

IN THE SUPREME COURT OF OHIO

CROWN CASTLE GT COMPANY, LLC,)
AND CROWN COMMUNICATION,)
INC.)

Appellants,)

vs.)

RICHARD A. LEVIN, [JOSEPH W.)
TESTA], TAX COMMISSIONER OF)
OHIO)

Appellee.)

CASE NO.: 2012-0780

Appeal from the Ohio Board of
Tax Appeals

Board of Tax Appeals
Case No. 2009-A-3187

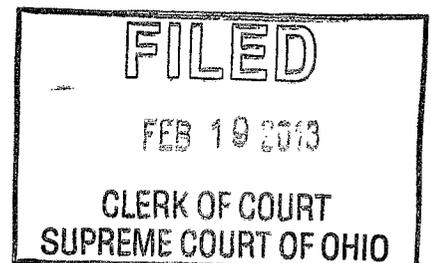
REPLY BRIEF OF APPELLANTS
CROWN CASTLE GT COMPANY, LLC AND CROWN COMMUNICATION, INC.

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I. INTRODUCTION

An individual must be able to justifiably rely upon an administrative body's legal obligation to provide correct written instructions concerning how to perfect an appeal. Any contrary finding shifts the burden of providing correct instructions from the government to the individual—a consequence neither intended by the General Assembly nor consistent with constitutional notions of due process.

The Tax Commissioner is explicitly required by statute to give a taxpayer correct instructions concerning how to appeal a final assessment of personal property. Even to a greater degree, when the Tax Commissioner does not inadvertently fail to provide correct appeal instructions, but sends patently erroneous ones, the taxpayer's reliance on those instructions is justified. Taxpayers should not be injusticed for the Tax Commissioner's written misrepresentation on how to appeal one of its own decisions where the taxpayer detrimentally follows those instructions, especially when the Tax Commissioner explicitly mandates his instructions be followed.

Blaming the taxpayer, as does the Tax Commissioner in this case, for failing to uncover the erroneous nature of the Tax Commissioner's instructions, whether simply sent inadvertently or provided under more nefarious motives, is not only offensive but is an example of the Tax Commissioner's intoxicated interest in usurping a taxpayer's right to prosecute a refund claim under Ohio law.

Here, the Tax Commissioner issued purported "Final Assessment Certificates of Valuation" to Crown Castle GT Company, LLC and Crown Communication, Inc. (collectively, "Crown") for tax year 2006. Accompanying the assessments, the Tax Commissioner provided Crown with instructions to appeal the valuation determination by filing a petition for

reassessment with the Tax Commissioner. As explicitly mandated on the face of the certificates, Crown followed the Tax Commissioner's enclosed instructions and filed a petition for reassessment long before the expiration of the sixty day appeal period expired.

Upon receipt of Crown's appeal, the Tax Commissioner did not advise Crown that it had improperly filed an appeal of a "final assessment". While noting in the record that the appeal should have been made to the BTA, the Tax Commissioner docketed the case for dismissal upon the expiration of the sixty-day period. Indicative of more nefarious motives of the Tax Commissioner, he assigned a case number to Crown's appeal and sent correspondence acknowledging receipt of Crown's letter "contesting" the personal property tax assessment, facilitating Crown's belief its appeal had been preserved by following the Tax Commissioner's written instructions. The Tax Commissioner does not, and cannot, deny its contradictory conduct upon receipt of Crown's petition for reassessment.

Due to the failure to provide accurate written instructions to Crown, the Tax Commissioner's assessment is not a valid final assessment. Alternatively, it should be construed as a preliminary assessment. Therefore, this case should be remanded to the Tax Commissioner for the issuance of a valid Final Assessment, or alternatively, for a determination on the merits of valuation. The doctrine of equitable estoppel also dictates the same result, as Crown justifiably relied upon the Tax Commissioner's erroneous instructions to appeal to the Tax Commissioner, which Crown did to its detriment.

II. FACTUAL REBUTTAL

The Tax Commissioner inaccurately sets forth in his Brief a significant issue—whether Crown, in fact, received his improper appeal instructions—as if a factual issue remains in dispute, which does not. The Tax Commissioner states:

“Ms. Ospina’s affidavit contained several representations that were not based from her own personal knowledge, including representations made in numbered paragraphs three and four, as follows:

3. On May 22, 2009, the Companies [Crown Castle T Company, LLC [sic] and Crown Communications, Inc.] received from the Ohio Department of Taxation the Final Assessment Certificates of Valuation attached hereto as Exhibit A, each of which related to ongoing personal property valuation disputes between the Companies and the Ohio Department of Taxation.
4. Each of the assessments set forth in Exhibit A included an identical attachment titled “Notice to Taxpayer,” a copy of which is attached hereto as Exhibit B.

Appellee’s Brief at p.9. However, the Tax Commissioner, inexplicably omits the second paragraph of the affidavit, which states:

2. Through ONESOURCE Property Tax, I have been, since 2006, an authorized representative on behalf of Crown Castle GT Company, LLC and Crown Communications Inc. (collectively, the “Companies”) in connection with personal property matters.

The significance of this detail, as more fully discussed *infra*, is that the Tax Commissioner never challenged the foundation of Ms. Ospina’s affidavit at the BTA by: (1) moving to strike the affidavit; (2) raising any such concern in briefing; (3) conducting any form of discovery concerning the evidence presented by Ms. Ospina; (4) requesting an evidentiary hearing to refute or challenge Ms. Ospina’s personal knowledge; or (5) submitting any evidence that refuted Ms. Ospina’s affidavit. Instead, because the Tax Commissioner failed to present any evidence to contradict Ms. Ospina’s statements, the Tax Commissioner now improperly attempts to interject a hypothetical cross-examination of what he might have done to challenge her statements, which he did not. Appellee’s Brief at Proposition of Law No. 3.

While the Tax Commissioner presented Ms. Pearson’s affidavit as to the Tax Commissioner’s “long standing, established administrative practice and policy, to send the taxpayer information in writing of the necessary steps to appeal the final assessment to the Board

of Tax Appeals”, Ms. Pearson sheds no light on what was actually sent to Crown in this case. In that regard, Ms. Pearson simply states: “As part of the preparation, instructions regarding the appeal of the assessments were *to be* included in the envelope.” Pearson affidavit at ¶2 (emphasis added). However, Ms. Pearson is noticeably silent as to what actually *was* sent to Crown with the assessments at issue in this case. On the other hand, Ms. Pearson *was* able to identify that other assessments sent to Crown outlined the process to petition *to the Tax Commissioner*. Pearson Affidavit at ¶6. It is rather curious that Ms. Pearson was unable to recall what was sent to Crown with the tax assessments at issue in this case, while, at the same time, could recall what was sent to Crown in other assessments not at issue in this case. Moreover, it is most striking that the record maintained by the Tax Commissioner is devoid of the appellate written instructions sent to Crown with its self-proclaimed “Final Assessment Certificates” other than what Crown identified it received. Specifically, Crown was instructed to file its appeal to the Tax Commissioner.

Nevertheless, Ms. Ospina’s affidavit as to what Crown did receive with the assessments at issue in this case remains undisputed. Accordingly, the Tax Commissioner’s challenges to Ms. Ospina’s undisputed affidavit are improper.

II. REBUTTAL ARGUMENT

- A. **If the Tax Commissioner had not provided Crown patently false appeal instructions in writing, its purported final assessment certificates would have been valid and appealable to the BTA. (Restating Appellee’s Proposition of Law No. 1)**

Crown does not dispute that a valid final assessment certificate is appealed by filing a Notice of Appeal with the BTA under R.C. 5711.26. But the Tax Commissioner never issued valid final assessment certificates because it never sent Crown proper appellate instructions. R.C. 5703.51(D).

The purpose of final assessment certificates of valuation is to: (1) notify the taxpayer of a final determination of value and tax (plus any interest and penalties) that are due; and (2) to advise the taxpayer of its appellate rights. *Sun Refining & Marketing Co. v. Brennan* (1987), 31 Ohio St.3d 306, at syllabus (full compliance with statutory requirements is a condition precedent to the applicable appeal period commencing for challenging an agency's determination). *Cleve. Elec. Illum. Co. v. Lake Cty. Bd. of Revisions* (2002), 96 Ohio St.3d 165, at syllabus (board of revisions must certify actions to all persons under R.C. 5715.20 to start the running of the appeal period). Where both elements are not present, the Tax Commissioner's action is not a valid final determination. *Id.*

Here, the assessments at issue state: "In the event you wish to object to the assessment or penalty, if any, please see instructions included." ST at 17. The Tax Commissioner does not dispute that Crown relied upon and followed the instructions he provided to file the appeal with the Tax Commissioner. Thus, if the assessment was intended to be a final assessment of the Tax Commissioner, he failed to provide Crown proper direction concerning filing an appeal to the BTA.

Moreover, a public agency has the burden of establishing when the period for which the agency's determination may be appealed begins. *Proctor v. Giles* (1980), 61 Ohio St.3d 211, 213 *citing* *Wycuff v. Fotomat Corp.* (1974), 38 Ohio St.2s 196, 197. Here, the Tax Commissioner is unable to do so because it never provided correct instructions.

The legislative intent of imposing a duty upon the Tax Commissioner to send correct instructions would be frustrated if a taxpayer does do not have the ability to rely upon the express directions provided by the Tax Commissioner.

Accordingly, the Tax Commissioner's assessments should not be treated as "final assessments" until proper instructions are provided to Crown, or Crown waives its rights to receive those instructions. In the alternative, the assessments should be treated as preliminary, and the matter should be remanded to the Tax Commissioner to hear the merits of Crown's refund claim.

B. Crown's Notice of Appeal filed with the BTA gave proper notice of the Tax Commissioner's action being objected to and the action the Tax Commissioner should have taken. (Restating Appellee's Proposition of Law Nos. 2 & 6)

The purpose of the specification requirement for BTA notice of appeals is to provide notice of "the nature and extent of the alleged error." *Gen. Mills, Inc. v. Limbach* (1992), 63 Ohio St.3d 273, 275. *See also, WCI Steel, Inc. v. Testa*, 129 Ohio St.3d 256, 2011-Ohio-3280, at ¶39. In order to raise an objection, the taxpayer must: (1) state the Tax Commissioner's action which is the basis of the objection; and (2) identify the treatment the Tax Commissioner should have applied. *WCI Steel*, at ¶29.

Here, Crown objected on two grounds: (1) the Tax Commissioner unjustly dismissed the appeal because his instructions advised Crown to appeal to the Tax Commissioner, not the BTA; and (2) valuation of personal property based upon replacement cost new studies enclosed with the appeal. ST. at 90-102. However, while the Tax Commissioner quotes from Crown's appeal, it attempts to dismiss Crown's first objection by stating it "only devoted the first paragraph" of its appeal to this issue. Appellee's Brief at p.8 and Proposition of Law No.2. Essentially, the Tax Commissioner would like this Court to ignore the first paragraph of the appeal because "the remainder of" the appeal was focused on the details of the underlying merits of valuation. *Id.* The Tax Commissioner later misleadingly argues that Crown simply said the assessment was

In fact, the only “Notice to Taxpayer” contained in the transcript filed by the Tax Commissioner with the BTA is the Notice to Taxpayer instructing Crown to contest the tax by filing a petition for reassessment with the Tax Commissioner. ST at 107.

Therefore, while Ms. Pearson’s statements may create a “presumption of regularity” as the Tax Commissioner contends, these statements are insufficient to overcome Ms. Ospina’s specific statements that proper instructions were not received by Crown in this situation.

D. The Tax Commissioner cannot rely upon R.C. 5703.51(H) to cure his prior defect of invoking subject matter jurisdiction. (Restating Appellee’s Proposition of Law No. 4).

Despite the Tax Commissioner’s argument that Crown’s appeal to the BTA did not raise the issue that his final assessment was not valid, or should be treated as a preliminary assessment, subject-matter jurisdiction cannot be waived. *Springfield Local Sch. Dist. Bd. of Edn. v. Lucas Cty. Budget Comm.*, 71 Ohio St. 3d 120, 121, 642 N.E.2d 362, 364 (1994); *French v. Limbach*, 59 Ohio St.3d 153, 571 N.E.2d 717 (1991) (dismissing the appeal of a preliminary assessment).

R.C. 5703.51(H) provides that the failure of the Tax Commissioner does not cure a *taxpayer’s* procedural defect. Here, the Tax Commissioner advocates to cure its own jurisdictional defect in failing to advise Crown of the proper appeal instructions in connection with its purported “final assessment” by claiming Crown made a procedural error by appealing to the Tax Commissioner.

First, it is not Crown’s, but rather, the Tax Commissioner’s defect which is at issue. The Tax Commissioner’s jurisdictional defect in failing to advise Crown of its appeal rights precludes application of R.C. 5703.51(H) against Crown. Thus, since the final assessment was

never properly issued, Crown's petition for reassessment was properly filed with the Tax Commissioner, and any appeal concerning the merits arising thereof is premature.

Second, estoppel should apply against the Tax Commissioner from twisting its own error of providing patently false instructions to which Crown justifiably relied upon to its detriment against Crown under the doctrine of equitable estoppel. A corollary of the equitable estoppel principle is the invited error doctrine in that an appellant induced the court to commit or for errors in which the appellant either intentionally or unintentionally misled the court. *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 781 N.E.2d 121, 2002-Ohio-7113.

In summary, the Tax Commissioner misconstrues Crown's position as an attempt to cure a procedure defect made by Crown. However, the procedural defect at issue—providing incorrect instructions on how to object to the Certificates—was made by the Tax Commissioner. As a result of this procedural defect, the Tax Commissioner did not, and has not to date, issued a valid "final assessment."

E. When the Tax Commissioner provides advice to taxpayers, he must not affirmatively mislead taxpayers, and if he does, he is estopped from relying on any error that he induced.

The Tax Commissioner asserts that Crown's reliance on his written appeal instructions is not justified, regardless of his statutory duty. The Tax Commissioner argues that he is permitted to provide erroneous instructions to taxpayers that mandate compliance on an occasional basis, but not continuously mislead over multiple decades or mislead the same person too frequently. Merit Brief of Appellee Tax Commissioner of Ohio, at p. 28 ("such communication was a *one-time* error... the Commissioner's personnel did not repeat that error for any other tax year than the 2006 tax year at issue here, so that the error's duration was limited to just one taxable annual period."). Acceptance of this practice would invite the Tax Commissioner to be neglectful in its

duties, or worse, trample the rights of taxpayers without the ability to obtain redress for their injuries. At one extreme, the Tax Commissioner would have the authority to obtain a blank check from any taxpayer who complies with his mandated, but erroneous, instructions. The Tax Commissioner is looking for one-sided application of the law.

The Tax Commissioner admits it has a longstanding practice of providing appeal instructions to taxpayers in connection with the issuance of assessments. Merit Brief of Appellee Tax Commissioner of Ohio, at p.20. The Tax Commissioner's narrow interpretation to the exception to application of the doctrine of equitable estoppel is that he is not responsible for the erroneous instructions he provides and requires taxpayers to comply with, *except* when misleading information is provided to the *same taxpayer* for multiple decades. *Ormet Corp. v. Lindley*, 69 Ohio St.2d 263, 431 N.E. 2d 686 (1982). However, in this context, such a view of *Ormet* would create an environment where no Ohio taxpayer would be able to rely upon any instructions of the Tax Commissioner until they were repeatedly damaged for decades.

In *Ormet*, the Court looked at the length of time and repeated nature of the Tax Commissioner's conduct to determine whether, in those circumstances, Crown's reliance was reasonable. *Id.* Like in *Ormet*, Crown was reasonable in its reliance upon the Tax Commissioner's instructions. The Tax Commissioner is charged by statute with providing correct instructions, and undisputedly does so in most cases, which makes Crown's reliance that the provided written instructions were proper, reasonable. But unlike *Ormet* where the Tax Commissioner did not have a statutory obligation to give proper instructions, Crown was not just advised, but instructed by the Tax Commissioner to follow specific instructions. Also, unlike *Ormet*, Crown was under a short time limitation in which to file its appeal. Finally, the Tax

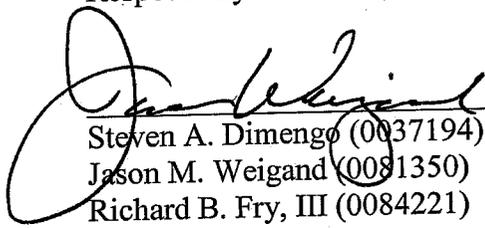
Commissioner further mislead Crown by acknowledging to Crown receipt of its “contest” before expiration of the appeal period.

To find that Crown should distrust the Tax Commissioner’s instructions, and instead, confirm the accuracy of every set of his instructions, is impractical. But blaming Crown for following its own erroneous instructions is precisely what the Tax Commissioner argues. Appellee’s Merit Brief at p.30. Accordingly, application of the previously held exception to equitable estoppel against the Tax Commissioner under *Ormet* is appropriate in this case.

III. CONCLUSION

The Tax Commissioner’s unjust conduct should not be excused. Whether through statutory interpretation, application of equitable estoppel, or procedural due process analysis, Crown should receive redress for the denial of their right to prosecute a refund claim under Ohio law and to a hearing.

Respectfully submitted,



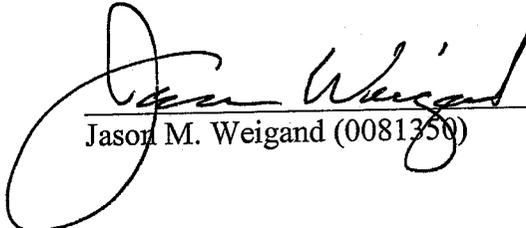
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 19, 2013 a copy of the foregoing Reply Brief of Appellants Crown Castle GT Company, LLC and Crown Communication, Inc. was served electronically upon barton.hubbard@ohioattorneygeneral.gov and by certified U.S. Mail to:

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