

IN THE SUPREME COURT OF OHIO

Appeal From the Ohio Board of Tax Appeals

CARROLL E. NEWMAN,
Adams County Auditor,

Appellant/Cross-Appellee,

v.

WILLIAM W. WILKINS [RICHARD A.
LEVIN], TAX COMMISSIONER OF OHIO,

Appellant/Cross-Appellee.

CINCINNATI GAS & ELECTRIC CO.

And

DAYTON POWER AND LIGHT CO.

And

COLUMBUS SOUTHERN POWER CO.

Appellee/Cross-Appellant

Case No. 07-1054

Appeal from BTA

Case Nos 2002-M-170, 171, 172.

FILED
AUG 06 2007
CLERK OF COURT SUPREME COURT OF OHIO

**MEMORANDUM CONTRA TO APPELLEE/CROSS-APPELLANT ELECTRIC
COMPANIES' MOTION FOR ORAL ARGUMENT**

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Court interpreting the rule would permit an oral argument on a motion when another rule, in this instance S. Ct. Prac. R. IX(B), permits an oral argument on the merits of the case.

Pursuant to the clear wording of S.Ct. Prac. R. IX(2), the option for an oral argument on a motion to dismiss filed by a party to an appeal from the Board of Tax Appeals (“BTA”) is not available. S.Ct. Prac. R. IX(2)(A) provides for an oral argument on the merits of a case “in an original action, or in an appeal that is not scheduled for oral argument pursuant to Section 1 of this rule.”

S.Ct. Prac. R. IX(1)(B) mandates an oral argument on the merits when parties have appealed from the BTA. That argument is to be heard “after the case has been briefed on the merits in accordance with S.Ct. Prac. R. VI. S.Ct. Prac. IX(1)(B). Unless specifically waived, this Court’s rules allow all parties in an appeal from the BTA the opportunity to orally argue the merits of a case. In this instance, the parties have appealed from a decision of the BTA, so the ability of the parties to argue issues has been fully covered by S.Ct. Prac. R. IX(1)(B).

As further indication that S. Ct. Prac. R. IX(2) is not available to parties filing a motion to dismiss, S. Ct. Prac. R. IX(2)(B) indicates the oral argument permitted under this rule is to be scheduled within 20 days of the filing of appellee’s or respondent’s merit brief. There is no wording in S. Ct. Prac. R. IX(2) that indicates the rule is applicable to jurisdictional motions. In fact, the Electric Companies admit that this rule is not applicable to a jurisdictional issue on page 3 of their Motion for Oral Argument. That section of the Motion reads as follows: “Utilities have borrowed the format for Motions for Oral Argument on the merits under S.Ct. Prac. R. IX(2) and applied the format to this Motion for Oral Argument on the Motion to Dismiss.” In other words, the Electric Companies are urging this Court to stretch its rules to allow for the possibility of an oral argument on a jurisdictional motion. In reality, this Motion for Oral

Argument is merely a thinly veiled attempt to skirt S.Ct. Prac. R. XIV(4)(B) prohibiting responses to Memorandum in response to jurisdictional motions and covering this inappropriate action by the terms “borrowed the format” and “applied the format.”

As further evidence that the Electric Companies’ Motion is an unprecedented attempt to expand this Court’s rule, the only case cited by the Electric Companies to justify their unusual request for oral argument on a jurisdictional motion was not on point. The case cited, *State ex rel. Woods v. Oak Hill Community Med. Ctr.* (2001), 91 Ohio St.3d 459, involved a denial of an oral argument on the merits of the case. The appellant appealed the dismissal of a writ of mandamus action to the Ohio Supreme Court. *Id.* at 460-461. The appellant sought to argue the merits of the writ of mandamus, but this Court denied the request, stating as a reason that S.Ct. Prac.R. IX(2) does not require oral argument in this particular appeal. The Court then stated that it found the briefs “sufficient to resolve the issues raised.” In addition to *Woods*, the Electric Companies did not cite any cases expanding S.Ct. Prac. R. IX(2) to cover jurisdictional motions. There are no such cases, because the rule clearly does not cover such an expansion.

Further, as provided in this Court’s rules and as mentioned earlier, Electric Companies will have ample opportunity to argue issues raised in the notices of appeal to this Court. According to S.Ct. Prac.R. IX(1)(B), that opportunity will occur after the issues are briefed.

Finally, there are no substantial constitutional or procedural issues in this case. The Electric Companies’ incorrectly argue that such issues exist, thereby allowing this Court to expand S.Ct. Prac. R. IX(2) to enable them to argue orally a jurisdictional motion. The Tax Commissioner thoroughly answered in its Memorandum submitted to this Court the flawed jurisdictional issues the Electric Companies raised in their original Motion to Dismiss.

Because the Electric Companies do not have an absolute right to receive an exemption from taxation, there is no absolute property right from which they are being deprived. See, e.g. *Cleveland Bd. of Educ. v. Loudermille* (1985), 470 U.S. 532, 542 (security guard had an absolute property right in his job). There is no absolute right to receive an exemption from taxation. All property is to be taxed unless specifically exempted from taxation. R.C. 5709.01. First and most important, the Electric Companies have falsely portrayed an exemption from taxation as an absolute property right from which they are being deprived. This basic requirement of a due process claim, that there be a deprivation of life, liberty or property, is, therefore, missing from a case in which Electric Companies seek exemption from taxation for replacement parts necessary to keep Stuart operating as it was designed.

In contrast to their blatant attempt to shift the statutory burden for obtaining an exemption, the Electric Companies always had and still have the burden of proving that the equipment from Stuart qualified for an exemption from the time that they filed their applications with the Tax Commissioner. R.C. 5715.271. Further, this Court has previously acknowledged that the Tax Commissioner has an obligation to make certain no property is improperly or illegally exempted as tax exemption is in derogation of the rights of all taxpayers and necessarily shifts a heavier tax burden upon the nonexempt. *Joint Hospital Services v. Lindley* (1977), 52 Ohio St.2d 153. Having the burden of proof, the Electric Companies should have anticipated proving that the equipment for which they sought exemption from real, personal, franchise, use and sales tax was merely replacement parts essential for the operation of an electro generating plant in operation before 1974.

Then, as noted in the Tax Commissioner's Memorandum, there was no due process flaw at the BTA. The Electric Companies had the notice and opportunity for a hearing appropriate to

the nature of the case. See, e.g. *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 313. In this instance, there was a hearing at the BTA about the Electric Companies' property certified and exempted from taxation as thermal efficiency improvement facilities.

The hearing as to whether the Tax Commissioner was justified in granting an exemption for this property was properly initiated when Carroll E. Newman, the Adams County Auditor ("auditor") filed a valid Notice of Appeal to the BTA from the Tax Commissioner's final determination. The auditor wrote in the Notice of Appeal that that the Tax Commissioner erred when exempting the property. The Notice of Appeal included the issue of parts and of a plant that was fully operational prior to 1974. The witnesses at the multi-day over a several year period hearing were questioned about replacement parts and about when the development, construction and operation of Stuart and similar plants. Thus, the Electric Companies had adequate notice of issues and opportunities for argument both before the BTA and in briefs, including an extra brief in which they opined fully upon the alleged errors in the Tax Commissioner's brief. They had adequate opportunities to counter the argument that they had filed as thermal heat efficiency improvement facilities for replacement parts for equipment designed prior to 1974, essential for the operation of Stuart and only able to maintain Stuart at its original design.

Further, it must be remembered that the Board of Tax Appeals is empowered to inquire into all relevant evidence. *Key Services v. Zaino* (2002), 95 Ohio St.3d 11. That is because the hearing before the BTA is de novo. R.C. 5717.02. *Pennsylvania Rd. Co. v. Porterfield* (1971), 25 Ohio St.2d 223; *Clark v. Glander* (1949), 151 Ohio St. 229. While there must be a presumption that the Tax Commissioner's final determination is lawful and without error, the BTA has an obligation, especially in an exemption case when the rights of non applicant taxpayers are at risk,

to make certain that the final determination exempting property is lawful and without error. *Zindorf v. Otterbein Press* (1941), 138 Ohio St. 287, 290.

Thus, there was no deprivation of Electric Companies' opportunity for a hearing appropriate for the nature of the case, so the second prong of a due process argument is also missing here. *Barry v. Barchi* (1979) 443 U.S. 55, 65 (There was no due process issue when a horse trainer was given the opportunity to present his reasons why he should not lose his license). Only when the Tax Commissioner understood that he had erroneously exempted property that was not qualified for exemption under R.C. 5709.46 did the Tax Commissioner so advise the BTA at the de novo hearing before it that the replacement parts did not qualify under R.C. 5709.46. It was the obligation of the Tax Commissioner to do so.

The Tax Commissioner appealed to the Supreme Court when the BTA compounded the error by affirming the Tax Commissioner's original erroneous exemption of the Electric Companies' property. Both the BTA and the Tax Commissioner had failed in their obligation to the taxpayers of Ohio by exempting property clearly not qualified under R.C. 5709.46 for certification as thermal heat efficiency improvement facilities. *Zindorf v. Otterbein Press*, 138 Ohio St. at 290. It is now the obligation of the Supreme Court to determine if the taxpayers of Ohio should pay more tax because it is necessary to exempt replacement parts for equipment developed as a necessary for the operation of equipment such as electro generating plants or refrigeration units and used in such equipment prior to 1974.

In summation, there is no reason for this Court to expand S.Ct. Prac. R. IX(2) to allow the Electric Companies to orally argue their rationale for their Motion to Dismiss. This Court does not specifically provide for oral argument when a party moves for dismissal of a notice of appeal. Also flawed is the Electric Companies' argument that this Court's rule should be

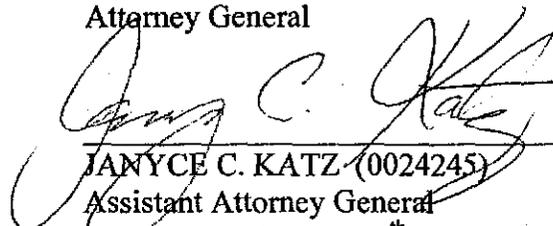
expanded to this particular Motion to Dismiss because this case has “deeply important procedural and constitutional issues of first impression.” The Electric Companies’ have provided no precedent or logical reason for expansion of this Court’s rule. This Court should not permit the Electric Companies to expand S.Ct. Prac. R. IX(2) in order to avoid this Court’s prohibition responses to Memorandum Contra Motions to Dismiss found in S.Ct. Prac. R. XIV(4)(B) prohibiting. As there is no Court rule or precedent existing that would permit the requested oral argument, this Court should deny the Motion.

CONCLUSION

For all these reasons, the Electric Companies’ rational for an oral argument should be denied.

Respectfully submitted,

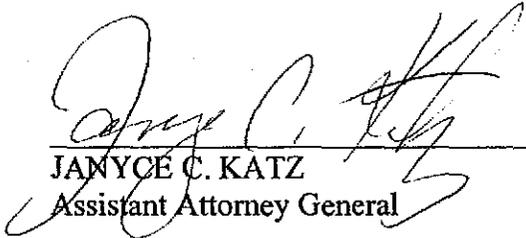
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Memorandum Contra to Appellee/Appellant Electric Companies' Motion for Oral Argument was sent by regular U.S. mail to David C. DiMuzio, David C. DiMuzio, Inc., 1900 Kroger Building, 1014 Vine Street, Cincinnati, Ohio 45202, counsel for Appellant/Cross-Appellee and to Anthony L. Ehler, Vorys, Sater, Seymour & Pease LLP, 52 East Gay Street, P. O. Box 1008, Columbus, Ohio 43216-1008, counsel for Appellee/Cross-Appellant Electric Companies, on this 6th day of August, 2007.



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CHARLES W. SLICER III
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February 5, 2002

Searcy Rutledge Jr. - A 413273
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Dear Mr. Rutledge:

Please be advised that the undersigned has been appointed by the Court to pursue an Appeal on your case. Enclosed herein please find an Order removing Public Defender Michael Lewis from your case pursuant to his request for new counsel. Also enclosed is a copy of my Order of Appointment by the Court along with a Financial Affidavit which you need to sign where indicated, have notarized by someone in the institution and forwarded back to my office as soon as possible. This Affidavit is necessary in order for me to be compensated by the Court to pursue your appeal.

I have received a copy of the transcript of your Trial and am in the process of reviewing it for possible issues to appeal. I will also discuss your case with your prior attorney to discuss any appealable issues. If you believe there are issues which should be brought up on appeal, I would ask that you put them in writing and send them to my office as soon as possible. The Brief on your Appeal is due February 25, 2002. I remain,

Very truly yours,


BARRY S. GALEN
Attorney at Law

BSG/skm

enclosures