

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Property Tax

SYLVIA ROSE,)
)
 Plaintiff,) TC-MD 020709C
)
 v.)
)
 MARION COUNTY ASSESSOR,)
)
 Defendant.) **DECISION**

Plaintiff has appealed the increase in the value of her property for the 2001-02 tax year. The matter is before the court on Defendant's Motion for Summary Judgment, which asks the court for an order in its favor on the issue of whether the rights granted by a conditional use and a leasehold were omitted property subject to assessment. The motion was heard February 5, 2003. Plaintiff appeared on her own behalf. Defendant was represented by Jane Ellen Stonecipher, Assistant Legal Counsel.

STATEMENT OF FACTS

The property at issue is located at 5845 Battle Creek Road, SE, Salem, Oregon, and is identified as property tax Account R32277. There is a low-powered cellular radio facility on the property that was added in 1994 following the issuance of a conditional use permit by the county. The tower operates pursuant to a 20-year lease between Plaintiff and the GTE Mobilnet, based on an initial five-year period and three five-year renewals. The land itself is and has been taxed by Defendant and the tower is taxed to the lessee. Defendant now seeks to tax as real property the lease and conditional use permit, which Defendant argues is an interest in the land. The base monthly rent, adjusted annually based on the consumer price index (CPI), was initially \$850, and is currently \$1,034.15. Plaintiff contends there has been no change to the property since 1995 and that the value

can only increase by 3 percent per year under Measure 50.

ANALYSIS

Defendant added \$108,390 as “exception value” based on the income stream associated with the land lease under the transmission tower built in 1994. The increase appeared in Plaintiff’s 2001-02 tax statement. Plaintiff appealed and the county board of property tax appeals (board) lowered the exceptions value to \$63,390. Defendant acknowledges in its Motion for Summary Judgment that the increase cannot be effectuated as exceptions value under ORS 308.153.¹ That statute provides for an exception to the method of determining maximum assessed and assessed values under ORS 308.146, which generally provides for a 3 percent annual increase in assessed value. Defendant now argues that the conditional use permit and the leasehold interest are real property interests subject to assessment and taxation and that that property, previously untaxed, may be added to the rolls as omitted property under ORS 311.216 through 311.223.

ORS 311.216 requires the assessor to add to the assessment and tax rolls any property omitted, in whole or in part, from assessment and taxation. Notice must be given before the roll is corrected as provided in ORS 311.219. The taxpayer is to be given an opportunity to appear to refute the intended assessment. *Id.* If the taxpayer fails to appear or appears but is unable to dissuade the assessor from making the correction, the roll shall be corrected by adding the value of the property omitted.

ORS 311.223(1). Thereafter the assessor shall immediately file a statement supporting the correction and give the taxpayer the prescribed notice. ORS 311.223(2). The notice must include a statement of appeal rights. *Id.* The taxpayer then has 90 days from the date of the roll correction to appeal to the Oregon Tax Court. ORS 311.223(4).

¹ All references to the Oregon Revised Statutes (ORS) are to 2001.

In this case Defendant believes that the omitted property statutes are the correct vehicle for adding the value associated with the cell tower not previously assessed or taxed. Defendant has asked the court to determine whether the value may be increased pursuant to the omitted property statutes under the theory outlined above. Defendant insists Plaintiff was not deprived of any due process rights because the tax statement reflected the increase and Plaintiff in fact petitioned the board after receiving that statement. Moreover, Defendant insists it is not seeking an advisory opinion.

In the court's view, Defendant is seeking either an advisory opinion or declaratory judgment and the Magistrate Division cannot issue either one. The Magistrate Division does not have the authority to issue advisory opinions because appeals to this division are governed by ORS 305.275 and require the taxpayer to be aggrieved by an "act" of the assessor. Here there has been no act except the admittedly improper increase reflected in the tax statement based on the assessor's initial determination that the "property" at issue could be added as exception value under ORS 308.153. Defendant acknowledges that act was improper and the act must therefore be reversed.² If Defendant is seeking a declaratory judgment, the request must be made to the Regular Division of the Tax Court pursuant to ORS 28.010, and by otherwise proceeding under ORS 305.560, as the Magistrate Division is not a court of record. ORS 305.430(1). The Department of Revenue may issue declaratory rulings under ORS 305.105 when requested by an interested person and is required to construe the tax and revenue laws of the state upon written request by an interested person or officer acting under such laws, as provided by ORS 305.110. The Magistrate Division of the Tax Court lacks a similar statutory mandate.

² Defendant concedes the value cannot be added pursuant to ORS 308.153. Accordingly, the increase reflected in the property tax statement issued in October 2001 is invalid. As such, the addition of exception value for the 2001-02 tax year must be removed and the maximum assessed and assessed values determined in accordance with ORS 308.146.

CONCLUSION

The court cannot grant Defendant's Motion For Summary Judgment because it seeks an order approving an act Defendant has not taken and ORS 305.275 requires that there be an act which aggrieves the taxpayer. Additionally, Defendant concedes that the initial act of adding exception value under ORS 308.153 based on the income from the cell tower lease was contrary to the statute because the property has existed prior to 1995. Now, therefore,

IT IS THE DECISION OF THIS COURT that Defendant's Motion For Summary Judgment is denied.

IT IS FURTHER DECIDED that Plaintiff's request for removal of the exception value is granted.

Dated this _____ day of May, 2003.

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 MAY 14, 2003. THE COURT FILED THIS DOCUMENT ON MAY 14, 2003.