IN THE SUPREME COURT OF THE STATE OF OREGON

WILLAMETTE ESTATES II, LLC, Plaintiff-Appellant, v. DEPARTMENT OF REVENUE, State of Oregon, Defendant-Respondent, And MARION COUNTY ASSESSOR, Defendant-Intervenor.	Tax Court No. 5146 Supreme Court No. S062027

RESPONDENT'S BRIEF

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

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RESPONDENT'S BRIEF

STATEMENT OF THE CASE

The Department of Revenue (the department) accepts taxpayer's statement of the case except as restated below.

Nature of the Proceeding

This is an appeal from the tax court's judgment affirming the department's decision, issued pursuant to ORS 306.115, to increase the land value of taxpayer's property from $1,002,840 to $5,000,000 for the 2007-2008 tax year. That judgment represents the latest chapter in a dispute between taxpayer and the Marion County assessor that began in 2008. The facts and procedural history relating to that dispute are uncontested.

Taxpayer owns an apartment building in Marion County. In 2008, taxpayer appealed the 2007-2008 real market value (RMV) of the improvements on the property to the Magistrate Division of the Tax Court. In the course of that proceeding, the parties stipulated that the property's overall RMV was $12,309,000 for both land and improvements. (SER 1-5, 6). Based in part on that stipulation, the court issued a judgment setting the 2007-08 RMV of the improvements at

$7,309,000. (SER 11; Ex 1 at 113).[1]

Following entry of that judgment, the Marion County Assessor filed a petition, pursuant to ORS 306.115, asking the department to exercise its discretion to correct the land value on the tax roll to $5,000,000, so that the total RMV of taxpayer's property on the roll would be $12,309,000, as agreed upon by the parties in the prior litigation. In September 2009, the department issued a supervisory conference decision ordering a change in the property's land value to $5,000,000 and a corresponding increase of the total RMV to $12,309,000. (Ex 1 at 13-16). Following an appeal to the Magistrate Division of the Tax Court and a subsequent remand, the department issued a second opinion adhering to its decision. (Ex 1 at 3-9).

Taxpayer then appealed the department's second decision to the Tax Court's Magistrate Division, where the magistrate granted summary judgment in favor of the department. Taxpayer appealed the magistrate's decision to the Regular Division of the Tax Court. Both parties moved for summary judgment. The court granted the department's motion and denied taxpayer's motion, holding that the

[1] Exhibit 1 to the Tax Court file is the record of the supervisory hearing held by the department pursuant to its authority under ORS 306.115 on July 19, 2011. A paginated copy of the Department Conference Record 09-0048, consisting of 155 pages, was filed in support of the Department of Revenue's Cross-Motion for Summary Judgment and Response on March 28, 2013, in Tax Court case no. 5146.

department "did not abuse its discretion under ORS 306.115 when it ordered a change or correction to the land value" of taxpayer's property. (ER 51). Taxpayer appeals from that judgment.

Questions Presented

1. Do the department's rules authorize the county assessor to petition the department to exercise its supervisory authority under ORS 306.115 to make a correction to the tax roll?

2. Does this court's opinion in *Nepom v. Dept. of Rev.*, 272 Or 249, 536 P2d 496 (1975), prohibit the department from exercising its discretion to correct the tax roll to reflect the agreed-upon real market value for taxpayer's property?

Summary of Argument

ORS 306.115(3) provides that the department, in its discretion, may correct the tax roll if it "discovers reason to correct the roll * * * to conform the roll to applicable law."[2] Taxpayer does not contend on appeal that the department abused

[2] ORS 306.115 gives the department authority to "exercise general supervision and control over the system of property taxation throughout the state." Subsection (3) of that statute provides:

> (3) The department may order a change or correction applicable to a separate assessment of property to the assessment or tax roll for the current tax year and for either of the two tax years immediately preceding the current tax year if for the year to which the change or correction is applicable the department discovers reason to correct the roll which, in its discretion, it deems necessary to conform the roll to

its discretion in correcting the land value of taxpayer's property from $1,002,540 to $5,000,000 based on the parties' stipulation in an earlier proceeding. Instead, taxpayer advances two arguments in support of its claim that the department was without authority to exercise its discretion at all.

In its first claim of error, taxpayer contends that the tax court erred in concluding that the Marion County Assessor could "appeal his own judicial determination" in a proceeding under ORS 306.115. That argument is without merit, because the administrative rules adopted by the department to implement ORS 306.115—which taxpayer does not challenge—authorize an assessor to file a petition with the department to request a correction to the tax roll.

In taxpayer's second claim of error, it contends that the department's decision to correct the tax roll—which resulted in an increase in the property's land value following an earlier appeal of the improvement value— is contrary to this court's opinion in *Nepom v. Dept. of Rev.*, 272 Or 249, 536 P2d 496 (1975). But *Nepom* held only that, in an appeal under ORS 305.275 challenging the land value or improvement value of a taxpayer's property, the Tax Court's authority was limited to the scope of the taxpayer's claim. *Nepom* says nothing about ORS

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applicable law without regard to any failure to exercise a right of appeal.

306.115, and nothing in that opinion prohibited the department from exercising its discretion in this case to correct the tax roll.

ANSWER TO ASSIGNMENT OF ERROR[3]

The tax court correctly granted the department's motion for summary judgment.

A. Preservation of Error

The department agrees that taxpayer's arguments in support of its assignment of error are preserved.

B. Standard of Review

This court reviews the tax court's decisions for "errors or questions of law or lack of substantial evidence in the record to support the tax court's decision." ORS 305.445.

ARGUMENT

As explained above, taxpayer does not argue that the department abused its discretion in correcting the land value of taxpayer's property from $1,002,540 to $5,000,000 based on the parties' stipulation in an earlier proceeding. Instead, taxpayer makes two arguments in support of its claim that the tax court erred in

[3] Taxpayer makes a single assignment of error, and then divides that assignment into assignments of error 1-A and 1-B. The department treats those sub-assignments as two separate arguments in support of taxpayer's single assignment of error, and responds accordingly.

granting summary judgment in favor of the department, because the department lacked authority to exercise its discretion to correct the tax roll. As explained below, both arguments are without merit, and the Tax Court's judgment should be affirmed.

A. ORS 306.115 gives the department the authority to correct errors on the tax rolls, and the department's rules authorize the assessor to request such a correction by filing a petition with the department.

In its "assignment of error 1-A", taxpayer contends that the Tax Court erred in concluding that "the assessor filed a permissible appeal from his own judicial decision." (App Br 7). That argument fails, because the department's administrative rules—which taxpayer does not challenge—authorize an assessor to file a petition requesting a correction to the tax roll.

ORS 306.115(1) confers on the department "general supervision and control over the system of property taxation throughout the state." As part of that supervisory authority, the department has discretion to order changes or corrections to an assessment or tax roll. Specifically, ORS 306.115(3) provides:

> The department may order a change or correction applicable to a separate assessment of property to the assessment or tax roll for the current tax year and for either of the two tax years immediately preceding the current tax year if for the year to which the change or correction is applicable the department discovers reason to correct the roll which, in its discretion, it deems necessary to conform the roll to applicable law without regard to any failure to exercise a right of appeal.

In order to carry out its responsibilities under ORS 306.115, the department has promulgated administrative rules. *See* OAR 150-306.115 to 150-306.115-(C). OAR 150-306.115(1) provides that "ORS 306.115 is an extraordinary remedy that gives the Department of Revenue authority to order a change or correction to a separate assessment of property. An assessor or taxpayer may request a change or correction by filing a petition with the department. A petition must meet the requirements of OAR 150-306.115-(A)."

In this case, as allowed by the rule, the Marion County assessor filed a petition with the department, asking that the department exercise its discretion to correct the tax roll. The department did so. Taxpayer has not challenged that rule, and its claim that the assessor could not "appeal his own judicial determination" (App Br 5) is without merit.

The authorities cited by taxpayer do not compel a different result. In arguing that an assessor may not appeal "his own decision," taxpayer ignores the plain language of OAR 150-306.115, and further ignores the fact that a petition filed pursuant to that rule is a means by which the department may discover an error on the tax roll, and not an appeal in the traditional sense. *See e.g. Esco Corporation v. Dept. of Rev.,* 307 Or 639, 645, 772 P2d 413 (1989) (the supervisory hearings process under ORS 306.115 is "outside the normal appeals process").

Taxpayer's reliance on the Court of Appeals decision in *State v. Hewitt*, 162 Or App 47, 985 P2d 884 (1999), is misplaced. The issue in *Hewitt* was whether the state could bring an appeal from a trial court decision to the Court of Appeals (i.e., from a lower court to a superior court). 162 Or App at 49. The Court of Appeals' broad discussion of appellate procedures in *Hewitt* is simply not relevant to petitions to the department under ORS 306.115, because such petitions are outside of the normal appeals process and are not appeals from any prior decision by a court.

In addition, the holding in *Bear Creek Plaza Ore., Ltd v. Dept. of Revenue*, 12 OTR 272, 275 (1992), also relied upon by taxpayer, is inapposite, because it did not involve an exercise of the department's supervisory authority under ORS 306.115. In *Bear Creek Plaza*, the Tax Court held that "if a taxpayer elects to appeal only the value of the land, the assessor cannot 'cross appeal' the value of the improvements" in an appeal under ORS 305.275. 12 OTR at 274. The current case does not involve an appeal under ORS 305.275.[4] Thus, even if this court were in any way bound to follow a decision of the Tax Court, which it is not, *Bear Creek Plaza* is inapposite and fails to support taxpayer's argument.

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[4] In fact, at the same time the court held that the department did not have authority under the regular appeal process to make the adjustment at issue in *Bear Creek Plaza*, it acknowledged that the department *did* have "authority to correct assessed values under its supervisory authority" under ORS 306.115. 12 OTR at 275, fn. 3.

In sum, none of the cases cited by taxpayer are controlling precedent in this court, and none of them stand for the proposition that an assessor may not file a petition asking the department to correct the tax roll in the circumstances presented by this case. The tax court's judgment should be affirmed.

B. *Nepom* does not apply to proceedings under ORS 306.115, and the department did not abuse its discretion in correcting the error on the tax roll.

In its "assignment of error 1-B," taxpayer makes a one-paragraph argument that this court's decision in *Nepom v. Dept. of Rev.*, 272 Or 249, 536 P2d 496 (1975), prohibited the department from exercising its discretion to correct the real market value of taxpayer's land. (App Br 15). That argument fails, because *Nepom* does not apply to this case.

In *Nepom*, this court held that, under the statutory appeal process in effect at that time, a taxpayer was "entitled to challenge only the value of the improvements, and that the Tax Court was entitled to reduce the value of such improvements; however, as the value of the land was not an issue in the case, the Tax Court acted improperly in adding the reduction in the improvement values to the land." *Id.* at 256. Stated differently, *Nepom* stood for the proposition that a taxpayer could elect whether to appeal land value, improvement value, or both, and

the Tax Court's authority in any particular case was, at least at that time, limited to the scope of the taxpayer's claim.[5]

The *Nepom* opinion does not mention ORS 306.115, and nothing in that opinion prohibits an assessor from utilizing the supervisory provisions of that statute to correct an error on the tax roll resulting from a stipulation in an earlier proceeding. In this case, the assessor and taxpayer agreed to facts that indicated a likely error on the tax roll, and *Nepom* did not prohibit the department from exercising its discretion to correct that error.

CONCLUSION

The court should affirm the judgment of the Tax Court.

DATED this 26th day of November 2014.

Respectfully submitted,
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[5] In 2011, the Oregon Legislature enacted ORS 305.287. That statute provides that where the appealing party appeals only one aspect (improvements or land) of a property tax account, the defendant may seek a determination as to the real market value of the total account or another component of the property tax account. This legislative change does not affect the current case.

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

Brief length

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 2,248 words.

Type size

I certify that the size of 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 26th day of November 2014.

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CERTIFICATE OF SERVICE

I certify that on November 26, 2014, I directed the original RESPONDENT'S BRIEF to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Donald H. Grim, and Ridgway K. Foley, Jr. Attorneys for Plaintiff-Taxpayer. And upon Scott A. Norris, Attorney for County-Intervenor, via U.S. Postal Service addressed as follows:

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