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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

BARBARA ELLISON, Plaintiff-Respondent, v. DEPARTMENT OF REVENUE, State of Oregon, Defendant-Appellant, and CLACKAMAS COUNTY ASSESSOR Defendant.	Tax Court No. 5177 SC S064092

APPELLANT DEPARTMENT OF REVENUE'S OPENING BRIEF

Appeal from the Judgment of the Oregon Tax Court
Honorable Henry C. Breithaupt, Judge

Continued…

BRUCE H. CAHN #935450
Attorney at Law
JACK L. ORCHARD #721888
Attorney at Law
Ball Janik LLP
One Main Place
101 Southwest Main St., Ste. 1100
Portland, OR 97204-3219
Telephone: (503) 228-2525
Email: jorchard@balljanik.com
Email: bcahn@balljanik.com

Attorneys for Plaintiff-Respondent

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
DENISE G. FJORDBECK #822578
Attorney-in-Charge
Civil/Administrative Appeals
DANIEL PAUL #140309
Assistant Attorney General
Tax and Finance
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email:
denise.fjordbeck@doj.state.or.us
daniel.paul@doj.state.or.us

Attorneys for Defendant-Appellant

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APPELLANT DEPARTMENT OF REVENUE'S OPENING BRIEF

STATEMENT OF THE CASE

Nature of the Proceeding

The question in this appeal is whether the tax court correctly ordered the Department of Revenue to pay more than $160,000 in attorney fees and costs to a taxpayer in a property tax dispute.

The county assessor maintains a tax roll or assessment roll, which is the record of the assessment of all taxable property in the county. *See* ORS 308.210(1). Barbara Ellison challenged the roll value of her property before the tax court. ER 1 (Tax Court File 7). Once she did so, the tax court had jurisdiction to determine the correct valuation based on the evidence before it, regardless of who had appealed. *See* ORS 305.412. Thus, in response to Ellison's appeal, the department asserted that the roll value—far from being too high, as Ellison alleged—was in fact too low. ER 2 (TCF 27). The tax court rejected both parties' arguments and affirmed the original roll value. ER 8–9 (TCF 238-240).

Ellison sought attorney fees and costs, including appraisal fees, from the department under ORS 305.490(4), a statute that allows fees when the tax court

"finds in favor of the taxpayer."[1] TCF 262 *et seq.* The department objected, contending that the court had not found in Ellison's favor because it affirmed the original roll value and, in any event, that fees were not warranted. TCF 367 *et seq.*

The tax court granted the motion for attorney fees in full. It held that it had found in Ellison's favor on the department's contention that the roll value was too low. It also found that fees were warranted because the department's position was objectively unreasonable. ER 11-14. It issued a supplemental judgment awarding Ellison attorney fees and costs in the sum of $166,783.69. ER 15-16.

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[1] That section provides:

> If, in any proceeding before the tax court judge involving ad valorem property taxation, exemptions, special assessments or omitted property, the court finds in favor of the taxpayer, the court may allow the taxpayer, in addition to costs and disbursements, the following:
>
> (A) Reasonable attorney fees for the proceeding under this subsection and for the prior proceeding in the matter, if any, before the magistrate; and
>
> (B) Reasonable expenses as determined by the court. Expenses include fees of experts incurred by the individual taxpayer in preparing for and conducting the proceeding before the tax court judge and the prior proceeding in the matter, if any, before the magistrate.

Nature of the Order Sought to Be Reviewed

The department seeks review of a supplemental judgment awarding attorney fees and costs.

Statutory Basis of Appellate Jurisdiction

This court has jurisdiction pursuant to ORS 305.445.

Jurisdictional Dates

The supplemental judgment was entered on April 27, 2016. Notice of appeal was timely filed on May 24, 2016.

Nature and Jurisdictional Basis of Tax Court Jurisdiction

The tax court had jurisdiction pursuant to ORS 305.275 and ORS 305.410(1).

Questions Presented on Appeal

1. The tax court may not award attorney fees to a taxpayer unless "the court finds in favor of the taxpayer." ORS 305.490(4)(a). Where the tax court—in an appeal filed by the taxpayer—rejects both sides' arguments about the valuation and affirms the original roll value, resulting in no reduction in assessment or taxes due, has the tax court found "in favor of the taxpayer?"

2. If the tax court had authority to award attorney fees, did it nonetheless err in finding that fees were warranted here on the ground that the department's position was objectively unreasonable?

3. If fees were warranted, did the tax court abuse its discretion in determining that 75 percent of the taxpayer's fees were attributable to addressing the department's argument?

Summary of Argument

The tax court erred in awarding attorney fees. ORS 305.490(4)(a) allows the tax court discretion to award attorney fees and costs, including expert expenses, if "the court finds in favor of the taxpayer." When the taxpayer files the appeal with the tax court, the court does not find "in favor of the taxpayer" unless it reduces her property tax assessment. The text, context, and legislative history of that provision, as well as this court's interpretation of nearly identical language in the Oregon Administrative Procedures Act, support this requirement. Although the tax court here rejected the department's argument that the roll value was too low, it also rejected Ellison's arguments that the value was too high. Because Ellison did not obtain any reduction in her assessment here, she was not entitled to attorney fees.

Although the tax court found in Ellison's favor on the department's arguments, the tax court erred in finding that the department's position was objectively unreasonable, particularly in light of the tax court's conclusion on the merits that both sides had failed to meet their burden of proving that a change in the valuation of the property was warranted. The department may have been wrong, but it was not unreasonable to pursue a theory—also pursued

by Ellison—that a "real market value" for a high-end horse farm could not be established from comparable sales and that other methods of valuation should be applied.

Finally, the tax court erred in awarding the full amount of fees sought, including appraisal fees spent in pursuing Ellison's unsuccessful appeal of the roll value established by the county's Board of Property Tax Appeals (BoPTA). There is no evidentiary support for the tax court's conclusion that 75% of Ellison's attorney and appraiser fees were attributable to opposition to the department's position.

The supplemental judgment should be reversed or, in the alternative, vacated and remanded with instructions to enter a judgment conforming to directions given by this court.

Summary of Material Facts

1. Description of the Property and the Dispute

Ellison owns a high-end horse breeding and training facility and associated residence in Clackamas County. ER 4 (TCF 235). Ellison disagreed with the real market value and maximum assessed value placed on the property by the county assessor and affirmed by BoPTA. Ellison filed an appeal to the Magistrate Division of the Tax Court, which affirmed the BoPTA value, $8,945,409. TCF 18.

2. The Tax Court Decision on the Merits

Ellison filed a complaint in the regular division of the tax court, asking the court to review the value of two of the seven accounts presented in the previous appeal. ER 1 (TCF 7). Ellison alleged that the real market value of those two accounts was $4,839,550. *Id.* The department filed an answer, alleging in its prayer for relief that "the real market value under ORS 308.205 of account 00816941 is no less than $14,851,577 and that the real market value under ORS 308.205 of account 00817012 is no less than $5,099,652," for a total of $19,951,229.[2] ER 2-3 (TCF 27-28). ORS 305.412 allows any party to a tax

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[2] ORS 308.205 provides:

> (1) Real market value of all property, real and personal, means the amount in cash that could reasonably be expected to be paid by an informed buyer to an informed seller, each acting without compulsion in an arm's-length transaction occurring as of the assessment date for the tax year.
>
> (2) Real market value in all cases shall be determined by methods and procedures in accordance with rules adopted by the Department of Revenue and in accordance with the following:
>
> (a) The amount a typical seller would accept or the amount a typical buyer would offer that could reasonably be expected by a seller of property.
>
> (b) An amount in cash shall be considered the equivalent of a financing method that is typical for a property.
>
> (c) If the property has no immediate market value, its real market value is the amount of money that would justly compensate the owner for loss of the property.

Footnote continued…

court proceeding to ask the court to establish the real market value of the property.[3]

In the regular division, the parties agreed and the tax court found that the real market value of the property could not be determined through sales of comparable properties, and that a cost approach was most appropriate.[4] ER 6 (TCF 237). The department took the position that the most appropriate method of assessment was the amount that would compensate Ellison for the loss of the

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(…continued)

> (d) If the property is subject to governmental restriction as to use on the assessment date under applicable law or regulation, real market value shall not be based upon sales that reflect for the property a value that the property would have if the use of the property were not subject to the restriction unless adjustments in value are made reflecting the effect of the restrictions

[3] That statute provides:

> When the determination of real market value or the correct valuation of any property subject to special assessment is an issue before the tax court, the court has jurisdiction to determine the real market value or correct valuation on the basis of the evidence before the court, without regard to the values pleaded by the parties.

[4] According to the department's Appraisal Methods Manual, there are three approaches to valuation: the cost approach, the sales comparison (market) approach, and the income approach. *Id.* at 6-1. The cost approach is "the most reliable approach for valuing unique properties." *Id.* at 6-3. The cost approach is based on the value of the bare land, plus the replacement or reproduction cost of any structures or improvements, less depreciation. *Id.* The manual can be found at http://www.oregon.gov/DOR/forms/FormsPubs/appraisal-methods_303-415.pdf (last visited August 26, 2016).

property. *Id.* Since the property was newly built for the purpose for which it is being used, the department argued that the real market value was the actual cost of construction. *Id.*

In contrast, Ellison's appraiser determined the real market value of the property by using the cost approach with a deduction for physical depreciation and a significant reduction of 50% for economic obsolescence. ER 7-8 (TCF 238-239).

The tax court was not persuaded by either appraisal. ER 8 (TCF 239). Ellison's appraiser used a starting cost of approximately $14 million; actual construction costs exceeded $18 million. ER 7 (TCF 238). The appraiser did not give a persuasive explanation for the discrepancy in these figures. As to depreciation, the properties were essentially new and the appraiser's assertion that they experienced an immediate reduction in value with use was at odds with other aspects of the methodology used. *Id.* And as to economic obsolescence, Ellison's appraiser relied on work done by appraisers of horse properties in other parts of the country, but their analysis was not accompanied by narrative explanations to support the conclusions that were drawn. The Tax Court declined to accept the appraiser's opinion of economic obsolescence without such a narrative. ER 8 (TCF 239). Accordingly, the tax court rejected her appraisal and found that Ellison had not met her burden of proving the BoPTA value was wrong. *Id.*

The court also rejected the higher valuation asserted by the department based on the work of the county's appraiser. It found that the appraiser failed to recognize a distinction between "value in use" and market value, although the court did not explain the significance of this distinction. ER 9 (TCF 240).

The tax court ultimately concluded that this was "not a case where the court is able to rely on the conclusions of either appraiser as to some components of the analysis," *id.*, and it therefore was "not in a position to reach a conclusion of value for the property at some point between the values asserted by the parties." *Id*. The court therefore affirmed BoPTA's valuation. ER 10 (TCF 241).

3. The Award of Attorney Fees and Costs

Ellison filed a petition for attorney fees pursuant to ORS 305.490(4), seeking 75% of the attorney fees and the appraisal expenses that she incurred. TCF 265 *et seq.* The department objected both to an award of fees at all and to the amount Ellison sought. TCF 367 *et seq.*

The Tax Court concluded that fees and costs were warranted because it found "in favor of" the taxpayer on the department's appraisal, and because the department's position was objectively unreasonable in relying on the cost of the relatively recent improvements on the property. ER 11-12 (TCF 392-393). The court also found that the department's position could have chilled settlement discussions. ER 12 (TCF 393). The court awarded the entire amount of fees

and costs sought, $166,783.69, ER 14 (TCF 395) and entered a judgment against the department accordingly. ER 15-16 (TCF 401-402).

ASSIGNMENT OF ERROR

The Tax Court erred in entering awarding attorney fees and costs to Ellison in the amount of $166,783.69.

Preservation of Error

The department preserved its claim of error. Ellison sought attorney fees and costs under ORS 305.490(4), which allows a discretionary award of fees in a property tax case if the court finds "in favor of the taxpayer." The department opposed the petition, arguing both that ORS 305.490(4) was inapplicable because Ellison did not succeed in reducing her tax liability and because the circumstances of the case did not warrant a discretionary award of fees against the department. TCF 371-376. The department also argued that the amounts sought were not reasonable because the tax court rejected the analysis and testimony of Ellison's appraiser. TCF 376-377.

Standard of Review

This court reviews the tax court's legal conclusions for errors of law and its factual findings for substantial evidence. ORS 305.445. This court reviews the amount of costs and fees awarded for abuse of discretion. *See* ORS 20.075; *Clackamas Cty. Assessor v. Village at Main Street*, 352 Or 144, 151, 282 P3d 814 (2012).

ARGUMENT

Ellison cannot recover attorney fees under ORS 305.490(4), because the tax court did not find in her favor. And even if that statute did not bar her request, a consideration of the factors contained in ORS 20.175 does not support an award of attorney fees and litigation costs. Finally, the amount awarded is unreasonable, given that the tax court placed no reliance on Ellison's appraiser.

A. ORS 305.490(4) does not authorize an award of attorney fees and costs when a taxpayer appeals to the Tax Court but obtains no reduction in tax assessment.

The first issue in this case is a question of pure statutory interpretation: whether ORS 305.490(4) authorizes the tax court to award attorney fees to a taxpayer when, on the taxpayer's appeal, the court rejects both parties' evidence of valuation and affirms the original roll value of the property. If this court agrees with the department that the answer is no, the tax court's award of fees must be reversed, and the court need not address any other issue presented on appeal.

In interpreting the statute, this court is guided by the interpretive principles of *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), and *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). The court seeks to determine the meaning of the statute that the legislature most likely intended by examining the text in context, any relevant legislative

history, and, if necessary, pertinent canons of construction. *Gaines*, 346 Or at 171-72.

1. The text and context of the statute support the conclusion that fees may be awarded only if the taxpayer obtains a reduction.

ORS 305.490(4) provides:

> (4)(a) *If*, in any proceeding before the tax court judge involving ad valorem property taxation, exemptions, special assessments or omitted property, *the court finds in favor of the taxpayer*, the court may allow the taxpayer, in addition to costs and disbursements, the following:
>
> (A) Reasonable attorney fees for the proceeding under this subsection and for the prior proceeding in the matter, if any, before the magistrate; and
>
> (B) Reasonable expenses as determined by the court. Expenses include fees of experts incurred by the individual taxpayer in preparing for and conducting the proceeding before the tax court judge and the prior proceeding in the matter, if any, before the magistrate.

(Emphasis added.)

The phrase "in favor of the taxpayer" requires, in the context of an appeal brought by the taxpayer, that the taxpayer obtain a material benefit as compared to her position before the appeal was filed. *Webster's Third New International Dictionary* 803 (unabridged edition 1993) defines "in favor of" as

> 1: to the special advantage or benefit of * * * as a: in accord or sympathy with; on the side of * * *. b: for the acquittal of * * *; in support of.

Thus, the tax court finds in favor of the taxpayer when it confers some special advantage or benefit on the taxpayer that the taxpayer would not have had without the appeal. When, as here, the taxpayer filed an appeal challenging the roll value of property, the tax court finds in favor of the taxpayer only if—at a minimum—it reduces the roll value.

The context of ORS 305.490(4) confirms this interpretation. The provisions authorizing an appeal to the tax court strongly suggest that a taxpayer must achieve a reduction in her taxes before the court may consider an award of fees and litigation costs. In an *ad valorem* property tax case, there is but a single claim: the determination of value. ORS 305.412 provides:

> When the determination of real market value or the correct valuation of any property subject to special assessment is an issue before the tax court, the court has jurisdiction to determine the real market value or correct valuation on the basis of the evidence before the court, without regard to the values pleaded by the parties.

Thus, the appellant in such a case asserts a value, as Ellison did here, and the department asserts a counter-value. The sole "claim" before the court is a request to determine the actual value of the property. Viewed in that context, the tax court finds in favor of the taxpayer in a property tax case if it determines that the value of the property under assessment, as determined by the county assessor, is too high.

That interpretation is also consistent with how this court construed similar language in the Administrative Procedures Act that allows a court to award attorney fees "if the court finds in favor of petitioner." ORS 183.497(1). In *Kaib's Roving R.Ph. Agency, Inc. v. Employment Dept.*, 338 Or 433, 111 P3d 739 (2005), this court suggested that "in favor of" meant that the decision had to be "of present benefit to petitioner." *Id.* at 442 n 4. In that case, a decision vacating an administrative order and remanding for a new hearing before an impartial administrative law judge was a decision in favor of the petitioner even though it address only procedural matters rather than the ultimate merits. *Id.* at 442-43. But the standard this court appeared to be applying there is the same as the one the department advocates here: the decision left the petitioner better off than it would have been if it had not filed for judicial review. So too here: A decision in a taxpayer's appeal is in favor if a taxpayer if it leaves the taxpayer better off than she would have been if she had not appealed—in other words, if it reduces the assessed roll value or the taxes due.

2. The legislative history supports the conclusion that a taxpayer must obtain a reduction in the tax assessment before fees may be awarded.

a. The 2001 Legislature intended to authorize fees and costs only for a "prevailing party."

The legislative history of ORS 305.490(4) makes it clear that the statute was intended to authorize a discretionary award of attorney fees only where a

taxpayer (1) wins a Tax Court appeal brought by the department or (2) is the "prevailing party" in an appeal brought by the taxpayer, which would require that the taxpayer obtained a judgment in her favor that awarded her affirmative relief.

The statute codified as ORS 305.490(4) was adopted by the legislature in 2001. *See* 2001 Or Laws Chapter 287, §1. The bill that became chapter 287, SB 130, was introduced at the request of Representative Kevin Mannix. App 1. As he explained to the Senate Committee on the Judiciary on March 7, 2001, the bill was intended to apply when the Department of Revenue appealed a decision in a property tax case and lost to a private party. App 8, 10. In such a case, the tax court would have discretion to award attorney fees. *Id.*

Committee counsel clarified that the language of the bill was broader than that, and would give the tax court discretion to award fees when "the judgment" is in favor of the taxpayer. App 9. The legislative history is also replete with descriptions of this provision as allowing fees to a "prevailing" taxpayer. *See, e.g.,* App 5 (Senate staff measure summary); 21 (House staff summary); 11 (testimony from representative of the Tax Section of the Oregon State Bar); 22 (legislative counsel); 22-23 (private attorney David Canary).

"Prevailing party" is a term of art that, in 2001, had a recognized meaning: a party who obtained a final judgment in its favor that embodied at least some relief on the merits of the party's claims. *See Hanrahan v. Hampton,*

446 US 754, 757 (1980) (attorney fees were available "only to a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal"); *U. S. Nat'l Bank v. Smith*, 292 Or 123, 128, 637 P2d 139 (1981) (the prevailing party is the one in whose favor final judgment was entered). In 2001, the same year it adopted the statute at issue in this case, the legislature adopted ORS 20.077, which provides that "the prevailing party is the party who receives a favorable judgment * * * on the claim," while a prevailing party on appeal remains "a party who obtains a substantial modification of the judgment." ORS 20.077(3).

The legislative history of ORS 305.490 that equates "in favor of" with "prevailing" suggests that the legislature intended to allow fees in a taxpayer's appeal only when the taxpayer obtained a judgment in her favor that embodied some form of affirmative relief. Thus, the legislature must have meant to authorize a discretionary award of attorney fees only when the tax court determined that the property's roll value was too high.

3. Because the tax court did not find in Ellison's favor, fees and costs may not be awarded.

In this case, Ellison—not the department—appealed the valuation issue to the tax court. Thus, the tax court would have found in her favor only if it had entered a judgment reducing the valuation from the original roll value or the value determined by BoPTA. It did not do so. Rather, it found that neither

party's appraisers provided convincing support for their valuation of the property, and it therefore affirmed the original roll value. Although the department did not succeed in having the original value increased, this did not mean that the court found in Ellison's favor, because the department had not filed the appeal. Because the tax court did not find in Ellison's favor, it erred as a matter of law in awarding attorney fees and litigation costs.

B. Even if the tax court had authority to award fees, it abused its discretion in doing so because the department's position was objectively reasonable.

Even if the tax court found "in favor of" Ellison for purposes of ORS 305.490(4)(a), it abused its discretion by awarding attorney fees because the department's position was objectively reasonable and no other factors support an award of attorney fees.

ORS 20.075 sets forth a list of factors that a court is to consider in any case in which there is discretion to award attorney fees, as well as a "catch-all" factor that allows consideration of any appropriate factors presented by the case. "In deciding whether to exercise its discretion to award attorney fees, the court must consider the factors listed in ORS 20.075(1); that statute is mandatory." *Clackamas County Assessor v. Village at Main Street Phase II, LLC*, 352 Or 144, 151, 282 P3d 814 (2012) (citing *Preble v. Dept. of Rev.*, 331 Or 599, 602, 19 P3d 335 (2001)). "The factors listed in ORS 20.075(1) include the parties' prelitigation conduct, the objective reasonableness of the parties'

claims and defenses, the extent to which a fee award would deter others from asserting good faith claims and defenses, and the extent to which a fee award would deter others from asserting meritless claims and defenses." *Necanicum Inv. Co. v. Employment Dep't*, 345 Or 518, 523, 200 P3d 129, 131 (2008).

Although the tax court did not cite specifically to any subsection of ORS 20.075, it appears from the award of attorney fees that the court considered primarily the objective reasonableness of the department's position and, secondarily, several other factors under ORS 20.075(1). But none of these factors support an award of attorney fees in this case.

1. The department's position was objectively reasonable.

The tax court appears to have based its award of attorney fees primarily on its finding that the department's position was objectively unreasonable because it relied on the notion that the property was "especial." ER 13 (TCF 394). "Especial property" is property specially designed for a specific use that is beneficial to only one particular owner. OAR 150-308.205-(A)(3). Because no general market for this property exists, the property has no immediate market value. *Id.* Thus, by statute, the property's real market value is "the amount of money that would justly compensate the owner for loss of the property." ORS 308.205(2)(c). The rule requires estimating the loss to the owner of the property through the use of "either the cost or income approaches, whichever is applicable, or a combination of both," when the property's

"usefulness is designed without concern for marketability." OAR 150-308.205-(A)(3).

The department reasonably relied on this statute and rule in arguing about the value of Ellison's horse-breeding facility. All parties to the tax court proceedings recognized that the property's real market value could not be determined using conventional means. Ellison's appraiser used the cost approach to value the property, as did the county and department appraiser. Ex A pp 88-89. That approach is endorsed by appraisal literature and the Oregon courts as an appropriate method for determining real market value especially where, as here, the property is newly constructed. *Freedom Federal v. Dept. of Rev.*, 310 Or 723, 801 P2d 809 (1990); *Magno v. Department of Rev.*, 19 OTR, 51 (2006), citing *The Appraisal of Real Estate* (12th ed 2001) ("The cost approach 'is particularly useful in valuing new or nearly new improvements.'"); *see also STC Submarine, Inc. v. Dept. of Rev.*, 13 OTR 14, 23 (1994), *aff'd* 320 Or 589, 890 P2d 1370 (1995) ("[I]f the building is a specially designed building and there is no market or income by which to determine its real market value, on a taking by the government, the owner will probably be compensated the cost of $1,000,000. This is not because the building is without flaws, but because cost is the only way the owner's loss can be measured.").

When it addressed the merits of the underlying appeal, the tax court noted but did not resolve the question whether the department's especial-property rule or the statute on which it is based were valid:

> In this case, neither taxpayer nor Defendants assert that the comparable sales indicator of value should be relied upon to determine RMV. Neither does either party rely on the income indicator of value. That being the case, all parties rely on the cost indicator. It follows that *this case presents no occasion to analyze further the question presented by the court* [as to the constitutionality of the statute and rule]. This case can be resolved based on the strength of the case made by the two appraisers.

Ellison v. Clackamas County Assessor, 22 OTR 201, 203-204 (2015). (Emphasis added.)

Nonetheless, in its order awarding attorney fees, the tax court relied almost entirely on its belief that the regulation is invalid:

> The theory of the county and department was that this property was 'especial property.' The court is of the opinion that the department rule in this regard, to the extent it departs from the constitutional definition of real market value, is invalid. * * *
>
> The law in Oregon is that value is to be value in exchange, not value in use or value to a particular taxpayer. The position of the county departed completely from this fundamental starting point. Attempting to use the notion of especial property, which the appraiser for the county could not explain or justify, that appraiser essentially argued that the value of the property must be equal to the amount taxpayer spent to build it. * * *.
>
> The court finds that the position of the county and the department in this matter was objectively unreasonable. Further, the persistence with which the position was advanced left taxpayer with no alternative but to expend significant amounts to defend

> against the position taken by Defendants in the case. Persistence may not be bad faith or malicious, but it is willful.

ER 13 (TCF 394).

This approach was incorrect. Because the court saw no need to decide the validity question when it ruled on the merits, it was inappropriate for the court to address that question for the first time in the context of attorney fees. *See Dept. of Rev. v. River's Edge Investments, LLC*, 359 Or 822, 844-45, __ P3d __ (2016) (attorney fee award may not be based on an issue that was unnecessary to the court's decision on the merits).

This case concerned valuation of a property that is rare for Oregon—a high-end horse farm. Appraisers for both sides agreed that comparable sales data was unavailable and relied on the same alternative approach, the cost approach, in evaluating the real market value of the property. The difference between the two appraisals was not the result of disagreement about whether the especial-property rule applied. Rather, the two appraisers started from a different cost basis and different treatment of depreciation and obsolescence.

Both appraisers relied solely upon the cost approach. The county's cost approach returned a value for the improvements of $18,275,412. Ellison's cost approach asserted a value of $14,214,814 for the improvements before deductions for physical depreciation and economic obsolescence, even though

the actual costs were as determined by the county. The tax court criticized Ellison's cost approach in its opinion on the merits, stating:

> Defendants challenged the conclusion of taxpayer's appraiser as to his starting cost number, noting that it was approximately $4 million less than actual construction costs and also approximately the same amount below his calculation of cost using the Marshall & Swift cost factors. *The appraiser did not give a persuasive explanation of these differences.*
>
> * * * * *
>
> As to physical depreciation, taxpayer's appraiser took not insignificant subtractions from initial cost even though the properties in question were essentially new. The explanation given by the appraiser was that these properties, like new cars, experience immediate depreciation once any use occurs. That explanation seems at odds with the age life method the appraiser purportedly used. *Again the approach of the appraiser is not persuasive.*

Ellison, 22 OTR at 204-205 (emphases added.)

Ellison's appraiser also made an additional downward adjustment in the amount of $5,991,957 to account for economic obsolescence. The tax court again criticized Ellison's appraisal:

> However, the court can give no more than limited weight to the evidence presented by taxpayer on this point in determining what specific amount of economic obsolescence was experienced by the property in question. It rests on the work of persons who gave no persuasive written discussions of their work and the conclusions that followed and were not available to be tested by cross-examination. *In addition, other than accepting the appraiser's judgment alone, there appeared to be little reason for arriving at the ultimate obsolescence level ultimately chosen.*

Id. at 205 (emphasis added.)

The county's appraisal did not make similar adjustments for physical deterioration or economic obsolescence. The county's appraiser testified that, in developing the cost approach, it made no difference whether the property was "especial" or not. Tr 805. He did not deduct for depreciation because he saw none when he inspected the property; the improvements were "essentially new." Tr 589-590. And because there were no similar properties to compare, he made no deduction for economic obsolescence. Tr 806. As a result, the cost approach yielded a value that was equal to the cost of the property and the improvements newly placed on it. Tr 723.

Thus, the department's position on the especial property statute and rule was not the reason for the value difference between the parties. The tax court's conclusion that the department's "persistent" reliance on the especial-property rule "left taxpayer with no alternative but to expend significant amounts to defend against the position taken by Defendants in the case" lacks any foundation in the evidence presented or in the court's own resolution of the case. ER 13 (TCF 394)..

While the trial court was not persuaded that the methodology used by either appraiser was sufficiently developed and explained, the department's position was a logical approach to a new, purpose-built facility. Under these circumstances, it is inappropriate to penalize the department with imposition of attorney fees and litigation expenses.

2. The tax court abused its discretion in awarding attorney fees based on pre-litigation or "willful" conduct.

ORS 20.075(1)(a) provides that in determining whether to award attorney fees, a court shall consider, "the conduct of the parties in the transactions or occurrences that gave rise to the litigation, including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal." Although not clear from its order, the tax court appears to have applied this factor because it described the position taken by the department that the property was especial property as "willful." ER-[page 3 of order] (emphasis added).

But ORS 20.075(1)(a) addresses the conduct of the parties *that gave rise to the litigation*, which is not at issue here. *See Necanicum Inv. Co.*, 345 Or at 523 ("The factors listed in ORS 20.075(1) include the parties' prelitigation conduct * * *."); *Barbara Parmenter Living Trust v. Lemon*, 345 Or 334, 345, 194 P3d 796, 802 (2008) ("[ORS 20.075(1)(a)] focuses on the nature of the conduct that gave rise to the litigation."). The only action that gave rise to the litigation was the county's original tax assessment and BoPTA's subsequent decision sustaining the real market value for the property determined by the assessor. The tax court did not address those actions, but instead focused solely on the department's arguments in litigation in the Regular Division of the court as to the value of the property. Those arguments may be considered for objective reasonableness under ORS 20.075(1)(b), but not for bad faith,

maliciousness, or willfulness under ORS 20.075(1)(a). Ellison also made no assertions in her Statement for Attorney Fees regarding the actions that gave rise to the litigation. Because Ellison did not assert that any of the prelitigation actions were reckless, willful, malicious, in bad faith or illegal, and because no evidence supports such an assertion, the tax court inappropriately relied on ORS 20.075(1)(a) to award attorney fees.

Moreover, even if the county had taken the position it adopted before litigation, the defendants' reliance on a statute, ORS 308.205(2)(c), and the department's rule adopted under the authority of that statute, is not "willful." In context, "willful" means something more than asserting a statutorily-supported position with which the court ultimately disagreed. Each other word used in the statutory phrase ("reckless, willful, malicious, in bad faith or illegal") suggests misconduct. "Willful" thus must also have been intended to mean something more than mere incorrectness or negligence. Indeed, this court has contrasted negligence and willfulness. *In re Albrecht*, 333 Or 520, 551, 42 P3d 887 (2002). The department may not have succeeded in persuading the court that its view was correct, but it was not "willful" in doing so. The tax court's finding that the department's actions were "willful" is erroneous and does not support an award of attorney fees.

3. An attorney fee award in this case will not deter meritless claims and defenses.

The tax court appears to also rely on ORS 20.075(1)(d), which provides that in determining whether to award attorney fees a court shall consider "[t]he extent to which an award of an attorney fee in the case would deter others from asserting meritless claims and defenses." The tax court stated in its award of attorney fees that "[a]n award of fees and expenses in this matter is needed to deter the type of claims made by Defendants and then so inadequately supported." ER 13 (TCF 394).

As explained above, the department's positions at trial were objectively reasonable; they were not meritless and there is no reason to deter them in future cases. Further, because the tax court did not rule on the validity of the especial property statute or the department's rule in its decision on the merits, an attorney fee award will not deter parties from relying on them in future cases.

In any event, the valuation dispute between the parties would have existed regardless of the validity of the department's rule. The parties did not agree on the cost of the property as new; as to whether depreciation was an issue as to an essentially newly built property; and whether or not an economic obsolescence adjustment was appropriate. If the trial were held again, both parties would, consistent with valuation principles, rely on the cost approach to

valuation again, and would be again separated by the same appraisal issues. An attorney fee award would make no difference in this regard.

An attorney fee award in this case will not change the conduct of the parties in future cases. The department and the county are obligated by law to determine the real market value for property subject to assessment. ORS 308.205. Where there is no immediate market for a property, the property must be valued using either the cost or income approach, or a combination of the two approaches, as described in OAR 150-308.205-(A)(3). The only difference will be that parties may be hesitant to cite the rule or use the words "especial property" for fear of being characterized as "unreasonable" and having attorney fees awarded against them. There will be no substantive difference in the claims and defenses asserted, so there is no basis under ORS 20.075(1)(d) to award fees. If anything, an attorney fee award here will discourage good faith arguments regarding the valuation of property.

4. There is no evidence in the record relating to settlement.

The tax court found that "but for the massive counterclaim by Defendants, it is much more likely than not that a settlement on a value between taxpayer's position and the BOPTA finding would have been achieved."[5] ER

[5] As noted above, the department did not file a counterclaim, but included in its prayer for relief the sum it contended the court should adopt.

12 (TCF 393). This appears to be a conclusion under the factor in ORS 20.075(1)(f), which considers the "objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute."

But there is no evidence in the record supporting the tax court's speculation about these matters. The tax court acknowledged that "[w]hether a settlement somewhere above taxpayer's position was possible *cannot be determined*." ER 12 (TCF 393) Without evidence to support its conclusion that the department's assertions prevented a settlement, the tax court abused its discretion in awarding attorney fees based on ORS 20.075(1)(f).

C. The amount of attorney fees and litigation costs awarded is excessive in view of Ellison's limited success.

Even if attorney fees were warranted, the tax court erred in awarding the full amount of the fees and costs requested by Ellison. Ellison sought more than $120,000, which represented 75 percent of the attorney fees she incurred in challenging the original roll value of the property. Ellison offered no objective criteria used to arrive at the conclusion that 75 percent of her counsel's time was spent on defending against the department's valuation in the regular division rather than in support of Ellison's main claim that the roll value was too high. Further, the entries in Ellison's statement include substantial time spent post-trial concerning the issue of exception maximum assessed value. It was an abuse of discretion to award those attorney fees.

A review of the time records submitted with the request for attorney fees suggests that the 75-percent estimate is excessive. Entries that make some reference to the county appraisal, especial property, the Healy testimony, and related issues account for a total of 75.4 hours of attorney time, often in conjunction with several other issues.[6] The total units billed (including a small amount of paralegal time) totaled 479.86 hours. TCF 263. The percentage of fees attributable to opposing the department's position therefore appears to have been no more than 15 percent according to their own time records. An award of five times that amount was an abuse of discretion.

The award of attorney fees was predicated on the tax court's conclusion that Ellison prevailed on the claim made by the department for a much higher real market value. But under ORS 305.412, the tax court was required to determine the correct valuation based on the evidence before it regardless of what the department pleaded in its answer. And had Ellison not filed an appeal, first from BoPTA and then from the Magistrate Division, she would have

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[6] Entries indicating time spent to counter the county/department appraisal include entries for these dates: 1/13/14; 1/16/14' 1/17/14; 1/21/14; 1/22/14; 1/23/14; 1/31/14; 2/11/14; 2/17/14; 2/18/14; 2/20/14; 2/21/14; 2/23/14; 2/25/142/28/14; 3/2/14; 3/4/14; 3/11/14; 3/14/14; 3/17/14; 3/18/14; 3/20/14; 3/28/14; 4/9/14; 4/10/14; 5/13/14; 5/23/14; 9/2/14; 9/8/14; 9/23/14; 9/24/14; 9/25/14; 9/30/14; 10/2/14; 10/8/14; 10/14/14; 10/15/14; 10/16/14; 10/17/14; 10/20/14; 6/3/15; 6/26/15; 6/29/15; and 6/30/15. TCF 265-279 (timekeeping records).

incurred no fees at all. The attorney fees incurred by Ellison all stem from her original claim of a reduced value for the subject property.

The tax court also awarded 75 per cent of the fees of Ellison's appraiser, a total of $43,741.70, or 75 percent of the total of $58,322.26. TCF 292 (itemized costs, including appraisal fees). The tax court found that all aspects of the appraiser's opinion, from the starting cost, to the depreciation figure, to the amount used for obsolescence, to be inadequately explained, unsupported, and unpersuasive. ER 7-9. It was an abuse of discretion to award any part of the appraiser's fees.

Assuming that Ellison is entitled to an award of attorney fees in any amount, it was an abuse of discretion to award $122,468.15. The supplemental judgment should be vacated and this matter remanded to the tax court to enter an amended judgment omitting any part of the appraisal fees and awarding a reasonable amount of attorney fees and costs not to exceed the amount supported by the time records, or approximately $25,000.

CONCLUSION

This court should reverse the supplemental judgment awarding attorney fees and expenses, both because the tax court did not find in Ellison's favor and because the department's position was objectively reasonable. In the alternative, the court should vacate the supplemental judgment and remand this

matter to the tax court for the entry of a smaller supplemental judgment consistent with the directions of this court.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
BENJAMIN GUTMAN
Solicitor General

/s/ Denise G. Fjordbeck
DENISE G. FJORDBECK #822578
Attorney-in-Charge
Civil/Administrative Appeals
denise.fjordbeck@doj.state.or.us

/s/ Daniel Paul
DANIEL PAUL #140309
Assistant Attorney General
Tax and Finance
daniel.paul@doj.state.or.us

Attorneys for Defendant-Appellant
Department of Revenue

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on August 30, 2016, I directed the original Appellant Department of Revenue's Opening Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and upon Bruce H. Cahn, attorney for respondent, by using the electronic filing system.

I further certify that on August 30, 2016 I directed the Appellant Department of Revenue's Opening Brief to be served upon Jack L. Orchard, Jr., attorney for respondent, by mailing two copies, with postage prepaid, in an envelope addressed to:

Jack L. Orchard, Jr.
Ball Janik LLP
One Main Place
101 Southwest Main Street, Suite 1100
Portland, OR 97204-3219

Continued…

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 7,242 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(2)(b).

/s/ Denise G. Fjordbeck

DENISE G. FJORDBECK #822578
Attorney-in-Charge
Civil/Administrative Appeals
denise.fjordbeck@doj.state.or.us

Attorneys for Defendant-Appellant
Department of Revenue

DGF:kw5/7660450