

REPRESENTATIVE FOR PETITIONER:

Chris L. Kemp, CPA

REPRESENTATIVE FOR RESPONDENT:

Thomas J. Hilligoss, Attorney

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**BEFORE THE  
INDIANA BOARD OF TAX REVIEW**

Dakalt LLC,	)	Petition No.: 34-002-14-1-7-20486-15
	)	
Petitioner,	)	Business Tangible Personal Property
	)	Parcel No.: 34-00-56-00-207.135-002
v.	)	Howard County
	)	
Howard County Assessor,	)	Center Township
	)	
Respondent.	)	2014 Assessment Year

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

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**July 11, 2016**

**FINAL DETERMINATION**

The Indiana Board of Tax Review (Board), having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**ISSUE**

1. Was the Petitioner's business tangible personal property subject to assessment for the March 1, 2014, assessment year?

## PROCEDURAL HISTORY

2. On August 21, 2014, the Center Township Assessor notified the Petitioner, via a Notice of Assessment/Change (Form 113/PP), that it failed to file the required assessment return. As such, the Township Assessor “estimated” the Petitioner’s business tangible property should be assessed at \$115,090 for the March 1, 2014, assessment year. On September 30, 2014, the Petitioner filed a Notice to Initiate an Appeal (Form 130). On August 20, 2015, the Howard County Property Tax Assessment Board of Appeals (PTABOA) issued its determination denying the Petitioner any relief. The Petitioner timely filed a Petition for Review of Assessment (Form 131) with the Board. The Board has jurisdiction over this appeal under Ind. Code § 6-1.1-1-15 and Ind. Code § 6-1.5-4-1.
3. On April 13, 2016, the Board’s administrative law judge, Joseph Stanford (ALJ), held a hearing on the petition. Neither the Board nor the ALJ inspected the property.

## HEARING FACTS AND OTHER MATTERS OF RECORD

4. The following people were sworn and testified:
  - For the Petitioner: R. Craig Harts, property owner,  
Chris L. Kemp, CPA.
  - For the Respondent:<sup>1</sup> Tonya Stephenson, Center Township Deputy Assessor.
5. The Petitioner submitted the following exhibits:
  - Petitioner Exhibit 1: Indiana Code § 6-1.1-1-11,
  - Petitioner Exhibit 2: Indiana Code § 6-1.1-2-7.
6. The Respondent submitted the following exhibits:
  - Respondent Exhibit A: Form 113/PP,
  - Respondent Exhibit B: Form 115,
  - Respondent Exhibit D: Petitioner’s 2012 Federal Tax Form 1065 and Form 4562 Statement (CONFIDENTIAL),
  - Respondent Exhibit E: Petitioner’s 2013 Federal Tax Form 1065 and Form 4562 Statement (CONFIDENTIAL),

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<sup>1</sup>Howard County Assessor, Melinda R. Heady, appeared at the hearing but was not sworn and did not testify.

Respondent Exhibit F: Real estate listing for the subject property,  
Respondent Exhibit G: Photographs included with the subject property's real estate listing.

7. The following additional items are recognized as part of the record:
  - Board Exhibit A: Form 131 with attachments,
  - Board Exhibit B: Hearing notice, dated January 29, 2016, with attachments,
  - Board Exhibit C: Hearing sign-in sheet,
  - Board Exhibit D: Notice of Appearance by Thomas J. Hilligoss.
8. The business personal property in question is located at 490 South Reed Street in Kokomo.
9. The PTABOA determined an assessed value of \$115,090. The Petitioner is requesting an assessment of \$0.

#### **ADMINISTRATIVE REVIEW AND THE PARTIES' BURDENS**

10. Generally, a taxpayer seeking review of an assessing official's determination must make a *prima facie* case proving both that the current assessment is incorrect and what the correct assessment should be. *See Meridian Towers East & West v. Washington Twp. Ass'r*, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also, Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998).
11. The taxpayer must explain how each piece of evidence relates to its requested assessment. *See Indianapolis Racquet Club, Inc. v. Washington Twp. Ass'r*, 802 N.E.2d 1018, 1022 (Ind. Tax Ct. 2004) (“[I]t is the taxpayer's duty to walk the Indiana Board . . . through every element of the analysis.”)
12. If the taxpayer makes a *prima facie* case, the burden shifts to the assessor to offer evidence to rebut or impeach the taxpayer's evidence. *See Am. United Life Ins. Co. v. Maley*, 803 N.E.2d 276 (Ind. Tax Ct. 2004); *Meridian Towers*, 805 N.E.2d at 479.

## FINDINGS OF FACT

13. Most of the relevant facts are not in dispute. The Petitioner operated a restaurant formerly known as Whiskey Creek Steakhouse. The property was purchased and the restaurant was opened in “2008 or 2009.” The real estate was purchased separately from the business personal property. As the restaurant was losing money, the Petitioner ceased operations and closed the business on “about November 10, 2013.” *Harts testimony; Kemp testimony; Resp’t Ex. D, E.*
14. Because the restaurant was closed, the Petitioner did not file a Business Tangible Personal Property Return for the March 1, 2014, assessment date. The Respondent issued a Form 113/PP and assessed the business personal property for \$115,090. This assessment was determined based on “historical cost.”<sup>2</sup> *Stephenson testimony; Resp’t Ex. A.*
15. Currently the real estate is listed for sale, although the record is not clear about when the property was initially listed. While the listing agent included photographs of personal property along with the listing, the personal property is “technically not for sale.” Although, according to Mr. Harts, he would sell the personal property if someone was interested. Mr. Harts further testified that “the business is not for sale” and that “the LLC is gone and defunct.” Because the business is no longer in existence, the Petitioner no longer depreciates the business personal property for federal tax purposes. *Harts testimony; Resp’t Ex. F, G.*
16. While there is some dispute regarding how much business personal property remained on the premises in November 2013, it appears that all of the personal property was still there as of March 1, 2014.<sup>3</sup> At some point, the Petitioner received an offer to purchase the building. As a result of this offer, the majority of the “equipment” was moved out of the

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<sup>2</sup> Ms. Stephenson did not specifically explain what she meant by “historical cost.” The Board assumes she was referring to the Petitioner’s previous tax returns that were used to determine the total cost and acquisition dates of depreciable assets.

<sup>3</sup> Neither party offered a specific listing of assets or their respective costs.

building in August 2014 and placed into storage. The “equipment” remaining after this move included bar seating, tables, a grill, a stove, a slicer, and two fryers. The Petitioner did not state if any “equipment” was moved prior to August 2014. None of the “equipment” has been abandoned, converted to personal use, destroyed, or transferred to a supply or scrap account. *Harts testimony; Kemp testimony.*

17. The Center Township Assessor’s Office assesses business personal property of other businesses that are closed, and has specifically done so with restaurants such as “Damon’s and Sonic.” The Petitioner questioned whether this practice is followed objectively and consistently, but failed to offer any evidence in that regard. *Stephenson testimony; Kemp argument.*

#### **CONCLUSIONS OF LAW**

18. Indiana’s personal property tax system is a self-assessment system. Every person, including any firm, company, partnership, association, corporation, fiduciary, or individual owning, holding, possessing, or controlling personal property with a tax situs in Indiana on March 1 of a year must file a personal property tax return on or before May 15 of that year unless the person gets an extension of time. Ind. Code § 6-1.1-3-7; 50 IAC 4.2-2-2.
19. The Petitioner’s business closed in November 2013. And believing its business personal property was not subject to assessment on March 1, 2014, the petitioner did not file a personal property return. In arguing against the assessment, the Petitioner cited to Ind. Code § 6-1.1-1-11. That statute provides, in part, that personal property includes all “tangible property (other than real property) which: (A) is being held as an investment; or (B) is depreciable personal property.” Ind. Code § 6-1.1-1-11(a)(3). The Petitioner argued that because the business closed and no income was being produced,

the property in question was not being held for those purposes.<sup>4</sup> The Petitioner further argued that the property qualifies as exempt “non-business personal property” under Ind. Code § 6-1.1-2-7(a). Under this statute, “non-business personal property means personal property that is *not*: (1) held for sale in the ordinary course of a trade or business; (2) held, used, or consumed in connection with the production of income; or (3) held as an investment.” Ind. Code § 6-1.1-2-7(a) (emphasis added).

20. In contending that its assessment should stand, the Respondent argued the relevant statute does not require that the property is “*being used*,” but only that it is “used.” Ind. Code § 6-1.1-2-7(a). In other words, the character of the property establishes whether it qualifies to be assessed as business personal property. Here, the property in question was placed into service and is available to use in a trade or business and for the production of income. Further, the Petitioner failed to retire the assets from service as outlined in 50 IAC 4.2-1-1.1(n). Specifically, this section of the rule provides, in part, that “[a]n asset is assessed until it is retired from service. An asset is retired property from service when it is permanently retired from use by: (1) sale or exchange of the property; (2) conversion to personal use; (3) abandonment; (4) transfer to a supply or scrap account; or (5) property is destroyed.” 50 IAC 4.2-1-1.1(n).
21. Further, the Respondent argued that the property in question is also being held as an investment, as it was purchased for the purpose of producing income, and the property is still for sale.
22. The Board finds the Respondent’s argument more persuasive. “Depreciable personal property” is all tangible personal property that is used in a trade or business, used for the production of income, or held as an investment that should be or is subject to depreciation for federal income tax purposes. *See* 50 IAC 4.2-1-1.1(g); 50 IAC 4.2-4-1. In general, personal property is deemed to become depreciable property when a depreciation

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<sup>4</sup> The Petitioner also argued that the property in question was not being held for sale in the ordinary course of a trade or business, and not being held, used, or consumed in connection with the production of income. In making these arguments, the Petitioner was citing to Ind. Code § 6-1.1-1-11(a)(2), which specifically addresses foundations on which machinery and equipment is installed. *See Pet’r Ex. 1.*

deduction is allowable for federal income tax purposes. 50 IAC 4.2-4-1. Here, it seems clear the personal property at issue met the criteria outlined in 50 IAC 4.2-1-1.1(g) and 50 IAC 4.2-4-1. Thus, the property is assessable as business tangible personal property, and the Petitioner was required to file a personal property tax return. Ind. Code § 6-1.1-1-11(a)(3); Ind. Code § 6-1.1-31-1; 50 IAC 4.2-2-1. Because the Petitioner failed to file its return, the township assessor acted within its authority in assessing the property. 50 IAC 4.2-3.1-5(2).

23. Additionally, the fact that the Petitioner closed the underlying business does not change the character of the personal property. Further, it does not make the personal property any less of an investment. As such, the property cannot qualify as “non-business personal property” under Ind. Code § 6-1.1-2-7(a).
24. Finally, as the Respondent correctly argued, the administrative rules for assessing tangible personal property are clear regarding criteria that must be met to retire assets from service, thereby rendering them no longer assessable. Again, an asset can be permanently retired from use by: (1) sale or exchange of the property; (2) conversion to personal use; (3) abandonment; (4) transfer to a supply or scrap account; or (5) property is destroyed. 50 IAC 4.2-1-1.1(n). Mr. Harts and Mr. Kemp testified that none of the criteria for “permanently retiring” the personal property had been met. Thus, for the March 1, 2014, assessment date the Petitioner’s tangible business personal property was assessable.
25. The Petitioner failed to offer any argument or evidence that the *amount* of the assessment was incorrect. Therefore, the 2014 assessment of \$115,090 stands.

**SUMMARY OF FINAL DETERMINATION**

26. The Board finds for the Respondent and the 2014 assessment will not be changed.

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

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Chairman, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

**- APPEAL RIGHTS -**

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5 and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required not later than forty-five (45) days after the date of this notice. The Indiana Code is available on the Internet at <<http://www.in.gov/legislative/ic/code>>. The Indiana Tax Court's rules are available at <<http://www.in.gov/judiciary/rules/tax/index.html>>.