

Property Tax

Timeliness of County-Level Appeals in North Carolina (*In re Appeal of DCF IV, LLC*)

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As practitioners of property tax know well, the intricacies of valuation issues in *ad valorem* cases are both fascinating and endless. However, often lost amidst the sea of complex legal and appraisal analysis are the procedural issues that can make or break the ability to bring a valuation issue to a hearing. The case of *In re Appeal of DCF IV, LLC*, 09 PTC 086 (N.C. Prop. Tax Cm. 2009) provides one example of how a county's procedural defense on timeliness of an appeal can be handled.

The Taxpayer, DCF IV, LLC, hand delivered a letter to the office of the Durham County Tax Administrator on April 8, 2009, appealing from Durham County's 2009 assessment of one of the Taxpayer's real property parcels and requesting a hearing before the Durham County Board of Equalization and Review.¹ By letter of April 16, 2009, the Durham County Tax Administrator responded to the Taxpayer's request for a hearing, stating the Board of Equalization and Review had adjourned on April 6, 2009, and that the Tax Administrator refused Taxpayer's request for a hearing before the Board.²

In stating that the Durham County Board of Equalization and Review had "adjourned" on April 6, 2009 and that therefore

¹ As a general rule in North Carolina, the first level of appeal on property tax matters is to request a hearing before the appropriate county's Board of Equalization and Review or, if that board is not in session, to the appropriate Board of County Commissioners. N.C. Gen. Stat. § 105-322.

² While not required under the North Carolina Machinery Act, it is common in North Carolina for county assessors or county tax administrators to serve as the clerk to their county board of equalization and review. Therefore, requests for hearing are often addressed to the county assessor or tax administrator in his or her capacity as clerk to the board of equalization and review.

Taxpayer's letter of April 8, 2009 was untimely, the Tax Administrator was invoking the language of N.C. Gen. Stat. § 105-322(g)(2), which states that "a taxpayer must make a request for hearing before the board, either in writing or by personal appearance, prior to the board's adjournment."

By letter of May 4, 2009, the Taxpayer responded to the Tax Administrator's letter, providing a legal analysis of N.C. Gen. Stat § 105-322 to show that the County's interpretation of the statute was incorrect, and again requested a hearing before the Board. On May 7, 2009, the Assistant Durham County Attorney responded and stated in relevant part that "the County of Durham is compelled to reject the appeal of DCF IV LLC as untimely".

At this point, no decision had been rendered by the Durham County Board of Equalization and Review on Taxpayer's appeal. Rather, the appeal had been rejected, first by the County Tax Administrator, and then again by the County through a letter from an assistant county attorney. It was unclear whether there was actually a "decision" on the untimeliness issue from which Taxpayer had the ability to appeal to the North Carolina Property Tax Commission. However, given that the Tax Administrator also served as Clerk to the Board of Equalization and Review, Taxpayer contended that the Tax Administrator's rejection of the appeal was an action by the Board itself, through delegated authority. On that basis, on May 14, 2009, Taxpayer appealed the case to the North Carolina Property Tax Commission.

Taxpayer's Fact Investigation into Untimeliness

Taxpayer's review of the timeliness issue revealed some very interesting facts. First, in accordance with statutory requirements, Durham County caused a "Notice of Meetings of the Durham County Board of Equalization and Review" to be published in the Durham Herald-Sun newspaper on March 25, 27 and 30. That Notice stated that the purpose of the meetings of the Durham County Board of Equalization and Review is "To hear, upon request, any and all taxpayers who own or control taxable property assessed for taxation in Durham County, with respect to the valuation of such property, or the property of others, and to fulfill other duties and responsibilities as required by law."

N.C. Gen. Stat. § 105-322 requires that the published notice also state the date when the County Board of Equalization and Review will first meet, and the date on which it expects to adjourn. Durham County's published notice stated that "The Board will convene for its first meeting on **Monday April 6, 2009**". (emphasis in original) The notice went on to state that "The Board will adjourn for the purpose of accepting requests for hearing at the meeting on **Monday April 6, 2009**". (emphasis in original) It concluded by asserting that

“Requests for hearing must be received no later than final adjournment which is scheduled for Monday April 6, 2009 at 5:00 PM.” (emphasis in original)

In other words, the date of convening and the date of adjournment (“for the purpose of accepting requests for hearing”) were scheduled for the same date – April 6, 2009. Since the Board convened at 9:00 a.m and allegedly adjourned at 5:00 p.m. that day, there was an eight-hour window of time in which to submit an appeal to the Durham County Board while it was meeting.

Second, Taxpayer was able to determine that after April 6, 2009 the Durham County Board of Equalization and Review continued to hold meetings and hear tax year 2009 real property appeals and other property appeals from Durham County taxpayers, doing so up to and including in July, 2009.

Third, Taxpayer investigated the advice given to the County Boards of Equalization and Review by the North Carolina Department of Revenue, Property Tax Division. That division publishes a “Member’s Handbook for Boards of Equalization and Review”. The most recent version of the Handbook is dated March 2004. Page three of the Handbook states that “the deadlines for adjournment should be interpreted as being the last possible date for receiving new appeals filed under the provisions of G.S. 105-322(g)(2).” Page four of the Handbook states that “The advertisement of scheduled meetings creates, in effect, a ‘window’ for accepting requests for hearing. Although an assessor may accept notice of appeal prior to the convening of the board, the advertisement gives public notice that requests can be made, and that a deadline for receiving those requests has been set.”

Fourth, Taxpayer sought input from a representative of the Property Tax Division of the North Carolina Department of Revenue, who provided an affidavit stating that he advises counties that their county boards of equalization and review should not convene and adjourn on the same day and that such conduct is not appropriate because when a county board of equalization and review convenes and adjourns on the same day, that board does not provide ample time or opportunity for taxpayers to appeal their property tax valuations. He further explained that the Property Tax Division recommends that, for counties in a non-reappraisal year, those counties schedule a minimum of two weeks between convening and adjournment dates. Among the benefits of following this recommendation of the Property Tax Division are that it generates greater uniformity across the state, enabling taxpayers to expect reasonably similar procedures from county to county.

Fifth, Taxpayer submitted an affidavit from the President and CEO of the entity who managed the property, stating that it manages and oversees property tax appeals, including overseeing property tax filings and appeals for properties in a number of counties in North Carolina, including Durham, Guilford, Mecklenburg, New Hanover, Union, and Wake. The affidavit stated that, other than Durham County, none of the other five counties convenes and adjourns its board of equalization and review on the same day. Instead, those counties provide a sufficient window of time between convening and adjourning their boards of equalization and review such that the property managers are able to see the public notice of convening the board, review the appropriate files and information to make a determination on whether or not to contest our valuations, and then prepare and file the necessary documents to request such a hearing before the county board of equalization and review, prior to the adjournment of the board.

Taxpayer then presented these facts before the North Carolina Property Tax Commission, in conjunction with an analysis of the relevant statutory language, to argue that it was both (a) statutorily impermissible to convene and adjourn on the same date, and (b) unfair and non-uniform to permit such a short appeal window.

Statutory Analysis of North Carolina Machinery Act Provisions on Meeting and Adjournment

N.C. Gen. Stat. § 105-322 is the section of the Machinery Act (the “Act”) establishing guidelines for county boards of equalization and review. Taxpayer contended that this statute requires that county boards of equalization and review adhere to two rules in setting adjournment dates:

- (1) County boards of equalization and review must hold multiple meetings prior to adjournment; and
- (2) County boards of equalization and review must receive taxpayer requests for hearing and hear all taxpayer real property appeals prior to adjournment.

In subsection (e) of § 105-322, the Machinery Act states that the board of equalization and review must hold its first meeting not earlier than the first Monday in April and not later than the first Monday in May. Durham County’s board held its first meeting on the first Monday in April (April 6, 2009). Since 2009 was not a revaluation year in Durham County, the board “shall complete its duties on or before the third Monday **following** its first meeting unless, in its

opinion, a longer period of time is necessary or expedient to a proper execution of its responsibilities.”

Further, subsection (e) of § 105-322 requires that “[f]rom the time of its first meeting **until its adjournment**, the board **shall meet** at such times as it deems reasonably necessary to perform its statutory duties and **to receive requests and to hear the appeals of taxpayers** under the provisions of subdivision (g)(2), below.” (emphasis added) In subsection (f) of § 105-322, the Act requires that, in providing notice to the citizens of the county, the board shall publish a notice of the “date, hours, place and purpose of the **first** meeting of the board of equalization and review...” (emphasis added). Subsection (f) then states that such published notice “**shall** also state the dates and hours on which the board **will meet following** its first meeting and the date on which it expects to adjourn...” (emphasis added).

In subsection (g)(2)(a) of § 105-322, a taxpayer must make a request for hearing before the board, either in writing or by personal appearance, prior to the board’s adjournment. A taxpayer who elected to make a request for hearing in 2009 by personal appearance before the Durham County board prior to its adjournment would only have had *eight hours* in which to make that request – between 9 am and 5 pm on April 6, 2009. To make the request in writing, a taxpayer who was initially placed on notice by happening to see the first public notice published on March 25, 2009 would have had only eleven days in which to submit its written request. If the taxpayer had only seen the last public notice, published on March 30, 2009, such taxpayer would have had only six days in which to submit its written request.

In summary, subsections (e) and (g) strongly imply, and subsection (f) requires, that the board will hold **more than one meeting** prior to adjournment: a first meeting and then one or more following meetings. This makes sense given that the time period between the first meeting and the adjournment is a “window” in which members of the public are made aware that they can appeal their property taxes. By convening and adjourning on the same day, Taxpayer argued that Durham County failed to comply with § 105-322, and did not provide ample time or opportunity for taxpayers to appeal their property tax valuations.

Further, subsection (e) requires that, during such meetings (“from the time of its first meeting **until its adjournment**”) the board shall meet “to receive requests” **and** “to hear the appeals of taxpayers.” Durham County’s board of equalization and review convened and adjourned all on

the same day – April 6, 2009. The board then proceeded, throughout April, May, June and into July, to hear and rule upon real property appeals filed on or prior to April 6, 2009. However, Taxpayer explained that there is no authority in N.C. Gen. Stat. § 105-322 for a county board of equalization and review to hear a real property appeal after the board adjourns.³

The Taxpayer hand-delivered a letter to the Durham County Tax Administrator appealing from Durham County’s assessment on the subject property on April 8, 2009, two days after the Board’s advertised adjournment date. Given the failure of Durham County to hold a meeting subsequent to its first meeting and prior to adjournment, and the failure of Durham County to comply with subsection (e) of § 105-322, which requires that “[f]rom the time of its first meeting **until its adjournment**, the board shall meet at such times as it deems reasonably necessary to perform its statutory duties and to receive requests and to hear the appeals of taxpayers...,” Taxpayer argued that its request on April 8, 2009 should be held timely.

Taxpayer contended that N.C. Gen. Stat. § 105-322 clearly establishes that a county board of equalization and review must hear all real property appeals prior to adjournment. However, Taxpayer recognized that this argument was contrary to the position taken by the North Carolina Department of Revenue, which had long taken the position that a county could “adjourn” for purposes of accepting new appeals, but still continue to meet after the adjournment date to hear and render decisions on appeals.

Therefore, Taxpayer argued that if the Property Tax Commission concluded that the statute is unclear, then it should apply the long-standing Supreme Court rule that “[t]ax statutes are to be construed strictly against the taxing authority.” *Watson Industries v. Shaw, Comr. of Revenue*, 235 N.C. 203, 69 S.E.2d 505 (1952), citing *Sabine v. Gill, Comr. of Revenue*, 229 N.C. 599, 51 S.E.2d 1 (1948); *Henderson v. Gill, Comr. of Revenue*, 229 N.C. 313, 49 S.E.2d 754 (1948); *State v. Campbell*, 223 N.C. 828, 28 S.E.2d 499 (1944).

(l) It is part of the law of North Carolina, as

³ The only situations in which a county board of equalization and review is authorized to act following adjournment are those specifically listed in § 105-322(g)(5), which are limited to hearing discovered property appeals, motor vehicle tax appeals, present-use value and exemption audit appeals, and personal property appeals. Since real property appeals are not contained in this list of specific duties which the board may undertake “following adjournment”, the only logical conclusion is that real property appeals are part of the “duties” which the board must complete prior to adjournment.

it is generally elsewhere, that in cases of doubt, taxing statutes are construed most strongly against the government and in favor of the taxpayer.

Davenport v. Ralph H. Peters and Co., 386 F.2d 199, 209 (4th Cir. 1967). “Thus, where a taxing statute is susceptible of two constructions and the legislative intent is problematic, the uncertainty should be resolved in favor of the taxpayer.” *Winston-Salem Joint Venture v. City of Winston-Salem*, 54 N.C.App. 202, 205, 282 S.E.2d 509, 511 (N.C.App., 1981), citing *Salvation Army v. State*, 144 Mont. 415, 396 P.2d 463 (1964). Thus, to the extent that the Property Tax Commission determined that the language of N.C. Gen. Stat. § 105-312 relating to “adjournment” and the requirements thereof was unclear, it should apply the same rule as the Court of Appeals in *Winston-Salem* and the Supreme Court in the *Watson Industries, Sabine, Henderson, and State v. Campbell* cases, and interpret the statute in favor of the taxpayer.

Decision of the North Carolina Property Tax Commission

These issues were put before the Property Tax Commission on a Motion for Summary Judgment on Timeliness filed by Taxpayer. After reviewing the materials provided by the parties and hearing oral argument from both sides, the five-member Property Tax Commission voted unanimously that the Taxpayer had timely filed its request for hearing before the Durham County Board of Equalization and Review and ordered the Durham County Board to hear Taxpayer’s appeal for tax year 2009. From its written decision, the Commission appears to have weighed the fact that Durham County continued to hold meetings after April 6, 2009 as a primary reason for its decision.

The Property Tax Commission’s decision and this case emphasize the importance of examining and analyzing legal procedure issues in property tax cases, as well as the effectiveness of filing and scheduling dispositive motions for hearing before property tax cases are heard on the underlying valuation issues.

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