IN THE SUPREME COURT OF THE STATE OF OREGON

WILLAMETTE ESTATES II, LLC,
Plaintiff-Appellant,

v.

DEPARTMENT OF REVENUE,
Defendant-Respondent,

and

MARION COUNTY ASSESSOR,
Defendant-Intervenor.

Tax Court
5146

S062027

APPELLANT WILLAMETTE ESTATES II, LLC'S OPENING BRIEF AND EXCERPT OF RECORD

Review of the Decision of the Oregon Tax Court, Regular Division
Honorable Henry C. Breithaupt

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STATEMENT OF THE CASE

A. Nature of Proceeding and Relief Sought.

Oregon statutes define "real market value" (RMV) and require the tax roll to determine and state land RMV and improvements RMV separately. ORS 308.215(1)(a)(E) and (F). They also require the land RMV to be added to the improvements RMV to yield the total property RMV. ORS 308.215(1)(a)(I).

Plaintiff-Appellant Willamette Estates II, LLC (Willamette Estates) appealed the real market value (RMV) of **improvements** to its real property, a residential apartment complex located in Marion County, Oregon, to the Magistrate Division of the Oregon Tax Court (first magistrate appeal). Willamette Estates did **not** appeal the **land** RMV; instead it appealed only the **improvements** RMV of its real property.

Willamette Estates prevailed and the Magistrate entered an order reducing the improvements RMV to its proper amount. Defendant-intervenor, Marion County Assessor ("Assessor), did not appeal the first magistrate appeal order to the Regular Division of the Tax Court; therefore, the Magistrate entered judgment setting the corrected real market value of the improvements; that judgment expressly required the Assessor to correct the tax roll to conform to the changed **improvements RMV** as ordered by the Court (case 080387D OJIN 27, 29). The Assessor complied as

required by law and corrected the tax roll. Again, neither BOPTA nor the Magistrate tinkered with the Assessor's land RMV in any fashion. The governing Magistrate decision became final with the passage of 60 days without any appeal. TCR-MD 19; ORS 305.440; ORS 305.501(7).

Thereafter, the Assessor appealed to Defendant Oregon Department of Revenue (Department) under ORS 306.115, requesting the Department to increase Willamette Estates **land** RMV from $1,002,840 to $5,000,000. The Department accepted jurisdiction, denied Willamette Estate's request for a merits conference, and increased the land RMV to $5,000,000.

Willamette Estates appealed this Department decision back to the Magistrate Division on multiple grounds (second magistrate appeal). The Magistrate decided this second magistrate appeal on cross motions for summary judgment. The Magistrate granted Willamette Estates' motion, denied the Assessor's motion, and remanded the matter to the Department for a merits conference. On remand, the Department adhered to its previous decision.

Willamette Estates appealed the Department's second decision back to the Magistrate Division (third magistrate appeal). Willamette Estates challenged both the Department's lack of jurisdiction and the Assessor's legal authority to appeal his

own judicial determination to the Department at all. The Magistrate ruled for the Assessor and upheld the Department's decision.

Willamette Estates appealed the third magistrate appeal decision to the Regular Division of the Tax Court. Both Willamette Estates and the Department moved for summary judgment. The Tax Court Judge granted summary judgment to the Department and the Assessor and denied Willamette Estates' summary judgment motion.

Willamette Estates timely appealed to this Court, seeking a reversal of the Tax Court Judgment and a holding that the Department disregarded governing authority and abused its discretion by changing the **land RMV** of Willamette Estates' real property.

B. Nature of the Judgment to be Reviewed.

The Tax Court judgment denied Willamette Estates' motion for summary judgment and granted the Department's summary judgment motion (ER 50-51). The Tax Court held that the Department did not abuse its discretion under ORS 306.115 when it determined that it had jurisdiction to consider the merits of the land value of Willamette Estates' real property [Marion County account R22411], and that the Department did not abuse its discretion under ORS 306.115 when it permitted the Assessor to appeal his own judicial determination of value and thereby change or

"correct" the land value of Marion County account R22411 from $1,002, 000 to $5,000,000 for the 2007-08 tax year (ER 42-49).

C. Statutory Basis for Jurisdiction.

ORS 305.445 establishes appellate jurisdiction in the Oregon Supreme Court.

D. Effective Date of Judgment and Timeliness of Appeal.

The Oregon Tax Court entered Judgment on January 13, 2014 (ER 50; case 5146 OJIN 23). Appellant Willamette Estates II LLC timely filed its Notice of Appeal on February 10, 2014 (case 5146 OJIN 25).

E. Questions Presented on Appeal.

1. Did the Tax Court err in holding that ORS 306.115 proceedings are not appeals?

2. Did the Tax Court err in deciding that county assessors may unilaterally petition the Department to change the **assessor's** original determination?

3. Did the Tax Court err in holding that this Court's decision in *Nepom v. Dept. of Rev.,* 272 Or 249, 536 P2d 496 (1975) did not prohibit the Assessor's appeal to the Department under ORS 306.115 and his shifting of value between land and improvements?

F. Statutory Provisions Significant for Appeal and Review.

Please see Appendix A for the full text of ORS 305.445 and ORS 306.115.

G. Summary of the Arguments.

The Tax Court abused its discretion under the statutory standard on review when it allowed the Assessor to appeal his own judicial determination in a case where the taxpayer Willamette Estates never challenged or otherwise put the land RMV at issue. In reaching this erroneous decision, the Tax Court failed to recognize that proceedings under ORS 306.115 constitute appeals, despite their discretionary and "non-traditional" character. Further, the Tax Court failed to apply the binding legal principle that RMV determinations comprise judicial decisions and that the law prohibits an assessor from challenging his own decision. The Tax Court also erred when it refused to recognize and apply the controlling principle established by this Court in *Nepom v. Dept. of Rev.*, 272 Or 249, 256, 536 P2d 496 (1975) which forbids assessors from shifting values between land and improvements where the taxpayer appeals only one of those values.

H. Summary Statement of the Facts.

The Statement of the Case, Sections A and B, set forth the procedural history and the general factual background necessary for understanding this appeal. Specific factual material appears in the following sections with citation to the Trial Court File by OJIN reference.

APPELLANT'S ASSIGNMENT OF ERROR

The Tax Court Erred In Denying Summary Judgment To Willamette Estates II LLC, and In Granting Summary Judgment In Favor of the Department and the Assessor

A. Preservation of Error. Each party moved for summary judgment before the Tax Court (ER -21 *et seq,* 41 *et seq*), and each party filed written authorities and supporting argument (*Id.*). Willamette Estates also fully set forth its position before the Magistrate in the third magistrate appeal (case 080387D OJIN 19, 24).

B. Standard of Review by the Supreme Court. Like ORAP 47 C, TCR 47 C authorizes summary judgment where the record shows that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. The Supreme Court reviews Tax Court final decisions and judgments for errors of law or for lack of substantial supporting evidence in the record. ORS 305.445 (*See* Appendix A). "This court's scope of review of a tax court judgment is limited to questions of law." *Julian v. Dept. of Rev.*, 339 Or 232, 235, 118 P3d 798 (2005); *confirm Delta Airlines, Inc. v. Dept. of Rev.*, 328 Or 596, 601-603, 984 P2d 836 (1999). Disregard of controlling legal authority constitutes error under any standard.

ASSIGNMENT OF ERROR 1-A

The Tax Court and the Magistrate Division Both Erred In Deciding and Holding That the Assessor Filed A Permissible Appeal from His Own Judicial Decision

Following briefing and argument, the Tax Court ruled:

> Taxpayer next argues that the department may not act under ORS 306.115 when a county assessor initiates proceedings under the statute. Taxpayer asserts that the county assessor should not be permitted to appeal his own decisions. In this argument taxpayer ignores the fact that proceedings under ORS 306.115 are not appeals. * * *. (ER 47) [the Tax Court analysis appears at ER 47-48]

Willamette Estates presented the identical detailed argument to the Magistrate who ruled in similar fashion:

> As for Plaintiff's [Willamette Estates'] assertion that the Assessor is prohibited from appealing "his" own decision, the Assessor's petition to the Department in this matter, submitted pursuant to the provisions of ORS 306.115, was not an appeal by the Assessor of its own decision. * * *. (ER 14)

1-A ARGUMENT

1. ORS 306.115 Proceedings Are Non-Traditional Appeals.

The Department, Assessor, and Tax Court rest their incorrect judgment on the erroneous premise that an appeal under ORS 306.115 is not an appeal at all. Only a master of jabberwocky could make this argument with a straight face. All agree that appeals to the Department under ORS 306.115 " * * * are not appeals in the

traditional sense." *McGill v. Dept. of Rev.*, 14 OTR 40, 42 (1996). When a taxpayer petitions the Department it does not appeal "* * * in the usual sense * * *" but rather "* * * it is helping defendant [Department] to 'discover' a reason to correct the tax roll." *FSLIC v. Dept. of Rev.*, 11 OTR 389, 391 (1990). Thus, an ORS 306.115 remedy "* * * falls outside the normal appeals procedure." *Perkins and Wiley v. Dept. of Rev.*, 13 OTR 426, 428 (1995). Nevertheless, such a "nontraditional" appeal still constitutes an appeal and no legalese or legerdemain can change its nature. Moreover, none of the authority above goes so far as to state that a petition under ORS 306.115 is not an appeal at all!

Understanding the procedure clarifies this issue. A "traditional" or "normal" property tax appeal grants the taxpayer a statutory right to be heard; the taxpayer must first petition the Board of Property Tax Appeals (BOPTA) under ORS 309.100. If dissatisfied with the BOPTA determination, the taxpayer may appeal the BOPTA decision to the Magistrate Division of the Oregon Tax Court as a matter of right. ORS 309.110 (7). If dissatisfied with the Magistrate's decision, the taxpayer may appeal, again as a matter of right, to the Regular Division of the Tax Court. ORS 305.501(5)(a). If still dissatisfied, the taxpayer ultimately may appeal to this Oregon Supreme Court, once again as a matter of right. ORS 305.445.

In addition to this traditional statutory property tax appeal process, however, the Oregon Legislative Assembly provided the Department with separate overlapping appellate jurisdiction under ORS 306.115. *Dept. of Rev. v. Oral and Maxillofacial Surgeons, P.C.,* 15 OTR 284, 288 (2001). "* * * [T]he legislature intended for taxpayers to be able to ***appeal*** to either body [BOPTA or Department] without first going to the other." ***Id.*** [Emphasis supplied].

Hence, although ORS 306.115 does not establish a statutory ***right*** to appeal, it does provide a discretionary process for an administrative review. *Id.* 287. Thus, under ORS 306.115(4) an appeal to the Department may be heard only at the latter's discretion, similar this Court's review process in many civil and criminal cases. *Durkee v. Lincoln County Assessor,* OTR-MD No. 030820D, 2004 WL 1982222 at *2 (2004). If the Department exercises discretion to accept jurisdiction, it conducts a hearing and decides the case on the merits. *Id.* The discretionary nature of this review certainly does not contort consideration of an accepted case into some sort of "non-appeal" any more than this Court's granting a Petition for Review and hearing a case previously decided by the Oregon Court of Appeals converts that case into some sort of "non-appeal."

Oregon authority and practice establish that an ORS 306.115 administrative review comprises an appeal even though it is not an appeal by statutory right. Both

the Department and the courts refer to an ORS 306.115 petition for review as an appeal. Indeed, the Department's established petition form is titled "PROPERTY ***APPEAL*** PETITION" [Emphasis supplied]. The Oregon Tax Court acknowledges the point in *McGill v. Dept, of Rev., supra,* 14 OTR 40 (1996): "Plaintiff [taxpayer] ***appeals*** the denial of her request * * *" under ORS 306.115 (Emphasis Supplied; Tax Court observing that these specific appeals are not appeals in the traditional – statutory right – sense). *Confirm, Perkins and Wiley v. Dept. of Rev., supra,* 13 OTR 426, 427 (1995).

The Oregon Court of Appeals provides additional analytic and linguistic validation in *State v. Hewitt*, 162 Or App 47, 51, 985 P2d 884 (1999).1 Neither the form of the initiating document nor the discretionary or non-traditional nature of acceptance of the case defines the concept of an appeal. *Hewitt* decides this issue and deserves an unusually long quotation, *Id.* at 50-51:

> [The term 'appeal'] * * * broadly and more generally describes any legal proceeding by which a decision of a lower court or other adjudicative body is brought to a higher court for review. A variety of procedural mechanisms lead to review of lower tribunal decisions by higher appellate courts. Many are not 'appeals' in the most narrow sense of the word. * * *. Although often termed an 'appeal,' a case in fact proceeds from this court to the Oregon Supreme Court by way of a

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1 This Court allowed review of *Hewitt*, 330 Or 252, 6 P3d 1099 (April 11, 2000) and review was subsequently withdrawn, 330 Or 567, 10 P3d 943 (August 29, 2000).

> discretionary 'petition for review.' Similarly, most administrative decisions are not brought to this court for review through notices of appeal but are pursued instead on petitions for review. Numerous other examples abound – e.g., * * * [including] special statutory review proceedings, * * *. It is both commonplace and, in a general way, correct to refer to all of those review mechanisms as 'appeals,' despite the fact that they are not initiated by a notice of appeal.

Additionally, *Hewitt*, 162 Or App at 50-51, note 3, cited with approval Black's Law Dictionary (6th ed. 1990), page 96, defining an "appeal" as including a "[r]esort to a superior (*i.e.* appellate) court * * * or administrative agency. * * * [A]n appeal may be as of right * * * or only at the discretion of the appellate court * * *." Further, this Court's favored dictionary defines "appeal" similarly:

> * * *. 2. To take proceedings for the removal of (a case) from a lower to a higher court for rehearing. * * * * *. 4. To apply for the removal of a case from a lower to a higher court for a rehearing.
> *Webster's 3rd New International Dictionary* page 103
> (Merriam-Webster Inc., Springfield, Massachusetts 1993)

Therefore, similar to established Oregon Supreme Court practice, a taxpayer's appeal to the Department under ORS 306.115 is submitted in the form of a petition for review, and the agency's decision to accept review is discretionary. Traditional or non-traditional, discretionary or as of statutory right, the Assessor's appeal to the Department pursuant to ORS 306.115 is as much an 'appeal' as is a Petition For Review to this Court. Each is an appeal and no amount of semantic misdirection can alter that essence.

2. The Law Bars an Assessor from Appealing His Own Decision

Assessors act in a judicial capacity when they establish the value of property. *Bear Creek Plaza, Ore., Ltd v. Dept. of Rev.,* 12 OTR 272, 275 (1992). Further, assessors may not unilaterally appeal their own judicial determination of value. "It is fundamental that an officer exercising judicial authority cannot appeal from his or her own decision." *Id., citing J.R. Widmer, Inc. v. Dept. of Rev.,* 261 Or 371, 374, 494 P2d 854 (1972).

When the Assessor determined the Willamette Estates land RMV and placed it on the tax roll, he made a judicial decision. The subsequent BOPTA decision sustained the Assessor's valuation and decision. Willamette Estates did not appeal the land RMV to the Magistrate, and the Magistrate's decision did not change it. The Assessor failed to appeal the First Magistrate Decision; therefore that decision became final after 60 days under ORS 305.440; ORS 305.501(7); TCR-MD 19.

Hence, similar to the taxpayer in *Bear Creek Plaza,* Willamette Estates never challenged the real property RMV; it only placed the improvements RMV in issue and no court considered the land RMV; by established law and practice the Assessor lacked authority to change his land RMV. The *Bear Creek Plaza* assessor judicially determined taxpayer's land RMV just as the Assessor in this case established the Willamette Estates' land RMV. Here, contrary to the *Bear Creek* Plaza prohibition,

the Tax Court permitted the Assessor to challenge his own judicial determination even though no prior action placed that value at issue. In so ruling, the Tax Court clearly abused its discretion here by permitting the Assessor to challenge his own decision where the taxpayer never placed the land RMV in issue.

Further, the Tax Court's contrary holding disregards its own authority. In *Wynne v. Dept. of Rev.,* 9 OTR 378 (1984) the taxpayer appealed the assessor's valuation to the Board of Equalization. The Board sustained the assessor's valuation. The assessor appealed that Board decision to the Department under ORS 305.275(2) and prevailed. On appeal, the Tax Court reversed and held that the assessor could not appeal to increase the value he had established by his judicial decision. The *Wynne* court relied on ORS 311.205 (1984), prohibiting correction of value returned to the assessor from the Board; although ORS 311.205 has been amended, it still prohibits change to, or "correction" of, valuation decisions which result in an increase in value. *Compare Clark v. Dept. of Rev.,* 14 OTR 221, 223 (1997) which upheld an assessor's ability to present evidence of a higher value than his assessment**, but only** where the taxpayer first placed the value in issue.

ASSIGNMENT OF ERROR 1-B

The Magistrate Division and the Tax Court Erred In Permitting and Enabling "Value Shifting" In Disregard Of Controlling Supreme Court Authority

Following briefing and argument the Tax Court concluded and held:

> Taxpayer next argues that if the county is able to prevail in this proceeding, the purposes of the decision in *Nepom v.Dept. of Revenue* * * * will be frustrated. In *Nepom* the Supreme Court held that under the appeal provisions of the property tax statutes, a taxpayer could appeal improvement value without also appealing land value. Nothing in this decision prevents a taxpayer from doing just that in the future. However, if a taxpayer does pursue such an appeal taking the type of position taken here and on a similar factual record, that taxpayer will not be able to prevail in challenging a separate proceeding and action by the department under ORS 306.115. (ER 48)

Willamette Estates had presented a similar detailed argument to the Magistrate who had ruled:

> Finally, Plaintiff [Willamette Estates] asserts that under *Nepom v. Dept. of Rev. (Nepom),* 272 Or 249, 536 P2d 496 (1975), a taxpayer may elect to appeal the value of the land, the value of the improvements, or both, and that because the Plaintiff in this case appealed the real market value of the improvements and the total real market value, the Department violated the rule in *Nepom* in its first decision by "shifting" the court's reduction in the improvement real market value to the land real market value. (Ptf's Mem at 13-14.) The problem with that argument is that, as indicated above, the court's decision in TC-MD 080387D only reduced the real market value of the improvements and the Department was well within its statutory authority to increase both the total real market value and the real market value of the land. (ER-17, 18)

1-B ARGUMENT

1. The Tax Court Allowed Impermissible Value Shifting

In this case, which arose prior to enactment of ORS 305.287 in 2011[2], taxpayers like Willamette Estates could elect to appeal either the improvements RMV or the land RMV, or both values, because the statutes required land and improvements to be separately appraised. *Nepom v. Dept. of Rev., supra,* 272 Or 249, 536 P2d 496 (1975). If a taxpayer appeals only the value of the improvements (as Willamette Estates did), the assessor and the Tax Court cannot "value shift", that is, they cannot order a reduction in the improvements value and then add that reduction back to the land value. *Nepom,* 272 Or at 256. Here, the Assessor disregarded and disobeyed this Court and did just what *Nepom* prohibits: he effectively shifted the reduction in the improvements RMV to increase the land RMV that was never in issue, and the Department and the Tax Court enabled him in this shenanigan.

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2 The 2011 Oregon Legislative Assembly changed the statutory scheme by enactment of ORS 305.287, effectively overruling *Nepom;* the present case is to be decided under the pre-2011 Code.

CONCLUSION

The Supreme Court should review the Tax Court judgment and remand to that court with directions to enter judgment for Willamette Estates II, LLC.

Respectfully Submitted, this 12th day of September, 2014.

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CERTIFICATE OF COMPLIANCE
WITH ORAP 5.05(2)(d)

I certify that this brief complies with the word-count limitation in ORAP 5.05(2)(b) and the word-count on this brief (as described in ORAP 5.05(2)(b)) is 4,394 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF FILING AND SERVICE

I certify that on September 12, 2014, I used the appellate court e-Filing system to file the foregoing **APPELLANT WILLAMETTE ESTATES II, LLC'S OPENING BRIEF AND EXCERPT OF RECORD** with the:

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I further certify that on September 12, 2014, I served the foregoing **APPELLANT WILLAMETTE ESTATES II, LLC'S OPENING BRIEF AND EXCERPT OF RECORD** via the court's eFiling system on:

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