

OHIO BOARD OF TAX APPEALS

Hamilton Brownfields)
Redevelopment, LLC,)
)
Appellant,) CASE NO. 2003-T-1944
)
vs.) (REAL PROPERTY TAX EXEMPTION)
)
Thomas M. Zaino, Tax) DECISION AND ORDER
Commissioner of Ohio,)
)
Appellee.)

APPEARANCES:

For the Appellant - Schottenstein, Zox & Dunn, L.P.A.
Robert K. Danzinger
US Bank Centre at Playhouse Square
1350 Euclid Avenue
Suite 1400
Cleveland, Ohio 44115

For the Appellee - Jim Petro
Attorney General of Ohio
Janyce C. Katz
Assistant Attorney General
Taxation Section
State Office Tower, 16th Floor
30 East Broad Street
Columbus, Ohio 43215-3428

Entered October 28, 2005

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

The Board of Tax Appeals considers this matter pursuant to a notice of appeal filed by Hamilton Brownfields Redevelopment, LLC. Hamilton Brownfields appeals from an order of the Tax Commissioner, in which the commissioner placed certain property on the exempt tax list beginning in tax year 2003. Hamilton

Brownfields argues that the exemption should have been granted beginning with tax year 1998. We conclude that the commissioner acted lawfully.

The property at issue in this matter is identified in the Butler County Auditor's records as permanent parcel number P6541-035-000-001. It is comprised of approximately 13 acres of land and was improved with a 500,000 square foot structure formerly used in the manufacture of safes.¹ In 1997, the owner decided to reposition the property into a multi-tenant facility for warehousing, distribution, and light manufacturing. H.R. at 17. The owner discovered that the property had been contaminated with lead and arsenic, both used in the manufacture of safes. The building also had asbestos insulation. H.R. at 18. As a result, the owner entered into a voluntary action program with the Ohio Environmental Protection Agency to remediate the property. Remediation was completed. As a result, on November 18, 1998, the EPA issued a "Covenant Not to Sue" (CNS) pursuant to R.C. 3746.12. It is during this same period that Hamilton Brownfields purchased the property.

After issuing a CNS under R.C. 3746.12, the director of the EPA is required to "**** certify to the tax commissioner *** that such a covenant has been issued and such remedies or remedial activities have occurred at that property." R.C. 5709.87(B). Upon receipt of the certification, the commissioner is to order that the subject property be placed on the exempt tax list for a ten-year period. R.C. 5709.87(C).

¹ The building was razed in early 2005. H.R. at 38.

In this instance, the EPA did not immediately certify to the commissioner that a CNS had been issued for the subject property. Hamilton Brownfields first became aware of the lack of certification in early 2003, when it received a tax bill from the Butler County Auditor. The bill was for the first half 2002 taxes, and further indicated that the true value of the property had been increased from \$265,000 to \$4,491,340.²

Hamilton Brownfields inquired into the certification issue. In a March 27, 2003 letter, the EPA replied that “[a]s Ohio EPA understands the matter, the property has not received a property tax exemption as applicable to the property under the Voluntary Action Program pursuant to Ohio Revised Code (ORC) 5709.87. To address the situation Ohio EPA is preparing a corrective memorandum to the Ohio Department of Taxation *** to certify, in accordance with ORC 5709.87(B), that the Director of Ohio EPA issued a Covenant Not to Sue for the property on November 17, 1998 pursuant to ORC 3746.12 and that remedial activities have occurred at the property.” Appellant’s Ex. D.

On June 17, 2003, the Director of the EPA filed his certification with the commissioner, indicating that the information “is being provided in satisfaction of ORC 5709.87(B), and in response to information recently learned that a certification may not have been provided originally.” S.T. at 3. The certification verifies that the CNS had been issued on November 17, 1998.

² The \$265,000 value had been applied to the 1998-2001 tax years. The \$4,491,340 value appears to be the result of Butler County’s 2002 sexennial reappraisal.

On June 18, 2003, the commissioner issued an order, in which he directed that the subject's 2002 value "be entered upon the tax list of property in said county which is exempt from taxation beginning in the tax year in which this order issued, 2003, and continuing for ten (10) years." S.T. at 1.

On appeal, Hamilton Brownfields argues that the commissioner's order should be made retroactive to tax year 1998, the year in which the CNS was originally issued. The commissioner counters that he lacks the authority to order the retroactive exemption of the property because his actions under R.C. 5709.87 are mandated; he has no discretion to consider the impact of the delay in the certification.

R.C. 5709.87 provides for an exemption from real and personal property taxation for any increase of value accruing from the voluntary cleanup of environmentally contaminated property ("brownfields"). The purpose is to encourage developers to restore brownfields by providing tax exemptions and by removing the risk of liability for future remediation costs. Before such exemption may be granted, the Tax Commissioner must receive notice from the director of the EPA that the property owner has complied with the specific requirements of R.C. Chapter 3746 and has obtained a "covenant not to sue":

"Upon receipt by the tax commissioner of a certification for property under division (B) of this section, the commissioner shall issue an order granting an exemption from real property taxation of the increase in the assessed value of land constituting property that is described in the certification, and of the increase in the assessed value of improvements, buildings, fixtures, and structures situated on that land at the time the order is issued as indicated on the current tax lists. The exemption shall commence on the first day of the tax year including the day on which the

order is issued and shall end on the last day of the tenth tax year after issuance of the order. ***” R.C. 5709.87(C).

The Ohio Supreme Court has specifically determined that the “Tax Commissioner’s duty under R.C. 5709.87 is purely ministerial.” *Columbus City School Dist. Bd. of Edn. v. Wilkins*, 101 Ohio St.3d 112, 2004-Ohio-296, at 115. “A ministerial act may be defined to be one which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to the exercise of his own judgment upon the propriety of the act being done.” *State ex rel. Trauger v. Nash* (1902), 66 Ohio St. 612, at 618. Additionally, “[a] duty is ministerial when the law exacting its discharge prescribes the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion. Official action the result of certain specific duties arising from fixed and designated facts is a ministerial act.” *McNelly v. Clay Township* (1910), 23 Ohio Dec. 506, at 508, quoting *Merlette v. State*, 100 Ala. 42. See, also, *State v. Moretti* (Apr. 9, 1974), Franklin App. Nos. 73AP-440, 73AP-441, 73AP-442, unreported (holding that “a ministerial duty is an absolute, certain and imperative duty imposed by law upon a public officer involving merely execution of a specific duty arising from fixed and designated facts. As such, ministerial duties are necessarily mandatory when required to be performed”).

The provisions of R.C. 5709.87(C) are both mandatory and precise. The commissioner, upon receipt of the certification, “shall” issue an exemption order. The order must be issued upon receipt of the EPA’s certification. The commissioner is not

given the discretion to review the situation to determine whether the property is indeed eligible for the exemption. Moreover, the exemption “shall commence” on the first day of the year in which the order is issued. In other words, neither the receipt of the EPA’s certification nor the issuance of the CNS trigger the exemption period. The General Assembly has mandated that the exemption period begin in the year in which the order is issued. The statute provides the commissioner no latitude to consider or alter the commencement of the exemption.³

Upon review, we must concur with the commissioner that an exemption under R.C. 5709.87 must be granted beginning with the year in which the order is issued regardless of when the CNS was issued. Because this duty is ministerial, the commissioner has no discretion in its discharge. *Columbus*, supra.⁴

In the alternative, Hamilton Brownfields argues that the delay in the exemption order has caused it harm in that it must pay tax on the increased 2002 value

³ Hamilton Brownfields asserts that the commissioner has granted retroactive exemptions in other cases. The commissioner does not deny this but represents that such orders were issued where the commissioner had made a mistake. The commissioner further represents that, following *Columbus*, supra, he no longer believes he has the authority to issue a retroactive order, even in cases where he is at fault for the delay. We do not find Hamilton Brownfields’ argument to be applicable to this matter. The question before us is whether R.C. 5709.87 permits the commissioner to retroactively apply the exemption. We will not speculate as to the propriety of past actions, nor do we find that the commissioner is somehow estopped from asserting his lack of authority because of previous orders. Estoppel does not apply against the state. *Amer. Handling Co. v. Kosydar* (1975), 42 Ohio St.2d 150; *The Recording Devices, Inc. v. Bowers* (1963), 174 Ohio St. 518, at paragraph one of the syllabus; *Loveland Park Baptist Church v. Kinney* (May 25, 1983), Warren Cty. App. No. 126, unreported.

⁴ R.C. 5709.87 does not specify a period for the filing of the director’s certification. Presumably, this allows flexibility, as the director of the EPA must first be satisfied that remediation has occurred on the property. Thus, it is conceivable that the director could delay certification months or years after the CNS is issued. Regardless, the statute authorizes the commissioner to order exemption beginning with the current tax year only. Any concerns over a lack of a timetable would be best addressed by the General Assembly.

and that the increased value will continue to follow the property.⁵ Accordingly, Hamilton Brownfields asks us to order the retroactive exemption of the property without regard to any limitations placed upon the commissioner's authority.

Hamilton Brownfields has asked us to grant it an equitable remedy. We note, however, that the Board of Tax Appeals has no express or implied equity jurisdiction. *Columbus Southern Lumber Co. v. Peck* (1953), 159 Ohio St. 564. As a creature of statute, we have only the jurisdiction, power, and duties expressly given by the General Assembly. *Steward v. Evatt* (1944), 143 Ohio St. 547; *Leiphart Lincoln-Mercury, Inc. v. Bowers* (1958), 107 Ohio App. 259. In addition, the court has consistently held that equity does not apply to the state as to taxing statutes. *General Motors Corp. v. Limbach* (1993), 67 Ohio St.3d 90, at 92; *Recording Devices, Inc. v. Bowers* (1963), 174 Ohio St. 518, at the syllabus. While we may be sympathetic to Hamilton Brownfields' situation, the requested relief lies beyond the scope of our authority.

Upon review, we find that the order of the Tax Commissioner is reasonable and lawful, and we affirm it.

ohiosearchkeybta

⁵ Hamilton Brownfields has challenged the auditor's valuation of the property by filing a complaint with the Butler County Board of Revision. See R.C. 5715.19.