



On January 22, 2015, Appellee Columbus City Schools filed a Motion to Dismiss the above-captioned appeal because Appellants did not initiate certified mail service of the Notice of Appeal upon the Tax Commissioner within the statutory timeframe for the filing of the Notice of Appeal. For reasons set forth in the Memorandum in Opposition below, Appellants ask this Court to hold that the requirement for certified mail service upon the Tax Commissioner may be waived by the Commissioner at least up to the time when Appellee's briefs are due, and to stay any action on the Motion to Dismiss until that date because of a pending request for the Tax Commissioner to waive notice.

Respectfully submitted,

/s J. Donald Mottley

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Memorandum in Opposition to Appellee Columbus City Schools' Motion  
to Dismiss Appeal

Appellants concede that they did not initiate service of their Notice of Appeal for this case upon the Tax Commissioner within the statutory timeframe for the filing of that Notice of Appeal. Under this Court's decisions, including one decided on January 21 of this year, an Appellant from the Board of Tax Appeals in a case involving a decision of a county board of revision must initiate service of the Notice of Appeal upon the Tax Commissioner within the statutory time limit for the filing of the Notice of Appeal. See *Columbus City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, Slip Opinion No. 2015-Ohio-150, ¶ 5; *Berea City School Dist. Bd. of Edn. v. Warren Cty. Bd. of Revision*, 138 Ohio St.3d 1219, 2006-Ohio-5601, 857 N.E.2d 145, ¶ 2. We ask this Court to distinguish the present case from these prior decisions and to hold that the Tax Commissioner may waive service of the Notice of Appeal, permitting this Court to retain jurisdiction over the appeal, by waiving service of said Notice up to the deadline for the filing of appellee's briefs.

Upon receiving Appellee's Motion to Dismiss, Appellants promptly contacted the Tax Commissioner, through his statutory counsel, to request that the Commissioner waive service of the Notice of Appeal in this action. After initially responding that the Department of Taxation believed that the Commissioner could not waive service after the period for filing the Notice of Appeal had lapsed, the Department (through its Deputy Commissioner and Chief Counsel) has verbally advised the undersigned counsel for Appellants that they are actively considering granting such a waiver, but that it might not be possible to make a decision regarding the waiver before today's deadline for filing

this response to the Motion to Dismiss. We note that the Tax Commissioner either has never, or has not for many decades, participated as an appellee in a board of revision decision ultimately appealed to the Supreme Court, even where the Commissioner was served.

The statute relied upon by this Court in *Berea, supra*, for the requirement that the Tax Commissioner be served a Notice of Appeal even where the Commissioner was not a party at the Board of Tax Appeals, is R.C. 5747.04. *Berea*, ¶ 2. That section requires that “Unless waived, notice of the appeal shall be served upon all appellees by certified mail.” R.C. 5747.04, ¶ 7. This Court has ruled that certified mail service, to be effective, must be initiated within the statutory time period for the filing of the Notice of Appeal. *Berea*, ¶ 2; *Columbus City Schools*, ¶ 5. This Court has not, however, ruled on when a waiver of certified mail service by the Tax Commissioner must be made in order to preserve this Court’s jurisdiction over an appeal from the Board of Tax Appeals.

Under a prior statute, at a time when the Commissioner of Tax Equalization (rather than the Tax Commissioner) was to be made an appellee of appeals from the Board of Tax Appeals regarding board of revision decisions, this Court held that the Commissioner of Tax Equalization could not waive service of a notice of appeal because “no provision for waiver appears in the statute.” *Board of Ed. Of Mentor Exempted School Dist. V. Board of Revision of Lake County* (1980), 61 Ohio St.2d 332, 333, 401 N.E.2d 435, 436. In the *Mentor* case, the Commissioner of Tax Equalization did not receive notice of the appeal until almost two months after the statutory time frame for the filing of the notice of appeal, but that Commissioner waived his right to a notice of appeal. *Id.* Unlike the prior statute in *Mentor*, however, the statute applicable

to the present case does provide that the Tax Commissioner may waive service of a Notice of Appeal. See R.C. 5747.04, ¶ 7. By adding this language, the General Assembly must have intended a waiver of service by the Tax Commissioner to be an alternative to actual certified mail service on the Commissioner as a method for this Court to obtain jurisdiction over an appeal. And, since the statute as amended does not provide that the waiver must be made before the statutory deadline for filing the notice of appeal, it should not be read to impose such a time limitation upon this waiver.

In *Columbus City Schools*, this Court stated that “R.C. 5747.04 by its own terms does not require service to be initiated or completed within any prescribed time frame, and in our recent cases we have declined to recognize a requirement as jurisdictional when the statute does not expressly require it.” *Columbus City Schools*, ¶ 4. The Court, however, held that it was bound by its prior decision in *Berea* holding that service must be initiated within the statutory period for filing the Notice of Appeal, unless the Court overruled *Berea*. *Columbus City Schools*, ¶ 4. But this Court would not have to overrule *Berea* to hold that it is distinguishable from the present case because *Berea* involved a situation where that taxpayer had neither initiated service nor sought a waiver of such service by the Tax Commissioner. Precisely since the statute does not provide a time frame within which the Tax Commissioner must waive service of the notice of appeal, and because this Court’s recent precedents have “declined to recognize a requirement as jurisdictional when the statute does not expressly impose it,” we ask this Court to hold that a waiver of service of the Notice of Appeal by the Tax Commissioner may be effective at least until the time when the Tax Commissioner, like other Appellees, would have to file an appellee’s brief if the case is not dismissed.

By waiving certified mail service of the Notice of Appeal at or before the time that appellee's briefs are due, the Tax Commissioner would be conceding that the Commissioner was not prejudiced by a failure to receive earlier service by certified mail. The intent of this statutory provision must be to allow the Tax Commissioner the same opportunity as other appellees to participate in an appeal to this Court of a decision originally rendered by a board of revision. Where the Tax Commissioner was not served, allowing another party to move for dismissal -- or the Court to dismiss the appeal sua sponte -- serves the interest of justice because the lack of service may have deprived the Tax Commissioner with an opportunity to participate in the case, including an opportunity to object to the failure of service. But the interest of justice is not served if an appeal can be dismissed notwithstanding that the Tax Commissioner, by waiving service, agrees that the Commissioner either does not want to participate in the case or has an effective opportunity to participate if the Commissioner wishes to do so.

The statute clearly provides that the Tax Commissioner may waive service of a notice of appeal, but does not clearly say when this waiver must be obtained to be effective. We thus ask this Court to hold that the Tax Commissioner may issue a waiver of such service in this case up until the deadline for appellee's to file their briefs, and on

that basis to stay ruling on Appellee Columbus School District's Motion to Dismiss until that time.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing **APPELLANTS 770 WEST BROAD STREET AGA, LLC AND WBS COLUMBUS, LLC'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS** was served, via email attachment (for Ms. Gorry and Ms. Mesirow) and by U.S. postage prepaid mail (for all of the following), this 2nd day of February, 2015, upon:

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