

January 22, 2008 merit hearing and to provide testimony about the documents. The subpoena was issued on January 3, 2008 and delivered, via certified mail, to Rich's business address on January 7, 2008. See, generally, Ohio Adm. Code 5717-1-13 for the BTA's rules regarding subpoenas.

The subpoena lists eleven categories of documents that the commissioner requests to be produced at hearing. The requested documents include, inter alia, copies of Rich's 1998 through 2003 financial statements; all Securities and Exchange Commission filings; annual reports; all studies, analyses, evaluations, investigative reports, tests, and "other documents" pertaining to Rich's reduction of previously determined book value or pertaining to the valuation of any portion of Rich's merchandising inventory; all source documents used in the preparation of Rich's 1998-2003 Ohio personal property tax returns and its application for final assessment; all records reflecting the costs of Rich's merchandising inventories; all source documents reviewed by Rich's witnesses; all contracts and other documents relating to Rich's markdown participation with its vendors; all true-cost analysis reports and supporting documents pertaining to Rich's Ohio-located merchandising inventories; all charts of accounts pertaining to merchandising inventories; stock ledger reports; and, accounting records reflecting vendor allowances adjustments to the costs of merchandising inventory.

In its motion, Rich's argues that the subpoena is investigative in nature and therefore constitutes an untimely attempt to seek discovery, that the subpoena is overbroad, that it seeks information already in the commissioner's possession, and that

it is unduly burdensome in that it requests a large amount of material just prior to hearing.

Initially, the commissioner argues that Rich's motion should be denied because the subpoena requests "documentation critical to Rich's establishing both the manner and extent of any claimed error in the Commissioner's valuation of the merchandising inventory. *** This lack of evidentiary support was emphasized in the field audit report ***." Commissioner's Memorandum in Opposition, at 4.

This board has previously found the commissioner's argument to be specious. In *Caraustar Paperboard Corp. v. Wilkins* (Interim Order, Mar. 23, 2007), BTA No. 2005-V-1147, unreported, the board held:

"This board does not find that the commissioner's novel claim that the subpoenaed documents are needed by the appellant to prevail in its appeal to be meritorious. It is axiomatic that the appellant bears the burden of demonstrating that the commissioner's assessments were unreasonable or unlawful. This board is not persuaded that the commissioner's last-minute request is made to assist the taxpayer in proving its case." Id. at 6.

Ohio Adm. Code 5717-1-11(A) governs the timing of discovery before this board, providing that discovery "should be commenced by all parties promptly after the filing of a notice of appeal and should be completed as expeditiously as possible. Discovery should be completed not more than one hundred twenty days after the filing of the notice of appeal, which shall also be the last day for a party to seek involvement of the board in discovery matters." The record before the BTA establishes that this appeal was filed on November 23, 2005. Pursuant to Ohio Adm.

Code 5717-1-11(A), the 120-day discovery period closed on March 23, 2006. It is significant to note that Rich's represents, and the commissioner does not deny, that the Tax Commissioner failed to engage in any formal discovery during this period.

The board further notes that a merit hearing was first scheduled in this matter on December 1, 2006. The parties subsequently sought four continuances, making the January 22, 2008 hearing date the fifth to be assigned. A review of the record fails to disclose that the commissioner endeavored to issue a similar subpoena prior to any of four the previously scheduled hearing dates; yet, nearly twenty-six months after the initiation of this appeal, he seeks what appears to be a voluminous amount of documentary evidence for production at hearing.

The BTA has previously sustained motions to quash last-minute subpoenas issued by the commissioner under similar circumstances. *Bay West Paper v. Zaino* (Interim Order, Sept. 23, 2002), BTA No. 2001-V-872, unreported; *Caraustar Paperboard Corp.*, supra; *WCI Steel, Inc. v. Wilkins* (Interim Order, May 21, 2007), BTA No. 2005-V-1565, unreported. In *WCI Steel, Inc.*, the BTA held:

“This board’s rule requiring the parties to pursue pretrial discovery within one hundred and twenty days of the filing of the notice of appeal embodies the most efficient and expeditious way of handling the matter which will not prejudice the party to whom the discovery is directed. The commissioner’s last minute request for what amounts to discovery of documents is neither efficient nor expeditious. Further, the commissioner makes no mention why the requested documents, alleged to be essential and vital to this appeal, were not the subject of a timely discovery request well over a year ago. Counsel’s level of preparedness concerning the issues to be presented before this board could be questioned, given the broad and expansive scope of the various documents requested in the subpoena. ***

“In this circumstance, based on the history of this appeal, the nature and volume of the documents requested, and the timing of the commissioner’s subpoenas, requiring the appellant to meaningfully comply with the commissioner’s subpoenas would be prejudicial and unreasonable.” *Id.* at 6.

In the instant matter, the commissioner counters that Rich’s should not be permitted to assert the 120-day discovery deadline because the commissioner relied upon Rich’s representations that documentation would be forthcoming. The commissioner admits that “formal discovery was not conducted ***.” Commissioner’s Memorandum in Opposition, at 5. However, the commissioner represents that, as part of an extended attempt to resolve the appeal, Rich’s had informally agreed to supply additional documentation. The commissioner represents that some, but not all, of the requested documentation was received.

The board agrees that a party should not be permitted to avoid its obligation to freely exchange information. The board has been especially critical of a parties who have attempted to hide behind the 120-rule after promising to provide documents to opposing counsel after receiving formal discovery requests. See, e.g., *Roberts Dev. Corp. v. Clinton Cty. Bd. of Revision* (Interim Order, Aug. 18, 2005), BTA No. 2004-T-523, unreported (holding that “this board has never favored any party’s hypertechnical reading of the rules to avoid its discovery obligations. Such a cavalier attitude falls outside the spirit of these proceedings, and, under specific circumstances, we have overruled discovery objections based on the 120-day rule where the moving party has demonstrated good cause for our intervention); *Medina*

Blanking, Inc. v. Medina Cty. Bd. of Revision (Interim order, August 17, 2004), BTA Nos. 2003-T-1375, 1378, unreported (“We have always held that the 120-day rule is not absolute. This board has the discretion to intervene in discovery disputes whenever good cause has been demonstrated for the need for such action.”) See, also, *Hypabyssal, Ltd. v. Summit Cty. Bd. of Revision* (Interim Order, Mar. 18, 1999), BTA No. 1998-A-487, unreported.

Nevertheless, the board does not find that Rich’s has acted to the commissioner’s detriment. The settlement discussions, and any exchange of information requested during such discussions, do not stay the formal discovery process or excuse the commissioner’s failure to use the board’s discovery rules to prepare his case for hearing.¹ Certainly, in light of this board’s previous rulings, the BTA need not remind counsel that a subpoena of the type now before the board is not a substitute for the normal discovery process. The board finds unacceptable any attempt to circumvent the discovery rules by placing upon another party a requirement that it produce, at the eleventh-hour, a substantial and overly-broad amount of documentary information. Any consequences resulting from commissioner’s failure to take advantage of the formal discovery period provided by the board’s rules must now be borne by him. Cf. *Nakoff v. Fairview Gen. Hosp.* (1996), 75 Ohio St.3d 254.²

¹ Compare *Great Northern Shopping Center v. Cuyahoga Cty. Bd. of Revision* (Interim Order, Mar. 3, 1995), BTA Nos. 1994-M-397, et al., unreported (production of documents ordered where party’s unfulfilled promises to comply with a formal discovery request resulted in the late filing of a motion to compel).

² Had the commissioner concluded that additional information was necessary for hearing once settlement could not be reached, the commissioner could have requested additional time to seek discovery. Ohio Adm. Code 5717-1-11(A) provides that, upon showing of good cause, the board may establish other specific times for completion of discovery. The commissioner made no such request in this instance.

The commissioner's remaining arguments appear to go to his assertion that he should have access to any documents that Rich's intends to rely upon at hearing. The board's rules, however, already address this issue, as each party is required to "provide copies of the documentary exhibits it plans to offer into evidence (reduced in size, if necessary) to all parties and the attorney examiner at least seven days prior to the hearing." Ohio Adm. Code 5717-1-15(I).³

In conclusion, given the breadth and volume of materials sought in the subpoena, and given the history of this appeal, the board finds that requiring Rich's to comply with the subpoena would be onerous and prejudicial. *Bay West Paper, Carastar Paperboard Corp.*, and *WCI Steel, Inc.*, supra. The BTA therefore grants Rich's motion and quashes the subject subpoena. In all other respects, this matter shall proceed to hearing as scheduled on January 22, 2008 at 9:00 AM.

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³ The board also finds spurious the commissioner's assertion that "Rich's has failed to comply with the subpoena ***." Commissioner's Memorandum in Opposition, at 3. The board is unable to ascribe to Rich's any bad faith when the subpoena requests compliance at a date still in the future.