OHIO BOARD OF TAX APPEALS

ROGER REYNOLDS, BUTLER COUNTY AUDITOR, (et. al.),	)	
Appellant(s),	)	CASE NO(S). 2021-120
vs.	)	(MISCELLANEOUS / OTHER)
JEFFREY A. MCCLAIN, TAX COMMISSIONER OF OHIO, (et. al.),	)	DECISION AND ORDER
Appellee(s).	)	

APPEARANCES:

For the Appellant(s) - ROGER REYNOLDS, BUTLER COUNTY AUDITOR
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Entered Wednesday, September 14, 2022

Mr. Harbarger, Ms. Clements, and Mr. Caswell concur.

The Butler County Auditor appeals from a Journal Entry of the Tax Commissioner finding the Auditor failed to lawfully value residential property in four political units during the 2020 sexennial reappraisal. Consistent with his finding, the Commissioner ordered specific aggregate increases for residential property within those political units. This matter is now considered upon the notice of appeal, the transcript certified by the Commissioner ("S.T."), the transcript of the hearing before this Board ("H.R."), the exhibits introduced into evidence at that hearing, and the briefs. The Auditor failed to file a reply brief, so we do not know his position on several arguments made in the Commissioner's brief. For the reasons that follow, this Board affirms.

As a preliminary matter, the Commissioner requested in his brief that specific numbered exhibits be "stricken from the record." TC's Br. at 2-3. While the Auditor in his "Appellant's Notice of Filing of Exhibit List" indicated that he "will be relying on [those documents] at the October 13, 2021, hearing" they were never proffered, marked, identified, or entered into evidence. It is well established that this Board receives new evidence (testimony or otherwise) at a hearing where it can scrutinize the evidence. *Nguyen v. Butler Cty. Bd. of Revision,* BTA No. 2021-1944, 2022 Ohio Tax LEXIS 1934 (July 12, 2022), citing *Cunagin v. Tracy*, BTA No. 1994-P-1083, 1995 Ohio Tax LEXIS 486 (Mar. 31, 1995). Here, the Auditor never offered those exhibits at the hearing, so they are not part of the hearing record and need not be stricken, nor will we consider them. Similarly, it is worth noting that the notice of appeal filed by the Auditor contains attachments of an evidentiary nature. Those attachments are replete with data, charts, graphs, and other information, but the contents of a notice of appeal are not evidence. As we stated in *Executive Express, Inc. v. Tracy,* BTA No. 92-P-880, 1993 Ohio Tax LEXIS 1837 (Nov. 5, 1993):

> The mere allegations contained within the Notice of Appeal do not rise to the level of "evidence" or "proof," in and of themselves. These are only naked allegations, claims or assertions. Appellant must offer proof of these claims -- not mere assertions. The law requires competent and probative evidence.

Further, more recently, we stated that:

> [S]tatements in, and attachments to, the notice of appeal do not rise to the level of evidence upon which we can rely in making our determination * * * as they constitute mere contentions, submitted outside this Board's hearing process.

Davang V. Patel v. Summit County Board of Revision, BTA No. 2021-1909, 2022 Ohio Tax

LEXIS 2049 (July 28, 2022). We have refused to consider such attachments in the past and will not do so here.

BACKGROUND

Legal Summary

Appeals of this kind are rare, so a review of the legal landscape is helpful. The Ohio Constitution requires property to be "taxed by uniform rule according to value * * *." Article XII, Section 2. The Ohio Supreme Court has held "[t]his provision generally requires a real-property valuation to ascertain 'the exchange value' of the property." (Emphasis omitted.) *Johnston Coca-Cola Bottling Co. v. Hamilton Cty. Bd. of Revision*, 149 Ohio St.3d 155, 2017-Ohio-870, 73 N.E.3d 503, ¶ 13, quoting *Rite Aid of Ohio, Inc. v. Washington Cty. Bd. of Revision*, 146 Ohio St.3d 173, 2016-Ohio-371, 54 N.E.3d 1177 ¶ 24. The exchange value "is the value amount for which [a] property would sell on the open market by a willing seller and a willing buyer * * *." *Johnston Coca-Cola* at ¶ 13, quoting *State ex rel. Park Inv. Co. v. Bd. of Tax Appeals*, 175 Ohio St. 410, 412, 195 N.E.2d 908 (1964); *Terraza 8, L.L.C. v. Franklin Cty. Bd. of Revision*, 150 Ohio St. 3d 527, 2017 Ohio 4415, 83 N.E.3d 916, ¶¶ 8-9.

To implement that mandate, the General Assembly enacted R.C. 5713.01 which requires that county auditors appraise property "at its true value in money" at least once in every six-year period. R.C. 5713.01(B); *AERC Saw Mill, Inc. v. Franklin Cty. Bd. of Revision*, 127 Ohio St.3d 44, 2010-Ohio-4468, 936 N.E.2d 472. The Tax Commissioner has "general supervisory jurisdiction to oversee the real property valuation process * * *." *Brown v. Tracy*, BTA No. 92-D-1213, 1993 Ohio Tax LEXIS 1879 (Nov. 12, 1993); R.C. 5715.01(A) (requiring the Commissioner to "direct and supervise the assessment for taxation of all real property."). The Commissioner must also "adopt, prescribe, and promulgate rules for the determination of true value and taxable value of real property by uniform rule for such values * * *." *Id*.

Upon initial completion of the required sexennial reappraisal process, a county auditor is required to submit to the Commissioner “an abstract of the real property of each taxing district in the auditor’s county, in which the auditor shall set forth the aggregate amount and valuation of each class of real property in such county and in each taxing district therein as it appears on the auditor’s tax list * * *.” R.C. 5715.23. Once an abstract is submitted, the Commissioner must determine if the reappraisal was performed according to law by valuing property at its true value.

Much of the Commissioner’s review begins when a tentative abstract is filed. That filing triggers a review by the Commissioner’s staff pursuant to section 5703-25-16(A)(2) of the Ohio Administrative Code, which states that:

> In order to achieve uniformity of assessment among the eighty-eight counties, and keeping in mind that there are variations in cost schedules, depreciation schedules, etc., used by the various appraisal firms, the staff of the department of taxation, upon receipt of the “appraised value” abstract as prepared and filed by a county auditor, will review the appraisal in the field in the light of the information it has collected relative to recent real property sales and other information relating to real property values to determine whether all real property has been uniformly appraised at “true value in money” as defined by rule 5703-25-05 of the Administrative Code. After such review the staff shall recommend to the tax commissioner whether the commissioner should accept the reported appraisal value as a reasonable estimate of true value as of tax lien date of the year of reappraisal or reject the values and order the auditor to make the changes needed to insure that the appraisal values are a reasonable estimate of true value in money as of tax lien date of the year of reappraisal. The county auditor shall be informed of the staff’s recommendation.

To aid his or her review, the Commissioner must perform sales ratio studies, and those studies may be used as guidelines. R.C. 5715.012 provides as follows:

> The tax commissioner shall make sales-assessment ratio studies of sales and assessments of real property for the purpose of determining the common level of assessment of real property within the counties pursuant to section 5715.19 of the Revised Code and for the purpose of equalization. Such studies shall be based on a representative sampling during the three years prior to the tax year to which the sample is applied of open market arms' length sales by a willing seller to a willing buyer for a current like use within the class or classes of real property sampled by the board. * * * Such studies and other information of the commissioner may be used by the commissioner as guidelines, where applicable, in the equalization of a class or classes of real property. * * * In addition, the commissioner shall make other studies of the value of real property within the counties which may be used as guidelines, where applicable, in the equalization of a class or classes of real property.

If, after the review process is complete, the Commissioner determines aggregate increases or decreases are necessary to ensure conformity with Ohio law, the Commissioner may order said increases or decreases pursuant to R.C. 5715.24 and R.C. 5715.25.

The 2020 Reappraisal

The Auditor conducted the County's sexennial reappraisal for tax year 2020, which had a tax lien date of January 1, 2020. *See* S.T., TC's Order to Initiate Reappraisal for Tax Year 2020. On August 24, 2020, the Auditor filed with the Commissioner a tentative abstract of the County's property values for the sexennial reappraisal. That filing triggered the aforementioned

review of the tentative abstract by the Commissioner's staff pursuant to Ohio Adm.Code 5703-25-16(A)(2). After staff review, the Commissioner determined that the residential property in seven specific political units within the County had not been assessed at its true value in money and notified the Auditor that the residential property in those political units had been under-assessed. That notification included the Commissioner's recommendations for the necessary adjustments needed to bring the tentative abstract into compliance. H.R. at 41; S.T., September 8, 2020, email from Shelley Wilson to Chasity McAnulty.

Thereafter, on September 30, 2020, the Auditor filed a second tentative abstract with the Commissioner that implemented the Commissioner's recommendations for three of those seven political units but not for the other four. On October 13, 2020, the Commissioner notified the Auditor that those four remaining political units – Fairfield Township, West Chester Township, Fairfield City, and Hamilton City – "were still in need of adjustment to bring the values into the minimum compliance range according to the Commissioner's sales ratio studies." Journal Entry. The record shows there were subsequent conversations between the Auditor, the Butler County Board of County Commissioners, and at least one member of the General Assembly regarding the Commissioner's decision. We note that evidence because we must review the entire record; however, we do not find those communications germane to our decision.

The Auditor did not file a third tentative abstract adopting the Commissioner's recommendations. Instead, on December 4, 2020, the Auditor filed his final abstract for 2020 values without adopting the Commissioner's recommendations for those four political units. Upon receipt of the Auditor's final abstract, the Commissioner determined that the property values for the four political units remained unchanged from the second tentative abstract and were out of compliance with the requirement that property be taxed at its true value in money. The Journal Entry stated that "Pursuant to Ohio Administrative Code section 5703-25-16, the Tax Commissioner reviewed [the Auditor's] values and found that residential property had not

been assessed at its true value in money * * *." Journal Entry. Accordingly, the Commissioner granted aggregate increases as follows: Fairfield Township, 23%; West Chester Township, 20%; Fairfield City, 20%; and Hamilton City, 20%. Those units comprised more than fifty percent of the County's residential tax base. Thereafter, on January 14, 2021, the Auditor filed this appeal challenging the Commissioner's Journal Entry.

In attachments to his notice of appeal, the Auditor set forth in multiple pages his claimed errors in a lengthy nontraditional format, with each page containing data, charts, and/or other information. The headlines on those pages summarized its claims as follows: "DTE's 2019 Sale Ratios are Too High"; "DTE's 2019 Median Sale Ratios are Too High"; "DTE's 2019 Median Ratios are Too High"; "Increase on 2019 Sales Discounts the OAC"; "DTE Discounts Their Sale Ratio Guidelines"; "DTE is Misinterpreting Future Real Estate Market Conditions"; and "Appraisal Experience/IAAO Standards Concerns/Questions." In sum, the notice of appeal asserts that the Commissioner's methodology was incorrect in reaching the determination set forth in the Journal Entry.

The Auditor's Pre-Hearing Brief

After discovery, the Auditor filed a trial brief to "narrow the scope" of the dispute. Aud. Pre-Hrg. Br. at 2. The Auditor's primary argument is the Commissioner's sales ratio studies were legally deficient because the Commissioner "relied exclusively or at least heavily on sales data from the year 2019 while ignoring or minimizing the sales data from 2017 and 2018." *Id*. at 3. The argument relies on an email from Shelley Wilson, DTE Program Executive, to the Auditor's designee. Therein, Wilson wrote the first tentative abstract did "not meet the minimum compliance standards based on the ratio from the 2019 sales." *Id.* at Ex. B. The Auditor further relied on a second email from Wilson to the Auditor stating the Commissioner had "always used the sales from the year immediately preceding the tax lien date to make" findings. Ex. C. Wilson also wrote the Commissioner examines "sales throughout the triennium

to determine the trend in market conditions which also inform [the Commissioner's] analysis." *Id*. The Commissioner did not file a pre-hearing statement.

This Board's Hearing

An evidentiary hearing was held before this Board on October 13, 2021, where the Auditor called Chasity McAnulty, Tax Accounting Specialist 2, from the Auditor's office. The Commissioner presented testimony from Wilson and called the Auditor as an adverse witness. The hearing centered on which methodology – the one used by the Auditor or the Commissioner – was the correct one in determining true value. Both parties cited R.C. 5715.012 in support of their positions.

At the hearing, McAnulty testified that she had been a Tax Accounting Specialist in the Auditor's Office for twelve years, and over the last couple of years, her job focused on the County's reappraisal and gathering and updating data. H.R. at 15. Concerning each of the four political units where the Auditor had not accepted the Commissioner's recommended changes, she testified that, in general, the Commissioner had recommended a twenty percent increase in value, whereas the Auditor's determination based on its CAMA (Computer Assisted Mass Appraisal) system indicated that a fourteen percent increase was appropriate. H.R. at 17-19. Further, she testified that the Auditor's property values were within the range of the sales ratios typically permitted by the Commissioner. H.R. at 19. In reaching his values, the Auditor used sales for all three years and did not balance or weight any of those years. H.R. at 19-20. In other words, the sales in each of the three years were treated equally in reaching value determinations for the four political units in question. Of note, McAnulty did not testify that in reaching his determination, the Commissioner had used an insufficient number of arm's-length sales in his calculations; had made any computational or mathematical errors; or that the Commissioner's data set was incomplete, corrupted with bad data, or otherwise erroneous. Instead, she testified

the Auditor's staff conducted their own study, which was identified as Exhibit D. She indicated she analyzed each of the four units using a "median one-year ratio," a "median two-year ratio," and a "median three-year ratio," H.R. at 18-20. She testified she did not balance or weight any of those years higher than the other two years. McAnulty further testified she did not know how the Commissioner modified his raw sales data based upon his review of the validity of a sale. *Id*. at 20. On cross, McAnulty again conceded she did not review each year individually. *Id*. at 24-25. For example, McAnulty testified her "median two-year ratio" included tax years 2018 and 2019. She testified she had no personal knowledge or evidence that property values in the four units were "actually declining as of" the 2020 tax lien date. H.R. at 25.

The Commissioner called the Auditor as an adverse witness. He testified that he had no evidence that home values were declining in the disputed four political units. H.R. at 29. Rather, his concern was that the injection of large amounts of COVID stimulus money was artificially increasing market prices and that such artificial stimulus would not necessarily have a long-term effect on values. H.R. at 31. He appeared concerned that the stimulus would distort the real estate market in the County and the ability of his office "to properly equalize valuations across the board." H.R. at 32. He agreed, however, that the stimulus money was not distributed until after the January 1, 2020, tax lien date and would have no effect on values as of that date. H.R. at 33.

Wilson testified regarding the methodology used by the Commissioner, and she stated that she reviews the property values submitted to the Commissioner with the goal of determining "whether or not the legal standard of true value in money has been met as of the tax lien date in question." H.R. at 36. She described the process used in the Commissioner's office to gather and review the information provided on the conveyance forms that accompany each real estate transaction across the state. That review enables the Commissioner's office to remove transactions which are determined to be invalid for valuation purposes. Sales ratio

studies are then run on the valid sales by dividing the value placed on the property by the county auditor by its actual sales price. H.R. at 36-37.

Wilson testified that sales ratio studies were performed individually for each separate tax year – 2017, 2018, and 2019 – and not by "a lump sum of all three years." H.R. at 37. She testified that those studies were relied upon in determining the values that were recommended to the Auditor. In explaining the Commissioner's methodology, she stated that sales most recent to the tax lien date are "indisputably the best evidence of value as of that date." H.R. at 38-39. She also stressed that her staff "look at – initially look at all three years' worth of sales to make sure we are looking at a consistent trend in the market throughout the triennial period" but the Commissioner will "rely primarily on the most recent year's sales. [The Commissioner will] use all three years to examine the trend." H.R. at 37-38. She was asked:

> Q. So the standard of relying on three years of sales for trending but placing primary weight on the most recent year, that's been the standard for how long?
>
> A. For as long as I've been with the department.

H.R. at 38.

On cross, Wilson was asked to explain her statements made in the two emails. She testified she did not fully unpack the process in those emails because she did not feel an elaborate discussion was "germane to the message [she] was trying to convey." H.R. at 39. She reiterated that the Commissioner has always been "very open" about the rule that recent sales are the "primary measurement of compliance with the market value standard." *Id*. Later in cross, Wilson argued the values set by the Auditor did not reflect the market or comply with IAAO standards. She testified the IAAO standards generally required ratios to fall between 90% and 110% to be reliable. Further, she testified the final abstract did not fall within that measure for the four units. Wilson stated she could not comment on McAnulty's figures because the

figures were a summary of data, and Wilson was "not intimately familiar with exactly how Ms. McAnulty prepared" the spreadsheet. *Id*. at 44.

Three exhibits, marked by the Auditor as Exhibits B (an email from Shelley Wilson to Chasity McAnulty dated September 8, 2020), C (an email from Shelley Wilson to Roger Reynolds dated October 13, 2020), and D (a spreadsheet prepared by the Auditor's Office showing sales ratios), were admitted into evidence without objection. H.R. at 44.

Post-Hearing Briefs and the Parties' Arguments

The parties further developed their legal arguments in their post-hearing briefs. The Auditor, restating the argument made in his pre-hearing brief, argued that the Commissioner " erred by disregarding the requirement in" R.C. 5715.012 "that a representative sampling of sales assessment ratios for all three years preceding" the County's reappraisal "be employed when evaluating whether" the county's reappraisal "accurately reflected the true value of real estate within Butler County." Aud.'s Post-Hrg. Br. at 5. The Auditor argued that failure led to inflated sales ratio studies, which in turn led to increases that were higher than appropriate. Ultimately, the Auditor argued the Commissioner failed to comply with an unambiguous statute, R.C. 5715.012, because "[n]o ambiguity exists in the wording 'representative sampling during the three years.'" Post-Hrg. Br. at 9. He further relied on a dictionary defining the term "representative sampling" as "sampling in which the relative sizes of sub-population samples are chosen equal to the relative sizes of the sub-populations." *Id.*

In his brief, the Commissioner argued the Auditor is simply wrong on the facts because the Commissioner did perform and employ appropriate sales ratio studies for 2017, 2018, and 2019. TC Br. at 9. In support, he cites Wilson's testimony explaining the Commissioner's process and clarifying her emails. The Commissioner then argues the Auditor's argument is wrong as a matter of law because Ohio law does not require the Commissioner to utilize the studies. Ohio law only requires him to perform the studies to consult; however, he is not bound

by the results. R.C. 5715.012. He also argues the Commissioner's practice of placing most emphasis on 2019 is consistent with generally accepted appraisal principles and the body of case law from the Ohio Supreme Court finding sales closer to the tax lien date are more probative of value than remote sales. He then argues his practice of looking at each year individually better captures market trends. He goes as far as to argue the Auditor's method is inconsistent with R.C. 5715.02 and the Ohio Supreme Court's decision in *Bd. of Edn. of the Westerville City Sch. Dist. v. Franklin Cty. Bd. of Revision*, 146 Ohio St.3d 412, 2016-Ohio-1506, 57 N.E.3d 1126. The Commissioner also argues that property owners are not without recourse since the board of revision complaint process is available to owners who wish to challenge individual values. Finally, the Commissioner argues that the Auditor's other concerns are outside the scope of the statute. He argues he "is expressly prohibited from adopting or enforcing any rule that would require property to be assessed at less than its true value in money * * *." TC Br. at 14-15. Additionally, the Commissioner says the concerns raised would not have impacted values as of January 1, 2020.

ANALYSIS

Standard of Review

Before addressing the merits, we must first determine the standard of review to be applied by this Board in reviewing the Commissioner's determination in the Journal Entry. The Auditor argues we must review the Commissioner's Journal Entry de novo. Aud.'s Post-Hrg. Br. at 4. The Commissioner argues we must review the Journal Entry under a reasonable and lawful standard, but the Commissioner contends we must review his use and reliance on his sales ratio studies under an abuse of discretion standard. *See* TC Br. at 6, citing *Johnson v. McClain*, 164 Ohio St.3d 379, 2021-Ohio-1664, 172 N.E.3d 1012; *see also Brown v. Tracy*, BTA No. 92-D-1213 (Nov. 12, 1993). The only direct precedent we find is *Brown*, which does provide some guidance. In *Brown*, we applied the reasonable and lawful standard, not strictly de

novo or abuse of discretion. However, we gave due weight to the wide latitude given to the Commissioner. We apply the same standard here.

The difficulty in determining our standard of review stems from the fact that there are three main statutes in play. *See* R.C. 5715.251 (governing appeals to this Board); R.C. 5715.24 (the statute governing the Commissioner's review and the statute that authorized the Commissioner to order increases); R.C. 5715.012 (the sales ratio study statute). The first is the statute that authorizes this appeal, R.C. 5715.251, which expressly requires us to apply the reasonable and lawful standard. That statute, per *Brown*, sets the benchmark because our role is to review the Journal Entry.

R.C. 5715.251 states that "[t]he county auditor may appeal to the board of tax appeals any determination of change in the abstract of real property of a taxing district in the auditor's county that is made by the tax commissioner under section 5715.24 of the Revised Code." R.C. 5715.251 then sets forth the standard of review to be used by this Board:

> If upon hearing and consideration of such record and evidence the [BTA] decides that the [Commissioner's] determination appealed from is *reasonable and lawful*, it shall affirm the same, but if the [BTA] decides that such determination is unreasonable or unlawful, the [BTA] shall reverse and vacate the determination or modify it and enter final order in accordance with such modification.

That standard of review is well developed because the courts of appeals and the Ohio Supreme Court apply that standard to review this Board's decisions. *See* R.C. 5717.04. The two standards are nearly identical except that one calls on this Board to review a decision and issue a "final order" while the other calls on courts to review a decision and issue a "final judgment." For comparison, we reproduce the relevant portions of R.C. 5717.04 and R.C. 5715.251, respectively:

> If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

> —

> If upon hearing and consideration of such record and evidence the board decides that the determination appealed from is reasonable and lawful, it shall affirm the same, but if the board decides that such determination is unreasonable or unlawful, the board shall reverse and vacate the determination or modify it and enter final order in accordance with such modification.

Indeed, it appears the General Assembly borrowed the language from R.C. 5717.04 because the reasonable and lawful standard articulated in that statute predates R.C. 5715.251, which was enacted in 1976. *See Denison University v. Bd. of Tax Appeals*, 173 Ohio St. 429, 183 N.E.2d 773 (1962) (quoting the reasonable and lawful standard articulated in R.C. 5717.04 showing unreasonable and unlawful standard was in place at that time).

We think the presumption of consistent usage is quite relevant to our analysis. The presumption of consistent usage is a well-established, albeit sometimes controversial, canon of statutory interpretation. Justice Scalia articulated the presumption generally in *United States v. Castleman*, 572 U.S. 157, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014) (concurring part and concurring in the judgment). He recognized the presumptive "rule of thumb that a term generally means the same thing each time it is used." *Id.* at 174. Justice Scalia went on to stress that while the presumption is "most commonly applied to terms appearing in the same enactment * * * it is equally relevant" when the legislature "'uses the same language in two

statutes having similar purposes.'" *Id.*, quoting *Smith v. City of Jackson*, 544 U.S. 228, 233, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005). That presumption has been considered in civil cases, tax cases, and cases before courts in this state. *See Return Mail, Inc. v. United States Postal Serv.* ,___U.S.___, 139 S.Ct. 1853, 173 L.Ed.2d 801 (2019) (civil); *Patients Mut. Assistance Collective Corp. v. Comm'r*, 151 T.C. 176, 2018 U.S. Tax Ct. LEXIS 54 (Nov. 29, 2018) (tax) ("But this is a tax case, and before we go too far afield in dictionaries or literature, we should draw back to other sections of the law we have to apply to these cases."); *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690 (2005).

As we noted, the presumption has limits; notably, the presumption gives way to context. *See, e.g., State v. Noling*, 153 Ohio St.3d 108, 2018-Ohio-795, 101 N.E.3d 435. However, much of the criticism is confined to situations when courts find materially *different* phrases or provisions have *different* meanings or purposes. *See, e.g., Gabbard v. Madison Local School Dist. Bd. of Edn.*, 165 Ohio St.3d 390, 2021-Ohio-2067 179 N.E.3d 1169 (DeWine, J., dissenting), quoting Scalia & Garner, *Reading Law* at 170. Here, however, we are consulting the presumption when comparing two provisions with no material variation, just as Justice Scalia did in *Castleman*. As a consequence, we think it appropriate to rely on existing case law interpreting the reasonable and lawful standard to the extent the case law is not inconsistent with our review under R.C. 5715.251. We need not start from scratch. We simply sit in the proverbial seat of the Court and review the Commissioner's decision as the Court would review our decision under R.C. 5717.04. The Court would review legal issues de novo and would affirm factual findings "if they are supported by reliable and probative evidence***." *HealthSouth Corp. v. Testa*, 132 Ohio St.3d 55, 2012-Ohio-1871, 969 N.E.2d 232, ¶ 10; *Willacy v. Cleveland Bd. of Income Tax Review*, 165 Ohio St.3d 103, 2021-Ohio-1734, 176 N.E.3d 25; *Seaton Corp. v. Testa*, 155 Ohio St.3d 424, 2018-Ohio-4911, 122 N.E.3d 111; *Chagrin Realty, Inc. v. Testa*, 154 Ohio St.3d 352, 2018-Ohio-4751; *E. Mfg. Corp. v. Testa*, 154 Ohio St.3d 200,

2018-Ohio-2923, 113 N.E.3d 474; *Lafarge N. Am., Inc. v. Testa*, 153 Ohio St.3d 245, 2018-Ohio-2047, 104 N.E.3d 739.

We reject the Auditor's de novo proposal for several reasons. First, he argues "de novo review, or a hybrid form of such," is appropriate since there has been "no judicial or other review" of the Journal Entry. In essence, we are the first tribunal to take a look at this Journal Entry so we must sit de novo. We disagree. The statute clearly articulates a reasonable and lawful standard. Additionally, de novo review is not required the first time a court or tribunal reviews an administrative decision. In fact, most agency decisions are never fully reviewed de novo. The Auditor cites R.C. 119.12, but that statute is clear and unambiguous that a reviewing court of common pleas does not exercise de novo review over factual issues. Those courts review an order to determine if it is "supported by reliable, probative, and substantial evidence and is in accordance with law." *Id.*; *Our Place, Inc. v. Ohio Liquor Control Com.*, 63 Ohio St.3d 570, 589 N.E.2d 1303 (1992) (a touchstone case defining the terms "reliable evidence," "probative evidence," and "substantial evidence."). The Auditor cites *MacDonald v. Shaker Heights*, 144 Ohio St.3d 105, 2015-Ohio-3290, 41 N.E.3d 376, in support of its assertion that a de novo review standard should apply. The decision in *MacDonald* is inapposite, however, because it dealt specifically with the standard of review that this Board was to apply under R.C. 5717.011, which involves appeals from final determinations of local boards of tax review. It did not address the standard of review for appeals under R.C. 5715.251. Unlike R.C. 5717.011, R.C. 5715.251 deals specifically with appeals filed by a county auditor challenging the Tax Commissioner's determination made pursuant to R.C. 5715.24 that changes the real property abstract filed by the county auditor. There is no dispute that R.C. 5715.251, not R.C. 5717.011, applies here as the Journal Entry stated that the Commissioner's review was conducted under R.C. 5715.24 and advised the Auditor that he "may appeal this order * * * pursuant to the provisions of R.C. section 5715.251." While the Auditor does not seem to use R.C. 5717.02 as a

corollary, we think it appropriate to acknowledge that the Court has said this Board exercises de novo review under that statute. *See, e.g., Accel* at ¶ 13-14. However, we are applying a reasonable and lawful standard, not the standard we apply under R.C. 5717.02. Notably, no party argues we should apply R.C. 5717.02.

The Commissioner's arguments are more nuanced. He acknowledges the reasonable and lawful standard applies, but he argues abuse of discretion should be used because the Auditor is attacking the Commissioner's actions under R.C. 5715.012. The Auditor did not file a reply, so we are unaware to what extent he disagrees. This is where *Brown* supplies guidance. There, we applied the reasonable and lawful standard, but we respected the fact the Commissioner has wide discretion in the creation and use of his studies. On pages 20-21 (emphasis in original), we specifically held:

> On the other hand, the results of a comparison of thousands of actual parcel sales over a three-year period with the Auditor's existing related assessed values, reflect statistically whether the individual and aggregated values as determined and used by the county auditor in assessing the real property in his county are reflective of their true values and show whether the Auditor's assessed values are within legally established and acceptable limits. <u>It is for the commissioner, not the auditor,</u> to <u>conduct the statistical studies and to evaluate the effectiveness of the cou</u>nty's <u>established tax assessment process.</u>
>
> * * *
>
> Furthermore, the Auditor has also failed to convince this Board that his studies and conclusions are more reasonable or reliable that those of the Commissioner.

We think it clear we applied the reasonable and lawful standard but gave appropriate

weight to the Commissioner's discretion. Again, we can draw from the Ohio Supreme Court's cases for guidance. It is well established that the Court affirms this Board's decisions if reasonable and lawful. In doing so, the Court has said it will "defer to the BTA's factual finding 'if they are supported by reliable and probative evidence***" but the Court will "afford deference to the BTA's determination of the credibility of witnesses and its weighing of the evidence subject only to an abuse-of-discretion review on appeal." *Seaton* at 7, quoting *HealthSouth*. In this manner, the reasonable and lawful standard is applied, but due deference is given to this Board in fulfilling its role as factfinder. Because our review in this case is analogous, we give due deference to the Commissioner.

We now turn to R.C. 5715.012, which controls the creation and use of the studies. It states as follows:

> The tax commissioner shall make sales-assessment ratio studies of sales and assessments of real property for the purpose of determining the common level of assessment of real property within the counties pursuant to section 5715.19 of the Revised Code and for the purpose of equalization. Such studies shall be based on a representative sampling during the three years prior to the tax year to which the sample is applied of open market arms' length sales by a willing seller to a willing buyer for a current like use within the class or classes of real property sampled by the board. * * * Such studies and other information of the commissioner may be used by the commissioner as guidelines, where applicable, in the equalization of a class or classes of real property. * * *.

The statute has mandatory and discretionary components. In particular, that statute distinguishes the Commissioner's *preparation* of the sales ratio studies, which is mandatory, from the Commissioner's *use* of the studies, which is discretionary. The mandatory component

of the statute states that "[t]he tax commissioner *shall* make sales-assessment ratio studies of sales and assessments of real property * * *. Such studies *shall* be based on a representative sampling during the three years prior to the tax year to which the sample is applied of open market arms' length * * *." Emphasis added. The statute then addresses the Commissioner's discretionary authority regarding the use of those studies. "Such studies and other information of the commissioner *may* be used by the commissioner *as guidelines, where applicable,* in the equalization of a class or classes of real property." Emphasis added. It is well settled that the word "may" is generally construed to render optional, permissive or discretionary the provision in which it is embodied." *Smucker v. Levin*, 113 Ohio St.3d 337, 2007-Ohio-2073, 865 N.E.2d 866, ¶ 14.

Review of R.C. 5715.012's Mandatory Components

The record establishes that the Commissioner complied with the mandatory portions of R.C. 5715.012 and that his determinations regarding those mandatory components were reasonable and lawful. The Commissioner clearly complied with the statute's first mandatory requirement, i.e., that the Commissioner make sales-assessment ratio studies for all three years.

The Auditor argues that the Commissioner did not comply with the second mandatory requirement of R.C. 5715.012: that those studies "be based on a representative sampling during the three years prior" to the subject tax lien date. The Auditor claims that the studies were conducted using a methodology not allowed by the statute, and that by placing primary weight on the 2019 tax year – the year closest to the tax lien date – the Commissioner failed to comply with R.C. 5715.012's language that sales ratio studies be based "on a representative sampling during the three years prior to the tax year * * *." Aud.'s Post-Hrg. Br. at 9. That argument fails for a number of reasons.

The statute does not require the Commissioner to equally weigh the ratio studies for each year. Wilson's credible testimony makes clear that data from all three years was, in fact,

contained within the sales ratio studies and considered by the Commissioner. "We look at – initially look at all three years' worth of sales to make sure we are looking at a consistent trend in the market throughout the triennial period." S.T. at 37. The methodology used by the Commissioner is clear: his staff conducts sales ratio studies for all three years but places the greatest emphasis on the last year. S.T. at 37-38. In that manner, they both capture the trend of the marketplace and get the best data – the sales closest to the tax lien date – to determine market value.

The Commissioner has wide latitude in creating a representative sample, and we are unpersuaded that the statute expressly requires him to weigh each year equally. This statute requires the Commissioner to create these studies using a representative sample to use as a guideline (addressed below) *for a subsequent tax year*. The goal is not to understand the trend over those three years but to understand the trends for prospective application. The goal is to create a study useful in determining value for a subsequent year. While utilizing data from all three years, the Commissioner's methodology, which gave primary weight to the most recent sales (tax year 2019), was in accordance with the language of Ohio Adm.Code 5703-25-16(A)(2) which states that the Commissioner's staff, "* * *, upon receipt of the "appraised value" abstract as prepared and filed by a county auditor, will review the appraisal in the field in the light of the information it has collected *relative to recent real property sales* and other information relating to real property values * * *." (Emphasis added). The sales for tax year 2019 were, of course, the ones most recent to the tax lien date.

Further, the Commissioner's emphasis on more recent sales is not only supported by Ohio Adm.Code 5703-25-16(A)(2), but it comports with standard appraisal practice and existing real property valuation law. An essential element of appraisal practice is for the appraiser to make judgments in choosing the most relevant data or information to be relied upon, among the sometimes-massive amount of data presented. Not all data is of equal value in

determining true value. Placing greater weight on certain data versus other data is a standard and accepted appraisal practice. As we stated in describing the appraisal process in *Consolidated Aluminum Corp. v. Board of Revision of Brown County*, BTA No. 87-F-1182, 1990 Ohio Tax LEXIS 233 (March 2, 1990), "***many pivotal aspects [of an appraisal] are based upon the subjective judgment of the appraiser. Information is utilized or ignored. Various adjustments and formulas are selected. Methods, calculations, facts and extrinsic data are examined and considered and then applied or disregarded***" In short, the search for true value is not furthered, but rather is hindered, by *compelling* the Tax Commissioner to treat data from all three years the same, and RC 5715.012 does not require or compel such equal treatment. It is very well established that sales closer to the tax lien date are more probative than remote sales. *See, e.g.*, *HIN, LLC v. Cuyahoga Cty. Bd. of Revision*, 124 Ohio St.3d 481, 2010-Ohio-687, 923 N.E.2d 1144 (finding a sale closer to the tax lien date was more probative than a more remote sale).

Significantly, there was no detailed cross-examination of Wilson or other evidence introduced by the Auditor showing that the Commissioner's analytical methodology was flawed. Nor was there any expert or other evidence introduced by the Auditor to show what the "correct" representative sampling method would look like. There is, of course, a critical distinction between merely offering an alternative methodology to the analysis of data than the one used by the Commissioner and *proving* that the Commissioner's approach was wrong. Those are two distinct matters. The fact that the Commissioner's methodology was different from that of the Auditor does not, of and by itself and without a more penetrating analysis of the Commissioner's methodology, prove that the Commissioner's methodology was wrong. Evidence of an alternative approach is not, alone, evidence that the Commissioner acted unreasonably.

The Auditor argues that the Commissioner may not "ignore," "minimize," or

“disregard” data within the three-year period, Auditor’s Merit Brief at 10, but a review of the record shows that the Commissioner did none of those things. Indeed, in Exhibit C – an exhibit introduced by the Auditor and cited in its brief – Wilson discusses a presentation made by DTE to the county auditors where DTE stated that “ODT [Ohio Department of Taxation] does conduct ratio studies for all three years for trending purposes.” Exhibit C. Further undermining the Auditor’s position is that in its brief, Auditor’s Merit Brief, page 11, fn. 1, and at the hearing counsel for the Auditor conceded that the most recent sales present more reliable indicators of value. In questioning Wilson, counsel for the Auditor said the following:

> Q. Okay. When you do an appraisal, nobody in this room is disputing that the most recent sales are probably the best evidence. We don’t dispute that.
>
> A. Uh-huh.

S.T. 40 – 41.

The evidence at the hearing showed that the Auditor failed to prove that the Commissioner erred. While the Auditor, through McAnulty, offered an alternative approach to the sales ratio study, he failed in his burden to show that the Commissioner’s approach was incorrect or flawed. In fact, the record shows that it would have been implausible, if not impossible, for McAnulty to testify about flaws in the Commissioner’s methodology because she admitted she was not aware as to how the Commissioner had scrubbed his data.

> Q. Okay. Do you have any reason to – now, you don’t know for a fact exactly how the Tax Commissioner scrubbed – may have scrubbed their data, do you?
>
> A. No, I do not.

S.T. 20.

While failing to show that the Commissioner's methodology was flawed, incorrect, or contrary to law, the Auditor also presented little to show the manner in which he made his computations. The only evidence offered by McAnulty regarding the manner in which the Auditor's data was created was that it was "generated from our CAMA system." H.R. at 18. There was no evidence offered, expert or otherwise, about the manner in which that system worked, how it calculated its results, or its accuracy and reliability. No data set or other documentation was introduced into evidence supporting the accuracy of Exhibit D, the spreadsheet summarizing the Auditor's computations upon which it based his conclusions. Indeed, much of the chart is blank.

We make clear we have independently reviewed the statutory transcript and found the record also contains reliable and probative evidence to support the Commissioner's studies. The reports appear to be similar to the reports generated in *Brown*. In that case, we relied on similarly captioned data reports. "Each report format or grouping includes a computerized listing of reported residential property sales that occurred" in the county for the relevant years. *Id*. at 13-14. Those reports, like the reports here, also include "selected and related information, sorted according to selected criteria, with a resultant summary." *Id*. The same is true here. The Commissioner reviewed sales for all classes. *See, e.g.*, S.T. at 09SRD1BUTL_CY2020; 09 nava 2020 - 1-5 Summary. For residential properties, he compiled the sales for all three years and measured mean and median figures as well as coefficient of dispersion, dollar weighted mean, price-related differential, and average sale price. Other reports stratify the figures by political subdivision. *See, e.g.*, S.T. at 09SRDO4_BUTL_CY2020; 09BUTL_RES2020 RRSR; Butler.xls. Using his reports, the Commissioner made recommendations to the Auditor on needed increases. *See, e.g.,* Butler-Residential Value Increase Requirements-2020.09.08 (original recommendations on seven political units). In other words, the Commissioner has sufficiently shown his work as he did in *Brown*.

While reasonable minds could differ about the best way to sort and interpret thousands of data points, our job is straightforward. The Commissioner acted reasonably and lawfully in performing his mandatory duties under R.C. 5715.012.

Review of R.C. 5715.012's Discretionary Components

The Commissioner complied with the discretionary portions of R.C. 5715.012. Indeed, this is where the Auditor's arguments are weakest. No statute requires the Commissioner to use his sales ratio studies in the equalization process. In his brief, the Commissioner argues:

> While appellant argues that the Commissioner is required to equally weigh the sales ratio studies for the three years prior to the reappraisal year, R.C. 5717.012 is clear and unambiguous – the sales ratio studies serve as guidelines and the Commissioner has discretion to determine how the sales ratio studies are to be utilized. This Board, citing R.C. 5715.012, has recognized that the sales ratio studies are to be used as guidelines * * *.
>
> * * *
>
> After reviewing these studies and other relevant information, the Commissioner chose to rely most heavily on the 2019 sales ratio study, as the sales in that study were closest to the January 1, 2020 tax lien date and, therefore, would be the best evidence of value as of that date. For over 25 years, the Department has consistently evaluated three years of sales ratio studies for trending purposes but relied most heavily on the year closest to the tax lien date to measure compliance with the market value standard when determining the required level of assessment. 2 (BTA HR 38).

As discussed above, here the Commissioner used all three years of the sales ratio studies to

examine value trends while placing primary emphasis on the sales ratio study for tax year 2019, the year most recent to the tax lien date. In so doing, the Commissioner sought, among other things, to utilize the most recent value data in the context of all three years.

The Commissioner's Journal Entry was Reasonable and Lawful

We must now round the circle by returning to R.C. 5715.251. Having found the Commissioner reasonably and lawfully created and utilized his sales ratio studies, we find he reasonably and lawfully argued aggregate increases. Importantly, the Auditor does not claim, and we see no reason to doubt, that the Commissioner's studies support the aggregate increases. Those figures are reflected on staff recommendations in the transcript. Having found he reasonably and lawfully complied with Ohio law with regard to the studies and taking into consideration the substantial deference he is owed in the equalization process; we find his Journal Entry supported by reliable and probative evidence. *HealthSouth* at 12, quoting *Our Place* (evidence is reliable when dependable and can be confidently trusted; evidence is probative when it has "the tendency to establish the truth of relevant facts").

For these reasons, we affirm.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Harbarger	[signature]	
Ms. Clements	[signature]	
Mr. Caswell	[signature]	

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

[signature]

Kathleen M. Crowley, Board Secretary