

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Property Tax

SKS PROPERTY, LLC,)
)
 Plaintiff,) TC-MD 021135C
)
 v.)
)
 MULTNOMAH COUNTY ASSESSOR,)
)
 Defendant.) **DECISION**

This appeal involves a challenge to Defendant's act of disqualifying 6.54 acres of land from farm use special assessment and declaring a potential additional tax of \$43,470.56 for tax years 1997-98 through 2001-2002. Trial was held by telephone April 23, 2003. Plaintiff was represented by Richard E. Fowlks, Attorney at Law. Defendant was represented by Ken Collmer, Property Appraiser, Multnomah County Assessor. Testifying for Plaintiff were Takahashi Yoshida (Yoshida), Tim Callaghan (Callaghan), Ken Brenler (Brenler) and Timothy Calcagno (Calcagno). Ken Collmer and Keith Michel (Michel) testified for Defendant.

I. STATEMENT OF FACTS

The subject property is a 6.54 acre tract located on Northeast Sandy Boulevard in Gresham, Oregon. Plaintiff and other related entities at least partially controlled by Yoshida have owned the property since April 29, 1997. Callaghan is a neighbor who helped Yoshida manage the property. Brenler is employed at Grower's Outlet¹ and Calcagno is a lessee of the property.

The parties agree farming activities have been conducted on at least some of the

¹ Brenler may be the owner or manager of the market; the evidence is silent as to his actual capacity.

property since 1997. The lessee Calcagno has grown vegetables on a portion of the property for about four years. He also farms at another location in Portland. Calcagno's deceased uncle, Louie Calcagno, farmed the land before him. Dogwoods and other trees are growing on another portion of the property, which is managed by Yoshida and Callaghan. Blackberry bushes are growing among the trees. Finally, there is a brick building sitting on roughly one acre of land not employed for farming that houses farm equipment used by Calcagno for growing the vegetables. At some point a dirt berm was added to a portion of the property in connection with a sewer easement. The berm prevents farming on the ground it covers. The entire property is currently for sale.

The uncontroverted testimony of various witnesses shows that Calcagno and his Uncle Louie have for many years grown various vegetable crops on the property including pumpkins, dill weed, tomatoes, jalapeno peppers, squash, and cucumbers. There are receipts showing income from the sale of pumpkins by Calcagno to Grower's Outlet for \$825 in 1999, \$1,125 in 2000, and \$750 in 2001. Additionally, Yoshida testified that he sold trees in 1999 and 2000, and there are four invoices showing the sale of trees by SKS Management in 1999 and 2000. Those receipts show sales to Shikosha, Inc., on March 20, 1999, and February 25, 2000, and sales to Nick Yoshida on March 20, 1999, and February 25, 2000. The invoice in each case shows the sale of 20 trees for \$20 per tree for a total of \$400 for each of the four transactions. Payment was made by two checks dated September 23, 2002, for \$800 each. One check is written by Shikosha, Inc., and the other by Nick and Takeshi Yoshida.

Plaintiff contends the entire 6.54 acres qualifies for farm use special assessment because the lessee's income is adequate to satisfy the statutory requirement and under

ORS 308A.059² Defendant is to consider the lessee's use in determining the property's qualification for special assessment. Moreover, Plaintiff argues it earned sufficient income in 1999 and 2000 from the sale of nursery stock to satisfy the income requirements for two years. Defendant argues that only 3.54 acres of land qualifies for farm use special assessment because the trees, which it insists occupy 2 acres, are not managed sufficiently to constitute farming (i.e., they are essentially neglected and abandoned) and another acre (in and around the building) is admittedly not farmed.

There are three issues for the court to resolve. The first is whether the statutorily required income needs to be earned by the owner or whether tenant income is sufficient. The second issue is the amount of property being farmed in a manner sufficient to qualify under the applicable statutes. The third and final issue is whether there is sufficient income to allow special assessment on all or part of the land.

II. ANALYSIS

The subject property is not zoned for exclusive farm use (i.e., non-EFU). Accordingly, to qualify for farm use special assessment under ORS 308A.068, the property must be used primarily for farm use and must meet the income requirements set forth in ORS 308A.071. The statute defines "farm use" as "the current employment of land for the primary purpose of obtaining a profit in money" by one of many enumerated activities. ORS 308A.056(1). Qualifying activities include "[r]aising, harvesting and selling crops" and using land "for any other agricultural or horticultural use." ORS 308A.056(1)(a), (h). Therefore, growing pumpkins and other vegetables and nursery stock are qualifying farm uses. As for the income requirements, ORS 308A.071 provides in relevant part:

² All references to the Oregon Revised Statutes (ORS) are to 2001.
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“(2)(a) Except as provided in subsection (6) of this section, in three out of the five full calendar years immediately preceding the assessment date, the farmland or farm parcel was operated as a part of a farm unit that has produced a gross income from farm uses in the following amount for a calendar year:

“(A) If the farm unit consists of six acres or less, the gross income from farm use shall be at least \$650.

“(B) If the farm unit consists of more than six acres but less than 30 acres, the gross income from farm use shall be at least equal to the product of \$100 times the number of acres and any fraction of an acre of land included.

“* * * * *

“(5) The burden of proving the gross income of the farm unit for the years described in subsection (2) of this section is upon the person claiming special assessment for the land.”

The statute further requires that the owner or operator of the farm unit include a Schedule F with the state excise or income tax return filed with the Department of Revenue and that the return be made available to the county assessor upon request.

A. *Must the owner earn the income?*

It is not necessary for the owner of the land to earn income. The statutory definition of farm use requires “current employment of the land.” ORS 308A.056(1). Subsection (2)(a) of ORS 308A.071, which is set forth above, requires that the “farm unit * * * produce[] a gross income from farm uses” as set forth in paragraphs (A), (B), and (C) and the minimum amount of income required is based on “gross income from farm use.” In each case the emphasis is on the use of the land, not the ownership. Moreover, the rule recognizes that a lessee may operate the farm. OAR 150-308A.059(2)(b)(B).³ Case law places similar emphasis on the use of the land. *See Ritch v. Department of Revenue*,

³ The date of the disqualification was June 25, 2002. Therefore the court is relying on the administrative rules in effect on January 2002.

261 Or 78, 493 P2d 38 (1972); *Capsey v. Dept. of Rev.*, 9 OTR 162 (1982); *Linfoot v. Dept. of Rev.*, 4 OTR 489 (1971). And in at least one case the land owner was entitled to farm use special assessment on portions of its property that were devoted to farming, where the lessee, who was using the land for industrial research purposes, subleased portions of the property to individuals who used the land for farming. See *Ritch*, 261 Or at 84. Thus, Calcagno's use of the land for farming entitles at least some of the property to special assessment. As for the portion of the land devoted to the growing of trees, the activity of the owner is relevant because the owner is the one doing the tree farming. The court therefore turns to the question of how much land is being farmed in accordance with the statute and thus entitled to special assessment.

B. How much land is being farmed?

As indicated above, to qualify for farm use there must be a "current employment of land for the primary purpose of obtaining a profit in money." ORS 308A.056(1). Moreover, the administrative rule provides that "[a]ny part of a farm unit which is being used for a non-farm use must be disqualified." OAR 150-308A.059(3).

The court is satisfied that Calcagno is farming the property for the purpose of obtaining a profit in money as required by ORS 308A.056. Defendant concedes that Calcagno is farming and estimates the amount of land so employed at 3.54 acres. Yoshida testified that about 1 acre under and around the brick building is not being farmed and that the nursery stock takes up 1 or 2 acres, leaving between 3.54 and 4.54 acres for farming. Yoshida's friend and neighbor Callaghan, who assists Yoshida with the management of the property, testified that five acres are being "farmed," that the five acres include the nursery stock, and that Calcagno's vegetable farming encompasses about four acres. Calcagno estimated that he was farming five acres. The court concludes that

Calcagno is farming four acres, that the nursery stock encompasses one and one-half acres, and that there is one acre under and around the brick building. The four acres being farmed by Calcagno qualify for special assessment.

It is less clear to the court whether Yoshida is employing the one and one-half acres of nursery stock for the primary purpose of obtaining a profit in money. The trees were sold to related parties⁴ in March 1999 and February 2000 and the checks were not written until September 2002, after the county notified Plaintiff of the disqualification. Yoshida testified that his son Nick, who bought half the trees, was in Japan and that he (Takahashi Yoshida) simply forgot about the money. The administrative rule requires that “the land must be used in a manner that is reasonably designed and intended to give rise to a profit in money by accepted farming practices.” OAR 150-308A.059(2)(b). The statute defines “[a]ccepted farming practice” as “a mode of operation that is common to farms of a similar nature, necessary for the operation of these similar farms to obtain a profit in money and customarily utilized in conjunction with farm use.”

ORS 308A.056(4)(a). The delay of more than two and one half years in collecting the money for the sale of the trees strikes the court as poor business practice and at odds with the statutory requirement of a profit motive. Additionally, the court is not persuaded that the trees are being cared for under accepted farming practices. Defendant’s appraiser Michel testified that when he inspected the property on three different occasions he observed blackberry vines growing among the trees. Mickel acknowledged that he was not knowledgeable about nursing practices and his opinion that the trees were not “cared for” is therefore not given the weight a similar opinion would have if rendered by a recognized expert. However, the court opines that the thorns on the blackberry vines would

⁴ Sales were to Yoshida’s son and Shikosha, a corporation with shareholders common to Plaintiff.

make harvesting the trees difficult and the vines would compete with the trees for food and light. The court therefore concludes there

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was a lack of profit motive and that the trees were not cared for consistent with accepted farming practices.

Finally, the parties agree the one acre in and around the building is not being farmed and under the statute it does not qualify for special assessment because it is not currently employed for farming, as required by ORS 308A.056(1).

C. Income Requirement

According to the administrative rule, not all land is counted in determining the number of acres to be considered in calculating the income requirements. See OAR 150-308A.071(6)(d) (providing an example of a mixed-use property and concluding that a non-farm homesite, an immature cherry orchard, a farm woodlot, and “wasteland * * * are not counted in determining the number of acres to be considered under ORS 308A.071(2)(a)”). However, in this case the court is satisfied that Calcagno earned a gross income of at least \$1,500 per year for at least three years (1999, 2000, and 2001) selling crops to Brenler. Thus, regardless of whether the income requirement is \$650 (for 6 acres or less) or \$700 (for 6.54 acres), the minimum statutory income requirement is met. See ORS 308A.071(2)(a)(A), (B).⁵

III. CONCLUSION

The court concludes that the 4 acres farmed by Calcagno qualifies for farm use special assessment based on the use of the property and the demonstrated income in

⁵ Under paragraph (A) the income requirement is at least \$650 for 6 acres or less and, under paragraph (B) the income requirement for farm units of more than 6 acres but less than 30 acres is at least \$100 for each acre or portion thereof. ORS 308A.071(2)(a).

excess of the statutory minimum and that the balance of the land, comprising 2.54 acres, does not qualify for special assessment for the reasons set forth above. Now, therefore,

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IT IS THE DECISION OF THIS COURT that Plaintiff's request for reinstatement of farm use special assessment is granted in part and that Defendant shall amend the assessment and tax rolls for account R320279 to reinstate farm use special assessment on four acres for the 2002-03 tax year and adjust the calculation of potential additional taxes for prior tax years accordingly.

Dated this _____ day of September, 2003.

DAN ROBINSON
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 DAN ROBINSON ON SEPTEMBER 30, 2003. THE COURT FILED THIS DOCUMENT ON SEPTEMBER 30, 2003.