

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Property Tax

OREGON EXCAVATION, INC., JIM)
WHITMORE, PRESIDENT,)
)
Plaintiff,) TC-MD 011090F
)
v.)
)
CLACKAMAS COUNTY ASSESSOR,)
)
Defendant.) **DECISION**

Plaintiff appeals Defendant's omitted property assessment for tax years 1999-2000 and 2000-2001. In particular, Plaintiff appeals the 100 percent penalty assessed for Plaintiff's failure to timely file personal property tax returns for the years at issue. The subject property is identified in the Clackamas County Assessor's records as Account P2236005.

I. STATEMENT OF FACTS

Plaintiff was formed by David Whitmore (Whitmore), its sole shareholder, in July 1998. During the preceding five years, Whitmore was a partner in another excavation company. There is conflicting information as to Plaintiff's success in its first six months of operation.¹ Starting in late 1998 or January 1999, Whitmore became ill such that he "[s]topped going to the office or even answering phone calls." (Ptf's ltr dated Oct 31, 2003, at 1.) His wife left him in February 1999, taking their son with her. Whitmore was eventually diagnosed with clinical depression. He started taking medication and seeing a

¹ In a letter dated October 31, 2003, Whitmore stated that Plaintiff employed 25 employees while earning monthly revenues of approximately \$200,000 during its first six months of operation. (Ptf's ltr dated Oct 31, 2003, at 1.) In contrast, Whitmore's physician relayed the following information given to him by Whitmore, "In the fall of 1998 the construction company was doing poorly financially. * * * House related costs led to using company funds. Then creditors requested payment." (Ptf's Ex A at 1.)

therapist. In the meantime, Whitmore's father (Whitmore Sr.) came from Hawaii to operate Oregon Excavation during the time his son was unable to do so. Whitmore Sr. had no prior experience in operating a business. He invested his own money in Plaintiff and became its sole shareholder. Whitmore Sr. returned to Hawaii in December 2001. Whitmore took over the business, operating on a smaller scale with only six employees.

During the years at issue, Plaintiff did not file personal property returns. Whitmore Sr. timely filed a personal property return on behalf of Plaintiff for tax year 2001-02. On July 13, 2003, Defendant sent Plaintiff an omitted property notice proposing to add the value of Plaintiff's property to the tax rolls for tax years 1999-2000 and 2000-2001. The omitted property notice also included a penalty equal to 100 percent of the tax due for each of the years at issue. Plaintiff appeals only the 100 percent penalty. Plaintiff, acting through Whitmore Sr., filed this appeal on October 12, 2001.

II. ANALYSIS

ORS 308.290(1)(a)² requires a business owning taxable personal property to file a personal property return by March 1 of each year. The statute goes on to state that, if a party fails to file a return by the March 1 deadline, they “shall be * * * subject to the provisions of ORS 308.296.” ORS 308.290(1)(a). ORS 308.296(1) states that any taxpayer responsible for filing a personal property return who fails to do so “shall be subject to a penalty as provided in this section.” The penalty is graduated based on when the taxpayer files its return. A penalty of 100 percent is imposed if a return is not filed by August 1 of the tax year. ORS 308.296(4).

² Unless otherwise noted, all references to the Oregon Revised Statutes (ORS) are to 1997 for tax year 1999-2000 and to 1999 for tax year 2000-2001. Any substantive differences will be noted in a footnote.

As noted above, Defendant added the property to the tax rolls through the omitted property process. A taxpayer is entitled to appeal a penalty assessed under the omitted property statutes to this court. ORS 311.223(4) (2001). The court has authority to waive "the liability for all or a portion of the penalty upon a proper showing of good and sufficient cause." ORS 305.422 (2001). The 2001 Legislature enacted ORS 305.422 and the changes to ORS 311.223. See Or Laws 2001, ch 303, §§ 1 and 5. Oregon Laws 2001, chapter 303, section 6 states that "Section 5 of this 2001 Act [ORS 305.422] and the amendments to ORS 308.295, 308.296 and 311.223 by sections 1 to 3 of this 2001 Act apply to penalties under ORS 308.295 or 308.296 that are first imposed on or after the effective date of this 2001 Act [October 6, 2001]." In other words, only penalties first imposed after October 6, 2001, may be appealed to this court. Unfortunately for Plaintiff, the penalties in the present case were imposed prior to the effective date of the act.

This means that the court's review is limited to determining whether or not the penalties were properly imposed pursuant to the applicable statutes. It is undisputed that Plaintiff did not file personal property returns for the years at issue. As noted earlier, a penalty of 100 percent is imposed if a return is not filed by August 1 of the tax year. ORS 308.296(4). Plaintiff's appeal must be denied.

III. CONCLUSION

But for the effective date of ORS 305.422 and the changes to ORS 311.223, Plaintiff may well have been at least partially successful in its claim for relief. However, the penalties were properly imposed pursuant to the statutes in effect at the time. Now, therefore,

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IT IS THE DECISION OF THIS COURT that Plaintiff's appeal is denied.

Dated this _____ day of January, 2004.

SALLY L. KIMSEY
MAGISTRATE

IF YOU WANT TO APPEAL THIS DECISION, FILE A COMPLAINT IN THE REGULAR DIVISION OF THE OREGON TAX COURT, BY MAILING TO: 1163 STATE STREET, SALEM, OR 97301-2563; OR BY HAND DELIVERY TO: FOURTH FLOOR, 1241 STATE STREET, SALEM, OR. YOUR COMPLAINT MUST BE SUBMITTED WITHIN 60 DAYS AFTER THE DATE OF THE DECISION OR THIS DECISION BECOMES FINAL AND CANNOT BE CHANGED.

THIS DOCUMENT WAS SIGNED BY MAGISTRATE SALLY L. KIMSEY ON JANUARY 29, 2004. THE COURT FILED THIS DOCUMENT ON JANUARY 29, 2004.