IN THE SUPREME COURT OF THE STATE OF OREGON

VILLAGE AT MAIN STREET PHASE II, LLC, Plaintiff-Respondent, v. DEPARTMENT OF REVENUE, Defendant-Appellant, and CLACKAMAS COUNTY ASSESSOR, Intervenor-Appellant.	Tax Court No. 5054 Supreme Court No. S063163 (Control)
VILLAGE AT MAIN STREET PHASE II, LLC, Plaintiff-Respondent, v. DEPARTMENT OF REVENUE, Defendant-Appellant, and CLACKAMAS COUNTY ASSESSOR, Intervenor-Appellant.	Tax Court No. 5055 Supreme Court No. S063164

Continued…

VILLAGE RESIDENTIAL, LLC, Plaintiff-Respondent, v. DEPARTMENT OF REVENUE, Defendant-Appellant, and CLACKAMAS COUNTY ASSESSOR, Intervenor-Appellant.	Tax Court No. 5056 Supreme Court No. S063165
VILLAGE RESIDENTIAL, LLC, Plaintiff-Respondent, v. DEPARTMENT OF REVENUE, Defendant-Appellant, and CLACKAMAS COUNTY ASSESSORS, Intervenor-Appellant.	Tax Court No. 5057 Supreme Court No. S063174

REPLY BRIEF

Continued…

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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REPLY BRIEF

Introduction and Summary of Argument

The department's reply addresses three points. First, the tax court's order wrongly concludes that if one party appeals a decision of the magistrate division of the tax court to the regular division of the tax court by filing a complaint, the other party must file its own complaint to assert a claim, rather than asserting a counterclaim in its answer. The tax court's order, which it published on its website, has impacted practice before both the magistrate and regular divisions of the tax court. Taxpayers do not contend that the tax court's order on that point was correct and this court should make clear that counterclaims may be filed in tax court cases.

Second, the assessor in these consolidated cases asserted, in each of its original answers, a counterclaim regarding the value of taxpayer's improvements. The assessor's prayers for relief can be considered for precisely what defendants relied on them for—a "factual statement" of the value sought. The taxpayers' complaints—attaching the magistrate division's decisions and identifying the property, tax accounts, and tax years at issue—set the stage for the case. The assessor admitted those allegations. The assessor's prayers, in that context, asserted everything necessary to plead a counterclaim regarding the value of taxpayers' improvements. And the assessor need not be

"aggrieved" to assert a counterclaim in the *de novo* proceedings before the regular division of the tax court—that requirement applies to appeals, not counterclaims.

Third, the assessor's pending motions to amend his answers to assert counterclaims regarding the value of taxpayers' land also precluded taxpayers' voluntary dismissals. None of the cases taxpayers rely on involve pending motions to amend to assert counterclaims. Rather, they involve pending motions for summary judgment or pending motions to dismiss. If this court reaches the issue, it should conclude, as a matter of first impression, that the pending motions to amend to assert counterclaims in the tax court precluded taxpayers from voluntarily dismissing their complaints.

ARGUMENT

A. A party can assert a counterclaim in a tax court case—it is not required to file its own appeal if the opposing party has done so.

The tax court's order denying defendants' motions for relief from the judgments of dismissal concludes that when one party appeals a tax magistrate's decision to the regular division of the tax court by filing a complaint, the other party may not file a counterclaim and instead must initiate its own appeal by filing a complaint. (ER 74–77). The department explained in its opening brief why that is wrong and why counterclaims are available in

cases before the tax court. (Dept Br 13–16). Taxpayers do not contend otherwise.

Taxpayers are correct that the department is concerned with the "reasoning" of the tax court's order. (*See* Resp Br 26). The magistrate division relies on orders of the regular division and, in the department's experience, this particular order has come up in numerous cases before the magistrate and regular divisions of the tax court. The tax court posted the order on its website with a notice that the order "should be considered by appealing parties."[1]

The order—in particular the conclusion that counterclaims are unavailable—has the potential to impact taxpayers and taxing authorities in many cases before the magistrate and regular divisions of the tax court. At least one case, *Multnomah County Assessor v. Hidden Court LLC*, TC 5257, is being held in abeyance in the regular division of the tax court pending this court's decision on that issue. Accordingly, this court should correct the "reasoning" of

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[1] On the home page for the Oregon Tax Court under the heading "Important Information" is a link to the order and the following:

> "Notice: The following Order filed on April 20, 2015, in the Regular Division of the Oregon Tax Court addresses issues regarding procedures for appeal to the tax court and should be considered by appealing parties."

See http://courts.oregon.gov/Tax/Pages/index.aspx (accessed January 28, 2016).

the tax court on this point, even if it ultimately affirms the dismissal of taxpayers' complaints.

B. The assessor had filed counterclaims regarding the value of taxpayers' improvements prior to the taxpayers' notices of dismissal.

In addressing defendants' arguments that the assessor had pleaded counterclaims in its original answers, taxpayers begin by asserting that there is an "obvious question"—if the assessor had pleaded counterclaims already, why did he then ask for leave to file counterclaims. (Resp Br 8–9). The answer is simple. The assessor initially filed counterclaims regarding the value of taxpayers' *improvements*—the issue addressed in taxpayers' complaints and the magistrate's decisions. After the legislature enacted ORS 305.287, which permitted counterclaims regarding land value even when the other party only challenges the improvement value, the assessor also sought leave to file counterclaims regarding the value of taxpayers' *land*. There is nothing inconsistent in what the assessor did.

Taxpayers argue that what the assessor alleged in his original answers did not constitute counterclaims. In particular, they assert that the assessor's original answers contained "no affirmative claim for relief," but merely admissions and denials, and that defendants cannot rely on what the assessor requested in his prayers for relief. (Resp Br 10–11). While it is true that generally the prayer for relief is not part of the cause of action, this court has

held "the prayer may be regarded as the equivalent of a factual statement of the relief which the [party] claims." *Marsh v. Davidson*, 265 Or 532, 537, 510 P2d 558 (1973).

Based on the nature of the counterclaims—the value of the taxpayers' improvements—the court should consider the prayers which allege the values sought by the assessor. With those values, the assessor sufficiently pleaded counterclaims regarding the improvement values.

That is so because the sole issue in the counterclaim is the value of the improvements. The assessor met the requirements for a counterclaim set forth in TCR 18 by: (1) admitting most of the taxpayers' allegations (including allegations about the specific lot number, tax accounts, and tax years at issue, and the matter at issue—"real market value of improvements"); and (2) affirmatively asserting a specific value for those improvements.[2] (*See* ER 1–2,

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[2] The tax court rules require that a claim for relief, including a counterclaim, contain a "(1) plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition;" "(2) A demand of the relief which the party claims;" and (3) "if the real market value of the property in in issue, a party seeking a change of the value shown on the assessment records shall plead the dollar amount of the real market value claimed by that party for each tax year at issue." TCR 18 A & B.

Although the specific value asserted by the assessor was the same as that found by the magistrate in some of the cases, as explained in the department's opening brief, that is nonetheless significant because once the taxpayers appealed, the magistrate's decision is essentially jettisoned. (*See* Dept Br 12 fn 4).

33, 45–46, 55–56, 67–71). Tellingly, taxpayers have identified no element of the assessor's counterclaims which he failed to plead.[3] Because the assessor's admissions, together with his prayers for relief, addressed all of the facts or allegations necessary regarding the improvement values, the assessor pleaded counterclaims on the improvement values.[4]

Taxpayers suggest that comparing the assessor's amended answers attached to his motions with his original answers demonstrates that those original answers did not contain counterclaims. (Resp Br 9). But it makes sense that a counterclaim regarding the value of taxpayers' land, which was not the subject of taxpayers' complaint or the magistrate's decision, would need additional facts. Thus, that the assessor's counterclaims on the new issue—land value—contained more detailed allegations than those on the existing issue—

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[3] The tax court has provided a form complaint on its website which demonstrates the limited nature of the allegations in a property tax valuation case. Specifically, that form requires identifying the property, attaching the lower tribunal decision, stating why the lower decision is wrong, and identifying the relief requested. *See* http://courts.oregon.gov/Tax/docs/RegComplaintProperty.pdf (last accessed January 28, 2016).

[4] Even if the assessor's admissions combined with his prayers for relief are not sufficient to demonstrate that the assessor had asserted a counterclaim in each case, the assessor's answer in case number 5055 contains an affirmative factual allegation: "The assessor further alleges that the value on the roll for this property for the tax year in question, 2008-09, does not reflect the completed value at 100% completion." (ER 68). So, at the very least, the court should reverse the tax court in that case.

improvement value—does not demonstrate that the assessor failed to plead the improvement value counterclaims.

Taxpayers also argue, relying on ORS 305.275, that the assessor could not have pleaded counterclaims because the assessor was not "aggrieved" by the decisions of the magistrate division, which did not reduce the real market value of taxpayers' improvements on the tax roll. (Resp Br 11–12). But the "aggrieved" requirement in ORS 305.275(1) for appeals to the magistrate division, and in ORS 305.570(1)(a) for appeals to the regular division of the tax court, apply only to appeals.[5] The issue here is not whether the assessor could have himself *appealed* from the magistrate's decision.

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[5] ORS 305.275(1) provides, in part:

> " Any person may appeal under this subsection to the magistrate division of the Oregon Tax Court as provided in ORS 305.280 and 305.560, if all of the following criteria are met:
>
> "(a) The person must be aggrieved by and affected by an act, omission, order or determination of:
>
> (A) The Department of Revenue in its administration of the revenue and tax laws of this state;
>
> (B) A county board of property tax appeals other than an order of the board;
>
> (C) A county assessor or other county official, including but not limited to the denial of a claim for exemption, the denial of special assessment under a special assessment statute, or the denial of a claim for cancellation of assessment; or

Footnote continued…

The issue is whether, once the taxpayers appealed the magistrate division's decision, the assessor could assert a counterclaim in the *de novo* proceedings before the regular division. Nothing in the tax court statutes or rules requires that the assessor have been aggrieved by a particular decision in order to assert a counterclaim. As explained in the department's opening brief, under the applicable statutes, tax court rules, and this court's decision in *Village at Main Street Phase II v. Department of Revenue*, 356 Or 164, 339 P3d 428

(…continued)

(D) A tax collector. * * * * * "

ORS 305.570(1)(a) provides:

> "Any person, including a county assessor or county tax collector aggrieved by and affected by a written decision of a tax court magistrate issued under ORS 305.501, or any person seeking a remedy in the tax court provided by statute, other than as provided in ORS 305.275 (1), may appeal to the regular division of the Oregon Tax Court, and appeal shall be perfected in the manner provided in ORS 305.404 to 305.560."

ORS 305.560(2) also has an "aggrieved" requirement for an initial complaint. But it applies only to the complaint, and not to a counterclaim in an answer. That statue provides:

> "The complaint shall state the nature of the plaintiff's interest, the facts showing how the plaintiff is aggrieved and directly affected by the order, act, omission or determination and the grounds upon which the plaintiff contends the order, act, omission or determination should be reversed or modified."

(2014), after one party has appealed by filing a complaint in the regular division, an opposing party may assert a counterclaim. (*See* Dept Br 13–15).

In sum, the assessor sufficiently pleaded counterclaims regarding the value of taxpayers' improvements by admitting the allegations pertaining to the properties, tax accounts, and tax years at issue, and asserting a specific value for the improvements.

C. Nothing precludes this court from determining that the assessors' motions for leave to amend, with the amended complaints attached, precluded taxpayers' later filed notices of dismissal.

In response to defendants' arguments that the assessor's pending motions to amend precluded taxpayers from dismissing their complaints, taxpayers rely heavily on Court of Appeals decisions regarding ORCP 54 A(1). (Resp Br 18–20). None of those cases involve pending motions to amend an answer to allege a counterclaim. Rather, they all appear to involve either pending motions for summary judgment or motions to dismiss with prejudice. There is a distinct difference between a pending motion to amend an answer to add counterclaims against the other party and a motion for summary judgment or motion to dismiss. The former involves an affirmative request for relief against the other party. That is the type of situation addressed by the treatise and out-of-jurisdiction cases the department cited in its opening brief. (*See* Dept Br 16–18).

This court should conclude, as an issue of first impression, that a pending motion to amend a complaint in the tax court to allege counterclaims precludes the voluntary dismissal of the complaint.

CONCLUSION

This court should reverse the tax court's judgment dismissing taxpayers' complaints and remand for further proceedings. This court should also direct the tax court to grant assessor's motion to amend his answers to include his counterclaims regarding the value of taxpayers' land.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 28, 2016, I directed the original Reply Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Kathleen J. Rastetter, attorney for appellant Clackamas County Assessor; and Donald H. Grim and Ridgway K. Foley, Jr., attorneys for plaintiffs-respondents Village at Main Street Phase II LLC and Village Residential LLC, by using the court's electronic filing system.

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 2,225 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).

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