JUNE 2008, VOL. 51, NO. 12

TAX TRENDS

The newsletter of the ISBA's Section on State & Local Taxation

Chair's column

By Thomas M. Battista

The field of State and Local Taxation is constantly changing. This is true primarily because politicians and government leaders are consistently revising the tax codes to accommodate economic demands. There is a constant flow of regulatory changes that also affects our practices and our clients. And there are the occasional statutory amendments that advance the public good, or streamline the practitioner's route through a tax challenge.

The Section Council has a number of responsibilities relevant to the members of this section that includes CLE, providing informational articles, and following legislative and regulatory changes affecting our practice. Because the field of tax law has the constant interest of the legislature, our Section Council keeps abreast of all proposed legislation affecting state and local taxes. We carefully track the numerous tax proposals filed each legislative session. We discuss and recommend our formal positions on legislation to Jim Covington and the ISBA Legislative Committee, generally taking no position on legislation that is not germane to our practices.

We also review regulations promulgated by the Property Tax Appeal Board and the Illinois Department of Revenue. Oftentimes these new regulations have widespread impact on the substantive and procedural rights of the clients we serve. Because state agencies have considerable legal authority to adopt regulations concerning the statutes which they are charged to enforce, we closely observe their proposals. Recently, we appointed Scott Longstreet, a member of the Section Council, to take charge of monitoring proposed agency regulations. This function allows the members of our Council to study the numerous proposals and determine which provisions require our support or opposition. Frequently, the agency proposals have merit but require modification. Some require all out opposition. The State and Local Tax Section Council meets and studies these proposed regulations and makes recommendations to the ISBA Legislative Committee, so that prompt action can be taken to comment on the regulations before they are considered by the body.

If you have an opinion about a particular piece of legislation that affects your practice, simply e-mail me or the Secretary and we will discuss your concerns. If you would like to offer a suggestion for a change in the law that has broad application, you may also forward your suggestions to me so that we can present them to the group for discussion. You can also provide us with information you may have regarding proposed regulations affecting our field of practice. We welcome the input. And, as always, you are invited to offer articles to be published in this newsletter concerning legislation, a regulatory matter, or any topic relevant to our Section Council.

Thomas Battista practices with the firm of Rock Fusco & Associates in Chicago, where he concentrates in the area of property taxation and professional licensing and regulatory matters.

Recent procedural developments in real property taxation*

By Jacqueline Gianneschi

***Green Tree Servicing, LLC v. Random Antics, LLC and Auditor and Treasurer of Delaware County*, No. 18A05-0605-CV-233 and No. 34A02-0608-CV-679 (Ind. Ct. App. June 6, 2007).**

Facts: Green Tree loaned funds to the Robertsons for the purchase of a mobile home and real estate in Muncie. The Robertsons executed a real estate note (contract) in favor of Green Tree and executed a real estate mortgage and granted a separate security interest to Green Tree in a mobile home located on the real estate. Three years later the Treasurer sold the taxes to DES Capital (Random Antics'

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predecessor) for $22,000, which more than covered the amount of the delinquent taxes. The tax sale produced a surplus of over $20,000 and neither the Auditor nor the Treasurer notified Green Tree of the surplus. Two years later, Robertson submitted a claim to the Auditor for the tax sale surplus funds. Green Tree was not notified of this claim either. The Auditor then issued a tax deed to DES Capital for the lot and approved Robertson's request for the surplus funds. Green Tree alleged that the Auditor's and the Treasurer's failure to notify them of the surplus or of Robertson's claim was negligent and amounted to an unconstitutional deprivation of property without due process of law.

The Auditor and Treasurer moved for summary judgment, stating they had followed the statutory procedures in disbursing the funds. This did not require notice to mortgagees or lienholders. They also argued that since Green Tree had received proper notice of the tax sale from the tax sale purchaser, there was no further duty to notify them of the surplus funds.

Discussion: The Court noted that the Indiana statutes contain an abundance of procedural safeguards with regards to notice requirements when real estate tax sales occur. It is undisputed that Green Tree received both required notices under the statutes. Green Tree took no action to protect its property interest in the land after receiving the notices. They could have learned of any additional information by contacting the county. The Court stated that the tax sale statutes do not protect those that have received actual notice of a tax sale but do nothing further to protect their interests in the property. The Court also noted that neither the Treasurer nor the Auditor were made aware by Green Tree of any information regarding the mortgage payoff until the surplus had already been distributed. It is the interested parties' burden to convince the trial court that they are entitled to a share of the surplus. The Court concluded the Auditor and Treasurer followed the statutory procedure in issuing the tax sale surplus funds to the Robertsons.

***Tim Roberts v. Paul Robert and Yolanda Robert, Trustees of the Samani Trust,* Dated 3-31-1997, No. 1 CA-CV 06-0530. (Court of Appeals of Arizona, Division 1, Department B. May 31, 2007).**

Facts: Appellees purchased two Arizona real property tax liens. The lienholders subsequently sued the owner of records whose name was Phyllis Johnson, the Mohave County Treasurer, various fictitious parties and the "unknown heirs of any of them" to foreclose their right to redeem the tax liens. A son of Johnson (Johnson was deceased), was served on Johnson's behalf and subsequently entered into an arrangement with the lienholders whereby they would obtain a default judgment without any assessment of fees or costs against Johnson or the son. The lienholders then obtained a default judgment barring Johnson or any person claiming title under her from asserting any interest in the property subject to the tax liens.

A year later, Appellant Tim Roberts appeared claiming to be a son and heir and argued that as such he had a right to redeem the tax liens. Roberts

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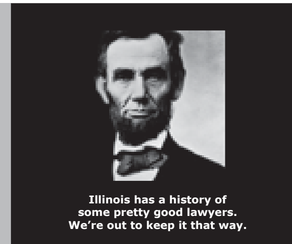

asserted that as an heir, he obtained an ownership interest in the property by operation of law which gave him a right to redeem the tax liens. He additionally claimed that the default judgment was void as to him because he had not been personally served or served by publication.

Discussion: The Court agreed that under A.R.S. § 42-18151 Roberts did have a legal claim to the property and therefore became entitled to redeem the tax liens. Roberts also claimed that because the lienholders failed to join him as a defendant in their foreclosure action, the foreclosure judgment did not foreclose his right to redeem. Section 42-18204 (Supp.2006) recognizes this point. The statutory wording makes it clear that only those parties that are joined in the action may have their rights to redeem foreclosed. Therefore, the lienholders needed to join Roberts as a defendant in their foreclosure action and obtain a judgment against him to foreclose his right to redeem. "[A]ny procedure which deprives an individual of a property interest must satisfy due process." *Mervyn's, Inc. v. Superior Court*, 144 Ariz. 297, 300, 697 P.2d 690, 693 (1985). A tax lien holder may need to examine public records, court records or interview relatives, friends and neighbors of a decedent property owner about the existence of heirs. *Cf. Preston v. Denkins,* 94 Ariz. 214, 222-23, 382 P.2d 686, 691-92 (1963). The courts stated it would not have been burdensome to ask the first son whether their were other heirs. Additionally, after due diligence to determine whether there are any other heirs, the unknown heirs can be made parties and served with process by publication. (See Arizona Rules of Civil Procedure 4.1(o) and 4.2(g)9. In this case, the lienholders named Johnson's unknown heirs in the caption of their complaint, yet they had not served Roberts by publication, believing he was not a party to the action. The court therefore holds that a decedent's heir has a right to redeem a tax lien on the decedent's real property and that the tax lien purchaser must make an heir a defendant to a tax lien foreclosure action and obtain a judgment foreclosing an heir's right to redeem.

***Jackson County, Plaintiff-Appellant v. State of Wisconsin Department of Natural Resources, Jackson County Sanitary Landfill, Inc. and Thomas McNulty, Defedants-Respondents*. No. 2004AP2582, No. 2005AP545. Supreme Court of Wisconsin Argued March 2, 2006, Decided July 1, 2006. Page 714.**

Facts: Jackson County Sanitary Landfill (JCSL) owned and operated a landfill in Jackson County. It was licensed by the Department of Natural Resources (DNR) to operate a solid waste facility. IN 1998, JCSL stopped paying real estate taxes on this property. In June of 2000, the landfill reached its authorized capacity and JCSL began closure. The County pursued tax delinquency proceedings against JCSL by issuing a tax certificate for unpaid taxes on the property. In 2002 the county clerk issued a tax deed to the county because JCSL did not redeem the tax certificate. The County accepted, recorded and re-recorded the tax deed. In 2003, the County's board of supervisors resolved to rescind the tax deed, having realized that the responsibilities associated with the landfill could place a financial burden on the County. Notwithstanding the County's resolution, JCSL continued to claim the County owned the landfill and was responsible for its care, maintenance and any subsequent liability. The County then filed a declaratory judgment action, alleging that it is inequitable to permit JCSL to escape its obligations for the landfill by refusing to pay taxes. The circuit court granted summary judgment to JCSL and the DNR. The County appealed, arguing that it had the authority to rescind the tax deed under Wis. Stat. § 59.03(1), which the County claims allows I to "exercise any organizational power, subject only to the constitution and to any enactment of the legislature." The County's position is that absent a statute barring its rescission of the tax deed, its actions resulted in effective rescission. The Court of Appeals certified the issue of whether "a county, after taking a tax deed to assume ownership of property on which taxes had not been paid, may rescind the tax deed and return the property to the original owner, without that owner's consent."

Discussion: The County contends that the county clerk made a mistake in issuing the tax deed and that it would be unfair to the taxpayers of Jackson County to bear the burden of the landfill and the expenses associated with its ownership. They contend rescission

Tax Trends

Published at least four times per year.

Annual subscription rate for ISBA members: $20.

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would return JCSL to the same position it would have been in had the tax deed never been issued. It argues that under its home rule powers, Wis. Stat. § 59.03, it is able to correct that mistake by rescission of the tax deed.

JCSL focuses on the lack of a statute that gives the County the power to rescind a tax deed, the statutory limitation on cancellations of tax deeds set out in Wis. Stat. § 75.22, and the effect on property ownership that Wis. Stat. § 75.14 provides. They claim as a result of the tax deed, all rights and interests in the property passed to the County.

The court asserted that a county is a creature of the legislature and has only those powers as provided by statute. Accordingly, the County's power to rescind a tax deed under the circumstances presented by this case must be found in a statute or necessarily be implied from a statute. The County correctly asserted the Wis. Stat. § 59.03 is a broad grant of power to counties. They also rely on Wis. Stat. § 75.22 wherein it asserts it has the implied, if not expressed, power to rescind this tax deed. When exercising home rule power, a county must be cognizant of the limitation imposed if the matter has been addressed in a statute that uniformly affects every county as such legislation shows the matter is of statewide concern *Mommsen v. Schueller*, 228 Wis.2d 627, 635, 599 N.W.2d 21 (Ct.App.1999). For those subjects where both the state and a county may act, the county's actions must "complement rather than conflict with the State legislation." *State ex rel. Ziervogel v. Washington County Bd. Of Adjustment*, 2004 WI 23, ¶37, 269 Wis.2d 549, 676 N.W.2d 401.

Four factors assisted the court in determining how a county's action is to be analyzed:

1. whether the legislature has expressly withdrawn the power of municipalities to act;
2. whether the ordinance logically conflicts with the state legislation;
3. whether the ordinance defeats the purpose of the state legislation; or
4. whether the ordinance goes against the spirit of state legislation.

Mommsen, 228 Wis.2d at 636-37, 599 N.W.2d 21 (citing *Anchor Sav. & Loan Ass'n v. EOC*, 120 Wis.2d 391, 397, 355 N.W.2d 234 (1984); *U.S. Oil, Inc. v. City of Fond Du Lac*, 199 Wis.2d 333, 345, 544 N.W.2d 589 (Ct. App1996). The court concluded that the second *Mommsen* factor had to be evaluated because Wis. Stat. § 75.22 specifically addresses cancellation of tax deeds. This statute provides:

> If after the issuance of a tax certificate or conveyance to the county of any lands subject to a tax certificate and within the time hereinafter prescribed it shall be discovered that the certificate was invalid, the county board shall make an order briefly stating the reason therefore, directing that the certificate, as it applies to the affected lands, or deed be cancelled. But no certificate or conveyance shall be deemed invalid within the meaning of this section by reason of any mistake or irregularity in any of the tax proceedings not affecting the groundwork of the tax; nor shall any county be liable to pay or refund any moneys by reason of any mistake or irregularity.

The County contends the mistake of the clerk affects the "groundwork of the tax" while JCSL contends there is no defect in the deed that affects "the groundwork of the tax" in this case. The court relied on *Foster v. Sawyer County*, 197 Wis. 218, 220-21, 221 N.W. 768 (1928) and *Bauermeister v. Town of Alden*, 16 Wis.2d 111, 113 N.W.2d 823 (1962) for interpretation of "the groundwork of the tax." They determined that the County would be required to show the property was inequitably taxed resulting in the property owner paying more than its equitable share of the tax. Here, the County argued that the mistake is related to the groundwork of the tax because the clerk did not recognize that the property would have no value to the County at the time the tax deed was issued. This is not the type of defect that causes the taxation of the property to be unfair to the County.

Additionally, the County's attempt at returning the property to JCSL is contrary to common law. In order to transfer title by deed, the deed must be accepted by the grantee. *Welch v. Sackett*, 12 Wis. 243, 292-95 (1860). Here JCSL would be forced to accept ownership of the property. Forcing one to accept ownership of property against that party's wishes is contrary to common law. See *Miles v. Mackle bros., Division Deltona Corp.*, 73 Wis. 2d 84, 89, 242. Therefore, without statutory authority that permits a county to force ownership of property on another, the common law cuts against the County's position.

The County argues that nevertheless it still has the power to rescind the deed under its generalized home rule power. The home rule power of a county does grant counties the right to act and decision-make on local affairs, however, counties must do so in a manner that does not conflict with the state's interest in uniformly treating those questions that arise in many counties across the state. The same four-factor test used above was applied by this court and they determined that this county interpretation would not conform to the letter and spirit of statewide law. The court relied on *Edwards Realty & Finance v. City of Superior*, 250 Wis. 472, 27 N.W.2d 370 (1947) to reach the conclusion that the rescission is not in conformity with the law.

The court concluded that the County lawfully issued the tax deed, and when the County accepted the tax deed all property rights vested in fee simple in the County. Because the County has no statutory authority to rescind a tax deed that was lawfully issued and impose property ownership on a third party, its attempted rescission has no effect on ownership of the property containing the landfill.

***William Little, Plaintiff and Appellant, v. Los Angeles County Assessment Appeals Board et al., Defendants and Respondents*. B195610, Court of Appeals of California, Second District, Division Three, Filed September 27, 2007.**

Facts: Plaintiff Little is appealing a judgment denying a petition for peremptory writ of mandate (Code Civ. Proc. § 1085). The petition sought the issuance of a writ directing the defendants and respondents to change the base year value for the subject real property from $480,000 to $288,000. The issue is whether a petition for writ of mandate under Code of Civil Procedure section 1085 lies to challenge a property assessment.

In July 1991, Little purchased the subject property, a 16-unit apartment building in Los Angeles. In 1992 the Assessor established the base year value for the property following the change of ownership as $700,000. In 1994, Little filed an application to reduce the assessed value due to a depressed real estate market. His application chal-

lenged the Assessor's property description which stated there were two buildings, not one as was only on the parcel. A field check by the Assessor confirmed there was only one 16-unit building on the parcel, which resulted in a reduction in value to $480,000 which Little accepted as reasonable.

In 1996, Little filed another appeal based on a Proposition 8 decline in value. The Board reduced the value to $288,000. This remained on the assessment roll (subject to inflationary increases, bringing the value to $304,000) until 2004, when the Assessor restored the 1992 base year value of $488,000. Adjusting for inflation, this increased the value to $572,000. In November of 2004, Little filed another appeal seeking a return to the valuation of $304,000. Little contended the base year value of $480,000 was incorrect, based on the size of the units, and the correct base year was $288,000.

In August of 2005, the Board made a finding of fact that the property consisted of 16 studio units having an average size of 450 sf, not one-bedroom units as the Assessor had indicated. The Board denied the assessment change however and declared it invalid. The Board found that the base year was properly determined on the 1992 application in the amount of $480,000.

In February 2006, Little filed a petition for writ of mandate seeking to overturn the Board's denial of his third assessment appeal. Little argued that the Assessor had made a mistake when setting the base year value at 480,000. He thought the property consisted of 16 one-bedroom units valued at $30,000 when in fact the property contained 16 studio units valued at $18,000 each. Little argued that since the Assessor's mistake did not 'involve the exercise of an assessor's judgment as to value,' the incorrect base-year value was not subject to the four-year limitations period governing judgmental errors in base-year determinations, but was and here is subject to correction without limitation as to time under R&T Code Section 51.5(a)."

The Assessor contended that Little was not entitled to mandamus because in 1994 the Board equalized that base year value at $480,000 and Little accepted that determination.

The trial court denied Little's petition on the grounds that the base year determination did involve the exercise of judgment as to value and that the statute of limitations had expired in 1998. The trial court also found that the value change in 1998 resulted from a Proposition 8 decline-in-value assessment and not on a base-year challenge. Thus, the base year value was never changed, only temporarily replaced. On appeal, Little contended he was entitled to proceed under his petition for writ of mandate; he is entitled to have the corrected base year value entered on the assessment roll because the incorrect base year value did not involve the Assessor's judgment as to value; and there is no limitations bar to the prosecution of this action.

Discussion: The Court of Appeals concluded mandamus does not lie to prevent or enjoin the collection of tax and that a taxpayer's remedy is to file suit in the superior court for a refund. The court relied on *Sunrise Retirement Villa v. Dear* (1997) 58 Cal.App.4th 948 and its discussion of "statutory procedure for appealing base-year determinations." The "mechanism for judicial review of decisions by a county assessment appeals board is significantly different from that of other administrative agency decisions. Ordinarily the aggrieved taxpayer's remedy is not to seek administrative mandate pursuant to Code of Civil Procedure section 1094.5, but to pay the tax and file suit in superior court for a refund. [Citations.]" (*Sunrise, supra*, 58 Cal. App.4th at p. 955, fn.2).

Further, "a writ of mandamus…only issues when there otherwise is no speedy and adequate remedy at law. (Code Civ. Proc., [§] 1086…)" (*County of Sacramento v. Assessment Appeals Bd. No. 2* (1973) 32 Cal.App.3d 654, 672). A suit for a refund of taxes paid is an adequate remedy. (Ibid).

The Court of Appeals also relied on Sunrise to support the fact that mandamus does not lie in Little's circumstances. In Little's case, the Board did hold a hearing and made a ruling on the merits against Little. *Sunrise* is not authority for the proposition that the Board's adverse decision with respect to the base year value is reviewable by way of a petition for writ of mandate under Code of Civil Procedure section 1085. Therefore, the trial court erred in overruling the Assessor's demurrer to the petition.

The court went on to state that even assuming the petition for writ of mandate was construed as a complaint for refund of taxes, the action is time-barred under Revenue and Taxation Code section 51.5. The language of section 51.5 provides that errors involving the assessor's exercise of judgment as to value are subject to a four-year limitations period. *Kuperman v. San Diego County Assessment Appeals Bd. No. 1* (2006) 137 Cal.App.4th 981, 929. The 1994 determination setting the base year value at $480,000 did involve the Assessor's exercise of judgment as to value and is therefore governed by the four-year limitations period of section 51.5, subdivision (b). The record reflected the fact that the Assessor considered sales of comparable properties and other factors in arriving at the $480,000 valuation. Whether the units were one-bedrooms or studios, judgment was involved in the value determination. Accordingly, Little's claim fell within the scope of section 51.5 and was time-barred.

Judgment denying the petition for writ of mandate is affirmed.

***City of Philadelphia, Appellant, v. Tax Review Board of the City of Philadelphia, to the use of Victa Floyd.* No. 1362 C.D. 2006. Commonwealth Court of Pennsylvania. Argued: March 5, 2007. July 23, 2007.**

Facts: The City of Philadelphia appeals the order of the Court of Common Pleas, which adopted and affirmed the decision of the Tax Review Board of the City of Philadelphia abating interest, penalties and lien charges relating to delinquent real estate taxes owed by Victa Floyd. The City argues the Board lacks the authority to abate the lien charges, to direct the apportionment of the payment to principal only, and to enter into an installment agreement with a taxpayer.

Floyd failed to pay real estate due on his Philadelphia property for the years 1990 to 1999 and 2003. In August of 2004, Floyd filed a petition with the Board seeking an abatement of interest and penalties that had accrued relating to the real estate taxes he owed. At the hearing before a Master in October of 2004, one-half of the interest, all of the penalties and all of the lien charges were abated provided Floyd made all payments by December 31, 2004. Floyd appealed the Master's decision to the Board and in January of 2006 Floyd testified at the Board hearing. He testified that he was delinquent due to life

events including a short marriage and a work-related injury. The Board agreed to abate all interest, penalties and lien charges if Floyd paid the principal he owed ($6,244.85) today and the legal fees ($2,186.41) in installments not to exceed 18 months. Hearing transcript, docket #36 REINPZZ6084, dated January 6, 2005. At the end of the hearing, Floyd tendered the check to the Board but it was post-dated to January 14, 2005.

The City appealed the Board's decision to common pleas. The City then voided Floyd's personal check and returned it to him. In its opinion, the Board noted that "the Philadelphia Code provides broad jurisdiction to the...Board to review charges claimed by the Department of Revenue. It is under this broad umbrella that the Board considers lien charges assessed by the City." The Board concluded that "Floyd had taken sufficient steps to correct the situation so that in the view of the…Board an abatement of interest and penalties was warranted. Board's Opinion, dated July 11, 2005, at 2. The Board further stated that "lien charges assessed by the City as part of a tax collection matter fit into the category of 'other charges' over which the …Board has jurisdiction under Chapter 19-1702(l) of the Philadelphia Code." Board's Supplemental Opinion, dated March 24, 2006, at 1. Common pleas adopted and affirmed the Board's decision by order dated June 1, 2006 and the City appealed.

Discussion: The City argued that the Board lacked the authority to abate the lien charges, to direct the apportionment of the payment to principal only, and to enter into an installment agreement with a taxpayer. Philadelphia Code § Section 19-1705 provides for the abatement of interest and penalties only, not lien charges. Section 19-1702 governs petitions for review "relating to the liability of any person for any unpaid money or claim collectible by the Department of Revenue…" Philadelphia Code § 19-1702 (1). Here, Floyd did not challenge the underlying liability for the unpaid taxes, interest, penalties, legal fees and lien charges, but simply sought to have the interest and penalties abated as a matter of grace. Thus, Section 19-1702 is inapplicable to this case and the Board lacks the authority to abate the lien charges for the tax years in question.

Regarding whether the Board lacks the authority to direct the apportionment of the payment to principal only, the court looked to Section 19-505(1) of the Philadelphia Code. This provides that "unless otherwise provided, when a partial payment is made on account of any delinquent tax, such payment shall be pro-rated between the principal sum of such tax and the penalties and interest accumulated on it." Additionally, the City Department of Revenue's General Regulation Section 5068 states:

> All payments for real estate taxes shall be applied to the oldest real estate tax year first and apportioned to tax principal, interest, penalties, costs and fees, regardless of any designation made by the taxpayer or his or her agent. However, if such an allocation would result in a taxpayer being unable to take advantage of the Senior Citizen Real Estate Tax Rebate Program offered by the Commonwealth of Pennsylvania or being unable to enter into the Installment Payment Program, as defined in Philadelphia Code § 19-1305, the taxpayer may apply for a different allocation of the payment. The method of applying for a change in allocation will be set forth by the Philadelphia Department of Revenue. Upon finding that the oldest year first allocation would prevent the taxpayer from taking advantage of or entering into either such program, the Department of Revenue may permit a different allocation of payments. The Department of Revenue's response to the taxpayer must be in writing. Payments made by a taxpayer who has entered into an agreement to pay delinquent real estate taxes, which agreement requires that the taxpayer pay current real estate taxes on time, shall be permitted to have payments applied to such current year taxes so long as that taxpayer has not otherwise broken the agreement.

The facts of the *Floyd* case do not present the type of situation where the DoR's allocation can be altered, therefore, the Board's apportionment of the payment of principal only was in derogation of Section 19-505(l) of the Philadelphia Code as well as the City Department of Revenue's General Regulation Section 506.

The final issued addressed by the Court is whether the Board has the authority to enter into an installment agreement with the taxpayer. The Court noted the Board has authority to make a waiver of interest and penalties contingent upon a taxpayer's entering into a suitable agreement with the City to pay the balance due, however, there is no authority for the proposition that the Board has the authority to enter into an installment agreement with a taxpayer. See *Estate of Kuljian v. Philadelphia Tax Review Bd*., 533 A.2d 1135 (Pa. Cmwlth. 1987); *Nine Penn Center Associates v. Tax Review Bd. Of the City of Philadelphia*, 692 A.2d 246 (Pa. Cmwlth. 1997).

Reversed.

AND FINALLY, AN UPDATE FROM LAST YEAR…………

***Santos Alvarez and Marie Perez Alvarez; Phillip Douglas; Andrew Dratt and Sophie Dratt; Faye H. Nazon; Polish Women's Alliance of America; Evanston Plaza LLC; and David Lawless, Individually and on Behalf of All Others Similarly Situated, Plaintiffs-Appellants, v. Maria Pappas, Treasurer and ex-officio Collector of Cook County, Illinois, Defendant-Appellee.* No. 1-06-0098. Appellate Court of Illinois, First District, First Division. June 4, 2007.**

Facts: Plaintiffs appeal from an order of the Circuit Court of Cook County dismissing their complaint pursuant to section 2-619(a)(5) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(5) (West 2004)). The Circuit Court held that Plaintiffs' claims for a return of duplicate real estate tax payments were barred by the five-year statute of limitations in section 20-175 of the Property Tax Code (35 ILCS 200/20-175 (West 2004)). Plaintiffs contend in this appeal that this section does not apply to their claims and that the Circuit Court erred in dismissing their complaint.

Plaintiffs alleged that defendant was the only treasurer in the State who refused to refund a duplicate real estate tax payment when the refund was requested more than five years after the duplicate payment was made. Plaintiffs specifically argued that the defendant accepted and dispersed duplicate payments with knowledge that the relevant tax bill had already been paid. The

duplicate payment was posted in the warrant Books and was not credited to taxpayers' future tax bills or automatically refunded. Only when a refund application was submitted within five years of the date on which the duplicate payment was made would a taxpayer receive the refund. Taxpayers were not provided with any notice of the duplicate payment nor were the funds that were unclaimed turned over to the State Treasurer. Plaintiffs noted that as of August 1, 2005, defendant began to mail taxpayers written notice of the existence of duplicate payments on their real estate tax bills. Plaintiffs' complaint sought relief under the following theories: (1) conversion; (2) a violation of plaintiffs' equal protection and due process guarantees; (3) unlawful taking without just compensation; (4) unjust enrichment; (5) the Illinois Uniform Disposition of Unclaimed Property Act (765 ILCS 1025/0.05 et seq. (West 2004)); and (6) the Illinois State Employees Pension System. The following relief was requested: (1) certification of the matter as a class action; (2) declaration that the duplicate payments were plaintiffs' private property which constitutes an unconstitutional taking as well as a violation of due process and equal protection rights; (3) entry of a temporary, preliminary or permanent injunction or writ of mandamus, providing for equitable and injunctive relief to ensure the return of plaintiffs' property and for an accounting of all duplicate payments, enjoining defendant from engaging in the policies and practices complained of, and requiring the defendant to deposit all duplicate payments with the State Treasurer as required under the unclaimed Property Act; and (4) judgment in the amount of the duplicate payments and all income earned thereon.

Plaintiffs' complaint was dismissed by the Circuit Court as stated above because their claims were barred by the five-year statute of limitations. See 35 ILCS 20/20-175 (West 2004)).

Discussion: On appeal, Plaintiffs contended that the Circuit Court erred in dismissing their complaint given that Plaintiffs' duplicate payments were not "tax payments" but mistaken payments of real estate tax assessments that had already been satisfied and therefore section 20-175 was not applicable. Plaintiffs also argued that these payments constituted "tangible property" and were subject to the Unclaimed Property Act (765 ILCS 1025/8.1 (West 2004)). The appellate court rejected both of these arguments, looking at statutory interpretation as well as the legislature's objective in enacting the statute. (see *United States v. Dalm*, 494 U.S. 596, 108 L. Ed. 2d 548, 110 S. Ct. 1361 (1990). After the Court characterized Plaintiffs' payments as tax "overpayments" and claims for a "refund," they examined whether those claims were subject to section 20-175's five-year statute of limitations.

The Court noted that the title of section 20-175 is "Refund for erroneous assessments or overpayments." This suggests that the statute applies to refunds for overpayments of taxes. After considering the language of the statute as well as the legislative history, the Court concluded that the legislature intended this section to provide for refunds when a real estate tax installment has been paid twice in error.

The Court then determined that the five-year statute of limitations begins to run on the date that the Plaintiffs made the duplicate payments, not when the taxpayer discovered that the payment was erroneous. *Dalm*, 494 U.S. at 609 n.7, 108 L. Ed. 2d at 562 n.7, 110 S.Ct. at 1369 n.7. Because Plaintiffs' complaint was filed more than five years after the duplicate payments were made, Plaintiffs' claims were untimely, their first amended complaint was properly dismissed and the judgment of the circuit court is affirmed.

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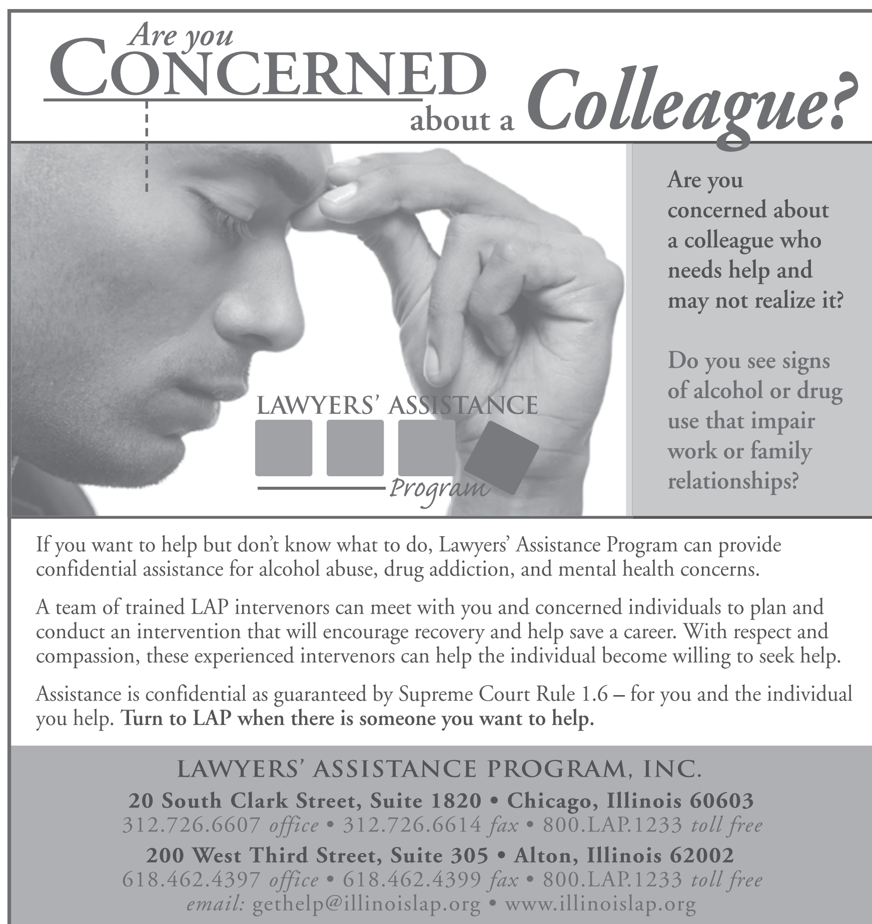
*RECENT PROCEDURAL DEVELOPMENTS IN REAL PROPERTY TAXATION by Jacqueline Gianneschi was originally presented at the IAAO Legal Seminar in December of 2007.



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Tax Trends
Illinois Bar Center
Springfield, Illinois 62701-1779
June 2008
Vol. 51 No. 12

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