

Marc J. Epstein, and )  
Melvin Jay Gross, Co-Trustees, ) CASE NO. 96-D-915  
) )  
Appellants, ) (REAL PROPERTY TAX)  
) )  
vs. ) )  
) ) DECISION AND ORDER  
Board of Revision of ) (Denying appellee's motion )  
Clark County and Auditor ) (to dismiss and case remanded)  
of Clark County, ) )  
) )  
Appellee. )

Counsel for Appellant - Daniel S. Siegel, Esq.,  
J. Kieran Jennings, Esq.,  
Fred Siegel Co., L.P.A.  
1900 E. Ninth Street - Suite 2700  
Cleveland, Ohio 44114-3499  
Tele (216) 241-1002  
FAX (216) 241-1006

Counsel for Appellee - Stephen A. Schumaker, Esq.,  
Clark Cty. Prosecuting Attorney  
Kirk D. Ellis, Esq.,  
Asst. Prosecuting Attorney  
50 East Columbia Street  
Springfield, Ohio 45502  
Tele (513) 328-2574

ENTERED: April 4, 1997

Mr. Johnson, Ms. Jackson and Mr. Manoranjan concur.

An appeal pursuant to R.C. 5717.01 from a final decision of the Clark County Board of Revision (BOR). The body of the final decision states:

"You have filed a complaint as to the assessment of your real property located within Clark County. That complaint has now been heard, the property has been physically viewed and a recommendation has been made.

"After a consideration of the information and evidence which you presented, as well as the recommendation of the appraiser, it is the decision of the Clark County Board of Revision that the following action take place relative to your complaint.

\* \* \* \* \*

{ X } D. Dismissed

CURRENT	CURRENT	RECOMMENDED	RECOMMENDED
100%	100%	100%	35%

"TOTAL

"If you disagree with the Board's decision, you have thirty (30) days to file with the Board of Tax Appeals or Common Pleas Court. Additional information on the appeal process can be obtained by calling Rod Dew at 328-2659."

It is important to note at this juncture that no reason is expressed in the BOR's decision for its dismissal.

On September 24, 1996, the BOR certified to this Board a transcript of the record of its proceedings pertaining to the original complaint and all evidence offered in connection therewith. R.C. 5717.01 Appellees' counsel entered his appearance on October 18, 1996. A hearing was scheduled before the Board of Tax Appeals on March 3, 1997.

On February 24, 1997, appellees' motion to dismiss this appeal was filed, albeit untimely under Ohio. Adm. Code 5717-1-12, for the reasons set forth in the attached memorandum in support of the motion, which included factual assertions and an exhibit extraneous to the transcript of the record filed by the BOR. Counsel claims support for this motion to dismiss in the case of LCL Income Properties v. Rhodes (1995), 71 Ohio St3d 652.

On February 28, 1997, by facsimile transmission, a stipulation was filed on behalf of all parties hereto, bearing a signature of their respective counsel. The body of the stipulation states:

"It is hereby agreed to and stipulated by and between the parties, through their respective counsel, that it is requested by both parties that the issue of jurisdiction and remand be decided on the record submitted and that the oral hearing be waived.

"It is further agreed to and stipulated that the Board of Tax Appeals of Ohio may enter an order accordingly."

The burden of proving and establishing the requisite facts in support of the motion to dismiss rests with the Appellee BOR.

The parties have stipulated the waiver of the hearing with respect to the motion and submitted the matter on the existing record. The evidence and legal

justification for the BOR's action of dismissal therefore must affirmatively appear upon the transcript of the record certified by the BOR.

The final decision states, inter alia, that the complaint has been heard, the property has been viewed and a recommendation has been made; further, that consideration had been given to the information and evidence which had been presented by or on behalf of the taxpayers (the appellants), as well as the recommendation of the appraiser. Who the appraiser was and what the appraiser's recommendation was, are facts not disclosed by the record, at least suggesting that the statutory transcript may be incomplete.

Under what circumstances the complaint had been heard and what information and evidence had in fact been considered by the BOR, is far from clear in the record. Suffice it to say, the BOR has affirmatively stated that it had given consideration to various matters concerning the merits of the complaint in the process of rendering its decision.

The appellees now seek dismissal of the appeal for the reason that the appellants did not appear at the hearing. Parenthetically, the BOR decision indicates some active participation on behalf of the taxpayers before the BOR. If the appellants did not appear at a particular hearing, then the question must be, was proper notice of such hearing given to the parties?

From a review of the statutory transcript, there is a copy of a letter notifying appellants of the hearing and the letter evidences a copy may have been produced for appellants' counsel who had actually filed the complaint. There is no evidence of mailing of such letter to be found upon the transcript. Unauthenticated extraneous evidence attached to the memorandum in support of the motion purports to be a copy of a return receipt for a certified mailing to the appellants. The Board of Tax Appeals does not customarily consider extraneous attachments to notices of appeal, or any other pleadings filed with the Board. Wiedt & Wiedt Tavern, Inc. v. Tracy (August 2, 1996), B.T.A. Case No. 95-A-1324, unreported (facsimile copy of certified mail receipt attached to notice of appeal); Cunagin v. Tracy (March 31, 1995), B.T.A. Case No. 94-P-1083; Peach Grove Manor, Ltd. v. Limbach (December 22, 1989), B.T.A. Case No. 88-F-689, unreported. There is no evidence of timely mailing or the receipt of the notice of hearing to

the party filing the complaint in the statutory transcript or extraneous to the record, except for counsel's assertion in the supporting memorandum.

Dismissal is a harsh result to any proceedings. The appellants are entitled to the benefit of the record, if there is any doubt concerning the matter of proper notice of the hearing to them or their counsel. In the context of the subject motion and the stipulation to the record, at the very least the record supports a finding that notice to counsel for the appellants was probably never sent nor did counsel ever receive any notice of the hearing to which the motion is directed.

LCL Income Properties, supra, cited in appellee's memorandum, does not support, due to the significant differences in the facts and circumstances, the appellee's position in this instance. The Court, at page 653, stated:

"We agree. Neither Hollingsworth nor LCL appeared for hearings before the board of revision or the BTA or filed briefs in this court or appeared at the hearing before this court. As we said in paragraph nine of the syllabus of Swetland Co. v. Evatt (1941), 139 Ohio St.6, 21 O.O. 511, 37 N.E.2d 601, '[a] county board of revision \* \* \* is a quasi-judicial body, and where a taxpayer files a complaint against the assessed value of his real property and thereafter fails to attend a hearing of which he had notice and no evidence in support of such complaint is offered by or on behalf of the taxpayer, a county board of revision is justified in fixing the valuation complained of in the amount assessed by the county auditor.'"

LCL Properties, supra, was a particularly egregious case in which neither the complainant nor the property owner appeared before the BOR, the Board of Tax Appeals, or the Supreme Court. The record supported the fact that notice of all hearings and proceedings was properly given to the parties. In the case, sub judice, since there is no competent evidence that counsel for the appellants had notice of the hearing, the failure to attend the scheduled hearing in May was not due to any fault on the part of the appellant's counsel or the fault of the appellants who would naturally rely upon their counsel to provide them with instruction and direction with respect to such a hearing. Furthermore, since the record reflects various activities concerning the merits of the matter and that information and evidence, including the recommendation of an appraiser, was considered in conjunction with the final decision of the BOR, there was at least some evidence presented or provided in support of the complaint.

Finally, it is evident that counsel for the appellants has been actively involved with the appeal pending before this Board in pursuit of a decision on the merits of the taxpayers' complaint and in resisting the subject motion. It is not fair to say that the appellants intentionally failed to pursue and perfect their claim before the BOR or would not have adduced further evidence at a scheduled hearing for such purpose had they been provided proper or adequate notice of such a hearing.

The Board of Tax Appeals finds and determines, upon the record and as a matter of law, that the present motion to dismiss pending before this Board is without proper factual and legal merit.

Moreover, the record fails to reflect, by competent evidence, that the appellants had been timely and properly notified of the BOR hearing by and through their counsel of record.

Furthermore, the record states that the BOR had information and evidence before it which was provided and apparently considered in conjunction with rendering its decision to dismiss the pending appeal. The stated facts in the final decision of the BOR do not justify a dismissal of the underlying complaint.

Based upon the stipulated record, the BOR's dismissal action was unreasonable and unlawful.

IT IS ORDERED that the final decision of the Clark County Board of Revision be and hereby is reversed and the cause remanded to said Board with instructions to take further action, including giving the parties an opportunity to be heard and adduce additional evidence with respect to the appellants' complaint.

IT IS FURTHER ORDERED that a certified copy of this decision and order be sent to the Auditor of Clark County, and to each of the parties hereto by and through their respective counsel ohiosearchkeybta.