

IN THE MAGISTRATE DIVISION  
OF THE OREGON TAX COURT

Property Tax

ANIG INC., TRUSTEE OF THE SUNNYSIDE )  
VILLAGE SQUARE TRUST, )  
 )  
Plaintiff, ) No. 990583B  
 )  
v. )  
 )  
CLACKAMAS COUNTY ASSESSOR, )  
 )  
Defendant. ) **DECISION**

This appeal concerns certain real property assessments for the 1998-99 tax year. This case is now before the Magistrate Division of the Oregon Tax Court on two Motions for Summary Judgment. MDR 6.

Oral arguments were presented on May 12, 2000, in Oregon City.

**THREE ISSUES PRESENTED**

- (1) May defendant later correct (for 1998-99) its failure to properly apply the provisions of Measure 50 in the base year (1997-98)?
- (2) Are there any "clerical errors" or "omitted property" for the 1998-99 tax year at issue?
- (3) Are there any equitable doctrines that apply to this situation?

**STIPULATION OF FACTS**

1. Plaintiff is the owner of the property that is identified in the records of the Clackamas County Assessor as Account No. 1638357, which is commonly known as Sunnyside Village Square (the "Subject Property").

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## **Measure 50 Issue**

2. For the 1997-98 property tax year the county assigned a value of \$4,586,310 to the Subject Property as of the July 1, 1997, assessment date. (Joint Ex 1).

3. For the 1998-99 property tax year, defendant determined that the maximum assessed value and the assessed value of the Subject Property was \$9,631,320 as of the January 1, 1998, assessment date. (Joint Ex 2).

4. The Clackamas County Board of Property Tax Appeals sustained defendant's determination of the assessed value of the Subject Property for 1998-99 in its Real Property Order dated March 9, 1999, relating to Petition No. 1998-0211. (Joint Ex 3).

5. Plaintiff has timely and properly appealed from the March 9, 1999, Order.

6. Plaintiff does not contest the "real market value" that defendant determined for the Subject Property for 1998-99, because that "real market value" does not affect the issues in this proceeding.

7. Plaintiff asserts that defendant erroneously computed the 1998-99 "maximum assessed value" and "assessed value" under Measure 50 (Or Const Art XI, § 11) and ORS 308.146 and 308.153. Plaintiff asserts that the correct maximum assessed value and assessed value for 1998-99 are no more than \$4,723,899, which is 103 percent of the assessed value for 1997-98.

8. Defendant denies that the values assigned to the Subject Property for the 1998-99 tax year are incorrect under Measure 50 and ORS 308.146 and 308.153.

9. Defendant's practice, prior to the adoption of Measure 50 and implementing legislation, was to assign a "temporary" real market value to property for any tax year in which the property appeared to be under construction.

10. Under defendant's practice, such a "temporary" value generally was lower than the value that was assigned in the first year after the property appeared to be complete.

11. Defendant intended that the real market and assessed values that defendant assigned to the Subject Property in Joint Exhibit 1 for 1997-98 would function as such a "temporary" value.

12. No new construction was completed on the Subject Property between July 1, 1997, and January 1, 1998.

## **Clerical Errors and Omitted Property Issue**

13. Subsequent to the commencement of this proceeding, defendant has asserted, in informal communications to plaintiff's counsel, that clerical errors and omissions, that are the subject of ORS 311.205 through .235 (the "Alleged Errors and Omissions") were made in assigning the value to the Subject Property for the 1997-98 tax roll, and that defendant is entitled to correct the roll and assess it pursuant to ORS 311.205 through .235. As a result of the Alleged Errors and Omissions, defendant asserts that additional property tax is due for both 1997-98 and 1998-99.

14. In this proceeding the parties are not contesting tax roll values prior to 1997-98 or subsequent to 1998-99.

15. Plaintiff and defendant wish to resolve in this proceeding the issue of whether any of the Alleged Errors and Omissions occurred in the preparation of the 1997-98 tax roll value of the Subject Property and, if so, whether defendant is permitted to correct the Alleged Errors and Omissions.

16. The Alleged Errors and Omissions are: overhead, profit, indirect costs (e.g., financing, interim taxes, interim insurance), on-site development costs (e.g., sewer hookup and fees, landscaping, grading, site preparation), the "incomplete" deduction and the local cost modifier.

17. In the interest of economy to the parties and to the Court, and specifically for the purpose of avoiding delay that would be caused if the parties followed the procedures described in ORS 311.205 through .235, plaintiff and defendant agree as follows:

- a. Defendant is deemed to have timely and properly given notice to plaintiff of defendant's intention to add the Alleged Errors and Omissions to the 1997-98 roll pursuant to ORS 311.205(3) and 311.219.
- b. Plaintiff is deemed to have timely and properly appeared before defendant to show cause why the Alleged Errors and Omissions should not be assessed pursuant to ORS 311.205(3) and .223.
- c. Defendant is deemed to have corrected the roll for the Subject Property by adding the Alleged Errors and Omissions thereto and otherwise to have proceeded properly pursuant to ORS 311.205 and .223 in assessing the Alleged Errors and Omissions to plaintiff.

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- d. Plaintiff is deemed to have timely and properly given notice and to have appealed to this court from the assessment of the

Alleged Errors and Omissions pursuant to ORS 311.205(3) and .223, and that appeal is deemed consolidated with the present proceeding.

- e. To the extent that any of the Alleged Errors and Omissions are determined in this proceeding not to be correctable on the 1997-98 tax roll and not to be subject to assessment pursuant to ORS 311.205, .206, .223 and .226, defendant is precluded from adding such property to the roll for 1997-98, and is precluded from assessing such property pursuant to ORS 311.205, .206, .223 and .226.
- f. To the extent that any of the Allegedly Omitted Property is determined in this proceeding to be correctable on the 1997-98 tax roll and to be subject to assessment pursuant to ORS 311.205, .206, .223 and .226, any dispute over the real market or assessed values of such property, or other issues related to the Alleged Errors and Omissions shall be resolved in this proceeding. Thereafter, defendant may correct the tax roll and alter the assessment correspondingly within 90 days after the later of (1) entry of a final judgment in this proceeding or (2) the exhaustion of all appeals in this proceeding. Additional taxes resulting from such correction or alteration shall be payable without interest if paid in the period prior to the 16<sup>th</sup> of the month next following the month of such correction, as provided in ORS 311.206 and .229.

### **Specific Improvements**

18. Joint Exhibit 4 is a map of the Subject Property showing each of the five buildings in the Subject Property and identifying each rental unit, either by tenant name or by a unique unit number.

19. The first building, identified in Joint Exhibit 4 as the Albertson's Food and Drug, was substantially complete, occupied and open for business on or before December 14, 1996. (Joint Ex 5). The Certificate of Occupancy for this building was issued on June 3, 1997. (Joint Ex 5).

20. The second building, identified in Joint Exhibit 4 as Building 2, was substantially complete as to all external features and structures before May 30, 1997. (Joint Ex 6). The Certificate of Occupancy was issued for this building on June 11, 1997. (Joint Ex 6).

21. The third building, identified in Joint Exhibit 4 as Building 3, was substantially complete as to all external features and structures before May 30, 1997.

(Joint Ex 7). The Certificate of Occupancy was issued for this building on June 11, 1997. (Joint Ex 7).

22. The fourth building, identified in Joint Exhibit 4 as Building 4, was substantially complete as to all external features and structures before May 30, 1997. (Joint Ex 8). The Certificate of Occupancy was issued for this building on June 9, 1997. (Joint Ex 8).

23. The fifth building, identified in Joint Exhibit 4 as McDonald's, was substantially complete, occupied and open for business on or before December 21, 1996. (Joint Ex 9). The Certificate of Occupancy for this building was issued on June 3, 1997. (Joint Ex 9).

24. Construction of the following tenant spaces, identified by the names shown on Joint Exhibit 4, was substantially complete, and the tenant spaces were occupied and open for business, on or before the first dates set forth below. Certificates of occupancy were issued on the second dates set forth below. (See joint exhibits set forth below).

### **ISSUE (1): MEASURE 50 APPLICATION**

Plaintiff contends that the defendant's increase in the 1998-99 assessed value is barred by the three percent limitation that is imposed under the Measure 50 implementation statutes. Or Const, Art. XI, § 11(1)(c).

There is a limitation (or "cap") on annual increases in property assessments. In general, "[t]he maximum assessed value of property shall equal 103 percent of the property's assessed value from the prior year \*\*\*." ORS 308.146(1). There are certain exceptions to this Measure 50 cap; the parties agree that only one may be applicable herein. That key concern is whether the subject property, as of the 1998-99 assessment date, included "[n]ew property or new improvements to property."<sup>1</sup> ///

According to ORS 308.149(5)(a)(A), new property or new improvements

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<sup>1</sup> ORS 308.149  
DECISION

mean changes in the value of the property as a result of "[n]ew construction, reconstruction, major additions, remodeling, renovation or rehabilitation of property \*\*\*."

These changes must have occurred between the two assessment dates of July 1, 1997, and January 1, 1998.

The stipulation of facts demonstrates no major construction or changes to the property during this limited interim. There was no independent evidence or convincing arguments offered to support a different finding. In fact, all buildings, parking lots and landscaping were done before May 30, 1997. The limited activity that occurred later were the cosmetic completion and leasing of four tenant spaces. They were done during the spring of 1998.

Defendant's reliance upon a historical procedure cannot negate the Measure 50 mandates. The prior use of a "temporary" value, until all construction was completed, does not relate to the new, Post-Measure 50 taxing and assessment scheme. While the implications of defendant's policy were not discovered until much later, they cannot be revisited or glossed over in the wake of the constitutional implementations.

The prior year's assessment cannot later be reexamined or changed due to an error. This was clearly established in *Ellis v. Lorati*, 14 OTR 525 (1999). Judge Byers, at page 535, stated:

"The court recognizes in one sense MAV is somewhat artificial or arbitrary. That is inherent in the overall scheme of section 11. The concept may, over time, result in various degrees of nonuniformity in the property tax system."

Clearly, Measure 50 does not allow for revisions or corrections of the real market value on the roll as of July 1, 1995. *Dept. of Rev. v. Froman*, 14 OTR 543,548

(1999).

Defendant may not, in the absence of clear and certain statutory authority, increase the 1998-99 assessment in the magnitude it contends. The maximum addition is limited to three percent of that determined for the prior 1997-98 year. Defendant's record assessment for 1998-99 is violative of this ceiling amount.

**ISSUE (2): "CLERICAL ERRORS OR OMITTED PROPERTY"**

Defendant contends that it made a "mistake of law" in assigning a temporary value to the subject property for 1997-98. As a result, defendant claims the oversight may be corrected under ORS 311.216(1) for omitted property or under ORS 311.205(1)(a) for clerical errors.

Defendant was required to inventory and value new improvements as of each assessment date. ORS 308.210(1). This was done by a personal inspection. The record does not reveal the existence of any specific items of tangible property that were overlooked, ignored or otherwise not captured.

It is clear that errors in valuation judgment may not be corrected in a later year. ORS 311.205(1)(a). Here, the parties agree that defendant's representative performed a physical appraisal and completed an inventory on May 30, 1997. As stated above, there were no new improvements added in the several months thereafter.

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In the case of *Marion County Assessor v. Dept. of Rev.*, 10 OTR 265, 270 (1986), the court wrote:

"\* \* \*[i]mprovements which are in existence and an integral part of property which is physically appraised by an assessor may not be later revalued and added as omitted property under ORS 311.207."

This holding was later adopted, in large part, by the Oregon Department of Revenue as Administrative Rule 150-311.216(2)(b).

The evidence does not support the existence of any legitimate error that may be corrected after the original assessment date for 1998-99.

### **ISSUE (3): "EQUITABLE DOCTRINES"**

Defendant also urges the court to find in its favor due to reasons of "equitable recoupment" and what was termed a "subconstitutional analysis." Defendant contends this is a situation where it "took much less than it was entitled to take from plaintiff"<sup>2</sup> If not corrected, plaintiff would be "unjustly enriched in perpetuity, at the expense of the taxing districts."<sup>3</sup>

The concept of "equitable recoupment" is not favored in tax cases. This is especially true when it conflicts with a clear statute. This was emphasized in *Allied Timber Co. v. Dept. of Rev*, 296 Or 412, 677 P2d 33 (1984). The court, at 296 Or 419, stated:

"Because of the stipulation that plaintiff paid more than it should have as tax on the improvements, it is indeed tempting to make bad law; however, we resist that temptation as did the Supreme Court of the United States in a somewhat similar case:

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"As statutes of limitation are applied in the field of taxation, the taxpayer sometimes gets advantages and at other times the Government gets them. Both hardships to the taxpayers and losses to the revenues may be pointed out. They tempt the equity-minded judge to seek for ways of relief in

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<sup>2</sup> Defendant's cross-motion at page 9.

<sup>3</sup> *Id.* at 10.



individual cases.

"But if we should approve a doctrine of recoupment of the breadth here applied we would seriously undermine the statute of limitations in tax matters."  
296 Or at 419 (quoting *Rotheneis v. Electric Battery Co.*, 329 US 296, 302-303, 67 S Ct 271, 91 LEd 296 (1946) (emphasis added).

Defendant's error cannot be corrected based on equitable arguments. As stated in *Bohemia Lumber Co. v. Haley*, 252 Or 349, 351, 449 P2d 443 (1969), "[t]ax law is notoriously impervious to the claims of equity."

The court is not persuaded that the cases cited by defendant demonstrate entitlement to the severe remedial relief requested. Defendant's Motion for Summary Judgment is denied as to these specific arguments.

**CONCLUSION**

The court's reasoning in this case is similar to that found in *Jones et al v. Lincoln County Assessor*, OTR-MD 991161B (2000). There, the defendant was not allowed to correct a prior year's "temporary value" on coastal condominiums.

IT IS THE DECISION OF THE COURT that defendant's Motion for Summary Judgment is denied; plaintiff's Motion for Summary Judgment is granted.

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If no appeal is timely taken from this Decision, defendant shall correct the 1998-99 tax roll and set the assessed and maximum assessed values at \$4,723,899. Dated this \_\_\_\_ day of July, 2000.

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JEFF MATTSON  
MAGISTRATE

**IF YOU WANT TO APPEAL THIS DECISION, FILE A COMPLAINT IN THE REGULAR DIVISION OF THE OREGON TAX COURT, 1241 STATE STREET, FOURTH FLOOR, SALEM, OR 97310. 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 JEFF MATTSON ON JULY 21, 2000. THE COURT FILED THIS DOCUMENT ON JULY 21, 2000.**