IN THE SUPREME COURT OF THE STATE OF OREGON

BOARDMAN ACQUISITION, LLC, a Delaware limited liability company, Plaintiff, vs. **DEPARTMENT OF REVENUE**, State of Oregon, Defendant.	Tax Court No. 5209
PORT OF MORROW, Plaintiff-Appellant, vs. **DEPARTMENT OF REVENUE**, State of Oregon, Defendant-Respondent.	Tax Court No. 5249 Supreme Court No. S063682

PLAINTIFF-APPELLANT'S REPLY BRIEF ON THE MERITS

On Appeal from the Judgment of the Oregon Tax Court
The Honorable Henry Breithaupt, Judge of the Oregon Tax Court
Decision Filed: October 20, 2015

Counsel and Addresses Listed on Next Page

October 2016

W. Michael Gillette, OSB No. 660458
Sara Kobak, OSB No. 023495
Dan Eller, OSB No. 042810
SCHWABE, WILLIAMSON & WYATT, P.C.
1211 SW 5th Ave., Suite 1900
Portland, OR 97204
Telephone: 503.222.9981
Email: wmgillette@schwabe.com
Email: skobak@schwabe.com
Email: deller@schwabe.com

Attorneys for Plaintiff-Appellant Port of Morrow

Ellen F. Rosenblum, OSB No. 753239
Attorney General
Paul L. Smith, OSB No. 001870
Deputy Solicitor General
Joseph A. Laronge, OSB No. 841330
Assistant Attorney General
OREGON DEPARTMENT OF JUSTICE
1162 Court Street NE
Salem, OR 97310
Telephone: 503-378-6060
Email: ellen.f.rosenblum@doj.state.or.us
Email: paul.l.smith@doj.state.or.us
Email: joseph.laronge@dog.state.or.us

Attorneys for Defendant-Respondent Department of Revenue

Table of Contents

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

This case is an *ad valorem* property tax dispute arising out of the changed use of two adjacent parcels of land. For a time, the property owner, the Port of Morrow ("the Port") leased the property to a private party for farm purposes. While the parcels were put to a farm use, the *ad valorem* taxes assessed on them were reduced to one-half the normal amount, but the Morrow County Assessor ("the Assessor") maintained a record as to the amount of taxes that might otherwise have been imposed. Eventually, the lease arrangement was terminated and, a few days later, the parcels were sold to another private party, Boardman Acquisition ("Boardman"), which did not devote the parcels to a farm use. At that point, the Assessor assessed the parcels at their non-farm-use rate, but also imposed the postponed taxes from the earlier period in which the parcels were farmed. The Port and Boardman challenged the assessment of the postponed amount in the Oregon Tax Court, which affirmed the Assessor's decision. The present appeal followed.

In its opening brief, the Port argued that the pertinent statutory scheme precluded the Assessor from imposing additional taxes on the property as a result of its sale of the property to Boardman, and that the additional assessment should be refunded. That was true, the Port argued, because the applicable statutes clearly contemplated such an outcome and a search of relevant legislative history confirmed that the legislature, in enacting those statutes, did

not intend that an additional assessment would be placed on property that was returned to a tax-exempt entity (here, the Port) at the conclusion of the property's use for farm purposes. The Defendant-Respondent Department of Revenue ("DOR") filed an answering brief disputing the Port's construction of the pertinent statutes. As established below, DOR's arguments conflict with both the statutory phrasing and the legislative history.

II. QUESTIONS PRESENTED

In its Opening Brief, the Port summarized the issues and the facts relevant to those issues:

> * * *[L]and like that involved here is not subject to *ad valorem* property taxes while owned by a municipal corporation. However, if the land is leased to a private party for whom the land, if owned by that party, would be taxable, then the land is taxable to that party. The tax may be reduced if, *inter alia*, the property is non-exclusive farm use property and is being put to a farm use. However, the exempted portion of the ordinary tax may be imposed retrospectively if the property ceases to be put to farm use, but remains in the hands of the private party or is transferred to another private party. If, on the other hand, the property ceases to be so used because it is transferred back to the municipal corporation that holds title to it, the additional tax is not (indeed, cannot be) collected under the terms of ORS 308A.709(5). The only fact in this case not specifically discussed in the * * * statutes is the fact that, although the Port took back the leased property and appropriately notified the County that the tax deferral no longer applied, the Port soon thereafter sold the property to another private party—Boardman, in whose hands the property is taxable and not eligible for the deferment.

(Op Br at 11-12) Or, as even more focused later in that brief:

> In other words, the entire case depended (in the view of the Tax Court Judge), not on whether there had been a disqualification [of the property from eligibility for the tax reduction connected with farm use], or even on whether the disqualification occurred at the same time that

> control of the property was returned to the public corporation. In order for the relief [from assessment of an additional tax] provided by ORS 308A.709(5) to apply, the property must *still be in public ownership on a particular January 1 (or July 1)*. Of course, none of the statutes [relevant to the case] * * * say anything of that sort * * *. But, the [Tax C]ourt insists, that is the outcome that the legislature intended.[1]

(Op Br at 16-17) Those summaries remain correct.

III. THE POSITIONS OF THE PARTIES AND ARGUMENT

A. The Tax Court's Analysis

In its Opening Brief, the Port argued as follows:

1. All parties agree that, in one way or another, ORS 308A.709(5) governs this case. That statute (including its prefatory paragraph) provides:

> Notwithstanding that land may have been disqualified from special assessment, no additional taxes may be imposed under ORS 308A.703 [the statute imposing additional taxes upon disqualification] if, as of the date the disqualification is taken into account on the assessment and tax roll, the land is any of the following:
>
> * * *
>
> (5) Public property that was leased or rented to a taxable owner as described in ORS 307.110 at the time of disqualification, and the reason for the disqualification was the termination of the lease under which the land was assessed.

2. The parcels in question clearly meet all of the specifically enumerated criteria in the statute, unless the phrase, "if, as of the date the

[1] Apparently, the County and DOR essentially agree as to the issues, although they prefer to boil it down to a single issue—what is the meaning of ORS 308A.709(5) in relation to the facts of the present case? Indeed, and although it is worded (slightly) differently, the first half of the Answering Brief for DOR essentially mirrors the way the Port's Opening Brief outlines the issues in the case.

disqualification is taken into account on the assessment and tax roll" somehow defeats eligibility.

3. The court specifically identified the purpose of the statute (and, in doing so, the reasonableness of the Port's construction of it) when it stated,

> The legislature appears to have considered that pattern [*i.e.*, lease of property for a time, followed by return to municipal corporation ownership] to be one for which the imposition of additional tax was not appropriate. * * * The legislative intent behind what is now the statute was to relieve public bodies of any tax obligation or lien on their property when a taxable lease ended and possible additional tax accrued.

It thus would appear that the Port should have prevailed.

4. The Tax Court ruled otherwise, however, unaccountably going on to declare that subsection (5) relief from additional taxation applied only where "the land returned to *and remained* in public ownership." (Emphasis added.) More precisely, the court held that the otherwise-qualifying property *must have also been qualified for the statutory exemption as of either July 1 or January 1 of the year following its disqualification*. That conclusion, the court asserted, found some support in a syntactical reading of the statute and was helped by a legislative history that, according to the court, "strongly suggest[ed]" it.

5. The property in the present case had remained in the Port's possession for only four days. The court ruled that period of time was insufficient and, as a result, the Port could not rely on ORS 308A.709(5). The Port granted DOR's motion for summary judgment, and later entered judgment accordingly.

B. The Port's Position

The Port attacked the Tax Court's construction of the statute on each of the grounds identified by the Tax Court. It asserted:

1. The court's "syntactical" analysis was wrong, because it compared apples and oranges. The parcels met both the "present tense" sense of the prefatory part of ORS 308A.709 and the "past tense" sense of subsection (5) of that statute, because the verb in each part of the statute served a different function.

2. The Port next challenged the Tax Court's idea that, to qualify, property must have returned to "and remained" in public ownership. The property *had* returned to public ownership, and—as the Port pointed out— the Tax Court simply created a requirement that it thereafter *remain* in that status from whole cloth. The requirement has no textual basis.

3. The Port then turned to the Tax Court's assertion that legislative history "strongly suggested" that the statute was only intended to apply when property "remained" with the municipal owner. The Port demonstrated that there is no support at all in the legislative history for that proposition and that, in fact, the extant legislative history points in precisely the opposite direction, *i.e.*, the legislature intended that property that reverted to the public owner would carry *no* "tail" of tax liability from the moment of its return, thereby

making it far more marketable for sale to a private (and tax-paying) entity. (Op Br 23-30)

Having addressed and answered each of the Tax Court's contentions, the Port urged reversal.

C. The Answer of DOR, and the Port's Reply

DOR argues that

> the proper resolution of this case * * * turns on *when* the taxing authority makes the determination about whether the exception applies. **The [DOR] agrees that if that determination was made as of August 7, 2012, the exception would apply.** However, under ORS 308A.709, the relevant date for the application of the exception is a specific date during the tax year—"the date the disqualification is taken into account on the assessment and tax roll." Taxpayer can prevail only if that specific date falls between August 6, 2012, and August 12, 2012, because it is only during that period of time that the property was publicly owned.

(Ans Br at 9) (italics in original; bold added).

The statute is construed under the now-familiar paradigm articulated in *PGE v Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), and further explicated in *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). DOR acknowledges that the time when a disqualification is "taken into account," as that phrase is used in ORS 308A.709, is nowhere defined in the statute. It argues, however, that this Court should conclude that other statutes provide "significant, relevant context."

Of course, any analysis of the meaning of statutory words should begin with the ordinary or dictionary meaning of those words. DOR omits such a

discussion. However, the task is not difficult, and it is useful: As the Merriam-Webster Unabridged Dictionary defines the phrase, "taking (something) into account" means "to think about, consider, or include (something) when making plans or calculations or forming an opinion." Put differently, the phrase, "taken into account," in ordinary English, means to be perceived and, thereafter, to be remembered when pertinent. In the present context, that means that the phrase has no temporal imperative associated with it: Something can be "taken into account" at any time it is relevant or useful. Thus, the words themselves suggest nothing with respect to whether there is some sort of "length of possession" requirement attached to ORS 308A.709(5).

DOR relies on the fact that the legislature uses the phrase, "as of the date the disqualification is taken into account" in the prefatory section of the statute, but then uses the phrase, "at the time of disqualification" in subsection (5). This inconsistent usage, DOR argues, "strongly suggests" that the legislature meant the two terms to have different meanings.[2] But this is no indicator of legislative intent—at least not in the sense that DOR wishes to use it. Instead, the legislative history establishes that the alternative wording derives from combining separate statutes while attempting to use a single prefatory description to encompass them all. (*See* Op Br at 27-29) It also is explainable,

[2] DOR appears to have abandoned the Tax Court's syntactical exegesis into the legislature's use of various forms of the verb "to be" in ORS 308A.709. That abandonment is justified. *See* Op Br at 17.

as the Port has pointed out, by the different functions that are performed by the different usages (*see* Op Br at 17). To illustrate: The passive voice use of "is" in the prefatory passage is part of a reference to a moment in time; the "was" in subsection (5) is part of an adjectival phrase that describes the property in question.

DOR next relies on ORS 308.210(1), which requires an assessor to "maintain a full and complete record of the assessment of the taxable property for each year *as of January 1, at 1:00 a.m. of the assessment year*." (Ans Br at 11-12) (emphasis DOR's) But that is of no help: The statutory direction simply puts property tax assessment on a level playing field for every taxpayer in any given year by selecting a particular date and "freezing" *what an assessor knows as of that date*; it says nothing about *when* the information that is the basis for each assessment either may be, may have been, or must be collected. The Port pointed out in its Opening Brief that the January 1 date had nothing to do with when the data on which the roll was based was collected. Logic dictates that data is not collected on New Year's Day, and that the "roll" is simply a compilation of that data, whenever during the prior year it had been collected. Certainly, there is nothing in the evidentiary record in this case that contradicts that self-evident fact. In fact, DOR itself commits more than two pages of its brief to acknowledging that the Port is correct in this regard, but nonetheless tries to imbue the date with something more: "[I]t identifies the

point in time at which the property valuation for the upcoming tax year occurs." (Ans Br at 12)

No, it does not. It identifies the point in time at which valuations, *which have been occurring throughout the year based on data gathered, received and recorded throughout the year*, will collectively be used in assessing *ad valorem* property taxes.[3] But that does not, as a matter of straightforward English, make January 1 the day on which the "property valuation occurs," (or, in the statutory wording, "the disqualification is taken into account"), unless January 1 is the day on which the Assessor receives word of the disqualification.[4] Here, as DOR acknowledges, the Assessor received the pertinent information in August, and required no more.[5]

The world, as the Tax Court and the DOR paint it, cannot work.

---

[3] Or, as DOR specifically acknowledges (Ans Br at 13), "By identifying January 1 as the cut-off date, the legislature has directed assessors to prepare the assessment roll with the required information *as it existed on that date*." (Emphasis added)

[4] And, as noted, the Assessor had better receive the information early: The actual cut-off is at 1:00 a.m. on January 1. ORS 308.210(1).

[5] In one particularly remarkable passage, DOR claims support for its theory from the fact that the legislature specifically authorized an assessor to make changes in the "ownership and description" of real property in the assessor's records. ORS 308.210(2). But, DOR asserts, there is no such authority to acknowledge a special property tax disqualification, so it must be that the assessor cannot do it. (Ans Br 13-14) By the same token, must we assume that the assessor cannot record information about sale of the property, or rental of the property (even though that affects who must pay taxes on it), or even the corrected address of the responsible taxpayer? This is bootstrapping at its energetic best.

Although the manner in which each assessor gathers data for the January 1 deadline doubtless differs among jurisdictions, it has to be true that the data gathering, including receiving and acting upon information like that provided to the Assessor by the Port, is an on-going, everyday activity throughout the year. Even the Assessor's email acknowledgment to the Port of the property transfer in this case bespeaks that fact. And, because the process is a dynamic one, the date on which the disqualification (or a sale, or a partition, or any other transaction affecting the taxability of a parcel) "is taken into account" necessarily can be any date during the year. As noted, the phrase, in ordinary English, means to be perceived and thereafter considered. And so it was here.

Finally, and even assuming that all the foregoing arguments are unpersuasive, it surely is at least true that the Port's construction of the statute *could* be correct, thereby triggering an inquiry into legislative history in an attempt to identify what the legislature intended. To assist in that inquiry, the Port has offered a full discussion of the legislative history of ORS 308A.709, all of which sustains its argument that the legislative intent in the statute was to cut off any *ad valorem* tax "tail" with respect to property that had been leased and put to farm use, but then returned to public ownership and control. *See*, generally, Op Br at 23-31.

Astonishingly, DOR refuses to even discuss legislative history, beyond flatly asserting that "[t]he history of *former* ORS 308.396 (1985)[, one of the

statutes from which the present provisions of ORS 308A.709 derive], cited by [the Port] is inapposite," because the topic of the measure from which it derived was exemption of "the state" from having a "tail" attached to property that it had leased and that had been returned to it. "That [bill's legislative] summary," DOR explains, "* * *assumed that the state would remain the owner of the property at the next assessment date.*" (Ans Br at 15-16) But no such limitation was expressed during consideration of the bill, and DOR's brief cites to no part of the legislative history to support its assertion. The argument is simply DOR's version of the Tax Court's assertion (again without citation) concerning what the legislative history of ORS 308A.709 "strongly suggests," and it has no better standing than that.

It follows that, although the statutory wording is sufficiently clear to make it unnecessary to consult the legislative history of ORS 308A.709(5), that history demonstrates that the legislative policy respecting the return of disqualified property to the municipal corporation was that the tax "tail" be severed. The Tax Court's contrary assertion, and DOR's repetition of that assertion, are not defensible.

The Port has no doubt that the Tax Court and DOR attempted to identify and apply the legislature's intent: But their application of Oregon's statutory construction methodology hid—even from them—the fact that they were attributing to the legislature an absurd intent. According to them, the legislature

absolutely intended entities like the Port to be free from the tax that the County now wishes to impose, but *only if* the Port maximized the value of the property by selling it on one of two days during the year—July 1 or January 1. [6] However, as explained, the wording of ORS 308A.709(5) does not support that outcome, and legislative history affirmatively demonstrates that the legislature never intended to be so quixotic in the policy choice that the statute described.

IV. CONCLUSION

The judgment of the Oregon Tax Court should be reversed, and the case remanded to that court with instructions to grant the Port's motion for summary judgment.

DATED this 4th day of October, 2016.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT, P.C.

[6] In fact, DOR is not even sure about July 1. There is a slightly puzzled tone to its footnote 3, Ans Br at 11, where DOR says,

> If the disqualification in this case had occurred before July 1, *it seems likely* that it would have been taken into account on July 1. * * *

One would hope for a more authoritative statement from the agency authorized by law to defend any assessment that a county assessor wants to make.

By: /s/ W. Michael Gillette

W. Michael Gillette, OSB No. 660458
Sara Kobak, OSB No. 023495
Dan Eller, OSB No. 042810
Schwabe Williamson & Wyatt, P.C.
1211 SW Fifth Avenue, Suite 1900
Portland, Oregon 92704
Telephone: 503-222-9981
Email: wmgillette@schwabe.com
Email: skobak@schwabe.com
Email: deller@schwabe.com

Attorneys for Plaintiff-Appellant
Port of Morrow

CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that: (1) this brief complies with the word-count limitation in ORAP 5.05; and (2) the word-count of this brief, as described in ORAP 5.05(2)(b), is 3,229 words. I also 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 October, 2016.

/s/ W. Michael Gillette
W. Michael Gillette, OSB No. 660458
Attorney for Plaintiff-Appellant
Port of Morrow

CERTIFICATE OF FILING AND SERVICE

I certify that on October 4, 2016, I filed the original of this PLAINTIFF-APPELLANT'S BRIEF ON THE MERITS with the State Appellate Court Administrator by the eFiling system.

I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system on the following:

Ellen F. Rosenblum, OSB #753239
Attorney General
Paul L. Smith, OSB #001870
Deputy Solicitor General
Joseph A. Laronge, OSB #841330
Assistant Attorney General
OREGON DEPARTMENT OF JUSTICE
1162 Court Street NE
Salem, OR 97310

Of Attorneys for Defendant-Respondent, Department of Revenue

By: /s/ W. Michael Gillette
W. Michael Gillette, OSB No. 660458
Attorneys for Plaintiff-Appellant
Port of Morrow