

[Cite as *A.K.J., Inc. v. Wilkins*, 2011-Ohio-99.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 94594**

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**A.K.J., INC.**

PLAINTIFF-APPELLANT

VS.

**WILLIAM W. WILKINS,  
TAX COMMISSIONER**

DEFENDANT-APPELLEE

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**JUDGMENT:  
DISMISSED**

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Administrative Appeal from the  
Board of Tax Appeals  
Case No. 2006-K-929

**BEFORE:** Stewart, P.J., Boyle, J., and Sweeney, J.

**RELEASED AND JOURNALIZED:** January 13, 2011

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MELODY J. STEWART, P.J.:

Appellant-taxpayer, A.K.J., Inc., appeals from a decision and order by the Ohio Board of Tax Appeals (the “board”) upholding a final determination by the tax commissioner, Richard D. Levin (the “commissioner”), relating to an assessment for use tax. The board found that it lacked jurisdiction to consider A.K.J.’s objections to the commissioner’s decision because A.K.J. failed to state error with the kind of specificity required by R.C. 5739.13(B).

Before considering the merits of the appeal, we first address the commissioner's motion to dismiss the appeal. The commissioner contends that we lack jurisdiction to hear this appeal because A.K.J. failed to serve its notice of appeal to the commissioner by certified mail, as required by R.C. 5717.04. A.K.J. concedes that it served its notice of appeal from the board's decision by ordinary mail, but maintains that the commissioner's argument for dismissal uses an overly-broad interpretation of the law and precedent.

R.C. 5717.04 states: "[A]ppeals shall be taken within thirty days after the date of the entry of the decision of the board \* \* \* by the filing by appellant of a notice of appeal with the court to which the appeal is taken and the board. \* \* \* Proof of the filing of such notice with the board shall be filed with the court to which the appeal is being taken. \* \* \* *Unless waived, notice of the appeal shall be served upon all appellees by certified mail.*" (Emphasis added.)

The supreme court has stated that the service requirements of R.C. 5717.04 are "mandatory and jurisdictional." *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 114 Ohio St.3d 1224, 2007-Ohio-4007, 871 N.E.2d 602, at ¶2. In *Olympic Steel, Inc. v. Cuyahoga Cty. Bd. of Revision*, 110 Ohio St.3d 1242, 2006-Ohio-4091, 852 N.E.2d 178, the supreme court stated:

“In any appeal from a decision of a county board of revision, R.C. 5717.03(B) requires the BTA to send a copy of its decision by certified mail to the Tax Commissioner, and R.C. 5717.04 requires that an appellant who wishes to challenge the BTA’s decision must serve the Tax Commissioner, who by statute must be made an appellee, with a copy of the notice of appeal by certified mail. In construing the substantially similar language of R.C. 5717.05, we held that the requirement of joinder and service is ‘mandatory and jurisdictional.’ *Huber Hts. Circuit Courts Ltd. v. Carne* (1996), 74 Ohio St.3d 306, 308, 658 N.E.2d 744, 745. Likewise, appellant’s failure in this case to comply with its statutory obligation to serve the notice of appeal on the Tax Commissioner in the prescribed manner deprives this court of jurisdiction to consider the appeal. *Am. Restaurant & Lunch Co. v. Glander* (1946), 147 Ohio St. 147, 34 O.O. 8, 70 N.E.2d 93, paragraph one of the syllabus (‘Where a statute confers the right of appeal, adherence to the conditions thereby imposed is essential to the enjoyment of the right conferred’).”

The supreme court reaffirmed the jurisdictional nature of R.C. 5717.04 in *Columbus City School Dist. Bd. of Edn.*, stating:

“In *Olympic Steel, Inc. v. Cuyahoga Cty. Bd. of Revision*, 110 Ohio St.3d 1242, 2006-Ohio-4091, 852 N.E.2d 178, we held that the service requirement set forth in the sixth paragraph of R.C. 5717.04 is mandatory and

jurisdictional and that failure to comply requires dismissal of the appeal. R.C. 5717.04 specifies who must be made appellees, and that section requires that an appellant serve a copy of its notice of appeal on those persons by certified mail.”<sup>1</sup> Id. at ¶1.

A.K.J. argues that *Olympic Steel* and *Columbus City School Dist. Bd. of Edn.* are distinguishable on their facts, noting for example that *Columbus City School Dist. Bd. of Edn.* held that a party that appeals a board of tax appeals decision must serve its notice of appeal, in accordance with the sixth paragraph of R.C. 5717.04, on the “person whom the record shows to be the owner of the property as of the time that the BTA was required to certify its decision.” *Columbus City School Dist. Bd. of Edn.* at ¶4. While *Columbus City School Dist. Bd. of Edn.* did involve an issue of who must be served and not an issue relating to the manner of service, the fact remains that the supreme court reaffirmed that the service requirements of R.C. 5717.04, including service by certified mail, are jurisdictional and, if not met, require the appellate court to dismiss the appeal. In *Satullo v. Wilkens*, 110 Ohio St.3d, 2006-Ohio-5856, 856 N.E.2d 954, the supreme court appeared to

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<sup>1</sup> The supreme court’s holdings that the certified mail requirement of R.C. 5717.04 is “mandatory and jurisdictional” do not address language in the statute noting that the certified mail requirement may be “waived.” We need not consider what constitutes a valid waiver of the service requirement or whether a waiver occurred in this case, however, because the commissioner filed his motion to dismiss the appeal before this case was submitted for hearing, he adequately preserved any objections to the lack of service by certified mail.

reaffirm the jurisdictional nature of certified mail service by finding that a notice of appeal from a decision by the Board of Tax Appeals had been properly served even though the proof of filing attached to the notice of appeal to the supreme court indicated it had been served by ordinary mail. The court found “no jurisdictional defect that compels dismissal of the appeal” because the appellant had also served the appellee by certified mail. Id. at ¶20. The supreme court’s decision plainly establishes that the failure to serve the notice of appeal by certified mail would have been a jurisdictional defect.

In accordance with this precedent, we find that our decision in *Cuyahoga Cty. Bd. of Revision v. Beachcliff-Kingston Apts.* (Sept. 6, 1990), 8th Dist. Nos. 57241 and 57242, is no longer valid. In *Beachcliff-Kingston*, we noted that the appealing party from a decision by the Board of Tax Appeals failed to serve a notice of appeal by certified mail, but found no error because the appellee admittedly received ordinary mail notice of the appeal and so was not prejudiced. This decision has been superseded by later supreme court decisions cited above and is no longer viable as precedent.

A.K.J. did not serve its notice of appeal on the commissioner by certified mail. This is a jurisdictional defect that deprives us of jurisdiction to hear this appeal.

Appeal dismissed.

It is ordered that appellee recover of appellant his costs herein taxed.

It is ordered that a special mandate issue out of this court directing the Board of Tax Appeals to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, PRESIDING JUDGE

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MARY J. BOYLE, J., and  
JAMES J. SWEENEY, J., CONCUR