

OHIO BOARD OF TAX APPEALS

Cincinnati Golf Management, Inc. and the)	CASE NO. 2007-T-1411
City of Cincinnati,)	
)	(USE TAX)
Appellant,)	
)	ORDER
vs.)	
)	(Denying Motion to Compel)
Richard A. Levin, Tax Commissioner of)	
Ohio,)	
)	
Appellee.)	

APPEARANCES:

For the Appellant	-	Julia L. McNeil Cincinnati City Solicitor Terrance A. Nestor Assistant City Solicitor Room 214, City Hall 801 Plum Street Cincinnati, Ohio 45202
For the Appellee	-	Richard Cordray Attorney General of Ohio Alan P. Schwepe Assistant Attorney General 30 East Broad Street, 25 th Floor Columbus, Ohio 43215

Entered February 17, 2009

This matter is before this board upon a motion to compel discovery filed on behalf of the Tax Commissioner. No response to the motion has been filed.

Consistent with the policy that discovery is intended to operate extrajudicially, Ohio Adm. Code 5717-1-11(A) sets forth the time period within which a party may seek this board’s involvement in resolving discovery disputes and the efforts which should first be undertaken, providing in pertinent part:

“(1) Discovery should be commenced by all parties promptly after the filing of a notice of appeal and should be completed

as expeditiously as possible. Discovery should be completed not more than one hundred twenty days after the filing of the notice of appeal, which shall also be the last day for a party to seek involvement of the board in discovery matters. Upon motion and for good cause, the board may establish other specific times for completion of discovery or consideration of discovery motions.

“(2) The board expects all counsel to provide for orderly, mutual discovery, freely exchanging discoverable information and documents. Counsel shall make all reasonable efforts to resolve discovery disputes by extra-judicial means, without intervention by the assigned attorney examiner. To the extent counsel may not resolve such disputes, then they may seek intervention of the attorney examiner to supervise discovery.”

Consistent with the preceding, Civ.R. 37(E) imposes upon litigants the obligation to make reasonable efforts to resolve any discovery dispute before seeking a tribunal’s involvement:

“[Duty to Resolve.] Before filing a motion authorized by this rule, the party shall make a reasonable effort to resolve the matter through discussion with the attorney, unrepresented party, or person from whom discovery is sought. The motion shall be accompanied by a statement reciting the efforts made to resolve the matter in accordance with this section.”

The Staff Notes pertaining to Civ.R. 37(E) indicate that its purpose “is to endorse and enforce the view that, in general, discovery is self-regulating and should require court intervention only as a last resort.”

In this instance, appellant’s notice of appeal was filed with this board on November 9, 2007. The commissioner’s counsel, through his motion to compel, represents that discovery was not served upon the appellant until March 8, 2008. Moreover, it was not until more than nine months had passed that the commissioner’s counsel, upon receiving no response to discovery, sent a single letter to appellant’s

counsel “inquiring as to the status of the discovery responses.” Memorandum in support at 1. Now, through motion filed fourteen months after the filing of this appeal, counsel requests this board issue an order compelling discovery.

Although Ohio Adm. Code 5717-1-11(A)(1) contemplates the existence of *extraordinary* circumstances whereby the deadline for completing discovery and seeking this board’s intervention in contested discovery matters may be extended, this rule requires the movant to demonstrate “good cause” for deviating from established time frames. Counsel for the commissioner has offered no explanation for his four-month delay in serving discovery in this matter, in waiting nine more months to initiate some contact with the opposing party, nor in filing the present motion well beyond the period set forth within this board’s rules. There also exists reason to question whether counsel’s single letter constitutes a “reasonable effort” to resolve this matter before seeking this board’s intervention.¹ Under these circumstances, this board is unable to find that the commissioner has demonstrated good cause for requesting this board’s involvement in discovery at this stage of the proceedings and therefore his motion to compel discovery is denied.

Nevertheless, appellant is hereby cautioned that even though the commissioner’s motion to compel discovery has been denied as untimely filed, it remains

¹ This board has previously warned litigants that it expects more than a singular effort to be made before the filing of a motion to compel discovery. See, e.g., *Karrington of Kenwood, Ltd. v. Hamilton Cty. Bd. of Revision* (Interim Order, Aug. 24, 2001), BTA No. 2000-T-1512, unreported; *Spalding Leasing Company v. Cuyahoga Cty. Bd. of Revision* (Interim Order, Jan. 31, 2000), BTA Nos. 1999-K-1460, et al., unreported. In fact, where a movant’s only effort to resolve discovery issues prior to requesting this board’s intervention is the mailing of a single correspondence, this board has, on occasion, denied a motion to compel. See, e.g., *Mayfield City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (Interim Order,

within this board's purview to impose a variety of sanctions, either upon motion or sua sponte, for a party's election to disregard the applicable discovery rules. Indeed, as was noted in *Karrington of Kenwood, Ltd. v. Hamilton Cty. Bd. of Revision* (Interim Order, Aug. 24, 2001), BTA No. 2000-T-1512, unreported:

“Although we decline to issue an order to compel in this instance, we wish to take this opportunity to remind the parties that the purpose of this Board, as with any tribunal, is to determine the facts based upon a review of the record. The discovery rules are an essential tool in that fact-finding process. See *Goff v. The Kroger Co.* (S.D. Ohio 1988), 121 F.R.D. 61. The discovery rules are not designed to place an onerous burden upon the parties. When followed, the rules provide a means by which the exchange of information can be carried out in a cooperative and professional manner. The rules also protect each party from abuses, which unfortunately do occur. Nevertheless, the discovery rules should never be used [or ignored] by a party to avoid the free exchange of information that may be beneficial to this Board's objective. While the time in which to seek this Board's intervention in discovery disputes is limited, neither the Civil Rules nor the Rules of this Board expressly restrict the duty of a party to respond to discovery, whenever served. We hope the interests of cooperation and fair play would motivate *Karrington*, even now, to voluntarily exchange the requested information.

“Additionally, *Karrington* is cautioned that, even though the county's motion to compel has not been granted in this instance, it remains within this Board's authority to impose sanctions *sua sponte* for violations of the applicable discovery rules. See Ohio Adm. Code 5717-1-14. See, also, *Nakoff v. Fairview Gen. Hosp.* (1996), 75 Ohio St.3d 254; *Salem Med. Arts & Dev. v. Columbiana Cty. Bd. of Revision* (1998), 82 Ohio St.3d 193 (a party need not have filed a motion seeking to compel discovery before Civ. R. 37(D) sanctions can be issued). Cf. *BRE/City Center LLC v. Cuyahoga Cty. Bd. of Revision* (Aug. 10, 2001), Interim

Footnote contd. _____

July 5, 2002), BTA No. 2002-A-256, unreported; *Marsol Apartments Co., Ltd. Part. v. Cuyahoga Cty. Bd. of Revision* (Interim Order, June 1, 2000), BTA No. 2000-K-134, unreported.

Order, BTA No. 00-T-320, *et al.*, unreported (imposing sanctions for failure to comply with discovery).” Id. at 7-8.

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