6-1.1-4-12). The statute prohibits the reassessment of the developer's "land in inventory" until the next assessment date following the earliest of: (1) the date on which title to the land is transferred by a developer or successor developer to a non-developer; (2) the date on which construction of a structure begins on the land; or (3) the date on which a building permit is issued for construction of a building or structure on the land. Ind. Code § 6-1.1-4-12(h).

The Indiana Board reasoned that the lots in 2009 were not the "same property" as the lots in 2010. (Pages 8, ¶ 18.) As of the March 1, 2009 assessment date, the lots were owned by the developer and infrastructure for the residential neighborhood was being constructed. But they were assessed as agricultural land under the "developer's discount." After the lots were sold at auction, they were "no longer entitled to the protections of the developer's discount." *Id.* The assessor was required to assess the lots for their new use as residential property. *Id.* According to the Board:

> Thus, the assessor was assessing agricultural property in 2009 and residential property in 2010. Because the assessor was not assessing the "same property" in 2010 as she assessed in 2009, the Board finds that the Petitioner has the burden to prove its properties' assessed values were incorrect in this case.

(Page 8, ¶ 18.) As noted above, the Board opines that the "developer's discount" creates an assessment that is "fiction," i.e. "land in inventory" that is not farmed is nevertheless valued (much lower) as agricultural land. In other words, the vacant land is valued as something (agricultural land) it is not. But between the 2009 and 2010 assessment dates, the record does not show that the lots at issue changed either physically or in their use. Both in 2009 and 2010, the vacant lots were held for future residential use. The lots appear to be the "same property." Regardless of the "facts," however, the Board concludes that the "fiction" controls. In the eyes of the Indiana General Assembly, for purposes of assessment and the burden-shifting provisions, the same vacant lots had different uses – agricultural in 2009 and residential in 2010. Because the legally

determined uses were different, the vacant lots in 2009 were not the "same property" under appeal for 2010.

The final determinations issued in *Markiewicz* and *Norris* seemingly address a question that the Indiana Board in the prior month had left for another day. On April 12, 2012, the Board concluded in *Wineinger v. Dubois County Assessor*, Pet. No. 19-006-09-1-5-00019 [Small Claims Docket] that because the assessor had produced no proof that the subject property's use had changed between assessment dates, "The Board therefore need not decide if an intervening change in a property's use affects whether Ind. Code § 6-1.1-15-17.2's burden-shifting provision is triggered in the first place." See http://1.usa.gov/LtHgy0. (Page 6, ¶ 19(c) n.3.) Based on the rulings in *Markiewicz* and *Norris*, the answer appears to be "yes": an intervening change in the property's use means that the property under appeal is not the "same property" from the prior assessment date, so the taxpayer has the burden of proof.

G. **Indiana Board would not rely on settlement agreement resolving prior year's assessment appeal for a parcel in determining application of the 5% burden-shifting rule to the same parcel's current assessment appeal** (originally posted at *www.taxhathet.com* on August 9, 2012).

Avoiding the "chill" in resolving property tax appeals: Indiana Board of Tax Review refuses to use settlement agreements to determine application of the 5% burden-shifting rule in property tax appeals.

Settlement agreements are common in all types of litigation, including in property tax appeals. As this blog has previously discussed, the Indiana General Assembly passed a law which became effective on July 1, 2011, that shifts the burden of proof on appeal to the assessor, where the disputed property's assessment has increased by more than 5% over the previous year's value (as determined by the assessor). Specifically, Indiana Code § 6-1.1-15-17.2 provides:

> This section applies to any review or appeal of an assessment under this chapter if the assessment that is the subject of the review or appeal increased the assessed value of the assessed property by more than five percent (5%) over the assessed value determined by the county assessor or township assessor (if any) for the immediately preceding assessment date for the same property. The county assessor or township assessor making the assessment has the burden of proving that the assessment is correct in any review or appeal under this chapter and in any appeals taken to the Indiana board of tax review or to the Indiana tax court.

What happens when the previous year's value was determined by a settlement agreement between the assessor and the taxpayer? The Indiana Board addressed that question in three final determinations issued last month.

Assessment returned to the prior year's original value, not to the stipulated value. In *Greenwood West Partners v. Johnson County Assessor*, Petition No. 41-026-09-1-4-01382 (July 25, 2012), the owner (Greenwood) challenged the March 1, 2009 assessment for its property, which consisted of a convenience store, service station, and car wash. *See* http://1.usa.gov/NOi0UG. The parties agreed that the 2009 assessment was more than 5% over the property's March 1, 2008 assessed value, so the assessor had the burden of proof on appeal. The assessor "did not even attempt to prove the existing 2009 assessment is correct" and conceded that the 2009 value should be reduced. (Page 3, ¶ 16.) But reduced to what number? The 2009 assessment was $882,100, a 6.9% increase above the property's original 2008 assessment of $824,800. The 2008 value, however, "was corrected by a stipulation agreement to $455,400." (Page 2, ¶ 12(b).) In the stipulation, Greenwood agreed to withdraw its 2008 appeal petition before the Indiana Board in exchange for lowering the assessed value.

Greenwood argued that nothing in the record demonstrated why the assessment almost doubled from 2008 to 2009, that no annual adjustments were made in the neighborhood for 2009, and that the stipulated $455,400 value therefore should be carried forward to 2009. The Indiana Board noted that the burden-shifting statute is "silent" as to what happens when the assessor has the burden of proof and fails to meet that burden. In those cases, the Board has returned the assessment "to the value determined by the county assessor for the immediately preceding assessment date." (Page 3, ¶ 17.)

The Board would not reduce the assessment to the stipulated value. In addition to the statute's "silence," the Board noted that "nothing in the terms of the agreement itself supports using the agreed value for a subsequent assessment year." (Page 3, ¶ 18.) The Board further found that policy reasons supported its decision, reasoning:

> Judicial policy strongly favors settlement agreements. They allow courts to operate more efficiently and allow parties to fashion the outcome of their disputes through mutual agreement. Our Supreme Court has held that "[t]he law encourages parties to engage in settlement negotiations in several ways. It prohibits the use of settlement terms or even settlement negotiations to prove liability for or invalidity of a claim or its amount." *Dep't of Local Gov't Fin. v. Commonwealth Edison Co.*, 820 N.E.2d 1222, 1227 (Ind. 2005). The strong policy justification for denying settlements precedential effect in a property tax case is that allowing parties to use the settlement would have a chilling effect on the incentive of the parties to resolve cases. *Id.* at 1228.
>
> Coupled with Ind. Code § 6-1.1-15-17.2, this case presents an unusual scenario. Nevertheless, general principles about the limitations of settlements still are persuasive. There are many reasons for parties to make such agreements. We will not speculate what those reasons might have been and we will not apply the settlement to other matters. This agreement is merely a settlement

whereby the 2008 appeal was withdrawn in exchange for a specified adjustment. It does not dictate what the 2009 will be.

(Page 4, ¶¶ 20-21) (citations omitted).

Settlement agreement would not establish "baseline" for applying 5% burden-shifting rule. In the above case, there was no question that the assessor had the burden of proof. In two other decisions issued on the same day involving a convenience store operator's March 1, 2008 assessments, the Board cited the same policy considerations and concluded, "[T]he settlement agreement for 2007 did not establish a new base line for purposes of the 5% rule in the burden shifting statute to the other appeals."

H. **Proceed with Caution, Part I (August, 2012): Indiana Board of Tax Review decisions regarding the 5% burden shifting statute** (originally posted at *www.taxhathet.com* on September 24, 2012).

"Proceed with Caution" posts will highlight developments on various procedural, jurisdictional, and evidentiary issues. This inaugural installment will discuss last month's decisions from the Indiana Board of Tax Review addressing application of the burden shifting statute found at Indiana Code § 6-1.1-15-17.2.

Where a home's assessment did not change, owner had burden of proof. *Lach Living Trust v. Porter County Assessor*, Petition No. 64-005-10-1-5-00007 (August 29, 2012) (March 1, 2010 assessment). Under Indiana Code § 6-1.1-15-17.2, the burden of proof on appeal shifts to the assessor in cases where the disputed assessment has increased by more than 5% over the previous year's assessment. The Board concluded, "In this case, the parties agreed that the assessed value of the Petitioner's property did not increase from 2009 to 2010. The Petitioner, therefore, has the burden of proving the property's 2010 assessment was incorrect." (Page 8, ¶ 14). *See* http://1.usa.gov/TsyPgU. *Accord Gentry v. Hancock County Assessor*, Petition No. 30-012-10-1-5-00001, Page 5, ¶ 20 (August 24, 2012) (March 1, 2010 assessment). *See* http://1.usa.gov/UAGt86.

Home's assessment increased by 23% between assessment dates, so Assessor had burden of proof. *Nowosielski v. Porter County Assessor*, Petition No. 64-011-10-1-5-00006 (August 6, 2012) (March 1, 2010 assessment). "In the case at hand, the parties agreed that the [owners'] property's assessment increased from $301,500 in 2009 to $370,700 in 2010, which is an increase of 23%. The Assessor, therefore, has the burden of proving the assessment was correct for 2010." (Page 8, ¶ 16). *See* http://1.usa.gov/S4mwEz.

Home was constructed on parcel during year between assessment dates. Property was not the "same property" as prior year, so owners had burden of proof. Indiana Board declined to decide whether burden shifting statute applied to deduction appeals. *Robinson v. Monroe County Assessor*, Petition No. 53-013-08-1-5-00001, (August 23, 2010) (March 1, 2008 assessment). The parties agreed that the property's

value increased from $25,000 in 2007 to $149,500 in 2008, an increase greater than 5%. But the Assessor submitted evidence showing that a single-family residence was built on the property between the March 1, 2007 and 2008 assessment dates. Consequently, the owner had the burden of proof. (Page 9, ¶ 25). The Board reasoned:

Under the plain language of Indiana Code § 6-1.1-15-17.2, the burden shifts to the assessor when the assessed value of the *same property* increases by more than five percent. Therefore, because the property's 2008 assessment accounted for the addition of a house to the property; whereas the property was not assessed for any improvement in 2007, the assessor was not assessing the "same property" in 2008 as she did in 2007. Thus, Indiana Code § 6-1.1-15-17.2 does not apply in this case and the Petitioners maintain the burden to prove their property's assessed value was incorrect for 2008.

Id. The issue before the Indiana Board was whether the County Board (also called the Property Tax Assessment Board of Appeals or "PTABOA") improperly denied the owners' claim for the model residence deduction in 2008. The Board noted, "Because the Board finds that the five percent burden shifting provision does not apply on other grounds, the Board need not decide if Indiana Code § 6-1.1-15-17.2 applies to a deduction appeal." (Page 9, ¶ 25 n.4). *See* http://1.usa.gov/Qfrheg.

Property was remodeled between assessment dates and thus was not the "same property." *Oliver v. Carroll County Assessor*, Pet. No. 08-018-10-1-5-00005 (August 6, 2012) (March 1, 2010) [Small Claims]. The parties agreed that the owners "significantly restored and remodeled the home between 2009 and 2010 after it was damaged by severe flooding"; accordingly, it was not the "same property" and the owners retained the burden of proof on appeal. (Page 4, ¶ 13). *See* http://1.usa.gov/Q3gBvv.

Two adjacent lots treated as a single property for purposes of burden shifting analysis. The Indiana Board in *Schafer v. Porter County Assessor*, Petition Nos. 64-002-07-1-3-00001 and 64-002-07-1-4-00004 (March 1, 2007 assessment) similarly concluded that the property owners retained the burden of proof, where two adjacent lots were assessed as vacant land in 2006 but one lot was assessed as an improved parcel in 2007. The lots were not the "same property" in both years. (Page 8 ¶ 17). They were contiguous lots, and there was no evidence that they were used as separate economic units. Therefore, the Board treated the two lots as a single property in its burden shifting analysis. (Page 8 ¶ 17 n.3). *See* http://1.usa.gov/QAyGSs.

Assessor fails her burden, homeowner meets his burden to prove lower value. *Masterson v. Tippecanoe County Assessor*, Pet. No. 79-156-10-1-5-00001 (August 24, 2012) (March 1, 2010 assessment) [Small Claims]. In the appeal of this single-family residence, the property's value increased by approximately 10% over its 2009 assessment. Accordingly, under Indiana Code § 6-1.1-15-17.2 the Assessor had the burden on appeal to support the home's 2010 assessment of $72,000. (Page 5, ¶ 14). To validate her assessment, the Assessor presented fourteen sales from the neighborhood and

an adjacent neighborhood that occurred in 2009 and Multiple Listing Service (MLS) information from four sales. She asserted that the sales were of single-family homes similar in size, age, location, and style to the homeowner's property. These sales had an average value of $75 per square foot, whereas the subject home's 2010 assessed value was $51 per square foot. But the Assessor's testimony was insufficient to prove the alleged comparable properties were, in fact, comparable. The Indiana Board found:

[T]he proponent must identify the characteristics of the subject property and explain how those characteristics compare to the characteristics of the purportedly comparable properties. Similarly, the proponent must explain how any differences between the properties affect their relative market values-in-use. This the [Assessor] did not do. [She] merely testified that the properties were similar in characteristics and location to the subject property. This falls far short of the burden to show comparability between the properties.

(Page 7, ¶ 18(b)) (citations omitted). The Board concluded that the home's value must be reduced to its 2009 assessment of $65,000. (Page 7, ¶ 18(c)).

The inquiry did not end there, as Masterson pressed for an even lower value. He had purchased the home on February 28, 2011, for $19,000. The Board noted, "The sale of the subject property is often the best evidence of the property's value." (Page 7, ¶ 19(a)) (citation omitted). However, this was one year after the March 1, 2010 assessment date. "[B]y itself, the [homeowner's] purchase price is not probative of the property's true tax value." *Id.* Masterson testified that the home was originally listed for $52,900, but the listing price decreased to $24,500. The house was vacant for eighteen months before he purchased it; during that period, the plumbing froze and the "house was trashed." (Page 7, ¶ 19(b)).

The Board explained: "By themselves, listings typically do little to show a property's market value-in-use, but an eighteen-month listing that ultimately results in a sale at or below the list price is much more persuasive; particularly where, as here, the property was actively listed on the relevant valuation date." (Pages 7-8, ¶ 19(b)). And the Tippecanoe County Circuit Court had determined the home's value to be $19,000 in an order dated December 2, 2010 – approximately nine months after the assessment date. The Board ruled: "Considering the totality of the evidence, the Board finds that Mr. Masterson raised a prima facie case that the subject property's true tax value was no more than $19,000 for 2010." (Page 8, ¶ 19(b)). *See* http://1.usa.gov/OQu26I.

Burden shifting statute applied to appeals pending as of July 1, 2011. Because the Assessor had the burden of proof, she could not move for an involuntary dismissal. *Hukill v. Monroe County Assessor*, Petition No. 53-005-06-1-4-00076 (August 23, 2012) (March 1, 2006 assessment). The Assessor argued that Indiana Code § 6-1.1-15-17.2 (effective July 1, 2011) only applied prospectively to Indiana Board appeals "absent clear and expressed language to the contrary." (Page 11, ¶ 30). The Board observed: "Indiana

Code § 6-1.1-15-17.2 does not change the rules or standards for determining whether an assessment is correct. Nor does the statute make any change to the assessor's duties in making assessments." (Page 12, ¶ 31). And the Board further concluded: "If the General Assembly had not intended the law to apply to pending appeals, it could have inserted language to that effect, stating that the law only applied to future assessments. This the legislature did not do." (Page 13, ¶ 32). The burden shifting statute thus applied to all appeals pending as of July 1, 2011. (Page 13, ¶ 34). The commercial property's assessed value for 2006 increased by more than 5% over its 2005 assessed value, so the Assessor had the burden of proof. *Id.*

The Assessor's counsel moved for an involuntary dismissal under Trial Rule 41(B) of the Indiana Rules of Trial Procedure (the trial rules apply to Indiana Board proceedings to the extent they don't conflict with the Board's rules). Trial Rule 41(B) provides:

After the plaintiff *or party with the burden of proof upon an issue*, in an action tried by the court without a jury, has completed the presentation of his evidence thereon, the opposing party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the weight of the evidence and the law there has been shown no right to relief.

(emphasis added). Here, the owner conceded that he possessed no sales information, no evidence on comparable properties in the neighborhood, and no other evidence of the property's market value-in-use. (Page 6, ¶ 16). The Indiana Board stated, "There is little question that, had the [owner] had the burden of proof in this appeal, the case presented by his representative would have fallen far short of the burden to prove the [owner's] property's assessment was in error." (Page 14, ¶ 36). Because the Assessor had the burden of proof, the owner's petition could not be involuntarily dismissed under Indiana Trial Rule 41(B). *Id.* The Assessor's motion was denied. *Id. See* http://1.usa.gov/TsBW8y.

In an earlier decision involving the same owner's service station in the same county for the same assessment date, the Board also denied the Assessor's motion for involuntary dismissal. *Hukill v. Monroe County Assessor*, Petition No. Petition No. 53-009-06-1-4-0022, Page 13, ¶ 35 (August 15, 2012) (March 1, 2006 assessment). The property's assessment had increased by more than 5% over its 2005 value, so the Assessor had the burden of proof. (Page 12, ¶ 31). In denying the motion, the Board reasoned, "The [Assessor] cannot sidestep the requirements of the burden shifting law, by seeking to dismiss a petition it deems insufficient to make a case." (Page 13, ¶ 35). The Board also remarked, "Trial Rule 41(B) allows a party to move for involuntary dismissal *after* the presentation of evidence" and the Assessor's counsel had moved for dismissal *before* the Petitioner had presented evidence. (Page 13, ¶ 34) (emphasis added). *See* http://1.usa.gov/RdiY29.

The Indiana Board reached the same conclusions in *South Central Leasing v. Monroe County Assessor*, Petition No. 53-012-06-1-3-00004, Pages 7-11, ¶ ¶ 20-30 (August 17, 2012) (March 1, 2006) (holding that the Assessor had the burden of proof and denying her motion for involuntary dismissal). In this case, however, the Board *increased* the vacant industrial land's assessment from $289,800 to $300,000 based on the property's sale price on March 31, 2005. (Pages 12-13, 14 ¶¶ 34, 38.) In so doing, the Board explained that the Board has "the authority to increase the assessed value of property where the evidence shows the assessment is in error and the value of the property is in excess of its assessed value." (Page 12, ¶ 34) (citations omitted). *See* http://1.usa.gov/Sj4i2g.

I. **Where improvement existed but was erroneously omitted from assessment for prior year, the burden-shifting statute does not apply in appeal of current year's assessment.** *McElwee and Hale v. Marion County Assessor*, Pet. Nos. 49-800-07-3-5-00095 and 49-800-07-1-5-01873 (Sept. 7, 2012) (March 1, 2007 assessment). Owners' home was constructed in 2004, but it was not placed on the assessment rolls until 2007. The Indiana Board held: "Therefore, . . . the 2006 and 2007 assessments are not for the *same property* and Ind. Code § 6-1.1-15-17.2 does not shift the burden to the Respondent." (Page 6, ¶ 25) (emphasis added). However, the Board further explained: "[I]f the Assessor attempts to claim that the assessed value should be anything *over* the value determined by the PTABOA, then the Assessor, and not [Owners], must prove that the PTABOA's assessment is incorrect." (Page 6, ¶ 26) (emphasis added).

J. **Burden-shifting provision did not apply to "significantly remodeled" property.** *Basic American Convalescent Center v. Madison County Assessor*, Pet. No. 48-003-08-1-4-00003 (Sept. 24, 2012) (March 1, 2008 assessment) [Small Claims Docket]. The Owner challenged the 2008 assessment of its nursing home. The parties agreed that the property's value increased from $775,300 in 2007 to $2,783,300 in 2008. But the nursing home was "significantly remodeled in 2007." (Page 6, ¶ 15) Building permits showed that Owner had "re-roofed the building, replaced the windows, updated the interior drywall and ceiling and floor finishes, updated the wiring in the building, and installed a central ventilation unit." *Id.* Owner described this as simply "normal maintenance." *Id.* The Indiana Board disagreed and found that the nursing home as assessed in 2008 – after being "significantly remodeled" – was not the "same property" that was assessed in 2007. (Page 6, ¶¶ 15, 16.) Ind. Code § 6-1.1-15-17.2 did not apply to shift the burden to the Assessor. (Page 6, ¶¶ 16.)

K. **Indiana Board's final determination reverses ALJ's decision on application of burden-shifting rule, where prior assessment's final value was based on a settlement.** *Menefee v. Noble County Assessor*, Pet. No. 57-006-10-1-5-00006 (Oct. 30, 2012) (March 1, 2010 assessment date) [Small Claims Docket]. At the administrative hearing, the ALJ preliminarily determined that because the home's assessment increased from $146,500 in 2009 to $165,300 in 2010 (more than 5%), the Assessor had the burden of proof. (Page 5, ¶ 14.) For the March 1, 2009 assessment date, the Assessor had initially valued the property at $178,200 – higher than the property's disputed 2010 assessed value. The Assessor and homeowner later stipulated to the $146,500 value to

settle the 2009 appeal. Indiana law "strongly favors settlements," and that "strong policy justifies denying settlements precedential effect in property tax cases." (Page 5, ¶ 16) (citing *Dep't of Local Gov't Fin. v. Commonwealth Edison Co.*, 820 N.E.2d 1222, 1228 (Ind. 2005)). "The Board therefore will not apply a settlement agreement to set a baseline for comparison to future assessments, especially where, as here, the agreement does not contain any language clearly indicating that the parties intended such a result." *Id.*

Furthermore, the home was assessed as 62% complete in 2009 and as 100% complete in 2010. The Indiana Board concluded that in 2010 the home was not the "same property" as was appealed and settled for 2009. (Page 5, ¶ 17.) The burden-shifting statute only applies if the "same property" is under appeal for the current and prior years. *Id.* The homeowner had the burden of proof on appeal to the Board. (Page 5, ¶¶ 14, 17.)

L. **Where property under appeal was carved out of larger parcel from prior year, the burden of proof does not shift to the Assessor under either Ind. Code § 6-1.1-4-4.4(b) or Ind. Code § 6-1.1-15-17.2.** *Centra Credit Union v. Clark County Assessor*, Pet. Nos. 10-009-07-1-4-10000 *et al.* (Oct. 9, 2012) (March 1, 2007 to 2010 assessment dates) [Small Claims Docket]. Owner appealed the assessments of its credit union property in Jeffersonville for the 2007 to 2010 tax years. The building was built new in 2006 on land that was carved out of a larger parcel; it was first assessed as of March 1, 2007. At the local hearing, the County Board changed the building's grade factor and thereby increased the assessed value from $840,900 to $1,000,200. For the March 1, 2007 assessment date, Owner argued that the Assessor had the burden of proof under two provisions, Ind. Code § 6-1.1-4-4.4 and Ind. Code § 6-1.1-15-17.2. Under Ind. Code § 6-1.1-4-4.4, the assessor has the burden to prove that each change to the "underlying parcel characteristics, including age, grade, or condition, of a property," is valid. Under Ind. § 6-1.1-15-17.2, the Assessor has the burden to prove that the property's assessment is correct where the assessment increased "by more than five percent (5%) over the assessed value determined by the [Assessor] for the immediately preceding assessment date for the same property."

The Board observed, "To shift the burden of proof under either statute the assessment under appeal is compared to the *previous year's* assessment." (Page 4, ¶ 14) (emphasis added). Here, there was *no 2006 assessment for the property*. Consequently, regarding the property's 2007 assessment, the Board held:

> The parcel under appeal was part of a bigger parcel on March 1, 2006. The improvements were not built until after March 1, 2006. Neither statute shifts the burden to the assessor for the assessment of a new property. The Petitioner has the burden of proof in the 2007 appeal.

Id. For the subsequent tax years, the Board held:

- The Assessor admitted that the property's 2008 assessment increased by more than 5% over its 2007 value. The Assessor had the burden of proof for 2008. (Page 5, ¶ 15.)

- The parties disputed the assessment assigned to the property by the Assessor for 2008 assessment. Relying on the value stated in the Owner's Form 130 appeal petition and the County Board's Form 115 notice of its determination, the Board concluded that the property's assessed value had not increased by more than 5% from 2008 to 2009. Owner had the burden of proof. (Page 5, ¶ 16.)

- The property's assessed value dropped from 2009 to 2010. Owner had the burden of proof. (Page 5, ¶ 17.)

UPDATE ON PROPERTY TAX EXEMPTIONS

Indiana Tax Court decision

1. **Assisted living facility owned by non-profit and leased to for-profit did not qualify for exemption.** In *Tipton County Health Care Foundation, Inc. f/k/a Tipton County Memorial Hospital Foundation v. Tipton County Assessor*, Cause No. 49T10-1101-TA-6, Indiana Tax Court, February 16, 2012, property owned by a non-profit hospital foundation was leased to a for-profit entity for exclusive operation as an assisted living facility. The Indiana Tax Court found that the property was not exempt from property tax. The Tax Court said the record did not indicate whether the lessee had either a "charitable purpose" or a "profit motive" as its motivation for the lease arrangement.

Indiana Board of Tax Review – Final Determinations

1. **Fraternal group failed to show that its office building qualified for charitable, educational or religious purposes exemption** (originally posted at *taxhatchet.com* on June 12, 2012).

   No Joke? Providing 'mirth' insufficient to support property tax exemption for fraternal group

   "Mirth is God's medicine. Everybody ought to bathe in it." - Henry Ward Beecher

   Laughter may be the best medicine, but apparently it is not the best prescription for a property tax exemption. The Indiana Board of Tax Review denied an exemption for property used to promote "mirth" in *International Royal Order of Jesters, Inc. v. Marion County Assessor*, Pet. Nos. 49-600-08-2-8-00010 and 49-600-10-2-8-01551 (Jan. 9, 2012) (March 1, 2008 and 2010 assessment dates). *See http://1.usa.gov/AmIAxk.* The International Royal Order of Jesters, Inc. (the Jesters), which was exempt from federal tax under 501(c)(3) and (c)(10), claimed a 100% exemption for an office building used as both a headquarters and museum. Counsel for the Jesters described the organization as a "domestic fraternal organization operating under a lodge system devoted entirely to religious, charitable, educational and fraternal purposes." (Page 7, ¶ 20.) The Executive Director testified that the Jesters organization was part of the Masonic fraternity and that there were "191 subordinate courts in the United States, Canada, Mexico and the Republic of Panama, with approximately 20,500 members." (Page 7, ¶¶ 20 & 21.) The Director also testified, "The purpose of the Jesters is spreading the gospel of mirth, merriment and cheerfulness, promoting fellowship and fraternity among members, and extending good cheer and assistance to the general public, which furthers the Masonic principles of brotherly love, belief and truth." (Page 7, ¶ 21.) According to the Director, "[']Mirth is king['] explains to the world the purpose of our existence." *Id.*

To be exempt, the Jesters had to show that the property was predominantly owned, occupied, and used for an exempt charitable, educational, or religious purpose (or some combination thereof). *See* Ind. Code § 6-1.1-10-16. The building was predominantly used for meetings and administrative tasks. Approximately one-third of the property was leased to a related group, the National Court, Royal Order of Jesters. The museum area was open five days a week and displayed historical artifacts, photographs, various Jester statuettes, and other items related to Masonry. However, it was not on the national museum registry, and there was no exterior signage or community advertisement for the museum. The Jesters organization had made no charitable contributions. And its educational activities "probably" came through its membership newsletter; further, the group had no "strictly religious activities." (Page 9, ¶ 26.)

The exemption claim was no laughing matter to the assessor, who argued that the Jesters organization was a "recreational group" that was predominantly a social club.

The Indiana Board ruled that the Jesters organization failed to meet its burden. (Pages 15-16, ¶ 44.) The property was not used for charitable purposes. The Board reasoned: "The Jesters' main function . . . is to promote the members' fraternalism, spreading mirth and cheerfulness and promoting good fellowship. To the extent charity exists in that mission, the Board holds that it is insufficient to support a finding that the property owned by the Jesters is exempt." (Page 16, ¶ 45.)

The property was not used for educational purposes. The Jesters' museum, which addressed the history of the Jesters, was intended primarily for members' own use and did not educate the public – a fact underscored by the lack of signage and community publicity for the museum. (Page 19, ¶ 49.)

And the property was not used for religious purposes. The Indiana Board concluded, "The record contains no such probative evidence that the property under appeal was used for any religious purposes." (Page 20, ¶ 50.) Thus, from the Jesters' perspective, what may have started out as an exemption comedy resulted in a property tax tragedy.

2. **100% exemption applied for property owned, occupied and used for dance and gymnastics education** (originally posted at *taxhatchet.com* on June 10, 2012).

Tangle over the Tango: Dance & Gymnastics School owned by S Corporation and leased to non-profit found 100% exempt from property tax

Property tax appeals often feel like a dance between the taxpayer and assessor, and in a January 2012 decision the parties went toe-to-toe over whether a dance and gymnastics studio qualified for a 100% exemption. In *Herrick Investments, Inc. v. Marion County Assessor*, Petition No. 49-500-08-2-8-00001 (Ind. Bd. Tax Rw., Jan. 4, 2012), *see* http://1.usa.gov/yqvtPE, the parties stipulated that the dance and gymnastics school under appeal was occupied and used for an exempt charitable and educational purpose. The issue was whether the school was "owned" for an exempt purpose. William and Lynn Herrick formed and were the sole shareholders of Herrick Investments, Inc. (HII), an S-Corporation. HII was formed for the sole purposes of owning the real property and

improvements associated with school. Effective January 1, 2008, HII leased the property to Artists in Motion, Inc. (AIM), an Indiana non-profit corporation. The lease required AIM to use and occupy the property exclusively as a non-profit school for dance and gymnastics education. HII had no intent to generate a profit from the lease. The payments were designed to get sufficient rent to pay the debt associated with the property. The Herricks received no compensation and took no cash distributions from HII during 2008 and 2009. But they did make significant contributions to AIM in 2008 and 2009 to assist with expenses, including payment of the rent for the school. A USPAP appraisal showed that the rent charged to AIM was a below market rate. Moreover, HII allowed other non-profits to use the property at no charge.

The Indiana Board of Tax Review applied a 100% exemption for the March 1, 2008 assessment date. The Board noted, "The leasing of property to a for-profit dance school previously was determined to qualify for an educational purposes property tax exemption." (Page 14, ¶ 53.) The Board further observed:

> [HII] is owned and operated by the Herricks as the sole shareholders, officers, and directors. It was formed to purchase, construct and own a facility for dance and gymnastics education. It purchased and constructed the Property solely to provide such a facility where Ms. Herrick is Executive Director. Furthermore, the Herricks personally made substantial charitable contributions to AIM to cover its expenses, including the rent. The Herricks also personally guaranteed the debt associated with the Property.

(Page 14, ¶ 54.) The Board also found the following facts to be important:

1. HII owned no other real estate.
2. There were no other tenants associated with the school.
3. The Herricks had no intent to profit from owning and leasing the property.
4. AIM is not permitted to assign, sublet or grant any concession or license to use the school without the prior written consent of HII.
5. HII has allowed several other non-profit organizations to use the school at no charge.
6. HII paid the property taxes that AIM is required to pay under the lease.
7. The rent was below market.

The 100% exemption applied because the totality of the evidence showed that HII "was created and exists as a vehicle to support the educational operations of AIM," and it "constructed and leased the Property for the sole and exclusive purpose to provide a facility for dance and gymnastics education." (Page 15, ¶ 57.)

3. **Below-market rents, charitable benefits and services supported 100% exemption for housing complex.** *FARH-West Affordable Housing, Inc. v. Marion County Assessor*, Pet. Nos. 49-601-08-2-8-00001 *et al.* (February 10, 2012) (March 1, 2008 assessment). FARH-West, a 501(c)(3) organization, was founded to provide affordable housing to low income tenants. FARH-West purchased a housing complex and spent $973,000 on capital projects, including repaving a city street. The property was managed by a for-profit company, but that company was paid below-market management fees. FARH-West provided language-learning programs and credit counseling for residents and hosted community events.

   FARH-West presented three rent studies and a USPAP appraisal showing that its rent levels fell below the rates charged by other complexes in the area. The Assessor denied FARH-West's exemption application, contending that the rents were close to or slightly above market rents. The Assessor argued that the rent studies included the area outside of I-465, whereas the subject property was in the separate submarket inside of I-465. The Assessor provided a rent analysis, though the analysis used data from 2011 while the exemption under appeal was for 2008.

   The Indiana Board found in favor of FARH-West. The Board found that FARH-West's rent studies and appraisal raised a prima facie case that the apartments were leased for less than fair market rent. (Page 15, ¶ 25.) Because the complex provided charitable benefits and services to its residents, FARH-West met the requirement that it do more than merely provide affordable housing. (Page 16, ¶ 26.) Further, by repaving the city street, FARH-West relieved the government of the burden to maintain that street. (Page 16, ¶ 27.) Thus, FARH-West established a prima facie case that its property qualified for a charitable exemption, and the Assessor failed to rebut that evidence. (Page 16, ¶ 28.) Accordingly, the Board found the property 100% exempt. (Page 17, ¶ 30.)

4. **Art Foundation which failed to timely file real property tax exemption applications could not use Form 133 petition to correct its error.** *D'Andrea LaRosa Art Foundation v. Dearborn County Assessor*, Pet. No. 15-013-08-3-5-00001 (August. 30, 2012) (March 1, 2008 and 2009 assessment dates). The Art Foundation, an exempt 501(c)(3) organization for federal income tax purposes, owned the old Lawrenceburg post office. The Foundation purchased the property in 2007. The Foundation failed to file a Form 136 exemption application in 2008 or 2009. May 15th is the standard exemption filing deadline each year. But non-Code legislation allowed taxpayers to file for exemptions regarding the 2001 to 2009 tax years before September 1, 2009. The Foundation did not file for an exemption until April 15, 2010, claiming a charitable purpose. The property was deemed exempt starting with the March 1, 2010 assessment date.

   The Assessor claimed no taxes were due for the March 1, 2008 assessment date, because the property had previously been "government owned." (Page 6, ¶ 17.) The Foundation sought the 2008 exemption anyway, believing that the 2008 exemption would carry forward to 2009. To avoid losing the property at a tax sale, the Foundation paid the outstanding taxes. The Foundation filed a Form 133 Petition to Correct Error, which it

filed on March 11, 2011. The Assessor argued that the Foundation could not correct its failure to timely file exemption applications using a Form 133 petition.

That the property showed no assessment and no tax liability for the March 1, 2008 assessment date was a mistake, the Board ruled. (Page 10, ¶ 33.) But that "situation does not prove an exemption was granted for 2008 and it does not create a basis for any exemption to carry over to 2009." *Id.* The Foundation, the Board explained, "demonstrated a fundamental misunderstanding about statutory exemption procedures." (Page 11, ¶ 34.) The Board observed, "Ultimately the [Foundation] was responsible for making sure that whatever needed to be done to claim an exemption for the property it recently bought actually was done." *Id.* The "decisive point" or "controlling point" was the Foundation's failure to file its Form 136 exemption applications by May 15th in 2008 and 2009, and its failure to meet the extended filing deadline of September 1, 2009, allowed by the non-Code provision. (Pages 11-12, ¶¶ 35-37.) That failure "waived whatever exemption might have been available." (Page 11, ¶ 35.) "The Board cannot extend the filing deadline any further than the Legislature did." (Page 12, ¶ 37.) Finally, the Board ruled, "A Form 133 cannot be used to get around the fact that the [Foundation] missed both the original filing date and the extended filing date for the exemption it sought." (Page 12, ¶ 39) (citing two Tax Court decisions explaining the "proper use" of a Form 133 is "to correct objective errors").

5. **Homeowners' Association did not prove that it was established for the purpose of retaining and preserving land and water for their natural characteristics; ten parcels comprising common areas of subdivision were not exempt from property tax.** *Marineland Gardens Community Association v. Kosciusko County Assessor*, Pet. Nos. 43-025-09-2-8-00001 etc. (Sept. 7, 2012) (March 1, 2009 and 2010 assessment dates). The Indiana Board rejected the exemption requests by the Homeowners' Association for ten parcels comprising the common area for the Marineland Gardens subdivision. (Page 8, ¶ 25.) A tract of land is exempt from property tax if the tract is owned by a non-profit entity "established for the purpose of retaining and preserving land and water for their natural characteristics." Ind. Code § 6-1.1-10-16(c)(3) (the tract also must not exceed 500 acres and may not be used by the entity to make a profit). The Association was organized as a non-profit corporation, but it offered only "scant evidence" to show the specific purpose for which it was organized. (Page 7, ¶ 20.) The Association's president pointed to "minimal steps . . . taken to maintain land and water," e.g. fencing the parcels. (Page 8, ¶ 22.) And some aspects of the Association's land use, e.g. laying down gravel for parking, were *inconsistent* with retaining and preserving land. (Page 7, ¶ 21.) The Association provided no articles of incorporation or other organizational documents "laying out the purpose or purposes for which [the Association] was organized." (Page 8, ¶ 23.) Accordingly, the Association failed to make a prima facie case that it was entitled to an exemption. (Page 8, ¶ 24.)

   Additional procedural note: The Association filed only two Form 132 petitions with the Indiana Board. The petitions listed only one parcel, one appeal for both assessment dates. But the petitions referred to "these tracts" and listed the other nine parcels as "related parcels." The petitions also attached the County Board's determination and the

Form 136 exemption applications listing all ten parcels. The Indiana Board's administrative law judge (ALJ) issued an order stating that the petitions did not comply with 52 IAC 2-5-1(b), which generally requires taxpayers to file a separate petition for each parcel under appeal. (Page 3, ¶ 6.) The error was correctable, the Board found. *Id.* The Association had "objectively manifested its intent to appeal" all ten parcels. *Id.* The Board rejected the Assessor's argument that appeals for the nine parcels not listed on the front page of the Form 132 petitions were untimely. *Id.* The ALJ made his finding contingent on the Association's timely responding to defect notices issued in conjunction with the ALJ's order. *Id.* The Association did timely respond, filing separate petitions for each parcel. *Id.*

LEGISLATIVE CHANGES AFFECTING PROPERTY TAXES[3]

P.L. 137-2012 – Tax Administration

- Ind. Code § 6-1.1-3-24, effective March 1, 2011, specifies the assessed value for outdoor advertising signs for 2011 through 2014 assessment dates.
- Ind. Code § 6-1.1-37-11, effective July 1, 2012, provides guidance on calculating interest when a provisional tax statement is issued in advance of a final or reconciling statement.
    - If a taxpayer is sent a provisional statement with a later final or reconciling statement, interest shall be computed after either the date on which taxes were paid under the provisional statement or the date on which taxes were first due, whichever is later.
- Ind. Code § 6-1.1-12-26.1, effective January 1, 2012, provides a 100% property tax deduction for solar power devices used to generate electricity and installed after December 31, 2011.
- P.L. 137-2012 § 129, effective upon passage, provides that during the 2012 legislative interim, the commission on state tax and financing policy shall study whether the value of Federal Income Tax credits under I.R.C. § 42 should be considered in determining the assessed value of low income housing tax credit property.

P.L. 146-2012 – Property Taxes

- Ind. Code § 6-1.1-4-39, effective July 1, 2012, provides that if a taxpayer wishes to have the income capitalization method or the gross rent multiplier method used in the initial assessment of the taxpayer's property, the taxpayer must submit the necessary information to the assessor by the March 1 assessment date.
    - Specifies that the taxpayer is not prejudiced or restricted in filing an appeal if the data is not submitted by March 1.
- Ind. Code § 6-1.1-13-1, effective July 1, 2012, provides that taxpayer must receive notice at least thirty (30) days before the taxpayer is scheduled to appear before the board.
- Ind. Code § 6-1.1-15-1, effective July 1, 2012, provides a taxpayer the right to a continuance of a PTABOA hearing for just cause.
    - Permits a taxpayer to request that the board make a decision based upon submitted evidence without the presence of the taxpayer.
    - Sets a deadline for filing a notice of withdrawal of a petition.
    - Imposes a $50 penalty if a taxpayer or representative fails to appear at the hearing and also fails to request a continuance, fails to request the board take action without the taxpayer being present, or fails to file a withdrawal. Permits an appeal of the penalty to the Indiana Board or directly to the Tax Court.
- Ind. Code § 6-1.1-15-18, effective July 1, 2012, specifies that a taxpayer or an assessing official may introduce evidence of the assessment of comparable properties to determine a property's market-value-in-use.

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[3] See also the presentation by DLGF Commissioner Brian Bailey, "New Legislation in 2012" (May 16, 2012), which can be viewed at *http://www.in.gov/dlgf/files/120516_-_Bailey_Presentation_-_Auditor_Conference.pdf* (last visited November 3, 2012).

- If the proceeding concerns residential property, the taxpayer or official may introduce evidence of assessments of comparable properties in same taxing district or within two (2) miles of such district's boundaries.
- If the proceeding concerns non-residential property, the taxpayer or official may introduce evidence of assessments of any relevant, comparable properties, with preference given to comparable properties in the same taxing district or within two (2) miles of such district's boundaries.

- Ind. Code § 6-1.1-37-11, effective July 1, 2012, provides that if an assessment is decreased by the Indiana Board or the Indiana Tax Court, the taxpayer is not entitled to the greater of $500 or 20% of the interest to which the taxpayer would otherwise be entitled on excess taxes paid if substantive evidence supporting the taxpayer's position was not presented by the taxpayer to the assessor before or at the hearing of the county PTABOA.
  - Provides that an appraisal may not be required by the county board or the assessor in a proceeding before the county board or in the preliminary informal conference.
- P.L. 146-2012 §§ 8-12, effective upon passage, permit various entities to file a late property tax exemption application for previous assessment years, and provides refunds regarding these exempt properties.

P.L. 112-2012 – Property Taxes

- Ind. Code § 6-1.1-4-4.2, effective July 1, 2012, requires the county assessor of each county before July 1, 2013, and before July 1 of every fourth year thereafter to prepare and submit to the DLGF a reassessment plan for the county.
  - Provides that the reassessment plan must divide all parcels of real property in the county into different groups of parcels.
    - Requires that each group of parcels must contain at least 25% of the parcels within each class of real property in the county.
  - Requires the reassessment of the first group of parcels under a county's reassessment plan to begin July 1, 2014, and be completed on or before March 1, 2015.
- Ind. Code § 6-1.1-4-5.5, effective January 1, 2013, specifies procedures for taxpayers to petition the DLGF for reassessment of parcels in a group and a schedule for completion of reassessment of parcels in a group.
- Ind. Code § 6-1.1-22.6-1 *et seq.*, effective March 19, 2012, specifies procedures for resolving multiyear delays in the issuance of tax bills for counties that are at least three years behind in issuing tax bills.

P.L. 120-2012 – Local Government Matters

- Ind. Code § 6-1.1-26-5, effective July 1, 2012, provides that the interest rate owed on property tax refunds is equal to the rate established by the commissioner of the Department of Revenue for refunds on excess state tax payments (current law sets the rate at 4%).
- Ind. Code § 6-1.1-37-9, effective July 1, 2012, provides that the interest rate owed on taxes the taxpayer is required to pay is equal to the rate established by the commissioner of the Department of Revenue for refunds on excess state tax payments (current law sets the rate at 10%).

P.L. 158-2012 – Information Technology Equipment Exemption

- Ind. Code § 6-1.1-10-44, effective July 1, 2012, provides that the property tax exemption for qualified enterprise information technology equipment applies only to property located in a high technology district area designated by the fiscal body of the county or municipality.
- Ind. Code § 6-1.1-10-44, effective July 1, 2012, also provides that an entity that leases qualified property for use in a facility or data center dedicated to computing, networking, or data storage activities is also eligible for the exemption. (Current law provides that only a business that operates such a facility is eligible for the exemption.)
- Ind. Code § 6-1.1-10-44, effective July 1, 2012, also requires that at least $10,000,000 must be invested in the facility or data center after June 30, 2012, by the entity entering into the agreement for the exemption and by the lessor of the qualified property (if the business is a lessee) and all lessees of qualified property.

DEPARTMENT OF LOCAL GOVERNMENT FINANCE
MEMOS AND PRESENTATIONS[4]

Subject	Date
Understanding Tax Abatement Process - John Toumey and Joe Lukomski	Jan. 18-20, 2012
Assessing Mobile Homes - John Toumey	Jan. 18-20, 2012
2012 Cost Table Corrections - David Schwab and Terry Knee	Jan. 18-20, 2012
Personal Property - Joe Lukomski	Jan. 18-20, 2012
Reassessment / PTABOA - Barry Wood	Jan. 18-20, 2012
Location Cost Multipliers	1/27/12
Manufactured Housing Circuit Breaker Clarification	1/27/12
Soil Productivity Factor Update	2/2/12
Future of Sales Disclosure Reporting	2/9/12
Nursing Home Exemption Decision	2/24/12
Supplement to 50 IAC 4.2-15-14 Present Value of Personal Property Leases	3/2/12
Addendum to: 50 IAC 1-3-1 (STB Directive 78-101 – Real Property) – Assessments of Oil and Gas	3/2/12
Golf Course Guidance	3/15/12
Soil Productivity Factor Changes	3/16/12
Land Type Codes – Farmland	3/23/12
Future of Sales Disclosure Reporting	4/2/12
Adjustments to Transportation Fund Maximum Levy	4/4/12
Mandatory Adoption of Anti-Nepotism Policy	5/11/12
Review and Adoption of Budgets and Levies of Certain Public Libraries	5/11/12
New Legislation in 2012 – Commissioner Brian Bailey	5/16/12
Handling Public Buildings – Cathy Wolter, General Counsel	5/16/12
Changes to the Processes of Advertising, Reviewing, and Adopting Budgets, Tax Levies, and Tax Rates Pursuant to IC 6-1.1-17-3, IC 6-1.1-17-3.5, and IC 6-1.1-17-20	5/21/12
Assessment and Appeal Changes	5/22/12
Homestead/Tax Cap Guidance	5/22/12
Assessor Certification and Qualifications for County Assessor Candidates	5/23/12
The Establishment of Fire Protection Territories	5/24/12
Additional Appropriations, HEA 1072, IC 6-1.1-18-5	5/24/12

[4] The DLGF's memos and presentations can be viewed at *http://www.in.gov/dlgf/2444.htm* (last visited November 3, 2012).

2012 - 2013 Budget Calendar	5/25/12
50 IAC 26 Amendment (Computer Standards for a Common Property Tax Management System)	6/15/12
Assessment Appeals 101	6/22/12
Assessment Appeals Flow Chart	6/29/12
Tax Sales & Payment of Delinquent Property Tax, HEA 1090	6/29/12
Allocation of Tax Revenue Subject to "Circuit Breaker" Credits	7/3/12
TIF and Redevelopment Commission Responsibilities	7/3/12
Cyclical Reassessment Follow-Up	7/7/12
HEA 1072 Homestead Deduction Proof	7/7/12
Circuit Breaker – Common Area Clarification	7/16/12
2012 Pay 2013 Certification of Net Assessed Values	7/27/12
Tax Sale Agreements – Cathy Wolter	8/2/12
Circuit breakers and common areas: difference in how the Indiana Code treats an apartment complex versus a mobile home park	8/10/12
Special Use Properties – Barry Wood	Aug. 21-24, 2012
Exemptions / Deductions / Abatements – Barry Wood	Aug. 21-24, 2012
Mobile Homes – John Toumey	Aug. 21-24, 2012
Future of Sales Disclosure Reporting	9/4/2012
State Board of Accounts Memo: Assessment – Penalties	9/4/2012
Updated Location Cost Modifiers for 2013 Annual Adjustment	10/31/12
Location Cost Multiplier Chart	10/31/12
Release of Updated Cost Information for 2013 Annual Adjustment	10/31/12
Cyclical Reassessment Guidance	11/16/12

INDIANA BOARD OF TAX REVIEW – 2012 RULE CHANGES

The following was originally posted at *www.taxhatchet.com* on August 26, 2012.

Ten Rule Changes on Deck: Indiana Board of Tax Review's new procedural rules for property tax appeals will become effective August 31, 2012

The Indiana Board of Tax Review states on its website, "The IBTR's proposed amendments to 52 IAC 1, 52 IAC 2, and 52 IAC 3 will become effective Friday, August 31, 2012." *See* http://www.in.gov/ibtr/ (last visited August 26, 2012). Here are ten of the changes that will become effective at the end of this month:

1. **Voluntary Resolution:**

   The IBTR is adding 52 IAC 2-11-1.5 to govern this process. Under the new rule, a "voluntary resolution" or "facilitation" is defined as "an informal process in which an administrative law judge acts to encourage and assist in the resolution of a property tax appeal." 52 IAC 2-11-1.5(a). The "program requires an agreement to participate by both the county and the taxpayer." 52 IAC 2-11-1.5(b). A facilitation must be conducted before the county property tax assessment board of appeals issues a decision. 52 IAC 2-11-1.5(d). "Voluntary resolution proceedings shall be considered settlement negotiations as governed by Ind. Evidence Rule 408" and they are not open to the public unless all parties agree. 52 IAC 2-11-1.5(f) & (g).

2. **Amendments to Petitions:**

   Current Rule - Amendments filed later than thirty days following the filing of the petition must be approved by the IBTR for good cause shown. *See* 52 IAC 2-5-2(c). Amendments filed solely for the purpose of adding new issues will be approved if filed no later than fifteen days prior to the hearing. *Id.*

   New Rule - "A motion to amend a petition may be filed later than thirty (30) days following the date a petition is filed and such motion may be approved by the board upon good cause shown."

3. **Issues raided before the IBTR:**

   Current Rule - Only issues raised in the appeal petition or any approved amendments to the petition may be raised at the hearing. *See* 52 IAC 2-5-2(g).

   New Rule - This provision is being eliminated.

4. **Prehearing Disclosures:**

Current Rule - Copies of documentary evidence or summaries of statements of testimonial evidence at least five *business days* before the hearing.

New Rule - The IBTR is eliminating the requirement to file summaries of statements of testimonial evidence.

5. **Subpoenas:**

Current Rule - A party may request that the IBTR issue a subpoena or subpoena *duces tecum* by filing a request with the IBTR at least ten business days before the date on which the hearing commences or the deposition is scheduled. *See* 52 IAC 2-8-4(a).

New Rule - The IBTR is adding 52 IAC 2-8-4(c): "A party may not request that the board issue a subpoena *duces tecum* to be served upon a nonparty until at least fifteen (15) days after the date on which the party intending to serve such request or subpoena serves a copy of the proposed request or subpoena on all other parties."

6. **Delays:**

IBTR is clarifying that motions (including motions for summary judgment or partial summary judgment) may be considered a delay reasonably caused by the party filing the motion and extend the time during which the hearing must be held.

7. **Continuances:**

IBTR is adding a new 52 IAC 2-8-1(b) to provide: "A continuance or extension requested less than two (2) business days prior to the hearing may be granted only upon a showing of extraordinary circumstances."

8. **Briefs:**

Current Rule - A party must file an original and two copies of a brief. The party must file the brief at the IBTR's central office. *See* 52 IAC 2-8-6(c)

New Rule - The IBTR is eliminating the requirement that an "original and two copies" of the brief be filed.

9. **Joint Stipulations:**

Current Rule - The IBTR must approve all stipulations submitted by the parties concerning the value or status of property.

New Rule - "If the parties resolve a matter after an appeal has been filed with the board, the parties shall notify the board that an agreement has been reached."

10. Small Claims 52 IAC 3-1-5(d):

IBTR is modifying this rule to provide that the request for documents and witness names and addresses must be made not later than ten business days before the hearing.

All of the Board's changes can be viewed at http://1.usa.gov/xYAjMU.

Indiana Board of Tax Review modifies Form 131 property tax appeal petition

The following originally was posted on *www.taxhatchet.com* on August 16, 2012.

The Indiana Board of Tax Review this month has modified its Form 131 appeal petition - the petition used to appeal a property tax assessment determination by the local County Board (the Property Tax Assessment Board of Appeals or PTABOA). *See* http://www.in.gov/ibtr/2331.htm. According to the Indiana Board:
The significant revisions to page 1 of the Form 131 petition include:

- Making it clear that the petitioner must file a separate petition for each appeal year.
- Adding a reference to the burden language in Ind. Code § 6-1.1-15-17.2.
- Adding space for e-mail addresses.
- In addition, the Form 131 Checklist on page 3 has been updated.

Regarding the new 5% burden-shifting rule, the amended petition provides on the first page:

> ***BURDEN:*** *If the assessed value that is the subject of this appeal increased by more than 5% over the assessed value determined by the assessor (county or township) for the immediately preceding assessment date for the same property, then the assessor has the burden of proving that the assessment is correct in any appeal before the Indiana Board of Tax Review. See Ind. Code § 6-1.1-15-17.2. Do you believe the assessed value increased by more than 5% over the assessed value determined by the assessor for the immediately preceding year?*