

IN THE SUPREME COURT OF THE STATE OF OREGON

VILLAGE AT MAIN STREET
PHASE II, LLC,

Plaintiff-Respondent,

v.

DEPARTMENT OF REVENUE,
State of Oregon; and CLACKAMAS
COUNTY ASSESSOR,

Defendants-Appellants,

Tax Court No. 5054

Supreme Court No. S061133
(Control)

VILLAGE AT MAIN STREET PHASE II,
LLC,

Plaintiff-Respondent,

v.

DEPARTMENT OF REVENUE, State
of Oregon; and CLACKAMAS COUNTY
ASSESSOR,

Defendants-Appellants.

Tax Court No. 5055

Supreme Court No. S061137

VILLAGE RESIDENTIAL, LLC,

Plaintiff-Respondent,

v.

DEPARTMENT OF REVENUE, State of
Oregon; and CLACKAMAS COUNTY
ASSESSOR,

Defendant-Appellants.

Tax Court No. 5056

Supreme Court No. S061138

VILLAGE RESIDENTIAL, LLC,)	Tax Court No. 5057
)	
Plaintiff-Respondent,)	Supreme Court No. S061139
)	
v.)	
)	
DEPARTMENT OF REVENUE, State of)	
Oregon; and CLACKAMAS COUNTY)	
ASSESSOR,)	
)	
Defendant-Appellants.)	

**RESPONDENT'S BRIEF AND
SUPPLEMENTAL EXCERPT OF RECORD**

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

Opinion Filed: July 11, 2012
Before: Henry C. Breithaupt, J.

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE	1
A. Nature of the Action and Relief Sought	1
B. Nature of the Judgment	1
C. Questions Presented on Appeal	2
D. Summary of Arguments	2
E. Statement of Material Facts	4
PLAINTIFF’S ANSWER TO DEFENDANTS’ FIRST ASSIGNMENT OF ERROR	5
A. Preservation of Error	5
B. Standard of Review	6
ARGUMENT	6
A. The Tax court Judge Correctly Determined that ORS 305.287 Did Not Apply to the Proceedings Before It.	6
B. The Tax Court Judge Could Have Reached the Same Conclusion on Other Grounds.	12
1. Applicable Law.	13
2. Discussion.	15
(a) Plaintiff’s Disputes Were Pending on the Effective Date of ORS 305.287.	15
(b) ORS 305.287 Extinguished a Substantive Taxpayer Right.. ..	15

(c) ORS 305.287 Contains No Retroactivity Clause.	16
(d) The Statutory Language Shows No Intent to Apply the Statute Retroactively.	17
(e) Legislative History Is Silent on the Issue of Retroactivity. . . .	19
RESPONDENT’S ANSWER TO APPELLANT’S SECOND ASSIGNMENT OF ERROR.	20
A. Preservation of Error	20
B. Standard of Review.	21
ARGUMENT.	21
The Tax Court Judge Properly Conducted a Retroactivity Analysis	21
RESPONDENT’S ANSWER TO APPELLANT’S THIRD ASSIGNMENT OF ERROR.	22
A. Preservation of Error	22
B. Standard of Review.	23
ARGUMENT.	23
The Tax Court Properly Denied the County’s Motion for Leave to Amend	23
CONCLUSION.	23

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Allen v. Dept. of Rev.</i> , 17 OTR 427, 431 (2004)	15
<i>Boone v. Wright</i> , 314 Or 135, 836 P2d 727 (1992)	13-14
<i>Clendenin v. Dept of Rev</i> , 7 OTR 62 (1977)	18
<i>Denny v. Bean</i> , 51 Or 180, 93 P 693 (1908)	17, 18
<i>Dept. of Rev. v. Froman</i> , 14 OTR 543, 546 (1999)	15
<i>In the Matter of the Marriage of Edwards</i> , 127 Or App 489, 873 P2d 401 (1994)	14
<i>Fromme v. Fred Meyer, Inc.</i> , 306 Or 558, 761 P2d 515 (1988)	13
<i>Hoffart v. Lindquist</i> , 182 Or 611, 189 P2d 592 (1948)	13
<i>Kempf v. Carpenters and Joiners Union</i> , 229 Or 337, 367 P2d 436 (1961)	13, 17
<i>Mid-Century Ins. Co., v. Perkins</i> , 344 Or 196, 179 P3d 633, <i>modified on other grounds</i> , 345 Or 373, 195 P3d 59 (2008)	18
<i>Nepom v. Dept. of Rev.</i> , 272 Or 249, 536 P2d 496 (1975)	16

<i>Newell v. Weston</i> , 150 Or App 562, 946 P2d 691 (1997), <i>rev den</i> , 327 Or 317, 966 P2d 221 (1998)	13, 17
<i>Portland General Electric Co., v. Mead</i> , 235 Or App 673, 234 P3d 1048 (2010)	14
<i>State v. Flowers</i> , 136 Or App 555, 902 P2d 624 (1995), <i>rev den</i> , 324 Or 513, 930 P2d 853 (1997)	14
<i>State v. Lanig</i> , 154 Or App 665, 963 P2d 58 (1998)	13
<i>Whipple v. Howser</i> , 291 Or 475, 632 P2d 782 (1981)	13

Statutes

ORS 174.010	14
ORS 305.286	19
ORS 305.287	1-12, 15-24
ORS 305.445	10
ORS 309.026	9
ORS 309.026(2)	9
ORS 309.100	9
ORS 321.960	18

Other Authorities

Black's Law Dictionary, 1567 (9 th ed. 2009)	16
Barron's Law Dictionary, 494 (4 th ed. 1996)	16

STATEMENT OF THE CASE

Plaintiff accepts defendant's statement of the case except as supplemented herein.

A. Nature of the Action and Relief Sought.

Contrary to defendants' assertion, the tax court judge did not consider or decide whether ORS 305.287 applies in every appeal in the Regular Division of the tax court. Instead, the tax court limited the issue to "whether ORS 305.287 applies to the *proceedings now pending* in this division of the court." ER 22 (emphasis added). In other words, the court limited the issue to whether ORS 305.287 applied to plaintiff's four proceedings. Accordingly, the tax court limited its decision (for each consolidated proceeding) to that narrow issue, holding: "* * * , ORS 305.287 does not apply to *this proceeding*." ER 34 (emphasis added).

Plaintiff seeks to have the tax court's decision affirmed. Because the tax court judge did not consider whether ORS 305.287 applies generally in every case before the Regular Division of the tax court, that issue is not before this court.

B. Nature of the Judgments.

The tax court's four limited judgments are consistent with its decision. "ORS 305.287 *does not apply to this proceeding* in the Regular Division * * * ."

ER 39, 41, 43, and 45 (emphasis added). Those judgments are consistent with the issue as presented by the parties, consistent with the issue as articulated by the court, and consistent with Oregon law.

C. Questions Presented on Appeal.

1. Defendants argue that plaintiff's tax disputes commenced anew with plaintiff's appeals from the Magistrate Division to the Regular Division of the tax court. However, the Oregon tax court is one court with two divisions and it may issue only one judgment. Did plaintiff's property tax disputes commence in the tax court before the effective date of ORS 305.287?

2. If plaintiff's property tax disputes commenced in the tax court prior to the effective date of ORS 305.287, did the legislature intend for the statute to apply retroactively?

D. Summary of Arguments.

Defendants assert that the tax court judge erred in holding that ORS 305.287 does not apply to proceedings in the Regular Division of the tax court. However, defendants misread the tax court's decision. Judge Breithaupt limited the issue to "whether ORS 305.287 applies to *the proceedings now pending* in this division of the court." ER 22 (emphasis added). He concluded that it did not. ER 34. In other words, Judge Breithaupt only considered

whether ORS 305.287 applied to the four cases immediately before him, i.e., plaintiff's four tax disputes. He did not consider whether the statute applied to every proceeding in the Regular Division. Because defendants premise their argument on an inaccurate interpretation of the tax court's decision, their appeal should be denied.

In arriving at his decision, Judge Breithaupt analyzed the legislature's use of the word "appeal," as that word is used in ORS 305.287. He did so to determine whether plaintiff's cases commenced before or after the effective date of the statute, not to determine if the statute applied to every case before the Regular Division. If plaintiff's cases commenced before the effective date of the statute, a retroactivity analysis would be necessary. If plaintiff's cases commenced after the statute became effective, no further analysis would be required - the statute would apply.

Because Judge Breithaupt determined that the word "appeal," as used in ORS 305.287, could only apply to an appeal commencing in the Magistrate Division, he concluded that plaintiff's cases commenced prior to the effective date of the statute. His decision was not in error.

Because the statute became effective after the commencement of plaintiff's property tax cases, Judge Breithaupt conducted the required retroactivity analysis. He determined that the legislature gave no indication that

the statute should apply to cases pending on the statute's effective date.

Therefore, the statute did not apply retroactively to plaintiff's cases. His decision was not in error.

E. Statement of Material Facts.

Plaintiff accepts defendants' statement of factual and procedural background with the following exceptions:

Defendants assert that "the court did not consider the legal history directly related to ORS 305.287 in construing that statutory provision, nor did it consider the language in ORS 305.287 as a whole." Appellant's Opening Brief, p. 8. There is no support in the record for defendants' conclusory assertion.

Defendants accurately recite the tax court's statement that plaintiff's cases had already "occurred." *Id.* In this instance, the word "occurred" is somewhat ambiguous. It could mean "commenced" or, "concluded," depending on context. However, Judge Breithaupt used "occurred" to indicate that plaintiff's cases had "commenced" for purposes of ORS 305.287. Judge Breithaupt did not mean that plaintiff's cases had "concluded" because: (1) he was referring to plaintiff's cases in the tax court, not as proceedings solely before the Magistrate Division; and (2) plaintiff's cases remained pending in the tax court at that time.

**PLAINTIFF’S ANSWER TO DEFENDANTS’
FIRST ASSIGNMENT OF ERROR**

Defendants incorrectly assert that Judge Breithaupt ruled “ORS 305.287 applies only to ‘appeals’ in the Magistrate Division of the tax court, and not to BOPTA or the Regular Division.” Appellant’s Opening Brief, p. 9. However, the tax court judge expressly limited the issue and his decision to whether ORS 305.287 applied to the proceedings then pending before him, i.e., plaintiff’s tax disputes. In determining this issue, the court concluded that the word “appeals,” as used in the statute, means “appeals” to the Magistrate Division of the tax court. This determination was necessary solely to find whether plaintiff’s cases commenced before or after the effective date of the statute.

The tax court judge did not consider whether ORS 305.287 applies to every case before the Regular Division of the tax court, as asserted by defendants. However, defendants did argue below that plaintiff’s appeals from the Magistrate Division to the Regular Division constituted “new” appeals, ones that commenced after the effective date of the statute. As the tax court judge determined, defendants were mistaken.

A. Preservation of Error.

Except as discussed above, plaintiff accepts defendants’ statement concerning the preservation of error on this assignment.

B. Standard of Review.

Plaintiff accepts defendants' statement concerning the applicable standard of review.

ARGUMENT

A. The Tax Court Judge Correctly Determined that ORS 305.287 Did Not Apply to the Proceedings Before It.

Defendants construct their entire argument on a faulty foundation - that the tax court held ORS 305.287 does not ever apply to cases before the Regular Division of the tax court. Contrary to Defendants' assertion, the record plainly shows the tax court limited the issue and its holding solely to whether ORS 305.287 applied to the four proceedings pending before it. For example:

- “This matter is before the court * * * on the question of whether ORS 305.287 applies to the *proceedings now pending* in this division of the court.” ER 22 (emphasis added).
- “Does ORS 305.287 apply to *this proceeding* in the Regular Division?” ER 24 (emphasis added).
- “Accordingly, ORS 305.287 does not apply to *this proceeding*.” ER 34 (emphasis added).
- “ORS 305.287 does not apply to *this proceeding* in the Regular Division * * * .” ER 39, 41, 43, and 45 (emphasis added).

Defendants’ misunderstanding of the tax court’s holding may have arisen through the court’s statutory construction analysis. More specifically, by the court’s analysis of the manner in which the legislature used the word “appeal” within ORS 305.287. ER 26-32.

“Whenever a party *appeals* the real market value of one or more components of a property tax account, any other party to the appeal may seek a determination from the body or tribunal of the total real market value of the property tax account, the real market value of any or all of the other components of the account, or both.”

ORS 305.287 (emphasis added). The court conducted its analysis, however, solely to determine when plaintiff’s appeals commenced - not to determine whether the statute applied in all proceedings in the Regular Division.

The date on which plaintiff’s tax disputes commenced is critical. If they commenced after the effective date of the statute, ORS 305.287 would apply and defendants could assert it as a counterclaim. This would allow defendants to enlarge the appeals to include both components of property value (land value as well as improvement value). Alternatively, if plaintiff’s tax disputes commenced before the effective date, ORS 305.287 does not apply and the proceedings remain limited to only the value of the improvements.

In beginning his analysis, Judge Breithaupt observed, there are “four occasions when the legislature refers to an ‘appeal’ in connection with a dispute

as to the valuation of property.” ER 27. They are, proceedings before: (1) the Board of Property Tax Appeals (“BOPTA”); (2) the Magistrate Division of the tax court; (3) the Regular Division of the tax court; and (4) the Oregon Supreme Court. Each proceeding is referred to as an appeal by the legislature at some point. If plaintiff’s tax disputes began anew at each of the four stages, defendants could employ ORS 305.287 as a counterclaim because the proceeding before the Regular Division commenced after the statute’s effective date. Thus, defendants argued that the “appeal” as used in the statute applied to each of the four proceedings. For the following reasons, Judge Breithaupt disagreed.

Judge Breithaupt first noted that the word “appeal,” as used in the statute, could not apply to an appeal to BOPTA. Doing so would create irreconcilable conflict with other statutes. For example, ORS 305.287 refers to an appeal by either party and allows for either an increase or decrease in valuation. In sharp contrast, appeals before BOPTA may be taken only by a taxpayer and may only consider reductions in value, not increases (with certain exceptions that do not apply here as noted by the court). ER 27.

ORS 305.287 refers to “appeals” by either party but only taxpayers may petition BOPTA. Only “the owner or an owner of any taxable property or any person who holds a taxable interest in the property * * * may petition the board

of property tax appeal for relief * * * .” ORS 309.100. Plainly, county assessors are not among those allowed to appeal a real property value to BOPTA. Thus, if “appeals,” as used in ORS 305.287, applied to a BOPTA appeal, the two statutes would be in direct conflict because only taxpayers can petition BOPTA for relief.

Similarly, ORS 305.287 provides the right to both increase and decrease property values. In contrast, BOPTA may only reduce property values. BOPTA “shall hear petitions for the *reduction* of * * * [t]he real market value of property as of January 1 * * * .” ORS 309.026(2) (emphasis added). Here again, if “appeals,” as used in ORS 305.287, applied to a BOPTA appeal, ORS 305.287 and ORS 309.026 would be in direct conflict because BOPTA is not permitted to increase real market value.

In sum, applying the word “appeals” in ORS 305.287 to BOPTA appeals would create irreconcilable conflicts with other statutes. Accordingly, the appeal referenced in the statute could not be an appeal to BOPTA.

Similarly, the application of the word “appeal” in ORS 305.287 could not apply to a property tax appeal before the Oregon Supreme Court. That “would cause serious statutory conflict” due to the Supreme Court’s limited scope of review. ER 28.

A property tax dispute before the Supreme Court “extends only to errors of law or absence of substantial evidence to support findings of fact * * *.” *Id.*; ORS 305.445. Thus, a review by the Supreme Court does not allow the enlargement of a property tax dispute to include the valuation of property components not considered below. In other words, the Supreme Court may only consider the value of those property components that were actually at issue before the tax court. This limited review is not consistent with the “appeal” referred to in ORS 305.287 which allows a court to consider the real market value of either or both components of property whether or not that component was considered below.

Therefore, the reference to an “appeal” in ORS 305.287 cannot be to a BOPTA appeal or to an appeal to the Oregon Supreme Court. That means it cannot possibly apply to each of the four occasions involving an appeal of property value as argued by defendants.

The tax court then determined whether the “appeal” referred to in ORS 305.287 applied to one or both of the two remaining steps – an “appeal” to the Magistrate Division or an “appeal” to the Regular Division. ER 29. The court started by observing that “[a]pplying ORS 305.287 at a point no later than an appeal to the Magistrate Division avoids or solves a number of problems.” *Id.*

Such usage creates no conflict with other statutes or procedure because “[t]he mechanisms of the appeal to the Magistrate Division and those of ORS 305.287 do not conflict.” ER 28.

In contrast, applying the word “appeal” to mean an appeal before the Regular Division, does create conflicts. For example, conflicts: (1) with the legislative intent that tax disputes first pass through the Magistrate Division; and (2) with “existing, and unchanged, time frames” within which a party can appeal a property component’s value. ER 29-31.

Following its detailed analysis, the court concluded “that the ‘appeal’ referred to in ORS 305.287 is the appeal of a party to the Magistrate Division of this court.” ER 32. Furthermore, “[i]n this case that appeal had already occurred at the time that ORS 305.287 became effective.” *Id.*

The sole purpose of the court’s analysis of the word “appeal” as used in the statute was to determine whether plaintiff’s tax disputes commenced before or after the effective date of the statute.

“The court therefore concludes that the ‘appeal’ referred to in ORS 305.287 is the appeal of a party to the Magistrate Division of this court. In this case that appeal had already *occurred* at the time that ORS 305.287 became effective.”

ER 32 (emphasis added). Thus, plaintiff’s tax disputes commenced before the statute became effective.

Defendants misinterpret the court's conclusion to mean that ORS 305.287 does not ever apply in the Regular Division. To the contrary, the court analyzed the legislature's use of the word "appeal" solely to determine when plaintiff's tax disputes commenced. By limiting the use of the word "appeal" to mean an appeal before the Magistrate Division, the tax court judge determined when plaintiff's tax disputes commenced for purposes of applying (or not applying) ORS 305.287.

In stating, "that appeal had already *occurred* at the time that ORS 305.287 became effective[,]" the court meant that plaintiff's tax disputes had *commenced* before ORS 305.287 became effective. Because plaintiff's tax disputes commenced before the statute's effective date, the court had to then determine whether the legislature intended the statute to apply retroactively to cases pending on the effective date.

B. The Tax Court Judge Could Have Reached the Same Conclusion on Other Grounds.

The tax court judge could have decided (based on other grounds argued by plaintiff) that: (1) plaintiff's tax disputes commenced before the effective date of ORS 305.287; and (2) the statute does not apply retroactively to plaintiff's tax disputes. That discussion is contained in plaintiff's Motion for

Preliminary Ruling and plaintiff's Reply to Defendant's Motion for Preliminary Ruling. SER 1-19. Plaintiff's alternative argument is summarized as follows:

1. Applicable Law.

Retroactive legislative action is one that affects existing legal rights or obligations arising out of past transactions or occurrences. *Fromme v. Fred Meyer, Inc.*, 306 Or 558, 561-62, 761 P2d 515 (1988). Whether a new law applies retroactively to pending cases is a question of legislative intent. *E.g. Whipple v. Howser*, 291 Or 475, 480, 632 P2d 782 (1981).

However, "[i]t is well settled that legislation is usually construed as prospective and not retrospective." *Hoffart v. Lindquist*, 182 Or 611, 620, 189 P2d 592 (1948). Indeed, "statutes will be construed to operate prospectively *unless* an intent to the contrary clearly appears." *Kempf v. Carpenters and Joiners Union*, 229 Or 337, 341, 367 P2d 436 (1961) (citation omitted) (emphasis added).

The clearest indication of legislative intent that a statute apply retroactively "is a plainly written retroactivity clause." *Newell v. Weston*, 150 Or App 562, 569, 946 P2d 691 (1997), *rev den*, 327 Or 317, 966 P2d 221 (1998). The absence of a retroactivity clause "strongly suggests that the measure was not intended to apply to cases pending upon enactment." *State v. Lanig*, 154 Or App 665, 671, 963 P2d 58 (1998) (citing *Boone v. Wright*, 314

Or 135, 138, 836 P2d 727 (1992)). The legislature knows how to direct the retrospective application of a new law, when it fails to do so in the plain words of the statute, courts should not read such words into the law. *In the Matter of the Marriage of Edwards*, 127 Or App 489, 493, 873 P2d 401 (1994) (citations omitted). In sum, “[courts] will not insert a retroactivity clause where none exists.” *State v. Flowers*, 136 Or App 555, 558, 902 P2d 624 (1995), *rev den*, 324 Or 513, 930 P2d 853 (1997) (citing ORS 174.010).

As a general rule,

“statutes involving procedural changes * * * are to be applied prospectively, *while statutes involving substantive changes* * * * are presumed not to be applied retroactively ‘*unless the language of the statute absolutely requires* such application.’”

Howser, 291 Or at 485, (citation omitted) (emphasis added).

“The basic test for whether a law is ‘substantive’ concerns whether application of it will ‘impair existing rights, create new obligations or impose additional duties with respect to past transactions * * * .’” *Portland General Electric Co., v. Mead*, 235 Or App 673, 682, 234 P3d 1048 (2010) (citation omitted). “‘Remedial’ statutes, by contrast, are those ‘which pertain to or affect a remedy, as distinguished from those which affect or modify a substantive right or duty.’” *Id.* (citation omitted).

2. Discussion.

(a) Plaintiff's Disputes Were Pending on the Effective Date of ORS 305.287.

It is not disputed that plaintiff's tax disputes commenced in the Magistrate Division of the tax court before the effective date of the statute. ER 23. Nor is it disputed that "the Oregon Tax Court is *one court* with two divisions." *Dept. of Rev. v. Froman*, 14 OTR 543, 546 (1999) (emphasis added). It includes both the Magistrate Division and the Regular Division. Although the proceeding in each division is separate, there is only a single matter before the court. "[T]here is one *matter* in [the tax] court, not one *proceeding*." *Allen v. Dept. of Rev.*, 17 OTR 427, 431 (2004). (emphasis in original).

Because plaintiff timely appealed the magistrate's decisions to the Regular Division, the tax court was never divested of jurisdiction. Thus, plaintiff's tax disputes, its "one matter" before the tax court, commenced before the effective date of the statute and remained pending before the court as of that date.¹

(b) ORS 305.287 Extinguished a Substantive Taxpayer Right.

Substantive law is defined as "[t]he part of the law that creates, defines,

¹ Plaintiff believes its tax disputes began, and its legal rights vested, with its petition to BOPTA. However, this court need not decide that issue.

and regulates the rights, duties, and powers of the parties.” Black’s Law Dictionary, 1567 (9th ed. 2009). Stated somewhat differently, substantive law is that “*which may give rise to a cause of action*” in contrast to “the practice and procedure or the legal machinery by which the substantive law is determined or made effective.” Barron’s Law Dictionary, 494 (4th ed. 1996) (emphasis added).

Under longstanding Oregon law, taxpayers were entitled to appeal the value of only one component of real property if they chose to, either the land or the improvements. *Nepom v. Dept. of Rev.*, 272 Or 249, 256, 536 P2d 496 (1975). ORS 305.287 extinguished that right, eliminating a cause of action to limit a property tax appeal to the value of a single component of the property. Under the new law, when one component of real property is appealed the tax court may determine the total real market value of the property, the real market value of any or all of the other components, or both. Thus, ORS 305.287 extinguished a cause of action or “substantive” appeal right.

(c) ORS 305.287 Contains No Retroactivity Clause.

ORS 305.287 is quite brief, comprised of only a single sentence. Neither the statute nor the legislation creating it contains a retroactivity clause.²

² Defendants concede that “ORS 305.287 does not contain an express retroactivity provision[]” and, further, that it “applies only prospectively.” Opening Brief, pp. 32-33.

Therefore, because it affects a substantive right and contains no retroactivity clause, the statute does not apply retroactively. “Unless retroactive construction is mandatory by the terms of the act it should not be applied if such construction will impair * * * [a substantive right] with respect to past transactions.” *Kempf*, 229 Or at 343 (referring to *Denny v. Bean*, 51 Or 180, 93 P 693 (1908)).

(d) The Statutory Language Shows No Intent to Apply the Statute Retroactively.

The starting point to determine legislative intent is the language of the statute. *E.g. Newell*, 150 Or App at 568. ORS 305.287 states:

“Whenever a party appeals the real market value of one or more components of a property tax account, any other party to the appeal may seek a determination from the body or tribunal of the total real market value of the property tax account, the real market value of any or all of the other components of the account, or both.”

Quite obviously, there is no clearly stated intent to apply the statute retroactively. That issue is not mentioned. Indeed, the sole word that suggests a temporal condition is the first word, “whenever.” On its face, “whenever” could be stretched to imply a retroactive intent. However, courts which have considered that issue have come to the opposite conclusion.

In determining not to apply even a procedural or remedial statute retroactively in similar circumstances, the Oregon Supreme Court interpreted

the phrase “*whenever* a judgment is given” to mean “when any judgment is *hereafter* obtained.” *Denny*, 51 Or at 185 (emphasis added). After observing the general rule that remedial statutes may be applied retroactively, the *Denny* court refused to do so in that instance because the word “whenever” showed a legislative intent to apply the statute prospectively only. *Denny*, 51 Or at 185-186.

The tax court has followed *Denny* when considering the legislature’s use of the word “whenever.” See *Clendenin v. Dept of Rev*, 7 OTR 62 (1977). In refusing to apply ORS 321.960 retroactively, the tax court noted that the “same language structure [use of the word “whenever”] is used here as was interpreted in *Denny* * * * .” *Id.* at 73. Thus, “ORS 321.960 cannot be applied retroactively in this instance * * * .” *Id.*

There is a presumption that the same word has the same meaning in related statutory provisions. *E.g. Mid-Century Ins. Co., v. Perkins*, 344 Or 196, 211, 179 P3d 633, *modified on other grounds*, 345 Or 373, 195 P3d 59 (2008). Accordingly, the word “whenever,” as used in ORS 305.287, should be given the same meaning as in *Denny* and *Clendenin*. Thus, if “whenever,” is attributed any temporal meaning in this instance, the implication should be to prohibit retroactive application.

As Judge Breithaupt noted, the 2011 legislature knew how to insert a retroactivity clause when it wanted to. ER 33. He gave the example of ORS 305.286, a related statute enacted at approximately the same time as ORS 305.287 and using similar language. *Id.* The legislature wanted ORS 305.286 to apply retroactively and so it included an express retroactivity provision in the bill creating that statute. *Id.* “The effective date provision for HB 2569 states that the provisions apply ‘to appeals active on or filed on or after the effective date’ of the bill.” *Id.*; HB 2569 § 3 (2011). The legislature had the opportunity to include a similar provision in the bill creating ORS 305.287 but did not do so.

(e) Legislative History Is Silent on the Issue of Retroactivity.

Legislative intent, alone, is insufficient to apply a substantive change in the law retroactively. Regardless, there is no such intent in this case. The legislative history on HB 2572, the precursor to ORS 305.287, is quite brief. There were few submissions. One was from the Oregon State Association of County Assessors, provided by Bob Vroman. He is the Clackamas County Assessor and one of the defendants in this case. If Mr. Vroman had wanted the statute to apply retroactively, he had the opportunity to propose that. He did not. App., 5-6. Neither did anyone else.

In sum, there is nothing in the legislative history which suggests any intention to apply the statute retroactively.³ Therefore, ORS 305.287 does not apply to plaintiff's tax disputes because those cases were pending before the tax court on the effective date of the statute.

ANSWER TO APPELLANT'S SECOND ASSIGNMENT OF ERROR

Defendants first argue that ORS 305.287 applies in the Regular Division of the tax court. As explained above, that issue is not before this court because it was not considered or decided by the tax court judge. Defendants then argue that because plaintiff's appeal to the Regular Division commenced after the effective date of the statute, no retroactivity analysis was required.

As explained above, plaintiff's tax disputes commenced in the tax court when it filed its appeal with the Magistrate Division, well before the effective date of the statute. Because plaintiff's tax disputes commenced before, and remained pending on, the effective date of the statute, the tax court properly conducted a retroactivity analysis.

A. Preservation of Error.

Plaintiff accepts defendants' statement concerning the preservation of error on this assignment.

³ Defendants observe that no one testified in opposition to the bill, but fail to acknowledge that notice of the pending bill was never provided to potential opponents (certainly not to this potential opponent).

B. Standard of Review.

Plaintiff accepts defendants' statement concerning the applicable standard of review.

ARGUMENT**The Tax Court Judge Properly Conducted a Retroactivity Analysis.**

Plaintiff commenced its tax disputes by filing petitions with BOPTA and continued those disputes by timely appealing the BOPTA decisions to the Magistrate Division of the tax court. All of these proceedings commenced prior to 2011, the year in which ORS 305.287 became effective. ER 23. Because the proceedings before BOPTA and the Magistrate Division all commenced before the effective date of ORS 305.287, it is not necessary for this court to decide which proceedings commenced plaintiff's tax disputes. Either way the disputes commenced prior to the statute's effective date. Therefore, because the statute became effective after plaintiff's tax disputes commenced, an analysis was necessary to determine if the statute applied retroactively to plaintiff's disputes.

Defendants don't argue that Judge Breithaupt's retroactivity analysis was in error. They argue that it was unnecessary because he wrongly decided that "ORS 305.287 applies only to appeals in the Magistrate Division, and so does not apply to appeals in the Regular Division." Opening Brief, p. 33. However,

as explained above, Judge Breithaupt did not consider or decide that issue. Instead, he limited the issue and his decision to whether ORS 305.287 applied to the specific proceedings before him.

Judge Breithaupt considered how the word “appeal” was used in the statute solely to determine when plaintiff’s tax disputes commenced. He decided that “appeal,” in this instance, referred to an appeal in the Magistrate Division. He did not determine whether ORS 305.287 applied in every case before the Regular Division, as argued by defendants. Because plaintiff’s “appeals” commenced before the statute became effective, a retroactivity analysis was necessary to determine whether the legislature intended for the statute to apply to tax disputes pending on the statute’s effective date.

RESPONDENT’S ANSWER TO APPELLANT’S THIRD ASSIGNMENT OF ERROR

Defendants argue that the tax court erred in denying the county’s motion for leave to amend its answer and add a counterclaim under ORS 305.287. However, as explained above, plaintiff’s tax disputes were pending in the tax court on the effective date of the statute. Therefore, because the statute does not apply retroactively, it does not apply to plaintiff’s tax disputes.

A. Preservation of Error.

Plaintiff accepts defendants’ statement concerning the preservation of error on this assignment.

B. Standard of Review.

Plaintiff accepts defendants' statement concerning the applicable standard of review.

ARGUMENT**The Tax Court Properly Denied the County's Motion for Leave to Amend.**

Plaintiff's tax disputes commenced long before the effective date of ORS 305.287, either with its petitions to BOPTA or its appeals of the BOPTA decisions to the Magistrate Division of the tax court. Accordingly, ORS 305.287 would have applied only if the legislature meant for it to apply retroactively - and said so in an express retroactivity provision. Defendants concede there is no retroactivity provision and that the statute applies prospectively only. Opening Brief, pp. 33-34. Therefore, ORS 305.287 does not apply in these tax disputes. Because the statute does not apply in these cases, the tax court properly denied the county's motion to amend its answer and add a counterclaim under ORS 305.287.

CONCLUSION

Defendants misread the tax court's decision in order to create a better foundation upon which to construct their argument. However, the primary issue before the tax court was straightforward – when did plaintiff's tax disputes

commence? If they commenced after the effective date of ORS 305.287, the statute applied. If plaintiff's tax disputes commenced before the effective date of the statute, the statute just as clearly did not apply because the legislature did not intend the statute to apply retroactively.

Under Oregon's property tax system, plaintiff's substantive right to challenge the real market value of its real property accrued when it timely petitioned BOPTA. Plaintiff maintained that right by appealing BOPTA's decisions to the Magistrate Division of the tax court. Plaintiff's disputes transferred to the Regular Division of the tax court and remained pending there as of the effective date of the statute. That plaintiff's cases transferred from one division of the tax court to the next does not matter because Oregon's tax court is a single court. It considers only one matter and issues only one judgment. Therefore, transferring plaintiff's cases from the Magistrate Division to the Regular Division did not "re-commence" the cases. They had commenced before the tax court long before ORS 305.287 was enacted.

The parties agree that neither ORS 305.287 nor the legislation creating it contain a retroactivity provision. Because plaintiff's tax disputes commenced before the effective date of ORS 305.287, and because there is no retroactivity provision, the statute does not apply in these cases.

Therefore, plaintiff respectfully requests this court to affirm the judgments of the tax court.

Respectfully submitted this 4th day of September, 2013.

/s/ Donald H. Grim

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 5,099 words. I further 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).

Dated this 4th day of September, 2013.

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CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that I filed the foregoing **RESPONDENT'S BRIEF AND SUPPLEMENTAL EXCERPT OF RECORD** using the eFiling system on:

Appellate Court Administrator
Appellate Court Records Section

I FURTHER CERTIFY that I served the foregoing upon the following counsel of record using the eFiling system on:

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