REPRESENTATIVE FOR PETITIONER:
Kenneth Herbert Connon, *pro se*

REPRESENTATIVE FOR RESPONDENT:
Frank Agostino, Attorney

BEFORE THE
INDIANA BOARD OF TAX REVIEW

Kenneth Herbert Connon,	)	Petition Nos.: 71-023-08-3-5-00001
	)	71-023-09-3-5-00001
	)	71-023-10-3-5-00001
Petitioner,	)	
	)	Parcel No.: 71-09-15-160-013.000-023
v.	)	
	)	County: St. Joseph
St. Joseph County Assessor,	)	
	)	Township: Penn
	)	
Respondent.	)	Assessment Years: 2008, 2009, and 2010

Appeal from the Final Determination of the
St. Joseph County Property Tax Assessment Board of Appeals

December 2, 2014

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. Should a homestead deduction be restored to the subject property for 2008, 2009, and 2010? Further, if the homestead deduction is not reinstated, is the Petitioner able to challenge the subject property's assessed value on his Form 133 petitions?

PROCEDURAL HISTORY

2. On June 2, 2011, the Petitioner filed Petitions for Correction of an Error (Form 133s) with the St. Joseph County Assessor. The Petitioner challenged the denial of the homestead deduction for subject property for the 2008, 2009, and 2010 assessment years. On October 4, 2012, the St. Joseph County Property Tax Assessment Board of Appeals (PTABOA) issued its determinations upholding the denial of the homestead deduction for 2008, 2009, and 2010.

3. The Petitioner timely filed Form 133 petitions with the Board for 2008, 2009, and 2010.

4. On July 16, 2014, the Board's administrative law judge, Jennifer Bippus (ALJ), held a hearing on the petitions. Neither the Board nor the ALJ inspected the subject property.

HEARING FACTS AND OTHER MATTERS OF RECORD

5. Kenneth Herbert Connon, St. Joseph County Assessor Rosemary Mandrici, and St. Joseph County Deputy Auditor Nancy Martin were sworn as witnesses.

6. The Petitioner submitted the following exhibits:

Petitioner Exhibit A:	Warranty Deed filed November 22, 1982, and accompanying document transferring title of the subject property to the Petitioner dated June 25, 1979,
Petitioner Exhibit B:	Form 133 petitions with attachments,
Petitioner Exhibit C:	Letter from Penn Township Assessor to "taxpayer" dated July 31, 2012, and accompanying Notice of Preliminary

Assessment (Form 134) for the March 1, 2011, assessment date,
Petitioner Exhibit D: Multiple Listing Service reports for the subject property and several comparable properties,
Petitioner Exhibit E: Memorandum from Department of Local Government Finance (DLGF) to county auditors regarding the homestead deduction, dated July 8, 2009,
Petitioner Exhibit F: Tax receipts dated May 13, 2013,
Petitioner Exhibit G: Excerpt from Indiana Code regarding homestead deductions and life estate definitions, [1]
Petitioner Exhibit H: Land contract filed December 10, 2012.

7. The Respondent submitted the following exhibit:

Respondent Exhibit 1: Warranty Deed filed November 22, 1982.

8. The following additional items are also recognized as part of the record:

Board Exhibit A: Form 133 petitions with attachments,
Board Exhibit B: Hearing notices, dated May 30, 2014,
Board Exhibit C: Notice of Appearance for Frank Agostino,
Board Exhibit D: Hearing sign-in sheet.

9. The property under appeal is a single-family residence located at 611 East 4th Street, in Mishawaka.

OBJECTIONS

10. Mr. Agostino objected to Petitioner Exhibits E and G. Mr. Agostino argued only a portion of the respective memorandum and statute was offered by the Petitioner. According to Mr. Agostino, the Petitioner should have offered each in its entirety, rather than excerpts.[2] The ALJ did not rule on the objections at the hearing.

11. While the Petitioner marked and offered the text of both a statute and a DLGF memorandum, there is nothing evidentiary about either of them. Further, a party is not

[1] The relevant statute appears to be Ind. Code § 6-1.1-12.
[2] The Petitioner did not make a clear response to Mr. Agostino's objection.

necessarily required to prove the contents of a statute or a related DLGF memorandum.[3] To the extent that the memorandum excerpt can be considered evidence, Mr. Agostino's objection goes to its weight rather than its admissibility. Thus, the Board overrules Mr. Agostino's objections.

12. Mr. Agostino also made a comment regarding Petitioner Exhibit A noting that the handwritten page dated June 25, 1979, was "separate and apart from the deed." To the extent this comment could be viewed as an objection, the Board finds Mr. Agostino's comment goes to the weight rather than to the admissibility of the exhibit. Thus, Petitioner Exhibit A is allowed.

PETITIONER'S CONTENTIONS

13. The homestead deduction was incorrectly removed and should be re-instated for the 2008, 2009, and 2010 assessment years.[4] The subject property was purchased by the Petitioner's father in the 1960s, and the Petitioner's father has lived there continuously since. In 1979, the Petitioner's father transferred title of the subject property to the Petitioner. In 1982, a transfer agreement was recorded, but not attached to the deed, stating that the Petitioner's father would continue to live in the property indefinitely, free of charge, and would pay the utilities and annual property taxes.[5] *Connon testimony; Pet'r Ex. A*.

14. The Petitioner is not currently residing at the subject property. In fact, the Petitioner has resided in Wisconsin since 1982. St. Joseph County has been mailing property tax bills to the Petitioner in Wisconsin since 1982, all while granting a homestead deduction on the subject property. However, in April 2011, a "pink form" was mailed to the Petitioner requesting a certification that the Petitioner resided at the subject property and was therefore eligible for the homestead deduction. The Petitioner placed a phone call to the

[3] Often, the Board takes official notice of not only the DLGF's promulgated rules, but also the related memorandums, as those memorandums are readily available on the DLGF's website.
[4] Throughout the hearing, the Petitioner refers to the homestead deduction as the "homestead exemption." There is no statute that exempts homesteads from taxation. The Board will assume the Petitioner is referring to the standard deduction for homesteads provided under Ind. Code § 6-1.1-12-37
[5] On December 10, 2012, the subject property was deeded back to the Petitioner's father through a recorded land contract. *Pet'r Ex. H.*

county inquiring about the "pink form." As a result of the inquiry, the County Auditor verified that the Petitioner did not permanently live at the subject property and removed the homestead deduction for 2008, 2009, 2010, and going forward. The Auditor generated a bill for over $6,000 in back taxes for 2008, 2009, and 2010. This bill increased to $10,000 while the Petitioner tried to resolve the issue. The imposition of back-taxes and penalties is wrong, and is "no way to treat residents." *Connon argument; Pet'r Ex. F.*

15. If the homestead deduction is not re-instated for the three years under appeal, the subject property's assessment should be lowered for all years under appeal. The 2011 assessment was lowered from $94,700 to $55,500 after a successful appeal with the county. Further, sale prices of comparable properties show that the subject property's assessment is too high. *Connon argument; Pet'r Ex. C, D.*

RESPONDENT'S CONTENTIONS

16. The homestead deduction was properly removed from the subject property. The Petitioner conceded that, while the subject property was titled in his name during the years in question, he lived in Wisconsin, and his father occupied the property. Because the Petitioner did not reside at the subject property, he was not entitled to the homestead deduction. *Agostino argument (referencing Connon testimony); Resp't Ex. 1.*

17. Upon learning the Petitioner did not reside at the subject property, and that in fact he was a resident of Wisconsin, the County Auditor correctly removed the homestead deduction. The Auditor's office followed the same procedures that it does with all other taxpayers. *Martin testimony*.

18. The Petitioner failed to establish any legal or recorded interest of the father in the subject property. The transfer document written in 1979 and recorded in 1982 was not recorded with the deed; therefore, it does not have probative value in this appeal. *Agostino argument.*

BURDEN OF PROOF

19. Generally, the taxpayer has the burden to prove that an 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). The burden-shifting statute as recently amended by P.L. 97-2014 creates two exceptions to that rule.

20. First, Ind. Code § 6-1.1-15-17.2 "applies to any review or appeal of an assessment under this chapter if the assessment that is the subject of the review or appeal is an increase of more than five percent (5%) over the assessment for the same property for the prior year." Ind. Code § 6-1.1-15-17.2(a). "Under this section, 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 the Indiana tax court." Ind. Code § 6-1.1-15-17.2(b).

21. Second, Ind. Code section 6-1.1-15-17.2(d) "applies to real property for which the gross assessed value of the real property was reduced by the assessing official or reviewing authority in an appeal conducted under IC 6-1.1-15." Under those circumstances, "if the gross assessed value of real property for an assessment date that follows the latest assessment date that was the subject of an appeal described in this subsection is increased above the gross assessed value of the real property for the latest assessment date covered by the appeal, regardless of the amount of the increase, the county assessor or township assessor (if any) making the assessment has the burden of proving that the assessment is correct." Ind. Code § 6-1.1-15-17.2(d). This change is effective March 25, 2014, and has application to all appeals pending before the Board.

22. Here, the Petitioner's main challenge was with the homestead deduction as listed on the Form 133s. Regarding that issue, the burden shifting provisions of Ind. Code section 6-1.1-15-17.2 do not apply, and the burden rests with the Petitioner. Further, for the reason discussed below, the Petitioner's challenge of the subject property's value is not available

via a Form 133, and again burden shifting provisions of Ind. Code section 6-1.1-15-17.2 do not apply.

ANALYSIS

23. Here, the Petitioner appeals the revocation of his homestead deduction provided by Ind. Code § 6-1.1-12-37. That statute provides a deduction in specified amounts for homesteads, which it defines as follows:

> (a) The following definitions apply throughout this section:
> (1) "Dwelling" means any of the following:
> (A) Residential real property improvements that an individual uses as the individual's residence, including a house or garage.
>
> . . . .
>
> (2) "Homestead" means an *individual's principle place of residence:*
> (A) that is located in Indiana;
> (B) that: (i) the individual owns; (ii) the individual is buying under contract; recorded in the county recorder's office, that provides that the individual is to pay the property taxes on the residence . . .; and
> (C) that consists of a dwelling and the real estate, not exceeding one (1) acre, that immediately surrounds that dwelling.

Ind. Code § 6-1.1-12-37 (emphasis added).

24. There is no dispute that the subject property was not the Petitioner's principle place of residence for the years in question. Thus, the Petitioner is not eligible to claim the homestead standard deduction.

25. The Petitioner argues that because Kenneth P. Connon resides at the subject property and is generally responsible for its maintenance, upkeep, and taxes, the subject property qualifies for the homestead deduction in Kenneth P. Connon's name. Under I.C. 6-1.1-1-9(f), "when a life tenant of real property is in possession of the real property, the life

tenant is the owner of that property." Assuming, arguendo, that a life tenancy exists,[6] then Kenneth P. Connon alone is the party eligible to claim the homestead standard deduction. Kenneth P. Connon has not claimed the homestead deduction, and the Respondent has properly denied the Petitioner's claim because the Petitioner does not reside there.

26. Nonetheless, the Board finds the Respondent over stepped her statutory authority with regard to the 2008 assessment under Ind. Code § 6-1.1-9-4(a) which states:

> (a) Real property may be assessed, or its assessed value increased, for a prior year under this chapter only if the notice required by section 1 of this chapter is given *within three (3) years after the assessment date for that prior year.*

Ind. Code § 6-1.1-9-4(a) (emphasis added). Given that the Respondent's reassessment action came as a result of correspondence with the Petitioner in April 2011, the Respondent's notice for the 2008 assessment must have fallen outside of the three year window. Thus the Respondent could not change the 2008 assessment.

27. To the extent that the Petitioner requests that the Board waive the penalties imposed by the county, the Board lacks jurisdiction. The Board is a creation of the legislature. It only has those powers conferred by statute. *Matonovich v. State Bd. of Tax Comm'rs*, 705 N.E.2d 1093, 1096 (Ind. Tax Ct. 1999). The relevant statute, Ind. Code § 6-1.5-4-1, provides as follows:

> (a) The Indiana board shall conduct an impartial review of all appeals concerning:
> (1) the assessed valuation of tangible property;
> (2) property tax deductions;
> (3) property tax exemptions;
> (4) property tax credits;

[6] The deed granting the property to the Petitioner does not create a life estate interest for Kenneth P. Connon. *Respondent Ex. 1*. The document presented by the Petitioner to establish a "de facto" life interest does not create a life interest. *Petitioner Ex. A*. Rather, Kenneth P. Connon's right to possession is not "for life," but may be unilaterally terminated by the Petitioner for a number of reasons. Moreover, the terms of the 2012 conditional land contract between the Petitioner and Kenneth P. Connon are entirely inconsistent with the existence of a life estate. *Petitioner Ex. G*.

> that are made from a determination by an assessing official or county property tax assessment board of appeals to the Indiana board under any law.
> (b) Appeals described in this section shall be conducted under IC 6-1.1-15.

Ind. Code § 6-1.5-4-1.

28. The Indiana Tax Court has held the Board's enabling statute "did not grant any power to the State Board to review penalties imposed by the County for the late payment of property taxes," because it contemplated only a review of assessments, deductions, exemptions, and credits.[7] *Whetzel v. Dep't of Local Gov't Fin.,* 761 N.E.2d 904 (Ind. Tax Ct. 2002); Ind. Code § 6-1.5-4-1 and its predecessor statute, Ind. Code § 6-1.1-30-11.

29. The Board now turns to the Petitioner's request to examine if the subject property was correctly assessed for the years under appeal. The Petitioner filed Form 133s for the subject property and only objective errors that can be corrected with exactness and precision can be addressed via a Form 133 filing.

30. Taxpayers have two methods to appeal an assessment: a Petition for Review of Assessment (Form 131) authorized by Ind. Code §6-1.1-15-1, or a Petition for Correction of an Error (Form 133) authorized by Ind. Code § 6-1.1-15-12. "A taxpayer that challenges a property assessment bears that responsibility of using the appropriate method." *Franchise Realty Corp. v. State Bd. of Tax Comm'rs*, 682 N.E.2d 832, 833 (Ind. Tax Ct. 1997); *Bender v. State Bd. of Tax Comm'rs* 676 N.E.2d 1113, 1114 (Ind. Tax Ct. 1997).

31. A taxpayer may file a Form 131 challenging any element of assessment, but this form can only be initiated within 45 days after the Notification of Final Assessment Determination is given to the taxpayer. Ind. Code § 6-1.1-15-3(d).

[7] *Whetzel* cited Ind. Code § 6-1.1-30-11 which has since been repealed, but is now in effect in substantially similar language in Ind. Code § 6-1.5-4-1(a).

32. Only objective errors that can be corrected with exactness and precision can be addressed with a Form 133. These forms are not for changes that require subjective judgment. Ind. Code § 6-1.1-15-12; *O'Neal Steel v. Vanderburgh Co. Property Tax Assessment Bd. of Appeals*, 791 N.E.2d 857, 860 (Ind. Tax Ct. 2003); *Barth Inc. v. State Bd. of Tax Comm'rs,* 756 N.E.2d 1124, 1128 (Ind. Tax Ct. 2001); *Bender,* 676 N.E.2d at 1114*; Reams v. State Bd. of Tax Comm'rs,* 620 N.E.2d 758, 760 (Ind. Tax Ct. 1993); *Hatcher v. State Bd. of Tax Comm'rs,* 561 N.E.2d 852, 857 (Ind. Tax Ct. 1990).

33. A determination is objective if it hinges on simple, true or false findings of fact. *See Bender,* 676 N.E.2d at 1115. "[W]here a simple finding of fact does not dictate the result and discretion plays a role, [the] decision is considered subjective and may not be challenged through a Form 133 filing." *Id.* And clearly, the issue of a property's value requires subject judgment.

34. Even if the Board were to consider this assessment issue, the Petitioner failed to make a prima facie case. While a taxpayer can certainly make a case that his property is overvalued using the sales-comparison approach, much more is required than simply offering sale prices of purportedly comparable properties. *See Long v. Wayne Twp. Ass'r*, 821 N.E.2d at 471 (stating that one who offers a comparable is responsible for explaining the characteristics of the subject property, how those characteristics compare to those of purportedly comparable properties, and how any difference affect the relevant market value-in-use of the properties). The record lacks any of the type of analysis contemplated by *Long*.

35. Where the Petitioner has not supported his claim with probative evidence, the Respondent's duty to support the assessment with substantial evidence is not triggered. *Lacy Diversified Indus. v. Dep't of Local Gov't Fin.,* 799 N.E.2d 1215, 1221-1222 (Ind. Tax Ct. 2003).

SUMMARY OF FINAL DETERMINATION

36. The Petitioner claims for relief are denied for 2009 and 2010. However, the Respondent went outside of her statutory authority when she corrected the 2008 assessment. Thus, the 2008 action is invalid under Ind. Code § 6-1.1-9-4(a). As to the tax penalties, the Board lacks the jurisdiction to review their validity. Further, the challenge of the subject property's assessment is not available via a Form 133. Therefore, the Board finds for the Respondent for the 2009 and 2010 assessment years and for the Petitioner for the 2008 assessment year.

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

_____

Chairman, Indiana Board of Tax Review

_____

Commissioner, Indiana Board of Tax Review

_____

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 of 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>.