IN THE SUPREME COURT OF THE STATE OF OREGON

BOARDMAN ACQUISITION LLC, a Delaware limited liability company, Plaintiff, v. DEPARTMENT OF REVENUE, State of Oregon, Defendant.	Tax Court No. 5209
PORT OF MORROW, Plaintiff-Appellant, v. DEPARTMENT OF REVENUE, State of Oregon, Defendant-Respondent, and MORROW COUNTY ASSESSOR, Defendant.	Tax Court No. 5249 SC S063682

RESPONDENT'S ANSWERING BRIEF

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

Continued…

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INTRODUCTION

This case is about the correct interpretation and application of ORS 308A.709. Someone who leases land for farming may be eligible to defer some of the property taxes on that land. The deferred taxes generally must be paid when the lease ends. But, under ORS 308A.709(5), the deferred taxes do not have to be paid if the land is publically owned "as of the date the disqualification is taken into account on the assessment and tax rolls." This case involves property where a lease was terminated and then three days later, the public owner of the property sold the property to a non-public (and taxable) entity. Under the plain meaning of ORS 308A.709(5), which exempts such property from the deferred taxes if it is publically owned "as of the date the disqualification is taken into account on the assessment and tax roll," the property at issue here did not qualify, because it was not publically owned on January 1, 2013—the assessment date.

STATEMENT OF THE CASE

Respondent, the Department of Revenue, accepts appellant-taxpayer's statement of the case, except the statement of facts, which is supplemented in argument, below.

Summary of Argument

The Tax Court correctly concluded that taxpayer, the Port of Morrow, did not qualify for the tax exemption in ORS 308A.709(5). That statute exempts property from imposition of "additional" deferred taxes if: (1) the property was leased to a taxable entity that qualified for a "farm use special assessment"; (2) the lease was terminated causing the disqualification of the special assessment; and (3) the property is publically owned "as of the date the disqualification is taken into account on the assessment and tax roll." Here, taxpayer's property satisfied the first two requirements of the exemption, but not the third. Before August 6, 2012, taxpayer—a public body—had leased the subject property to a taxable entity, and that taxable entity qualified for a farm use special assessment. That special assessment had the effect of deferring a portion of the property taxes on the subject property, so long as the property qualified. On August 6, 2012, the lease was terminated, which disqualified the property from the special assessment. On August 10, 2012, taxpayer sold the property to a private party. Then, on January 1, 2013, the county assessor prepared the assessment roll; on that date, "the disqualification [was] taken into account," and on that date the property was not publically owned. Consequently, the Tax Court correctly concluded that the property did not qualify for the ORS 308A.709(5) exemption from payment of the deferred additional taxes. This court should affirm the judgment of the tax court.

ARGUMENT

A. Statutory Overview and Factual Background

In general, property owned by public bodies, including "municipal corporations" like the Port of Morrow, is exempt from taxation. ORS 307.090(1). However, if the publically owned property is being leased by an entity that is not exempt from taxation, that property "shall be subject to assessment and taxation for the assessed or specially assessed value thereof uniformly with real property of nonexempt ownership." ORS 307.110(1).

Property in nonexempt ownership is subject to taxation on its assessed value unless it qualifies for a special assessment. One such special assessment is the "farm use special assessment." ORS 308A.068. That special assessment applies when property that "is not within an exclusive farm use zone is being used, and has been used for the preceding two years, exclusively for farm use" and when statutory income requirements are met. *Id.* The effect of the farm use special assessment is to defer a portion of the regular property taxes until the assessment is discontinued. ORS 308A.068; ORS 308A.703. That special assessment "shall be discontinued" upon:

> (a) Notification by the taxpayer to the assessor to remove the special assessment;
>
> (b) Sale or transfer to an ownership making it exempt from ad valorem property taxation;

> (c) Removal of the special assessment by the assessor upon the discovery that the land is no longer in farm use for failure to meet the income requirements under ORS 308A.071 or is no longer in farm use; or
>
> (d) The act of recording a subdivision plan under the provisions of ORS chapter 92.

ORS 308A.116(1).

When a special assessment is discontinued pursuant to ORS 308A.116(1), "an additional tax" is assessed against the property. ORS 308A.703(2). The amount of that "additional tax" is "equal to the difference between the taxes assessed against the land and the taxes that would otherwise have been assessed against the land" during the years of the special assessment up to a maximum of five years. *Id.* However, "no additional taxes may be imposed under ORS 308A.703 if, as of the date the disqualification is taken into account on the assessment and tax roll, the land is * * * [p]ublic 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 that termination of the lease under which the land was assessed." ORS 308A.709(5).[1]

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[1] ORS 308A.709 provides a complete list of exemptions from additional taxes that may be imposed under ORS 308A.703. In its entirety, that statute provides:

> Notwithstanding that land may have been disqualified from special assessment, no additional taxes may be imposed under ORS 308A.703 if, as of the date the disqualification is taken into

Footnote continued…

(…continued)

account on the assessment and tax roll, the land is any of the following:

(1) Acquired by a governmental agency as a result of the lawful exercise of the power of eminent domain or the threat or imminence thereof.

(2) Acquired by purchase, agreement or donation under ORS 390.121 (relating to State parks and Recreation Commission acquisitions).

(3) Acquired by a city, county, metropolitan service district created under ORS chapter 268 or park and recreation district organized under ORS chapter 266 for public recreational purposes or for the preservation of scenic or historic places.

(4) Acquired for wildlife management purposes under ORS 496.146.

(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.

(6) Land that ceases to be located within the boundaries of an exclusive farm use zone as the result of a change in the boundaries of the zone or removal of the zone following an action by the governing body of the county or city that:

(a) Was not requested or initiated by the owner of the land; or

(b) Was requested by:

(A) The State Parks and Recreation Department for public park purposes under ORS 390.121; or

(B) The State Fish and Wildlife Commission for wildlife management purposes under ORS 496.146.

Footnote continued…

The property in this case consisted of two adjoining parcels of land not zoned exclusively for farm use and owned by the Port of Morrow. For at least five years before August 6, 2012 (from at least 2005, if not before), the port had leased the property to a taxable tenant who had used the property for a farm-related use. Therefore, although the property was subject to taxation because it was being leased from the port, it qualified for a farm use special assessment under ORS 308A.068.

On August 6, 2012, the port and the tenant terminated their lease agreement. On August 7, 2012, the port notified the Morrow County Assessor of the lease termination via e-mail and mail, and it requested that the property be disqualified "from special farm use and from special assessment." (APP-3). On August 10, 2012, Boardman Acquisition LLC purchased the property from the port. In November 2012, the county sent tax statements to Boardman Acquisition identifying the amount of property taxes for the "Standard Property Tax" for tax year 2012-13. (APP-3). On or after May 29, 2013, Boardman

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(…continued)

> (7) Forestland acquired by a federal, state or local governmental agency. In the case of an acquisition described in this subsection, a lien for additional taxes and interest may not attach on the day preceding the day of transfer of the forestland to the governmental agency.

No party has suggested and any exception other than paragraph (5) is at issue in this case.

Acquisition received from the county "Notices of Disqualification from Special Assessment as Farmland in a Non-EFU Zone." (APP-3). In November 2013, the county sent tax statements to Boardman Acquisition identifying the amount of property taxes for the "Standard Property Tax" "as well as the Additional Taxes that first became due for tax year 2013-14." (APP-4).

Taxpayers (the Port of Morrow and Boardman Acquisition) filed a complaint in the Oregon Tax Court alleging, in part, that the county should not have imposed the additional deferred taxes, because the property was exempt under ORS 308A.709(5). On cross-motions for summary judgment, the Tax Court disagreed and held that the imposition of the additional tax was valid.[2] This appeal followed.

As explained below, because the property in this case had been leased by the port to a taxable tenant, the property was subject to assessment and taxation. But because the tenant used the property for a farm-related use, the property qualified for a special assessment under ORS 308A.068. On August 7, 2012, when the port notified the assessor pursuant to ORS 308A.116(1)(a) that the property was no longer being used for a farm-related purpose and that it no

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[2] Before the Tax Court these were initially two separate cases—one brought by Boardman Acquisition and the second brought by the Port of Morrow. Because the port ultimately paid the additional taxes, pursuant to its contract with Boardman Acquisition, the Tax Court concluded that the port had standing to pursue its challenge to the additional taxes at issue here. (APP 4-5).

longer qualified for the special assessment, the taxes that had been deferred during the time of the special assessment became due as "an additional tax * * * extended against the land on the next assessment and tax roll" pursuant to ORS 308A.703(2), unless one of the exceptions to the additional tax—described in ORS 308A.709—applied. This case concerns whether the exception in ORS 308A.709(5) applies to the property transfers here, which would have precluded the imposition of the additional tax. As explained below, it does not.

B. ORS 308A.709(5) exempts property from deferred additional taxes only if the property is publically owned on the date that the farm use special assessment disqualification is taken into account on the assessment and tax roll.

ORS 308A.709 provides:

> Notwithstanding that land may have been disqualified from a special assessment, no additional taxes may be imposed under ORS 308A.703 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 the disqualification, and the reason for the disqualification was the termination of the lease under which the land was assessed.

(Emphasis added). Here, there is no dispute that between August 6, 2012, and August 12, 2012, this property was "public property" that had been "leased to a taxable owner" and that the reason the property no longer qualified for the farm use special assessment was because of "the termination of the lease under

which the land was assessed." The proper resolution of this case, however, turns on *when* the taxing authority makes the determination about whether the exception applies. The department 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 publically owned.

When "the date the disqualification is taken into account on the assessment and tax roll" occurs is a question of statutory construction that this court addresses under ordinary rules of statutory construction. *See State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (describing statutory construction methodology); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993) (same). Under that methodology, the court's goal is to discern the legislature's intent. *PGE*, 317 Or at 610; ORS 174.020(1). It does so by examining the text, context, and legislative history of the statutory wording. *Gaines*, 346 Or at 171-72. If the legislature's intent remains elusive, the court then applies relevant maxims of construction to finally construe the statute. *Id.* at 172.

ORS 308A.709 does not specify when a county assessor takes a disqualification "into account on the assessment and tax roll." However, other statutes provide significant, relevant context. The most relevant context for the meaning of that phrase is found in the legislature's use of a similar—but not identical—phrase in paragraph (5) of the same statute. Paragraph (5) uses the phrase "at the time of disqualification." Whereas, the lead in to ORS 308A.709 uses the phrase "as of the date the disqualification is taken into account on the assessment and tax roll." This juxtaposition—within the same statute—strongly suggests that the legislature contemplated "the time of disqualification" to be a different than "the date the disqualification is taken into account." Otherwise, the legislature would have used "the time of disqualification" in both paragraphs of ORS 308A.709.

Additionally, under ORS 308.007(1), an "assessment year" is a "calendar year," ORS 308.007(1)(b), and a "tax year" is "a period of 12 months beginning on July 1," ORS 308.007(1)(c). Based on those definitions, then, it seems likely that either January 1 or July 1 would be the relevant date on which a disqualification would be "taken into account on the assessment and tax roll." Here, because the property became disqualified after July 1, that

disqualification would be taken into account on the following January 1 assessment roll.[3]

Other context supports that interpretation. ORS 308.210(1) provides, in part:

> "The assessor shall proceed each year to assess the value of all taxable property within the county, except property that by law is to be otherwise assessed. The assessor shall 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*, in the manner set forth in ORS 308.215. Such record shall constitute the assessment roll of the county for the year."

(Emphasis added). This statute directs the assessor to create an assessment roll, which represents a record of all of the taxable property within the county as it exists at a specified point in time—January 1, at 1:00 a.m.

Taxpayer dismisses the significance of ORS 308.210(1) by declaring, "[o]bviously, creating 'a full and complete record of the assessment of taxable property for each year as of January 1' is not an event that simply occurs on New Year's Day: No assessor could have either the personal energy or the

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[3] If the disqualification in this case had occurred before July 1, it seems likely that it would have been "taken into account on the assessment and tax roll" on July 1. *See, e.g.*, ORS 308A.068(3) ("[I]f land so qualified becomes disqualified prior to July 1 of the same assessment year, the land shall be valued under ORS 308.232, at its real market value as defined by law without regard to this section, and shall be assessed at its assessed value under ORS 308.146 or as otherwise provided by law. If the land becomes disqualified on or after July 1, the land shall continue to qualify for special assessment as provided in this section for the current tax year.").

manpower to do all that is required on that single day; rather the 'full and complete record' necessarily is a compendium of information collected and assessment work done throughout the preceding year." (Op Br 15). Of course, taxpayer is correct that the statute does not direct county assessors to conjure a complete assessment roll the moment the clock strikes one on New Year's Day. Neither the department nor the Tax Court has suggested such a feat is required. Instead, the significance of ORS 308.210(1) is that it identifies a point in time at which assessments take legal effect. For the purposes of the issue before this court, it identifies the point in time at which the property valuation for the upcoming tax year occurs.

This cut-off date and time reflects the practical reality of the job faced by assessors: they must create an "assessment roll" of all taxable property within their jurisdiction including data that is constantly changing—sometimes on a daily basis. ORS 308.215 identifies the form that assessment rolls must take and the information that the roll must contain. Among other information required for real property, the roll must contain the names of the owners of the property or the names of the agent of the owner to whom the tax collection notices are to be sent. ORS 308.215(1)(a)(A). It must contain a detailed description of the property, including the size and class of the property. ORS 308.215(1)(a)(B)-(D). Finally, the assessment roll must contain information about the real market value, assessed value, and maximum assessed value of the

land and of the structures on the land. ORS 308.215(1)(a)(E)-(I). The roll contains similar requirements for personal property. ORS 308.215(1)(b).

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. Having such a cut-off date (and having that date be January 1) is the standard throughout the property tax code. *See, e.g.*, ORS 308.153 (describing formula for adding new property or new improvements to property "as of January 1 of the assessment year"); ORS 308.156(4)(a) (referring to "the January 1 assessment date" for determining a property's maximum assessed value when a parcel was subject to a special assessment and later is disqualified from that special assessment); ORS 308.215(1)(b) (relying on January 1 as relevant date for assessment rolls of personal property); ORS 308A.068(3) (setting January 1 as the date for determining whether farmland qualifies for a special assessment).

Despite the need for such a cut-off date, the legislature has vested assessors with authority to make some changes to the assessment rolls throughout the year. Specifically, ORS 308.210(2) vests assessors with authority to change "the ownership and description" of real property throughout the year "to reflect on the assessment roll the divisions of property or the combining of properties after January 1 so as to reflect the changes in the ownership of that property and to keep current the descriptions of property."

"The assessor shall also have authority to change the ownership of record after January 1 of a given year so that the assessment roll will reflect as nearly as possible the current ownership of that property." ORS 308.210(2). This authority makes sense as it ensures that ownership interests in real property are kept up-to-date to ensure that the correct persons receive appropriate notices regarding the property.

As it relates to the issue in this case, this authority is also telling for what it omits. The legislature specifically provided assessors with authority to make certain specific changes to the assessment rolls throughout the year—changes that reflect the ownership and physical descriptions of the property. The legislature did not provide that same authority with respect to changing market values or special assessments. That is a strong indication that the legislature intended the ORS 308A.709 disqualifications to only be "taken into account on the assessment and tax roll" on January 1.

The final piece of context for determining when disqualifications are taken into account is simply looking at the various circumstances described in ORS 308A.709 that would lead to a disqualification. In addition to the one at issue here—public property that was leased to a taxable owner and then the lease was terminated—this statute contemplates six other circumstances that would lead to a disqualification from the special assessment. Each of those circumstances involves the acquisition—or re-acquisition—of real property by

governmental entity for the public good. Each of these circumstances results in a situation where the property ends up in public ownership "on the assessment and tax roll."[4] As noted above, such property would normally be exempt from standard property taxes. However, without ORS 308A.709 it would not be clear whether that property would also be exempt from the deferred additional taxes under ORS 308A.703. ORS 308A.709 provides that clarity, as the purpose of that statute was to insure that property owned by governmental entities was not assessed any previously deferred taxes.

The property at issue here, of course, was owned by the port for less than one week after it was disqualified from receiving the special farm use assessment. Thereafter, it was owned by a private entity. Providing that private entity a tax exemption under ORS 308A.709 would be inconsistent with the purpose behind that provision.

The department is not aware of any legislative history that directly bears on the issue in this case. The history of *former* ORS 308.396 (1985), cited by taxpayer, is inapposite. (Op Br 23-29). The legislative summary to Senate Bill 41 (1983) makes clear that "the state" would be exempt from additional

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[4] Although paragraph (6) does not involve the acquisition of property by a public entity, it does involve land that was subject to a zoning change by a public body that was not initiated by the property owner or was requested by the state for "public park purposes" or "wildlife management purposes." So, even under this paragraph, the disqualifying event was done for the public good.

deferred taxes when state-owned property that had been leased to a taxable entity, but that qualified for a special assessment, no longer qualified for the assessment because of the termination of the lease. That summary, however, assumed that the state would remain the owner of the property at the next assessment date. The summary does not speak to the present situation, where the property was no longer publically owned on the relevant assessment date. So, although the subsequent enactment of ORS 308A.709 was merely an effort to reorganize and restructure the farm use statutes—including *former* ORS 308.396—that would aid taxpayer only if *former* ORS 308.396 had the meaning taxpayer now attributes to it. It does not.

C. The Tax Court correctly concluded that the ORS 308A.709(5) exemption did not apply.

Based on the foregoing understanding of ORS 308A.709(5), the Tax Court correctly determined that the exemption from the imposition of additional taxes did not apply to the property in this case. As the Tax Court noted, ORS 308A.709(5) requires that property be "public property" to qualify for the exemption. (APP-9). And that statute directs that determination to be made at a specific point in time—the date that the special assessment disqualification "is taken into account on the assessment and tax roll." (APP-8). Although ORS 308A.709(5) does not specify a date for when information "is taken into account on the assessment and tax roll," other statutes make clear that that

typically occurs on January 1. That is the statutorily identified point in time for when an assessor takes into account all of the information required to be on the assessment rolls. An identified point in time is necessary, because much of the data required to be on an assessment roll is fluid—like market value and qualification for special assessments—and it would be impossible to constantly create new county-wide assessment rolls to reflect this ever-changing information.

In this case, on January 1, 2013, the subject property was not publically owned. Therefore, on the date that the disqualification from the farm use special assessment was "taken into account on the assessment and tax roll," the property did not qualify for the ORS 308A.709(5) exemption from payment of additional deferred taxes. Consequently, the Tax Court correctly granted the department's motion for summary judgment and it correctly denied taxpayer's summary judgment motion.

CONCLUSION

For all of the foregoing reasons, this court should declare the imposition of the deferred additional taxes valid, and it should affirm the judgment of the Tax Court.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on August 2, 2016, I directed the original Respondent's Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon W. Michael Gillette and Sara Kobak, attorneys for appellant, 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 4,075 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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