IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Property Tax

DANNY L. ELWESS and TAMMY M. ELWESS,	)	
Plaintiffs,	)	No. 020066C
v.	)	
DESCHUTES COUNTY ASSESSOR,	)	
Defendant.	)	**DECISION**

Plaintiffs appeal Defendant's assessment of additional property taxes for a clerical error correction made under ORS 311.205, affecting tax years 1997-98 through 2000-2001. Trial was held by telephone on August 22, 2002. Plaintiffs were not represented by legal counsel. Testifying at trial for Plaintiffs were Tammy Elwess, Ruth Elwess (Tammy's mother-in-law), and Paula Hannan, President, First Rate Mortgage, Inc. Defendant was represented by Laurie Craghead, Assistant Legal Counsel for Deschutes County. Testifying for Defendant was David Lilley, Chief Tax Deputy.

STATEMENT OF FACTS

Plaintiffs own certain real property in Deschutes County identified in the assessor's records as Account No. 17-13-28 02400, Serial # 109350. Plaintiffs purchased the property from Alfred and Ruth Elwess in February 2001. Alfred and Ruth, who are the parents of Danny Elwess, originally acquired the property, which then consisted of 40 acres and an old manufactured home, in 1990. The old manufactured home was later removed and replaced by a newer manufactured home. In addition, roughly 23 of the 40 acres were sold. Following these changes, which occurred before the sale to Plaintiffs, the property consisted of a manufactured home on 17 acres of land. At the time of Plaintiffs acquisition in 2001, Alfred and Ruth (sellers) owed roughly

$147,000 on their mortgage. The property was deeded to Plaintiffs for $0 plus other consideration. The “other consideration” was an unwritten agreement between the parties pursuant to which Plaintiffs would pay off Alfred and Ruth's $147,000 mortgage and acquire a second manufactured home for Alfred and Ruth to live in, while Plaintiffs would live in the existing home. The second home was to be added to the subject property under the hardship provisions. Plaintiffs agreed to pay for the new home plus all the setup costs. Under the terms of the agreement, there was to be two manufactured homes on the property, one for Plaintiffs and another for their parents, when all aspects of the transaction were finally completed. The second manufactured home was eventually placed on the property sometime around September 2001, roughly six months after the deed was executed transferring title to Plaintiffs. The total cost of adding the second manufactured home was roughly $84,000; approximately $63,000 to purchase the home and another $21,000 for setup (excavation, etc.). Thus, the total cost of the property to Plaintiffs was $231,000 ($147,000 loan payoff and $84,000 for the second manufactured home). After the second home was added Plaintiffs refinanced the property, giving the lender a mortgage to secure a loan in the amount of $247,000.

According to the testimony at trial, the property was valued by an independent fee appraiser at $260,000 after the addition of the second home. Defendant did not object to the testimony regarding that appraisal. A second appraisal was submitted by Plaintiffs after trial but was not accepted into evidence by the court because it was outside the parameters set by the court at the end of the trial and Defendant subsequently objected to the court’s consideration of that evidence. Moreover, the disputed appraisal valued the property as of August 21, 1998, which is more than two years before the sale and, for obvious reasons, did not include the value added by the

addition of the second home in September 2001. Its relevance, in terms of probative value, is therefore nominal.

The real market value (RMV) of the property for tax purposes for the 1995-96 tax year was set by Defendant at $141,550. Of that amount, $61,645 was allocated to the improvements (buildings). (Def's Ex C.) The land was valued at $79,905. Because the property was under farm use special assessment, the total assessed value (AV) that year (land and improvements) was $79,210. The RMV for the 1997-98 tax year was $156,470, with $81,735 allocated to the improvements and $74,735 allocated to the land. (Def's Ex D.) The increase was due in part to the addition of a greenhouse between 1995 and 1997. The AV appearing on Plaintiffs' tax statement in 1997 (for the 1997-98 tax year) was $24,680, a decrease of more than $50,000 from the 1995-96 tax year. Thereafter, the AV increased 3 percent per year through tax year 2000-2001.

On September 26, 2001, Defendant mailed Plaintiffs a letter explaining that an error had been discovered in the assessment and tax rolls for Plaintiffs' property and as a result the county intended to increase the AV. This letter explained that "[i]n 1997, Deschutes County encountered a number of serious issues while implementing the changes required by Measure 50. Unfortunately, during this complex implementation, we inadvertently left off a portion of your building(s) value from the roll." (Def's Ex E at 1.) The letter indicated that the corrections would cover tax years 1997-98, 1998-99, 1999-2000, and 2000-2001. (*Id*). Measure 50 was a referendum measure approved by the voters in May 1997 that generally reduced property tax values based on a sometimes complex mathematical calculation that became effective for the 1997-98 tax year. Measure 50 also limited future growth in those values. As a result of Defendant's correction, the increase in AV was $55,481 for 1997-98, $57,143 for 1998-99, $58,857 for 1999-2000, and $60,624 for 2000-2001. (*See* Def's Ex E.) Defendant

explained that the clerical error corrections increased the AV of the property by adding the MAV of the original improvements, which had been omitted from the calculation performed by the computer program when calculating the total 1997 MAV for the property. The error was carried forward through 2000.

The assessor's office sent Plaintiffs written notice of the correction in a letter dated October 16, 2001. (Def's Ex G.) Plaintiffs filed an appeal with this court on February 4, 2002, requesting that the added taxes be removed.[1] Defendant timely filed its Answer, responding that the error was "not a change in the real market value, but a correction in the calculation of the maximum assessed value." (Def's Amended Answer at 1.) Defendant requested the court dismiss the case.

Plaintiffs argue that they did not own the property for the years at issue and that they should not be held liable for the additional taxes. Defendant disagrees with that claim, asserting that Plaintiffs are not bona fide purchasers. As to the validity of the correction, Defendant asserts that the correction is allowed under both ORS 311.205 and that all the information necessary to support the correction is contained in the assessor's records as submitted into evidence. Moreover, Defendant stresses that the correction only added the MAV of the original buildings, which were dropped when the computer was calculating the improvement MAV in 1997.

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ISSUES

There are two issues for the court to resolve: 1) are Plaintiffs bona fide purchasers (BFPs) and therefore not liable for the additional taxes pursuant to

[1] The appeal appears to have been untimely under the 90 day rule in ORS 311.223(4), but that issue was not raised by Defendant.

ORS 311.235; 2) was the information necessary to make the correction contained in the assessor's records?

COURT'S ANALYSIS

An overview of the applicable law is helpful to an adequate understanding of the disputed correction. Prior to 1997, property was generally assessed at 100 percent of its RMV. ORS 308.232 (1995).[2] Significant changes were made to the law in 1997 when, as a result of the passage of ballot Measure 50, the state's constitution was amended to provide for a MAV which, beginning with tax year 1997-98, could not exceed 90 percent the property's RMV for the 1995-96 tax year. Or Const, Art XI, § 11(1)(a).[3] The relevant constitutional provisions have been codified in chapter 308 of the Oregon Revised Statutes and appear in ORS 308.142 through ORS 308.166. After Measure 50, AV is the lesser of RMV or MAV. ORS 308.146(2). Thereafter, "the property's maximum assessed value shall not increase by more than three percent from the previous tax year." Or Const, Art XI, § 11(1)(b). There are exceptions to the 3 percent annual limit on growth in value that are not relevant here. *See* ORS 308.146(3) to 308.153 (providing a method for calculating MAV where there are changes to the property such as new construction, partitioning, rezoning, etc.)

Bona Fide Purchasers

Plaintiffs assert bona fide purchaser status because of their acquisition in February 2001. The relevant statute is ORS 311.235, which provides that taxes on real or personal property purchased by a bona fide purchaser are not a lien on the property

[2] Exceptions include property under farm or forest special assessment, which was (and still is) assessed at a lesser value.

[3] Section 11 provides in part as follows: "For the tax year beginning July 1, 1997, each unit of property in this state shall have a maximum assessed value for ad valorem property tax purposes that does not exceed the property's real market value for the tax year beginning July 1, 1995, reduced by 10 percent." Or Const, Art XI, § 11(1)(a).

unless the taxes were a matter of public record at the time of the purchase. The additional taxes in this case were not a matter of public record at the time of Plaintiffs' purchase.

That statute defines "bona fide purchaser" as "an individual purchaser of a fee simple interest in a single property, who acquires the property in good faith, in an arm's-length transaction and for fair market value and adequate consideration." ORS 311.235. Defendant argues that Plaintiffs are not bona fide purchasers because the sale was not an arm's-length transaction and Plaintiffs did not pay fair market value. The other elements (fee simple interest, good faith, and adequate consideration), are not challenged. Defendant relies on the familial relationship between buyer and seller and the convenient arrangement between the parties, whereby the parents could continue to live on the property after the sale, to support the claim the sale was not arm's-length. On the question of fair market value, Defendant argues that Plaintiffs' own appraisal shows that Plaintiffs paid less for the property than it was worth. Plaintiffs respond that they paid adequate consideration for the property and that the arrangement was not necessarily one of convenience.

The determination of whether a sale was arm's-length is a factual question for the court to resolve. *Miller v. Dept. of Rev.*, 327 Or 129, 958 P2d 833 (1998), *Freedom Fed. Savings and Loan v. Dept. of Rev.*, 310 Or 723, 727, 801 P2d 809 (1990). The existence of some type of relationship between buyer and seller, such as major stockholder or family relationship, does not preclude a determination that a transaction was arm's-length, but it does make the transaction suspect. *Springfield Lbr. Mills v. Commission*, 3 OTR 147, 149 (1967). The actual facts involved can overcome the suspicion. *Id.* Thus, a familial relationship between the parties does not by itself prove a sale is not arm's-length. Defendant points to the unusual circumstances involved in

the sale as additional support for the contention that the transaction was not arm's-length. Specifically, Defendant notes that the parties entered into an unwritten agreement whereby Plaintiffs would acquire a second home at their cost and allow it to be put on their newly-acquired property for Danny's parents to live in. Defendant notes further that the contract violates the statute of frauds because it pertains to the sale of property and was not in writing.

The court agrees that it is unusual for the buyer of a piece of property to enter into an unwritten agreement allowing the seller to continue to live on the property in a home that the buyer agrees to purchase at a later date for the seller to live in, especially where the buyer is also going to live on the property. The court agrees it is significant that the agreement is not in writing. Putting aside the question of whether the contract violates the statute of frauds, the arrangement was complicated because performance of additional acts, involving money, judgment and preference, was to take place over time and apparently after the deed was executed transferring title. Such an arrangement would ordinarily be reduced to writing so that either party, but particularly the seller, could enforce the agreement against the other party. Written agreements are also important to ensure that each side understands their obligations. There are many factors to be taken into consideration in the arrangement involved in this case, including the time-period in which the buyer was expected to purchase the home, the size, quality and condition of the home to be acquired, the color of the home, and the maximum amount to be spent. Because the parties chose to not put such a complicated agreement in writing, the court concludes that the parties did not enter into an arm's-length transaction.

The court finds the second question, which is whether Plaintiffs paid fair market value for the property, a more difficult one to answer because of the inherent complexity

involved in determining value, even where there is an appraisal. However, having found the sale to be other than arm's-length, the court need not resolve the question.

Because the sale was not arm's-length, Plaintiffs may not avoid the tax lien under the provisions of ORS 311.235, and the court must therefore turn to the second issue, which is whether the Defendant acted in accordance with the statute in making the correction to the assessment and tax rolls.

Validity Of Correction (Was The Information In The Assessor's Records?)

The statute providing for clerical error corrections reads, in pertinent part:

> "(1) After the assessor certifies the assessment and tax roll to the tax collector, the officer in charge of the roll may correct errors or omissions in the roll to conform to the facts, as follows:
>
> "(a) The officer may correct a clerical error. A clerical error is an error on the roll which either arises from an error in the ad valorem tax records of the assessor, * * * or which is a failure to correctly reflect the ad valorem tax records of the assessor, * * * and which, had it been discovered by the assessor or the department prior to the certification of the assessment and tax roll of the year of assessment would have been corrected as a matter of course, and the information necessary to make the correction is contained in such records. Such errors include, but are not limited to, arithmetic and copying errors, and the omission or misstatement of a land, improvement or other property value on the roll.
>
> "(b) The officer may not correct an error in valuation judgment, except as provided in ORS 308.242 (2) and (3). Such errors are those where the assessor would arrive at a different opinion of value. The officer may correct any other error or omission of any kind. Corrections that are not corrections of valuation judgment errors include, but are not limited to, the elimination of an assessment to one taxpayer of property belonging to another on the assessment date, the correction of a tax limit calculation, the correction of a value changed on appeal, or the correction of an error in the assessed value of property resulting from an error in the identification of a unit of property, but not an error in a notice filed under ORS 310.060."

ORS 311.205 (Emphasis added.)

Defendant explained that the error leading to Plaintiffs' correction was the consequence of taxpayer phone calls questioning unusual changes in their tax statements for the 1997 tax year. An investigation disclosed computer computational

errors initially affecting roughly 5,000 accounts. In the intervening years several hundred additional errors were found and corrected. A pattern emerged reflecting errors of two types; one involved improvement value errors and the other land value errors. In the case of improvement value errors, the computer program dropped one (or in some cases both) of the components of improvements, either original improvements or new improvements added to the property between 1995 and 1997. In Plaintiffs' case, Defendant asserts that the computer program substituted a zero for the MAV of the original improvements instead of using 90 percent of the 1995 improvement RMV. As a result, only the adjusted value[4] of the new construction (the greenhouse) plus the maximum special assessed value (MSAV) of the land was used to calculate the total

AV for the 1997-98 tax year. That problem was carried forward through tax year 2000-2001.

Under the Measure 50 mandate, the MAV for the subject property in 1997 (1997-98 tax year) should have been $80,161, which is the total of 90 percent of the 1995-96 improvement RMV ($55,481), the land MSAV of $10,080, and the MAV of the new property added in 1996 ($14,600).[5] However, the MAV in 1997 was only $24,680, a difference of $55,481. Because the building value in 1995 was $61,645, the 1997 building MAV should have been $55,481[6].

Defendant's Exhibit C is a copy of microfiche records from the assessor's office showing land and improvement values for 1995. That exhibit shows a 1995 RMV for

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[4] The "adjusted value" of the new property was the market value of that property "multiplied by the ratio of the average maximum assessed value over the average real market value for the assessment year." ORS 308.153(1)(b).

[5] $16,780 (RMV of the new property) x .87 (CPR) = $14,600.

[6] $61,645 x .9 = $55,481.

improvements (buildings) of $61,645. Reducing this value by 10 percent, as required by Measure 50 in calculating the 1997-98 MAV, results in an improvement MAV of $55,481 (rounded). Defendant's Exhibit H is a computer screen print-out for 1997 *before* the correction was made. According to the testimony, this information was retrieved from computer back-up tapes by the Information Technology Department and made available to staff members of the assessor's office. Page 2 of Exhibit H shows the land MAV carried over from page 1 of that exhibit ($66,110) plus the MAV of the new construction in 1996 ($14,600).[7] Page 1 of Exhibit H also shows a MSAV of $10,080. However, there are no numbers in the MAV column on page 2 above the $66,110 land MAV. According to the testimony, the MAV for the existing structures (the house) belongs in that column. The explanation given for the absence of that number is that the MAV for the existing structures (the "base" improvement MAV) was omitted by the computer, which, in calculating the building MAV, picked up only the new construction, with a RMV of $16,780.

Defendant's Exhibit I is a computer screen print-out for 1997 *after* the disputed correction. Page 2 of Exhibit I shows $55,481 at the top of the MAV column. This is the correction made by Defendant to capture the base improvement MAV. The $55,481 building MAV is easily verified because it is 90 percent of the 1995 building RMV, as required by Measure 50. The original assessment that year was only $24,680 (AV), which was the sum of the MSAV of the land ($10,080) and the MAV of the new construction in 1996 ($14,600). The AV after the correction is $80,161, and reflects the addition of the base improvement MAV of $55,481, to the original AV of $24,680.

The court acknowledges that it is difficult to sort out all the numbers on the printed versions of the computer screens before and after the correction, marked as

[7] In the column marked "Ratio."

Defendant's Exhibits H and I. Some of the difficulty interpreting those exhibits stems from the fact that a portion of the land is under special assessment. The 1996 construction adds an additional wrinkle. However, after a careful examination of the evidence pertaining to tax year 1997-98, the court is satisfied that the information presented by Defendant accurately reflects the assessor's records before and after the clerical error correction and that the records contain the information necessary to make that correction. The corrections for subsequent years comport with the dictates of Measure 50. Finally, the correction was not a result of valuation judgment, which is prohibited by paragraph (b) of subsection (1) of the statute. *See* ORS 311.205(1)(b).

The additional taxes are due November 15, 2002. ORS 311.206. Moreover, ORS 311.206(1) provides that the additional taxes shall "be collected and distributed in the same manner as other ad valorem property taxes imposed on the property." Because of this provision, Plaintiffs have the option of paying the taxes in one-third installments due on or before November 15, 2002, February 15, 2003, and May 15, 2003. *See* ORS 311.505(1). Further, the 3 percent discount for full payment of taxes and the 2 percent discount for two-thirds payment of taxes also apply. *See* ORS 311.505(3).

CONCLUSION

The court concludes that Defendant's assessment of additional taxes to correct a clerical error made in 1997 and carried forward through tax year 2000-2001 meets the statutory standard of ORS 311.205. The additional taxes, added to the roll on October 16, 2001, will be due on November 15, 2002. Payment of the taxes may be made under the provisions of ORS 311.505. Now, therefore,

IT IS THE DECISION OF THIS COURT that Defendant's clerical error assessment, adding additional taxes for tax years 1997-98, 1998-99, 1999-2000 and

2000-2001, is upheld.

IT IS FURTHER DECIDED that Defendant's motion to dismiss is denied.

Dated this _____ day of October, 2002.

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DAN ROBINSON
MAGISTRATE

IF YOU WANT TO APPEAL THIS DECISION, FILE A COMPLAINT IN THE REGULAR DIVISION OF THE OREGON TAX COURT, FOURTH FLOOR, 1241 STATE ST., SALEM, OR 97301-2563. 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 DAN ROBINSON ON OCTOBER 30, 2002. THE COURT FILED THIS DOCUMENT ON OCTOBER 30, 2002.