BEFORE THE
TENNESSEE STATE BOARD OF EQUALIZATION

In Re: Kerr Brothers Salvage, Inc. Personal Property Account No. P-067934 Tax year 2004	)))	Shelby County

INITIAL DECISION AND ORDER GRANTING MOTION TO DISMISS

Statement of the Case

The subject property is presently valued for tax purposes as follows:

APPRAISAL	ASSESSMENT
$48,500	$14,550

On November 1, 2004, the taxpayer filed an appeal with the State Board of Equalization ("State Board"). As indicated on the appeal form, the property in question was not appealed to the Shelby County Board of Equalization ("county board") during its regular 2004 session.

The undersigned administrative judge entered a NOTICE OF HEARING on September 21, 2007, setting this matter for hearing on October 24, 2007 in Memphis.[1] This notice contained the following admonition:

> **If, by the time of the hearing, the undisputed portion of the tax on the subject property has not been paid, or any delinquent taxes have accrued on the property, then the appeal may be dismissed without any further right of administrative review.[2]**

On or about October 12, 2007, Shelby County Property Assessor's Audit Manager Eric Beaupre, CPA filed a motion to dismiss this appeal for lack of jurisdiction.

The appellant Ross S. Kerr (of Kerr Brothers, Inc.) and Mr. Beaupre appeared for the hearing at the scheduled time.

Findings of Fact and Conclusions of Law

Before calling the hearing to order, the administrative judge received updated information concerning the tax status of the subject account from the offices of the Shelby County Trustee and City of Memphis Treasury. This information, the accuracy of which was not disputed by Mr. Kerr, indicated that there were delinquent taxes on this property for several years prior to the tax year under appeal.

For the reasons expressed in the attached case of Williford Construction, Inc. (Shelby County, Tax Years 2004 and 2005, Initial Decision and Order, August 24, 2007), the administrative judge must respectfully recommend dismissal of this appeal.

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[1]Previously, on July 11, 2006, the administrative judge had entered an ORDER HOLDING APPEAL IN ABEYANCE because of the taxpayer's apparent failure to meet the condition for hearing prescribed in Tenn. Code Ann. section 67-5-1512(b)(1)(C).

[2]*See* Acts 2007, Public Chapter No. 332, section 1 (effective June 4, 2007).

Order

It is, therefore, ORDERED that this appeal be dismissed.

Pursuant to the Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-301—325, Tenn. Code Ann. § 67-5-1501, and the Rules of Contested Case Procedure of the State Board of Equalization, the parties are advised of the following remedies:

1. A party may appeal this decision and order to the Assessment Appeals Commission pursuant to Tenn. Code Ann. § 67-5-1501 and Rule 0600-1-.12 of the Contested Case Procedures of the State Board of Equalization. Tennessee Code Annotated § 67-5-1501(c) provides that an appeal **"must be filed within thirty (30) days from the date the initial decision is sent."** Rule 0600-1-.12 of the Contested Case Procedures of the State Board of Equalization provides that the appeal be filed with the Executive Secretary of the State Board and that the appeal **"identify the allegedly erroneous finding(s) of fact and/or conclusion(s) of law in the initial order"**; or
2. A party may petition for reconsideration of this decision and order pursuant to Tenn. Code Ann. § 4-5-317 within fifteen (15) days of the entry of the order. The petition for reconsideration must state the specific grounds upon which relief is requested. The filing of a petition for reconsideration is not a prerequisite for seeking administrative or judicial review.

This order does not become final until an official certificate is issued by the Assessment Appeals Commission. Official certificates are normally issued seventy-five (75) days after the entry of the initial decision and order if no party has appealed.

ENTERED this 5th day of November, 2007.

Pete Loesch

PETE LOESCH
ADMINISTRATIVE JUDGE
TENNESSEE DEPARTMENT OF STATE
ADMINISTRATIVE PROCEDURES DIVISION

cc: Ross S. Kerr, Kerr Brothers Salvage, Inc.
Tameaka Stanton-Riley, Appeals Manager, Shelby County Assessor's Office

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BEFORE THE
TENNESSEE STATE BOARD OF EQUALIZATION

In Re:	Williford Construction, Inc. Personal Property Account No. P-078979 Tax years 2004, 2005	)))	Shelby County

INITIAL DECISION AND ORDER

Statement of the Case

These are direct appeals to the State Board of Equalization ("State Board") pursuant to Tenn. Code Ann. section 67-1-1005(b) from back assessments/reassessments of the subject property. The Shelby County Assessor of Property ("Assessor") sent copies of the certifications of these back assessments/reassessments to the taxpayer on March 8, 2006. The appeals were filed on behalf of the taxpayer on June 15, 2006 by G. Shayne Smith, CPA, of Lenahan, Smith & Bargiachi, P.C. (Memphis).

By NOTICE OF HEARING dated May 21, 2007, the undersigned administrative judge set these appeals for hearing on June 27, 2007 in Memphis. As explained in the attached PRE-HEARING ORDER of July 6, 2007, that hearing was not held due to the taxpayer's failure to pay the undisputed portion of the taxes on the subject property. In accordance with the terms of that order, Assistant County Attorney Thomas Williams submitted a brief in support of the Assessor's motion to dismiss the appeals. The taxpayer filed no response to Mr. Williams' brief, which was received on July 30, 2007.

Findings of Fact and Conclusions of Law

When the original notice of hearing of this matter was entered, Tenn. Code Ann. section 67-5-1512(b)(1) read (in relevant part) as follows:

> (B) Except as provided in subdivision (b)(1)(C), it is a **condition for appeal** that the undisputed portion of the tax levied be paid **before the delinquency date of the tax** and that no delinquent taxes have accrued on the property.
>
> (C) No **hearing** shall be held on any appeal until the undisputed portion of the tax has been paid. The provisions of this subdivision (b)(1)(C) only apply in counties having a population greater than seven hundred seventy thousand (770,000) according to the 1980 federal census or any subsequent federal census.[1] [Emphasis added.]

On June 4, 2007, Governor Phil Bredesen signed an act of the Tennessee General Assembly which added the following new sentence at the end of Tenn. Code Ann. section (b)(1)(B) above:

> Failure to pay such undisputed portion of the tax and/or any other property tax delinquency that has accrued on that property by the

[1]Only Shelby County currently meets the specified minimum population requirement.

> time of hearing shall result in the appeal being dismissed without any further right of administrative appeal.

Acts 2007, Public Chapter No. 332, section 1. This amendment took effect immediately upon becoming a law.

In Thomas v. State Board of Equalization, 940 S.W.2d 563 (Tenn. 1997), a Davidson County homeowner sought judicial review of the State Board's dismissal of her appeal due to non-payment of the undisputed portion of the tax on the property in question before the delinquency date. On the meaning of Tenn. Code Ann. section 67-5-1512(b)(1)(B) (prior to the quoted amendment thereof), the Supreme Court of Tennessee opined that:

> The phrase "condition for appeal" could refer to either filing an appeal or maintaining an appeal....The statute is simply not clear. Furthermore, the statute does not prevent the reinstatement of an appeal when the taxpayer pays the undisputed portion of the tax in a timely manner after the entry of an initial order dismissing the appeal.[2]

940 S.W.2d at 567.

The 2007 amendment to Tenn. Code Ann. section 67-5-1512(b)(1)(B) was presumably designed to resolve the ambiguity perceived by the Court in the Thomas case. In deference to that ruling, the State Board had habitually refrained from dismissing an appeal on the ground of delinquent taxes on the property in question. Instead, the assigned administrative judge would routinely enter an order holding such appeal in abeyance pending receipt of satisfactory proof of payment of the amount past due.

Arguably, the impact of the quoted amendment could be avoided or mitigated by simply delaying the "time of the hearing" of a case (by continuance) until the stated "condition for appeal" has been met. In the opinion of the administrative judge, however, the consequent delay would only tend to frustrate the apparent purpose of the legislation. Moreover, the State Board would have virtually unbridled discretion as to whether to grant such a reprieve.

It might be contended that no appeal which was pending before the agency on the effective date of Public Chapter No. 332 (June 4, 2007) should be subject to dismissal thereunder. But in the absence of a saving or grandfather clause which could easily have been included in the statute, the administrative judge must infer that the legislature intended the date of *hearing* – not the date of *filing* – of an appeal to be determinative. Indeed, it seems counterintuitive to suppose that the law would accord preferential treatment to pre-existing appeals by property owners who may already have longstanding delinquencies. Surely such persons would enjoy no constitutional right to an administrative hearing before the State Board without at least paying the undisputed portion of the tax for the tax year(s) in controversy.

There remains the question of whether Tenn. Code Ann. section 67-5-1512(b)(1)(C), which was not explicitly affected by the recent amendment, should be construed as an exception to the general rule enunciated in Acts 2007, Public Chapter No. 332. Respectfully, the administrative judge cannot subscribe to an interpretation whereby only owners of property

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[2]With all due respect to the Court, it is unclear how a taxpayer who has failed to pay the undisputed portion of the tax prior to the delinquency date could later be deemed to have paid such amount "in a timely manner."

in Shelby County would be immune from outright dismissal of an assessment appeal because of unpaid taxes. It is difficult to conceive of any rational basis for such an anomalous result.

Order

It is, therefore, ORDERED that these appeals be dismissed due to the taxpayer's failure to pay the undisputed portion of the taxes on the subject property by the time of the scheduled hearing.

Pursuant to the Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-301—325, Tenn. Code Ann. § 67-5-1501, and the Rules of Contested Case Procedure of the State Board of Equalization, the parties are advised of the following remedies:

1. A party may appeal this decision and order to the Assessment Appeals Commission pursuant to Tenn. Code Ann. § 67-5-1501 and Rule 0600-1-.12 of the Contested Case Procedures of the State Board of Equalization. Tennessee Code Annotated § 67-5-1501(c) provides that an appeal **"must be filed within thirty (30) days from the date the initial decision is sent."** Rule 0600-1-.12 of the Contested Case Procedures of the State Board of Equalization provides that the appeal be filed with the Executive Secretary of the State Board and that the appeal **"identify the allegedly erroneous finding(s) of fact and/or conclusion(s) of law in the initial order"**; or
2. A party may petition for reconsideration of this decision and order pursuant to Tenn. Code Ann. § 4-5-317 within fifteen (15) days of the entry of the order. The petition for reconsideration must state the specific grounds upon which relief is requested. The filing of a petition for reconsideration is not a prerequisite for seeking administrative or judicial review.

This order does not become final until an official certificate is issued by the Assessment Appeals Commission. Official certificates are normally issued seventy-five (75) days after the entry of the initial decision and order if no party has appealed.

ENTERED this 24th day of August, 2007.

Pete Loesch

PETE LOESCH
ADMINISTRATIVE JUDGE
TENNESSEE DEPARTMENT OF STATE
ADMINISTRATIVE PROCEDURES DIVISION

cc: G. Shayne Smith, CPA, Lenahan, Smith & Bargiachi, P.C.
Assistant County Attorney Thomas Williams
Tameaka Stanton-Riley, Appeals Manager, Shelby County Assessor's Office

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