

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2013-1955

FRED P. SCHWARTZ, TRUSTEE

Appellants,

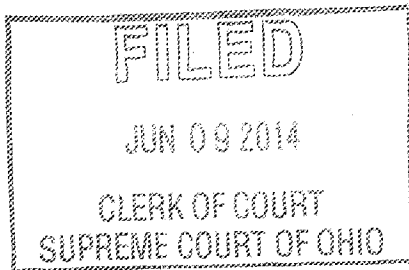
vs.

WADE STEEN, CUYAHOGA COUNTY
FISCAL OFFICER, et al.

Appellees.

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MERIT BRIEF OF APPELLEES CUYAHOGA COUNTY



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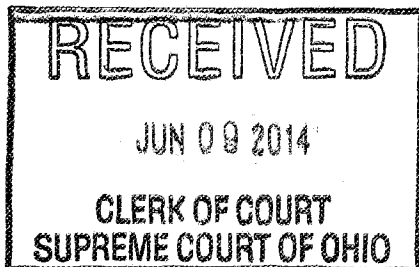


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STATEMENT OF CASE AND FACTS

On January 25, 2013, Appellant's, Fred P. Schwartz, Trustee, property valuation hearing took place at the Cuyahoga County Board of Revision ("BOR"). Appellants did not appear, and were represented by counsel, and Vladimir Victor, the beneficiary owner of the trust, for parcel number 684-31-045. The Fiscal Officer valued the property at \$126,800, for tax year 2011, and appellant, through Vladimir, and his attorney claimed the property had a value of \$30,000, noting that property values in the county had fallen.. Statutory Transcript ("S.T."), Exhibit ("Exb") A & E, and BTA Case No. 2013-608.

It is undisputed that Appellant purchased the property in October, 2011 for \$5,000 from the Secretary of Housing and Urban Development ("HUD"). S.T., and BTA Case No. 2013-608. However, this fact is irrelevant to the issues herein, because Appellant claimed that the property had a value of \$30,000. In support of his value claim, Appellant submitted documentation, at the BOR, and the BTA, of housing code violations, and sales of other properties. S.T., and BTA Case No. 2013-608. The BTA concluded "that there exists an insufficient basis upon which to alter the fiscal officer's original assessment of the property and the BOR's confirmation thereof...we find the value of the subject property as of January 1, 2011...True Value \$126,800..." BTA Case No. 2013-608.

LAW AND ARGUMENT

PROPOSITION OF LAW NO. 1: THE BTA REASONABLY AND LAWFULLY FOLLOWED PRECEDENT IN CONCLUDING THAT THERE EXISTS AN INSUFFICIENT BASIS UPON WHICH TO ALTER THE FISCAL OFFICER'S ORIGINAL ASSESSMENT OF THE PROPERTY BASED ON A HUD PURCHASE.

The true value of property for tax purposes is a question of fact that is primarily within the province of the taxing authorities to determine and will not be disturbed unless it affirmatively appears from the record that such decision is unreasonable or unlawful. *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 134 Ohio St. 3d 529, 2012-Ohio-5690, 983 N.E. 2d 1285. Thus, there is a presumption of validity accorded to a determination of value by the BOR and a taxpayer challenging the decision of the BOR has the duty to prove his right to a reduction in value. *Id.*, *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Rev.* (1994), 68 Ohio st. 3d 336, 337, 626 N.E. 2d 933. Consequently, the burden is, therefore, upon the appellant in challenging the decision of the BOR, and its incumbent upon the appellant to come forward and offer evidence which demonstrates their right to value sought. *Id.*

The burden is not met when the appellant comes forward with some evidence of value. Nor can the appellant rest on his claim if appellees present nothing further than the evidence that was presented before the BOR. *Western Industries, Inc. v. Hamilton Cty. Bd. of Rev.* (1960), 170 Ohio St. 340. The burden of persuasion rests firmly on the appellant to convince the tribunal that the value submitted by the appellant is the true value of the property. *Cincinnati School Bd. of Edn. v. Hamilton Cty. Bd. of Rev.* (1997), 78 Ohio St. 3d 325.

Typically, the “best evidence” of a property’s value is the amount for which it transfers between two unrelated parties near the tax lien date. *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Rev.*, 106 Ohio St. 3d 269, 2005-Ohio-4979. As the Supreme Court has pointed out, “such information is not usually available, and thus an appraisal becomes necessary” *State ex. rel Park Invest. Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410, 412. In the instant case, the subject property was “a HUD sale”, and Appellants did not heed this Court’s directive and secure an appraisal of the property for the tax lien date.

As to the HUD aspect, in *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 127 Ohio St. 3d 63, 2010-Ohio-4907, this Court found that sales from HUD were essentially “forced” sales and therefore not voluntary, and, accordingly, not indicative of true value. See. R.C. 5713.04 (“[T]he price for which such real property would sell at auction or forced sale shall not be taken as a criteria of its value.”) In any event, Appellant’s HUD argument is a red-herring, because he argued the property had a true value of \$30,000, and not the HUD sale value of \$5,000.

With regard to Appellants’ witness’ representation about the condition of the property, Ohio courts have consistently held that “evidence of needed repairs, while a factor in arriving at true value, will not alone prove true value. A party must demonstrate more than the mere existence of adverse factors, but the impact that they have upon the property’s value. A recitation of defects in a taxpayer’s property, without more, is not especially helpful in determining a lower valuation. *Gupta v. Cuyahoga Cty. Bd. of Revision* (1997), 79 Ohio St. 397; *Throckmorton v. Hamilton Cty. BOR* (1996), 75 Ohio St. 3d 227.

Comparable sales will be addressed in Proposition of Law No. II. Accordingly, Appellant’s Proposition of Law No. I is without merit.

PROPOSITION OF LAW NO. II: THE BTA REASONABLY AND LAWFULLY FOLLOWED PRECEDENT WHEN IT FOUND THAT ROSS’ EVIDENCE OF COMPARABLE SALES ON THE SAME STREET WAS NOTHING MORE THAN A LIST OF RAW SALES DATA, LEAVING IT TO SPECULATE AS TO HOW COMMON DIFFERENCES, e.g., LOCATION, SALE, QUALITY OF CONSTRUCTION OF IMPROVEMENTS, NATURE OF AMENITIES, DATE OF SALE AS OPPOSED TO THE TAX LIEN DATE, ETC., MAY AFFECT A VALUE DETERMINATION.

Appellant presented information regarding the sales of other properties on the subject’s street, during the last five years, including sheriff sales, and bank sales. With nothing more than a list of raw sales data, a trier of fact is left to speculate as to how common differences, e.g.,

location, size, quality of construction of improvements, nature of amenities, date of sale as opposed to tax lien date, etc., may affect value determination. Thus, the comparable sales reports are not sufficient to support the appellant's opinion of value. *Id.* By not developing a sufficient foundation to establish an appropriate expertise in appraisal methods and the deviation of true value for a particular piece of real property, the comparable sale analyses are not particularly probative and are not accorded much weight. *Witt Co. v. Hamilton Cty. Bd. of Rev.* (1991), 61 Ohio St. 3d. 155; *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Rev.* (1975), 44 Ohio St. 2d. 13)..

Appellant did not present any new evidence to the BTA, and just reiterated many of the same arguments made to BOR. The BTA correctly concluded that there exists an insufficient basis upon which to alter the fiscal officer's original assessment of the property, and the BOR's confirmation thereof. Where the BTA rejects the evidence presented to it as not being competent and probative, or not credible, and there is no evidence from which the BTA can independently determine value, it may approve the board of revision's valuation, without the board of revision presenting any evidence. *Simmons v. Cuyahoga Cty. Bd. of Revision* (1998), 81 Ohio St. 3d 47.

Accordingly, Appellant's second proposition is meritless, because the BTA decision was reasonable and lawful, pursuant to legal precedent.

**PROPOSITION OF LAW NO. III: THE BTA ACTED REASONABLY AND
LAWFULLY APPLYING LEGAL PRECEDENT REGARDING THE ALLOCATION OF
THE BURDEN OF PROOF TO THE EVIDENCE IN THIS CASE.**

Appellees restate, and reincorporate, their law and argument, as stated in Proposition of Law No. I, as if fully, rewritten herein. Clearly. Appellant's third proposition of law is baseless. Accordingly, the BTA acted reasonable and lawfully, because it followed legal precedent.

PROPOSITION OF LAW NO. IV: THE BTA CLEARLY ACTED AS A FAIR AND IMPARTIAL TRIBUNAL IN APPLYING ESTABLISHED LEGAL PRECEDENT TO THE FACTS HEREIN, AND ACCORDINGLY, SCHWARTZ WAS NOT DENIED DUE PROCESS WHERE HE APPEARED AT THE BTA HEARING, THROUGH COUNSEL, PRESENTED WITNESS TESTIMONY AND EVIDENCE OF THEIR CHOOSING, AND NO OBJECTION WAS MADE REGARDING SCHWARTZ BEING UNABLE TO ATTEND. MOREOVER, THIS ARGUMENT WAS WAIVED BECAUSE SCHWARTZ RAISED IT AT THE BOR, AND DID NOT RAISE IT AT THE BTA.

Appellees restate, and reincorporate, the law and argument, as stated , in the three previous propositions, and the statement of the fourth proposition, as if fully rewritten herein.

Clearly, Appellant's fourth proposition lacks merit

PROPOSITION OF LAW NO. V: THIS APPEAL SHOULD BE DISMISSED BECAUSE THE RECORD DOES NOT CONTAIN PROOF THAT ROSS TIMELY SERVED THE TAX COMMISSIONER WITH NOTICE OF THIS APPEAL BY CERTIFIED MAIL, AS STATUTORILY REQUIRED.

Appellees contend that the appeal should be dismissed because the Appellant failed to name the Tax Commissioner as an appellee, and the Appellant further failed to serve the Notice upon the Tax Commissioner by certified mail. R.C. 5717.04 expressly requires that in "all such appeals the commissioner or all persons to whom the decision of the board appealed from is required by such section to be sent, other than the appellant, shall be made appellees. Unless waived, notice of the appeal shall be served upon all appellees by certified mail." Appellant's failure to comply with the mandates of the statute necessitate that this Court dismiss the appeal.

Proof of the filing of such notice with the board shall be filed with the court to which the appeal is being taken. R.C. 5717.04. Appellees are unaware of any certified mail receipts in the record. Moreover, in the attached email, the Tax commissioner, states he was never served. (see appendix).

Appellees contend that the appeal should be dismissed, because Appellant failed to serve the Notice upon the Tax Commissioner by certified mail. R.C. 5717.04 expressly requires that in “all such appeals the commissioner or all persons to whom the decision of the board appealed from is required by such section to be sent, other than the appellant, shall be made appellees. Unless waived, notice of the appeal shall be served upon all appellees by certified mail.” A taxpayer's failure to comply with its statutory obligation to serve the notice of appeal on the tax commissioner deprives the court of jurisdiction. *Olympic Steel, Inc. v. Cuyahoga Cty. Bd. of Revision* (2006), 110 Ohio St. 3d 1242.

Appellant’s appeal is jurisdictionally defective due to Appellant’s failure to comply with the mandates of R.C. 5717.04. Accordingly, the appeal should be dismissed.

CONCLUSION

Appellant failed to meet her burden to overcome the presumption of accuracy in the Fiscal Officers and the BOR’s determination of value. The property has not been recently sold at an arm’s-length sale, nor did appellant heed the court’s directive and secure an appraisal of the property as of the tax lien date in issue. Appellant failed to present competent and probative evidence of value, at all levels. Accordingly, the Appellees respectfully request that this Honorable Court affirm the decision of the BTA finding the fair market value of the property to be \$126, 800 for tax years in question.

In the alternative, the appeal should be dismissed for being jurisdictional defective.

Respectfully submitted,

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of Cuyahoga County, Ohio



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ATTORNEY FOR DEFENDANT-APPELLEES

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing memorandum in response was mailed on this of 6th of June, 2014 to the following parties:

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Attorney Appellants

Mike Dewine
Ohio Attorney General
Christine T. Mesirow
Chief – Taxation Section
30 East Broad St., 25th Floor
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RENO J. ORAZINI, JR. (0039848)
Assistant Prosecuting Attorney

Reno Oradini

From: Brewer, Margaret <Margaret.Brewer@tax.state.oh.us>
Sent: Thursday, May 22, 2014 9:09 AM
To: Reno Oradini
Cc: Gleich, Jenny; Gudmundson, Gary
Subject: RE: Fred P. Schwartz, Trustee v. Wade Steen, Cuyahoga County Ohio Fiscal Officer, et al, Ohio Supreme Court No. 2013-1955

The Tax Commissioner did not receive a Notice of Appeal for the subject case.

/Marge

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From: Reno Oradini [mailto:roradini@prosecutor.cuyahogacounty.us]
Sent: Wednesday, May 21, 2014 4:23 PM
To: Brewer, Margaret
Cc: Gleich, Jenny; Gudmundson, Gary
Subject: Fred P. Schwartz, Trustee v. Wade Steen, Cuyahoga County Ohio Fiscal Officer, et al, Ohio Supreme Court No. 2013-1955

Marge,

Did the Tax Commissioner receive a Notice of Appeal, for the above case, by certified mail, or any other means?

Thank you,

Reno Oradini
Assistant Prosecuting Attorney
216-443-7769

C

Effective: October 11, 2013

Baldwin's Ohio Revised Code Annotated Currentness

Title LVII. Taxation (Refs & Annos)

Chapter 5717. Appeals (Refs & Annos)

→ 5717.04 Appeal from decision of board of tax appeals to supreme court

This section does not apply to any decision and order of the board made pursuant to section 5703.021 of the Revised Code. Any such decision and order shall be conclusive upon all parties and may not be appealed.

The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides. If the taxpayer is a corporation, then the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the supreme court or to the court of appeals for the county in which the property taxed is situate, or the county of residence of the agent for service of process, tax notices, or demands, or the county in which the corporation has its principal place of business. In all other instances, the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the court of appeals for Franklin county.

Appeals from decisions of the board determining appeals from decisions of county boards of revision may be instituted by any of the persons who were parties to the appeal before the board of tax appeals, by the person in whose name the property involved in the appeal is listed or sought to be listed, if such person was not a party to the appeal before the board of tax appeals, or by the county auditor of the county in which the property involved in the appeal is located.

Appeals from decisions of the board of tax appeals determining appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be instituted by any of the persons who were parties to the appeal or application before the board, by the person in whose name the property is listed or sought to be listed, if the decision appealed from determines the valuation or liability of property for taxation and if any such person was not a party to the appeal or application before the board, by the taxpayer or any other person to whom the decision of the board appealed from was by law required to be sent, by the director of budget and management if the revenue affected by the decision of the board appealed from would accrue primarily to the state treasury, by the county auditor of the county to the undivided general tax funds of which the revenues affected by the decision of the board appealed from would primarily accrue, or by the tax commissioner.

Appeals from decisions of the board upon all other appeals or applications filed with and determined by the

board may be instituted by any of the persons who were parties to such appeal or application before the board, by any persons to whom the decision of the board appealed from was by law required to be sent, or by any other person to whom the board sent the decision appealed from, as authorized by section 5717.03 of the Revised Code.

Such appeals shall be taken within thirty days after the date of the entry of the decision of the board on the journal of its proceedings, as provided by such section, by the filing by appellant of a notice of appeal with the court to which the appeal is taken and the board. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days of the date on which the first notice of appeal was filed or within the time otherwise prescribed in this section, whichever is later. A notice of appeal shall set forth the decision of the board appealed from and the errors therein complained of. Proof of the filing of such notice with the board shall be filed with the court to which the appeal is being taken. The court in which notice of appeal is first filed shall have exclusive jurisdiction of the appeal.

In all such appeals the commissioner or all persons to whom the decision of the board appealed from is required by such section to be sent, other than the appellant, shall be made appellees. Unless waived, notice of the appeal shall be served upon all appellees by certified mail. The prosecuting attorney shall represent the county auditor in any such appeal in which the auditor is a party.

The board, upon written demand filed by an appellant, shall within thirty days after the filing of such demand file with the court to which the appeal is being taken a certified transcript of the record of the proceedings of the board pertaining to the decision complained of and the evidence considered by the board in making such decision.

If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

The clerk of the court shall certify the judgment of the court to the board, which shall certify such judgment to such public officials or take such other action in connection therewith as is required to give effect to the decision. The "taxpayer" includes any person required to return any property for taxation.

Any party to the appeal shall have the right to appeal from the judgment of the court of appeals on questions of law, as in other cases.

CREDIT(S)

(2013 H 138, eff. 10-11-13; 2009 H 1, eff. 10-16-09; 1987 H 231, eff. 10-5-87; 1983 H 260; 1977 H 634; 1973 S 174; 125 v 250; 1953 H 1; GC 5611-2)