

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

**MOTION FOR RECONSIDERATION OF THE COURT'S
GRANTING OF APPELLEES' MOTION TO DISMISS**

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CLERK OF COURT
SUPREME COURT OF OHIO

I. Statement of Case

On January 20, 2010 Appellant filed a Notice of Appeal to this Court from a Decision of the Ohio Board of Tax Appeals. That Decision pertained solely to jurisdictional issues related to county boards of revision. It did not pertain to the value of any real property.

After a mediation period the matter was set for briefing. Appellant filed its Merit Brief on December 13, 2010. Appellee filed its Brief on January 10, 2011. Appellant's Reply Brief was filed January 28, 2011.

On January 10, 2011 Appellee filed a Motion to Dismiss solely on the ground that the Appellant's Notice of Appeal had not been served on the Tax Commissioner of Ohio.

On January 20, 2011 Appellant filed a Memorandum Contra which argued that under O.R.C. Sections 5717.04 and 5717.03 no service on the Tax Commissioner was required as the Decision appealed from was purely jurisdictional and did not pertain to valuation.

On April 6, 2011 the Court dismissed the appeal without comment or opinion. No oral argument was ever scheduled in this matter.

II. Statement of Facts

Cognizant of this Court's Rule 11.2, providing that a Motion to reconsider shall not constitute re-argument, Appellant limits its Statement of Facts to noting that the Decision of the Board of Appeals appealed from concerned only the timing and effect of filings in the county boards of revision and not the valuation of real property. This fact is in contradistinction to the provision of Subsection (B), O.R.C. 5717.03 on which Appellee relied in its motion to dismiss. Under that subsection service of a notice of appeal to this Court from a decision of the Ohio Board of Tax Appeals is to be served on the Tax Commissioner of Ohio only where the Board of

Tax Appeals has made a determination of value of real property or corrected a discriminatory valuation. Neither of those determinations was made by the Board of Tax Appeals in this case.

III. Argument

A. The Basis for Reconsideration

Ohio law indicates that reconsideration of an appellate court decision is justified where there is obvious error or an issue is raised that has not been considered at all or was not fully considered when it should have been. Matthews v. Matthews (1982), 5 Ohio App.3d 140 (J. Moyer).

As the Order granting the Appellee's Motion to Dismiss in this case was without opinion or any form of explanation, Appellant is at a disadvantage in demonstrating exactly how obvious error could have occurred or what was or was not considered.

However, Appellant submits that the result herein is so patently erroneous that it could only stem from obvious error or a failure to fully consider the fact that the Decision appealed to this Court from the Ohio Board of Tax Appeals did not deal with the valuation of property but solely the jurisdiction of county boards of revision and the Ohio Board of Tax Appeals.

B. Dismissal of Appellant's Appeal for failure to "send" the Tax Commissioner a copy of the notice of appeal is either obvious error as neither statute, rule nor case law require such notice or results from not fully considering that the Decision appealed from concerned only jurisdiction and not the valuation of real property.

Review of the statutes, rules and cases relative to filing an appeal to this Court reveal no indication or implication that in order to invoke the jurisdiction of this Court to review jurisdictional issues pertaining to the Ohio Board of Tax Appeals in real property tax cases a copy of the notice of appeal must be sent to the Tax Commissioner of the State of Ohio.

Supreme Court Practice Rule 2.3(A) sets forth no such requirement.

Ohio Revised Code Sections 5717.04 and 5717.03, when read together, make no such requirement. Only when the Board of Tax Appeals has determined the taxable value of property or a value to correct a discriminatory valuation is the notice of appeal to be “sent to the Tax Commissioner” under Subsection (B) of O.R.C. Section 5717.03.

Subsection (B) provides in pertinent part:

(B) In case of an appeal from a decision of a county board of revision, the board of tax appeals shall determine the taxable value of the property whose valuation or assessment by the county board of revision is complained of, or in the event the complaint and appeal is against a discriminatory valuation, shall determine a valuation which shall correct such discrimination, and shall determine the liability of the property for taxation, if that question is in issue, and the board of tax appeals' decision and the date when it was filed with the secretary for journalization shall be sent by the board to all persons who were parties to the appeal before the board, to the person in whose name the property is listed, or sought to be listed, if such person is not a party to the appeal, to the county auditor of the county in which the property involved in the appeal is located, and to the tax commissioner.

However the decision appealed in this case did not fall under Subsection (B) but under Subsection (E) which does not require sending a copy of the notice of appeal to the Tax Commissioner.

Subsection (E) reads as follows:

(E) In the case of all other appeals or applications filed with and determined by the board, the board's order and the date when the order was filed by the secretary for journalization shall be sent by the board to the person who is a party to such appeal or application, to such persons as the law requires, and to such other persons as the board deems proper.

That the Decision of the Board of Tax Appeals did not determine a valuation or otherwise fit within Subsection (B) is evident from the concluding of paragraphs of that Decision which read as follows:

Therefore, this board must find that neither complaint filed with the BOR effectively lodged jurisdiction in that body. The complaint filed in BTA No. 2006-M-1794 was untimely, but, even jurisdictionally defective, served as a bar to

the filing of another complaint by Willis Day during the triennium. Therefore, BTA No. 2006-M-1794 is remanded to the BOR with instructions to dismiss the complaint. The board affirms the actions taken by the BOR in BTA No. 2007-M-869. Mr. Dunlap concurs.

I reluctantly concur with the decision dismissing the complaint. The outcome highlights the Board of Tax Appeals' lack of authority to apply the fairness principles of equity to a factual situation requiring a resolution other than the foregoing dismissal. (copy attached)

While the Decision of the Board of Tax Appeals ultimately affects valuation of property, it did not determine a valuation of property.

Once it is recognized that the Decision of the Board of Tax Appeals falls under Subsection (E) of O.R.C. Section 5717.03 and not Subsection (B), the requirement of sending a copy of the notice of appeal to this Court to the Tax Commissioner is eliminated. This results as the sixth paragraph of O.R.C. Section 5717.04 requires the notice of appeal be "sent" to the Tax Commissioner only if required by O.R.C. Section 5717.03.

This Court has held that jurisdictional statutes for administrative agencies must be strictly complied with. In order for that principle to be applied equitably the statutes must be strictly construed whether they support jurisdiction of an appeal or deny it. In this case strict construction of the jurisdictional statutes involved support jurisdiction of this appeal.

- C. The Dismissal in this case effectively establishes a new, unwritten jurisdictional requirement for appeals to this Court which must be either rejected or elucidated in writing on Reconsideration.

Since in the instant case the Board of Tax Appeals in the Decision appealed from made no valuation determination whatsoever, a jurisdictional requirement of sending a copy of the notice of appeal to the Tax Commissioner of Ohio, who was never a party to process and whose statutory duties were not involved, is not intuitively obvious.

Moreover since the case law recited in the Appellee's motion concerned cases where the Board of Tax Appeals had made valuation determinations, unlike the instant case, their value as precedents in light of language of O.R.C. Section 5717.03 and 5717.04, is negligible. See Olympic Steel Inc. v. Cuyahoga County Board of Revision (2006), 110 Ohio St.3d 1242; Columbus City School District Bd. of Ed. V. Franklin County Bd. of Revision (2007), 114 Ohio St.3d 1224.

Appellant submits that the above state of the law in conjunction with this Court's Decision without opinion in this case leaves practitioners in this area without written guidance in statute, rule, or case law as to what is required to invoke the jurisdiction of this Court where jurisdictional issues alone arise out of Decisions of the Board of Tax Appeals. Moreover as cases before Boards of Revision and the Board of Tax Appeals multiply, issues of notice and jurisdiction can be expected to similarly increase, thereby expanding the need for clarity in procedures leading to review by this Court.

While recognizing that undertaking the responsibility of bringing clarity to the cloudy procedure in this area will be burdensome on this Court, Appellant submits the Court's obligation under oath to administer justice encompasses that task. To place this conclusion in context, Appellant submits there is no logical way one could come to the conclusion from the applicable statutes and rules that an appeal of the jurisdictional decision of the Board of Tax Appeals in this case would require sending a copy of the notice of appeal to the Tax Commissioner, an uninterested, non-party. Accordingly, at least for the benefit of future practitioners, this Court should reconsider its Decision, even hold an oral argument if needed,

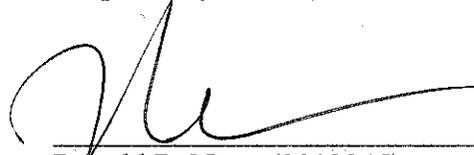
and at the very least issue an Opinion instructing practitioners in this area as the result in this case clearly constitutes an expansion of jurisdictional requirements which are not set forth in statute rule or case.

Conclusion

Appellant submits the rubber stamp dismissal in this case cannot be justified as stemming from a missed deadline or failing to follow statutes and rules as written. Therefore, unless this Decision is reconsidered so that its rationale can be made available to other practitioners, other parties will be denied their day in Court for no explicable reason and the administration of justice prejudiced.

Therefore this Decision should be reconsidered and combined for oral argument with the merits of this case as all merit briefing is complete.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Reconsideration of the Court's Granting of Appellees' Motion to Dismiss has been sent by ordinary U.S. mail, postage prepaid, this 18th day of April, 2011.



Ronald B. Noga (0013345)

Board of Revision (“BOR”) called into question the jurisdictional validity of that appeal, as the original complaint was not filed in accordance with the law. The record also calls into question the jurisdictional validity of BTA No. 2007-M-868. When a complaint for an earlier year in a triennial period is filed, a subsequent complaint may not have jurisdictional validity even if the earlier complaint is also found to be jurisdictionally deficient.

R.C. 5715.19 sets forth the requirements for the filing of a complaint with a county board of revision:

“(A)(1) *** a complaint against any of the following determinations for the current tax year¹ shall be filed with the county auditor on or before the thirty-first day of March of the ensuing tax year:

“***

“(d) The determination of the total valuation or assessment of any parcel that appears on the tax list, except parcels assessed by the tax commissioner pursuant to section 5727.06 of the Revised Code[.]”

The record supports a finding that the complaint which was the genesis of BTA No. 2006-M-1794 and challenged value for tax year 2005 apparently was filed on August 8, 2006, well after the time period provided by R.C 5715.19(A)(1). The appellant argues, however, that the appeal period should be tolled because actions of the Wood County Auditor created a situation in which it was physically impossible

¹ The relevant triennium for Wood County includes tax years 2005, 2006 and 2007. The complaint which was the genesis of BTA No. 2006-M-1794 challenged value for tax year 2005. The complaint which was the genesis of BTA No. 2007-M-868 challenged value for tax year 2006.

to meet the time limitations provided by statute.

The facts as deduced from the record are as follows: The appellant, Willis Day Warehousing Co. ("Willis Day"), is the owner of certain property located in Wood County. The property in question is subject to a "Current Agricultural Use Valuation" ("CAUV") adjustment. The CAUV adjustment was in existence at the time the first tax bill for tax year 2005 was issued. After that tax bill was issued, the auditor's staff realized the CAUV deduction applied to Willis Day's assessment was not correct because of changes made by a recent software conversion. S.T. BTA No. 2006-M-1794, Ex. E. The auditor's staff corrected the error prior to the issuance of the second-half tax bill. Id.

Willis Day received notice of the valuation correction through its second-half bill. After some discussion with the Wood County Auditor, Willis Day filed a complaint challenging the valuation change. S.T. BTA No. 2006-M-1794 Complaint, Cover letter. The BOR considered the complaint, concluding that the auditor's value was correct and Willis Day did not provide sufficient evidence to support a change in value. Id. Ex. E. An appeal to this board followed.

A review of the record before this board caused us to question the validity of the BOR's actions. The requirements of R.C. 5715.19 are specific and mandatory in nature. When a statute confers the right of appeal, adherence to the terms and conditions set forth therein is essential to the enjoyment of the right conferred. *Am. Restaurant & Lunch Co. v. Glander* (1946), 147 Ohio St. 147.

Therefore, the BOR's first action should have been to question its own jurisdiction.

Willis Day claims, however, that the BOR's actions were lawful because case law permits it to file outside the time prescribed by R.C. 5715.19. Willis Day first claims that the auditor's failure to provide notice in sufficient time for the corporation to timely file a real property valuation complaint permits a tolling of the period during which complaints may be filed. In support of this claim, Willis Day cites *Slone v. Bd. of Embalmers and Funeral Directors of Ohio* (1995), 107 Ohio App.3d 628, and *Knickerbocker Properties Inc. XLII v. Delaware Cty. Bd. of Revision*, 119 Ohio St.3d 233, 2008-Ohio-3192. Neither case is apposite.

The gravamen in *Slone* was the failure to serve a determination directly upon the party affected. The Ohio Board of Embalmers and Funeral Directors revoked the license of the appellant in *Slone*, but mailed notice of the revocation by certified mail only to the appellant's counsel. In that case, the appellate court concluded that the 15-day period during which the appellant could have appealed did not begin to run until notice was sent directly to him.² In *Knickerbocker*, the board of revision failed to provide proper notice to the property owner of a complaint filed against the property owner. The court held that jurisdiction was proper because the requirements of the statute had been met. However, the court's decision is applicable to this appeal:

² The holding in *Slone* is consistent with the Ohio Supreme Court's holding in *Cleveland Elec. Illum. Co. v. Lake Cty. Bd. of Revision*, 96 Ohio St.3d 165, 2002-Ohio-4033, wherein the court concluded when a county board of revision's decision had not been mailed to all persons identified by former R.C. 5715.20, the filing of a notice of appeal with this board was premature.

“When a *statute* specifically requires a litigant to perform certain acts in order to invoke the jurisdiction of an administrative tribunal (or the jurisdiction of a court to review an administrative decision), the performance of such acts usually constitutes a prerequisite to the tribunal’s jurisdiction. See *Am. Restaurant & Lunch Co. v. Glander* (1946), 147 Ohio St. 147, ***, paragraph one of the syllabus; *Zier v. Bur. of Unemp. Comp.* (1949), 151 Ohio St. 123, ***, paragraph one of the syllabus. By contrast, this case involves the manner in which the BOE filled out the valuation complaint form prescribed by the Tax Commissioner. Knickerbocker does not cite any statute that requires the complainant to provide an address.” *Id.* at ¶10. (Emphasis sic, parallel citations omitted.)

In the present appeal, R.C. 5715.19 specifically requires that a complaint challenging valuation must be filed by March 31 of the ensuing year. In this matter, the complaint was not filed until August 9 of the ensuing year. Therefore the complaint was untimely.

This is not the board’s first opportunity to consider this issue. In *Edgewater Yacht Club v. Cuyahoga Cty. Bd. of Revision* (June 29, 2001), BTA No. 1997-R-369, unreported, the auditor increased the value of certain property in the second year of a triennium and at the same time included within the tax bill a retroactive increase for the first year of the triennium. The property owner was made aware of the increase when it received its tax bill for the second year. The property owner challenged value for both the first year and the second year of the triennium. As to the jurisdictional validity of the challenge of value for the first year of the triennium, the board held:

“The jurisdiction of the BOR and this Board is established by statute. *** R.C. 5715.19(A)(1) provides that:

“*** a complaint against any of the following determinations for the **current tax year** shall be filed with the county auditor on or before the thirty-first day of March of the ensuing tax year:

“(d) The determination of the total valuation or assessment of any parcel that **appears on the tax list** ***.”

(Emphasis added.)

“Thus, according to the statute, a county board of revision is vested with jurisdiction to consider complaints filed only for the ‘current tax year’ if they are timely filed by March 31 of the subsequent year.

“Edgewater filed its complaint on February 7, 1996. (S.T. Exh. A) Therefore, pursuant to R.C. 5715.19(A)(1), the BOR was not empowered to decide value for 1994, only 1995.*** This proposition is further supported by the case law. *Dublin City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (Jan. 14, 2000), B.T.A. Nos. 97-M-960 and 961, unreported; *Fiery v. Lucas Cty. Bd. of Revision* (Sept. 10, 1993), B.T.A. No. 91-R-698, unreported; *Hunt v. Lorain Cty. Bd. of Revision* (Apr. 8, 1988), B.T.A. No. 86-D-709, unreported.” Id. at 3.

In a footnote, the board held:

“The Board acknowledges that the 1995 tax bill was the first notice Edgewater had of a change in the value of the yacht basin for 1994. There may exist an alternative remedy under such circumstances. See R.C. 2723.01.” Id. Footnote 6.

Willis Day also argues that the changes made to the tax duplicate were unlawful. We are unable to reach the substance of the claim, as we must find that the

BOR lacked jurisdiction to consider the matter.

As to the jurisdictional validity of BTA No. 2007-M-868, Willis Day timely filed a complaint challenging value of the same properties for the 2006 tax year. S.T., BTA No. 2007-M-868, Ex. 1. The BOR effectively dismissed the appeal, acknowledging the complaint filed in the earlier year, and stating "Pursuant to ORC 5715.19A(2) a complaint shall not be filed more than once within that three year period [since the last appraisal]." S.T., BTA No. 2007-M-868, Ex. E.

The BOR was correct. In *Elkem Metals Co., L.P. v. Washington Cty. Bd. of Revision* (1998), 81 Ohio St.3d 683, the Ohio Supreme Court rejected the contention that a subsequent complaint filed within the same triennium was jurisdictionally valid when the initial complaint was dismissed as defective. The BTA found that when an initial complaint is jurisdictionally invalid and void ab initio, that complaint did not rise to a "filing" that would invoke the prohibition against a second filing as set forth in R.C. 5715.19(A)(2). The court held otherwise.

Therefore, this board must find that neither complaint filed with the BOR effectively lodged jurisdiction in that body. The complaint filed in BTA No. 2006-M-1794 was untimely, but, even jurisdictionally defective, served as a bar to the filing of another complaint by Willis Day during the triennium. Therefore, BTA No. 2006-M-1794 is remanded to the BOR with instructions to dismiss the complaint. The

board affirms the actions taken by the BOR in BTA No. 2007-M-868.³

Mr. Dunlap concurs.

I reluctantly concur with the decision dismissing the complaint. The outcome highlights the Board of Tax Appeals' lack of authority to apply the fairness principles of equity to a factual situation requiring a resolution other than the foregoing dismissal.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.


Sally F. Van Meter, Board Secretary

³ The board notes that counsel for Willis Day filed a motion to compel discovery on August 28, 2008. At the evidentiary hearing held on October 30, 2008, counsel for the county appellees sought an additional 10 days to respond to the discovery. The additional time was granted. Through his written brief in support of jurisdiction, counsel informed the board that the discovery was answered but there remained an issue as to an unfulfilled request for the production of certain documents. Our cursory review of the discovery requests revealed sufficient delineation of the issues through the interrogatories. Therefore, the failure to respond to the production requests is deemed, in this instance, moot.

The Supreme Court of Ohio

FILED

APR 06 2011

CLERK OF COURT
SUPREME COURT OF OHIO

Willis Day Warehousing Co.

Case No. 2010-0115

v.

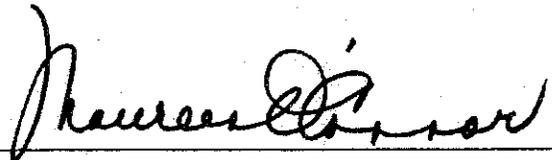
ENTRY

Wood County Board of Revision and the
Wood County Auditor

This cause is pending before the Court as an appeal from the Court of Board of Tax Appeals.

Upon consideration of appellees' motion to dismiss, it is ordered by the Court that the motion to dismiss is granted. Accordingly, this cause is dismissed.

(Board of Tax Appeals; Nos. 2006M1794 and 2007M868)



Maureen O'Connor
Chief Justice