

IN THE SUPREME COURT OF OHIO

ORIGINAL

Willis Day Warehousing Co. :
: Appellant, :
: Case No. 2010-0115 :
: :
Wood County Board of Revision and the :
Wood County Auditor : Appeal from the Ohio Board of
: Tax Appeals Case No. 2006-M-1749
Appellees. : and Case No. 2007-M-868

**APPELLANT WILLIS DAY WAREHOUSING CO.'S
REPLY BRIEF**

Ronald B. Noga (0013345)
1010 Old Henderson Road, Suite 1
Columbus, Ohio 43220
614/326-1954
614/447-1673 – fax
noga@nogalaw.net

Attorney for Appellant
Willis Day Warehousing Co.

James Gorry (0032461)
1299 Carron Drive
Columbus, Ohio 43220
Dublin, Ohio 43017
614/327-1067
jgorry@richgillislawgroup.com

Attorney for Appellees Wood County
Auditor and Board of Revision

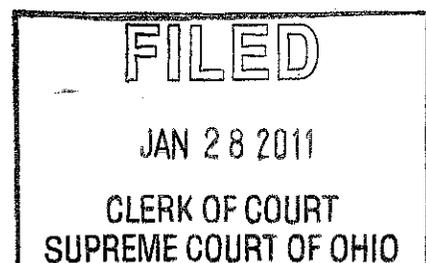


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I. APPELLEES' REFERENCE TO OTHER FORMS OF STATUTORY RELIEF ARE INAPPOSITE.

Appellees in their Merit Brief contend the doctrine of tolling the deadline for filing a Complaint with the Board of Revision is not authorized by statute. Appellees further contend there are other statutes which offer the Appellant a remedy where the Auditor unilaterally changes the valuation of real property after the March 31 deadline of O.R.C. Section 5715.19(A)(1). Appellees' contentions are not persuasive.

First, although Appellee correctly points out that there is a procedure for correcting the tax list for "clerical errors" set forth in O.R.C. Section 319.35, that procedure was not invoked herein. This is evident as Appellant attempted to procure from the Auditor a "Certificate of Correction" required for clerical errors under O.R.C. Section 319.39. However, the Certificate was never produced by the Auditor. Nor has the Auditor ever asserted he followed that process or issued a "Certificate of Correction".

More significantly, the reference to a process for correcting clerical errors in the tax duplicate fails to address the fundamental problem which is lack of notice and an opportunity to be heard where the Auditor has unilaterally increased the valuation of real property after the date for filing Complaints. For the Appellees to contend that the second half tax bill is all the notice a property owner is entitled to simply misses the point entirely.

As discussed in Appellant's Merit Brief under Proposition of Law No. 1, O.R.C. Section 5715.12 prohibits an increase in valuation without notice and an opportunity to be heard. It is clear that unless the doctrine of tolling is applied herein with respect to filing of a Complaint under these circumstances, the Auditor has unlimited and unreviewable power to increase valuations of real property and thereby the amount of tax liability.

Further, in addition to the tolling cases cited in Appellant's Merit Brief, this Court's recent holding in AERC Saw Mill Village vs. Franklin County Board of Revision, et al. (2010), 127 Ohio St.3d 44, is instructive. There this Court discussed the necessity of "harmonizing conflicting statutes and competing mandates in the real property tax statutory scheme.

The instant case presents an analogous context. Here, the Board of Revision's jurisdictional criteria set forth in O.R.C. Section 5715.19 competes with the Board of Revision's power over the assessment of real property set forth in O.R.C. Section 5715.11 (a power independent of and superior to the County Auditor's) and conflicts with the prohibition in O.R.C. 5715.12 against increasing valuations without notice and an opportunity to be heard. "Tolling", a judicial doctrine this Court has recognized in other contexts "harmonizes" these statutes to avoid an unconstitutional and unreasonable result. See O.R.C. Section 1.47.

Further, the Appellees' contentions that O.R.C. Section 2723.01 and/or O.R.C. Section 5715.39 are alternative remedies in lieu of tolling are erroneous.

O.R.C. Section 2723.01 provides for an injunction against the illegal levy or collection of taxes, and potential recovery after collection. The ability of Appellant to establish the increase in valuation here as an "illegal" levy is purely speculative. The issue presented by these facts is not whether the act of increasing the valuation of this property is legal, the issue is whether Appellant has had notice and an opportunity to heard under the existing statutory scheme of Chapter 5715, Ohio Revised Code, which establishes an administrative remedy for contesting the valuation of real property. Moreover, exhaustion of administrative remedies pursuant to O.R.C. Section 5715.19 would be a prerequisite to any action under O.R.C. Section 2723.01. BP Communications Alaska Inc., et al. v. Central Collection Agency, et al. (2000), 136 Ohio App.3d

807; Helmets v. McCarthy (1917), 6 Ohio App. 423. Consequently, O.R.C. Section 2723.01 is not an alternative remedy available to Appellant.

Similarly, there is no relief available to Appellant under O.R.C. Section 5715.39. Subparagraph (E) of Section 5715.39 expressly provides that this Section “shall not provide to the taxpayer any remedy with respect to any matter that the taxpayer may be authorized to complain of under section***5715.19***of the Revised Code”.

In sum, the Appellees present no lawful rationale for rejection the doctrine of tolling as to tax year 2005 nor do they offer any lawful alternative to the course Appellant has been forced to take.

II. WHERE THE TAXPAYER/OWNER IS AN INNOCENT VICTIM OF AN UNLAWFUL UNILATERAL ACTION BY THE COUNTY AUDITOR THE STATUTORY AND CONSTITUTIONAL REQUIREMENTS OF NOTICE AND AN OPPORTUNITY TO BE HEARD TRUMP A RIGID APPLICATION OF O.R.C. SECTION 5715.19.

In response to Appellant’s Propositions of Law Nos. 1 and 2, the Appellees in their Merit Brief posit a “one size fits all” analysis of the jurisdictional criteria for the filing of Complaints with county boards of revision. The argument Appellees make, and the cases Appellees cite, are based on the conventional response that if a Complaint is not filed by March 31 of the year subsequent to the tax year in question, the board lacks jurisdiction to consider the Complaint. And certainly for the vast majority of Complaints filed after the March 31 deadline this analysis is sufficient. However, as recent cases in this Court clearly demonstrate, where facts present more complex contexts this Court has held the basic constitutional and statutory requirements of notice and an opportunity to be heard trump a heedless application of the March 31 deadline.

Appellant submits the cases presented by Appellant and Appellees in this matter can be reconciled only by recognizing that Courts have insisted that the statutory and constitutional

precepts of notice and opportunity to be heard will trump blind application of the March 31 deadline if the “affected party” is in essence an innocent victim of the bureaucratic and administrative process.

Note for example in the two cases cited by Appellee the taxpayer/owners whose complaints are rejected as untimely, or wrongfully filed within the interim period, were active in the creation of the problem. In Elken Metals Co. LP v. Washington Cty. Bd of Revision (1998) 81 Ohio St.3d 683, for instance, the taxpayer/owner failed to properly complete the Complaint. In Concord Columbus L.P. v. Joseph W. Testa Auditor of Franklin County (1997), 122 Ohio App.3d 205, the taxpayer/owner was adding value to the subject property over the period involved in the construction process. Clearly this taxpayer/owner had full knowledge of and participation in the increase in valuation. In Cleveland Municipal School District Board of Education, et al. vs. Cuyahoga County Board of Revision, et al. (2005), 105 Ohio St.3d 404 (the Royal Financing case) the taxpayer/owner filed a late complaint not to protect the prior valuation, which had been stipulated to by the previous owner, but to seek a further reduction from the stipulated amount. All of these cases are distinct from the innocent victim status of Appellant herein.

The Appellees’ failure to recognize the distinction raised here is demonstrated by its contention at page 7 of its Merit Brief that the cases Cleveland Mun. School Dist. Bd. of Edu. V. Cuyahoga Cty. Bd. of Revision (2005), 105 Ohio St.3d 404 (Royal Financing) and IBM Corporation v. Board of Revision of Franklin County, et al. (10th Dist.) No. 06AP-108, 2006 Ohio 6258; 2006 Ohio App. Lexis 6233 dealt with the same facts presented here. As noted above, the Royal Financing case dealt with a taxpayer/owner seeking to reduce a previously stipulated valuation. Royal Financing had to be fully aware of the valuation issues as part of its

purchase from the prior owner and sought to take advantage of the situation. Similarly in IBM, supra, the taxpayer/owner contributed to the creation of the valuation change when it failed to meet the job creation requirements necessary to maintain a tax abated status. IBM had to know, or was certainly chargeable with the knowledge, that there would be a valuation change and how it should be calculated in advance. None of these factors is present in the instant case where the taxpayer/owner is simply blindsided with a valuation increase with no notice and with respect to which it played no role.

All of the above cases relied on by Appellees are distinguishable from the instant case where the taxpayer/owner is hit with a huge increase in the valuation of its property by the unilateral action of the County Auditor at a point subsequent to the March 31 deadline for filing challenges to that action. This wrongful act is then compounded by the Wood County Board of Revision which invites the taxpayer/owner to file a complaint for 2005 (a complaint which merely seeks maintenance of 2004 values) and then uses that filing to deny jurisdiction for a subsequent filing for 2006 to 2007.

In light of the distinction discussed above, the instant case must not be controlled by the line of cases where the taxpayer/owner plays an active party in its dilemma. Rather, this case should be controlled by those cases where the statutory (O.R.C. 5715.12) and constitutional requirements of notice and an opportunity to be heard are determinative. These cases include MB West Chester, LLC v. Butler County Bd. of Revision (2010), 126 Ohio St.3d 430, and Knickerbocker Properties Inc. XLII v. Delaware County Board of Revision (2008), 119 Ohio St. 3d 323, discussed in Appellant's Merit Brief.

In sum, where the taxpayer owner is not an active or knowledgeable participant in creating the dispute or the change in valuation, that party's right to notice and an opportunity to

be heard precludes a rigid application of O.R.C. 5715.19. Rather, the provisions of O.R.C. 5715.12 which preclude the Board of Revision from increasing the value of property without notice and an opportunity to be heard must be harmonized with the requirements of O.R.C. Section 5715.19, to permit Appellants' 2006 Complaint to be heard irrespective of the prior filing for 2005. (As an aside, Appellant submits the foregoing also supports the use of the doctrine of tolling with respect to the 2005 Complaint.)

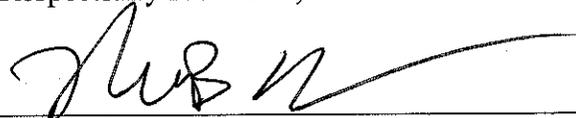
To fail to recognize the distinction discussed above results in the County Auditor having unfettered and unreviewable authority to increase property valuations to the detriment of innocent taxpayer/owners.

Accordingly, this Court must find that Appellant's Complaint for 2006 (carried over to 2007) is a valid Complaint before the Board of Revision irrespective of the Court's disposition of the filing for 2005.

III. CONCLUSION

For the foregoing reasons the Decision of the Board of Tax Appeals must be overruled with instructions to remand the case back to the Board of Revision for hearing and determination of the value of Appellant's property for tax years 2005, 2006 and 2007.

Respectfully submitted,



Ronald B. Noga (0013345)
1010 Old Henderson Road, Suite 1
Columbus, Ohio 43220
614/326-1954
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief has been sent by ordinary U.S. mail, postage prepaid, to James Gorry, Attorney for Appellees, 1299 Carron Drive, Columbus, Ohio 43220 and Tax Commissioner of Ohio, 30 East Broad Street, 20th Floor, Columbus, Ohio 43215, on this 28th day of January, 2011.

A handwritten signature in black ink, appearing to read 'Ronald B. Noga', written over a horizontal line.

Ronald B. Noga

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Citation: **orc 319.39**

ORC Ann. 319.39

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*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2010 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH OCTOBER 1, 2010 ***

TITLE 3. COUNTIES
CHAPTER 319. AUDITOR

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ORC Ann. 319.39 (2011)

§ 319.39. Record of "additions and deductions"; certificate of correction

The county auditor shall keep books or other records of "additions and deductions," in which he shall enter all corrections of the general duplicates and of the classified duplicate respectively, made after delivery of such duplicates to the county treasurer, which either increase or diminish the amount of a tax or assessment, as stated in such duplicates. In addition to the marginal corrections provided for in section 319.35 of the Revised Code, he shall in each case give the treasurer a certificate of the correction.

History:

RS § 1039; 71 v 30, §§ 1-3; GC § 2592; 114 v 714 (726), § 3; Bureau of Code Revision. Eff 10-1-53.

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ORC Ann. 5715.11

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TITLE 57. TAXATION
CHAPTER 5715. BOARDS OF REVISION; EQUALIZATION OF ASSESSMENTS

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ORC Ann. 5715.11 (2011)

§ 5715.11. Duty of county board of revision to hear complaints

The county board of revision shall hear complaints relating to the valuation or assessment of real property as the same appears upon the tax duplicate of the then current year. The board shall investigate all such complaints and may increase or decrease any such valuation or correct any assessment complained of, or it may order a reassessment by the original assessing officer.

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§ 5715.39. Remission of illegally assessed taxes or late payment penaltyCitation: **orc 5715.39***ORC Ann. 5715.39*

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TITLE 57. TAXATION
CHAPTER 5715. BOARDS OF REVISION; EQUALIZATION OF ASSESSMENTS
REVIEW OF ASSESSMENTS BY TAX COMMISSIONER

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ORC Ann. 5715.39 (2011)

§ 5715.39. Remission of illegally assessed taxes or late payment penalty

(A) The tax commissioner may remit real property taxes, manufactured home taxes, penalties, and interest found by the commissioner to have been illegally assessed. The commissioner also may remit any penalty charged against any real property or manufactured or mobile home that was the subject of an application for exemption from taxation under section 5715.27 of the Revised Code if the commissioner determines that the applicant requested such exemption in good faith. The commissioner shall include notice of the remission in the commissioner's certification to the county auditor required under that section.

(B) The county auditor, upon consultation with the county treasurer, shall remit a penalty for late payment of any real property taxes or manufactured home taxes when:

(1) The taxpayer could not make timely payment of the tax because of the negligence or error of the county auditor or county treasurer in the performance of a statutory duty relating to the levy or collection of such tax.

(2) In cases other than those described in division (B)(1) of this section, the taxpayer failed to receive a tax bill or a correct tax bill, and the taxpayer made a good faith effort to obtain such bill within thirty days after the last day for payment of the tax.

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(3) The tax was not timely paid because of the death or serious injury of the taxpayer, or the taxpayer's confinement in a hospital within sixty days preceding the last day for payment of the tax if, in any case, the tax was subsequently paid within sixty days after the last day for payment of such tax.

(4) The taxpayer demonstrates that the full payment was properly deposited in the mail in sufficient time for the envelope to be postmarked by the United States postal service on or before the last day for payment of such tax. A private meter postmark on an envelope is not a valid postmark for purposes of establishing the date of payment of such tax.

(C) The board of revision shall remit a penalty for late payment of any real property taxes or manufactured homes taxes if, in cases other than those described in division (B)(1) to (4) of this section, the taxpayer's failure to make timely payment of the tax is due to reasonable cause and not willful neglect.

(D) The taxpayer, upon application within sixty days after the mailing of the county auditor's or board of revision's decision, may request the tax commissioner to review the denial of the remission of a penalty by the auditor or board. The application may be filed in person or by certified mail. If the application is filed by certified mail, the date of the United States postmark placed on the sender's receipt by the postal service shall be treated as the date of filing. The commissioner shall consider the application, determine whether the penalty should be remitted, and certify the determination to the taxpayer, to the county treasurer, and to the county auditor, who shall correct the tax list and duplicate accordingly. The commissioner may issue orders and instructions for the uniform implementation of this section by all county boards of revision, county auditors, and county treasurers, and such orders and instructions shall be followed by such officers and boards.

(E) This section shall not provide to the taxpayer any remedy with respect to any matter that the taxpayer may be authorized to complain of under section 4503.06, 5715.19, 5717.02, or 5727.47 of the Revised Code.

(F) Applications for remission, and documents of any kind related to those applications, filed with the tax commissioner under this section are public records within the meaning of section 149.43 of the Revised Code unless otherwise excepted under that section.

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