

**BOARD OF TAX APPEALS**

Penske Truck Leasing Co., L.P.,	)	
	)	CASE NO. 97-D-864
Appellant,	)	
	)	(REAL PROPERTY TAX)
vs.	)	
	)	
Board of Revision of Franklin County,	)	
Auditor of Franklin County, and	)	ORDER
Hilliard CSD Board of Education,	)	
	)	
Appellees.	)	

Counsel for Appellant,  
Penske Truck Leasing Co., L.P.

-Karen H. Bauernschmidt, Esq.  
Arter & Hadden  
1100 Huntington Building  
925 Euclid Avenue  
Cleveland, OH 44115-1475  
Tele (216) 696-1100

Counsel for Appellee,  
Hilliard CSD Bd. of Education

-Jeffrey A. Rich, Esq.  
Teaford, Rich & Wheeler  
20 East Broad St. – 3<sup>rd</sup> Floor  
Columbus, OH 43215-3682  
Tele (614) 228-5822

Counsel for County Appellees

-Ronald J. O'Brien, Esq.  
Pros. Atty., Franklin County  
Matthew H. Chafin, Esq.  
Asst. Prosecuting Attorney  
323 South High Street  
Columbus, OH 43215  
Tele (614) 462-7519

ENTERED: March 18, 1999

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

An appeal on behalf of Penske Truck Leasing Co., L.P. [Penske] from a decision of the Franklin County Board of Revision [BOR] rendered June 11, 1997, which

determined real property values for Parcel Nos. 560-201273 and 560-201274 pertaining to the tax year 1994.

As prescribed by R.C. 5717.01, a certified transcript of the record of the proceedings of the Franklin County Board of Revision [BOR] pertaining to the original complaint, and all evidence offered in connection therewith, was filed with this Board [ST.].

The original complaint underlying the present cause was filed with the BOR in February, 1995 (ST.). The complaint appears to bear the signature of David C. Dunkin, of the Firm of Dunkin & Vihon, 180 North LaSalle St., Chicago, Illinois, who was acting as the attorney or agent of the property owner, Penske Truck Leasing Co., as complainant (ST.). In April , 1995, a counter-complaint was filed on behalf of the Hilliard CSD Board of Education (ST.). The matter of both complaints was assigned BOR No. 94-172 A&B (ST.). By letter of decision, dated October 19, 1995, the BOR declared in part (ST):

“The above complaint has been dismissed by the Board of Revision, due to violation of the 3 year rule. No further action will be taken.

“You may appeal this decision by proper notice of appeal with either the Ohio Board of Tax Appeals, (O.R.C. 5717.01), or with the Court of Common Pleas (O.R.C. 5717.05). \* \* \*.”

An appeal was timely perfected on behalf of Penske from that dismissal by the BOR to this Board. That appeal was assigned BTA Case No. 95-P-1262. The appellant, Penske, was represented by David C. Dunkin, and Ted B. Clevenger (who is an attorney licensed to practice law in Ohio), as co-counsel. The Board of Tax Appeals rendered a

decision and order on November 22, 1996, pertaining to BTA Case No. 95-P-1262<sup>1</sup> the body of which states:

“This is an appeal filed by appellant in accordance with the provisions of R.C. 5717.01. Appellant seeks relief from a decision of Franklin County Board of Revision dismissing appellant’s complaint for allegedly filing more than one complaint within the same triennium.

“The facts are uncontested: Appellant mailed a complaint to the Franklin County Auditor on March 30, 1994, to contest its valuation for the 1993 tax year ---- the first year of a new triennium for Franklin County. However, it was not received until April 1, 1994, which is beyond the time permitted by R.C. 5715.19. The school district filed a motion to dismiss. The Franklin County Board of Revision then sent out a notice setting the motion to dismiss for a hearing upon the question of its jurisdiction. Appellant responded by withdrawing its complaint. A new complaint was then timely filed for the 1994 tax year. The Franklin County Board of Revision dismissed that complaint as well, asserting a ‘violation of the three year rule.’ The parties waived hearing and have submitted the matter upon briefs.

“Appellant’s brief raises a number of persuasive arguments. One we find compelling and dispositive. The first complaint was void ab initio. The Supreme Court has determined ‘file’ to mean actual delivery and receipt by the public official (Case citations omitted.). This did not occur within the time frame permitted by statute. As such the 1993 tax year complaint conferred no jurisdiction, whatsoever, upon the board of revision. Any action the board of revision might endeavor to take without jurisdiction is a nullity and of no force or effect. Appellees’ reliance upon Gammarino v. Hamilton County Board of Revision (1994), 71 Ohio St.3d 388, is misplaced. To consider the complaint before us a ‘second complaint’ we would have to acknowledge and give effect to the earlier complaint. We find nothing within Gammarino that would require us to give efficacy to a void complaint. This, in our view, would constitute a non-sequitur. The Gammarino court did not consider the issue of lack of jurisdiction for filing beyond the statutory deadline. In the matter before us the earlier complaint is an absolute nullity. Accordingly, the complaint now before us is not a ‘second complaint’ within the meaning of R.C. 5715.19 --- it is the first valid complaint.

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<sup>1</sup> A copy of this Board’s decision rendered in BTA Case No. 95-1262 is not included as part of the statutory transcript filed in the present case. However, this Board takes notice of its decision rendered November 22, 1996.

“Therefore, the order of the Franklin County Board of Revision dismissing appellant’s complaint must be, and the same hereby is, vacated, and this matter is remanded for further consideration of appellant’s complaint in accordance with this decision and order and applicable law.”

Upon remand, and pursuant to this Board’s decision and order issued November 22, 1996, the BOR rendered a decision which determined values of the subject real property pertaining to the tax year 1994. The appellant, being dissatisfied with the values determined by the BOR, has timely filed a second appeal to this Board. It is this second appeal that is now before this Board for decision.

The captioned matter was scheduled for hearing upon the merits on August 31, 1998, notice of which was given to all parties by BTA letter dated July 6, 1998. By letter, dated August 27, 1998, counsel for Penske advised the BTA that the parties are waiving the oral hearing scheduled for August 31, 1998, and that the parties would like to brief the matter to this Board. By letter dated October 19, 1998, counsel also requested the BTA to consider assigning counsels’ selected briefing dates.

By BTA order issued October 19, 1998, the counsels’ waiver of the hearing was accepted and counsels’ recommended briefing dates were formally approved and assigned accordingly. Subsequently, counsel for Penske requested an extension of its briefing time to December 14, 1998, which was also granted.

On December 14, 1998, counsel for Penske, filed with this Board, a letter, together with a brief entitled “Brief In Support Of Jurisdiction.” The body of the letter states in part:

“The Board will note that the Appellant had requested to file a Brief on the Merits of the within appeal in lieu of a hearing. Upon review of the complete file, it was determined that there was a legal issue that had to be addressed first before the valuation issue can be addressed. As a result, the Property Owner has filed the within Brief in Support of Jurisdiction. Once the Board determines that there is jurisdiction, the Property Owner would like to go forward on the merits of its appeal with an oral hearing.”

On January 8, 1999, a “Brief of Appellee Board of Education in Opposition to Jurisdiction” was filed.

There has been no formal motion with supporting memorandum heretofore filed pertaining to the particular jurisdictional matter to which the briefs are directed. Appellant’s brief suggests that the jurisdictional question only recently appeared to counsel upon an ex parte review of the appellant’s file. Counsel for the appellant used its right to file a brief as a vehicle to raise the jurisdictional question. Counsel for the Board of Education apparently decided to limit the substance of its brief solely as a response to the jurisdictional question raised in appellant’s brief. The first raising of the subject jurisdictional issue at this point in time and in the present manner based in part upon asserted facts not reflected in the present record is procedurally questionable.

From a review of the record, it is evident that the original complaint filed in February, 1995, appears to bear the signature of David C. Dunkin, who admittedly is an attorney at law licensed to practice in and by the State of Illinois. However, there is no affirmative evidence in the record before this Board that David C. Dunkin was or was not heretofore legally authorized to execute and file the subject complaint on behalf of Penske. The full record in the prior proceedings before the BOR is not now before this

Board for possible additional review regarding such particular matter. There is no conclusive objective evidence in the present record that requires this Board to rule favorably for the benefit of either party.<sup>2</sup>

Jurisdictional questions, now being raised and argued, might be timely presented and adequately resolved based upon evidence of probative value adduced in a proceeding before a board of revision. Such jurisdictional matters and evidence pertaining thereto should not be withheld for first presentation before this Board after an appeal from a merit decision of the board of revision has occurred. Risman v. Cuyahoga Cty. Bd. of Revision (October 17, 1997), BTA Case No. 96-M-548 (unreported).

One ultimate fact is certain: David C. Dunkin was heretofore permitted to act as counsel for the property owner in prior years' proceedings without question or expressed objection previously made by any party or their counsel. The first raising of such a vague threshold jurisdictional question after a second appeal to this Board and after the merit hearing process is concluded, seems inequitable to all concerned. Nevertheless, since the question has been here pursued by counsel for all parties, this Board reluctantly will respond to it.

This particular jurisdictional issue has been previously considered and decided in Risman v. Cuyahoga Cty. Bd. of Revision (October 17, 1997), BTA Case No. 96-M-548 (unreported).

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<sup>2</sup> Seemingly, based upon the arguments made by counsel, if jurisdiction were found not to exist, appellant's appeal would be dismissed; if, on the other hand, jurisdiction were found to exist, appellant's related request for an oral hearing, which right to a hearing was heretofore waived, would present further procedural questions.

During the pendency of Risman, the Supreme Court issued its decision in Sharon Village, Ltd. v. Licking Cty. Bd. of Revision (1997), 78 Ohio St.3d 479. The syllabus stated that “the preparation and filing of a complaint with a board of revision on behalf of a taxpayer constitute the practice of law.” The court then referred to R.C. 4705.01, the statute governing the practice of law in Ohio, which states in part:

“No person shall be permitted to practice as an attorney or counsel at law, or to commence, conduct, or defend any action or proceeding in which he is not a party concerned, either by using or subscribing his own name, or the name of another person, unless he has been admitted to the bar by order of the supreme court in compliance with its prescribed and published rules.”

Persons practicing law in the State of Ohio must be authorized by the Supreme Court of Ohio pursuant to its prescribed and published rules. Those rules make some provision for participation of an out-of-state attorney in a cause litigated within this state. Such participation may take place in a particular case with “leave of the judge hearing such cause.” Gov. Bar. SR.I(9)(I). Royal Indemnity Co. v. J. C. Penny Co. (1986), 27 Ohio St.3d 31. Whether or not to permit such representation by out-of-state counsel lies within the sound discretion of the tribunal before which the matter is pending. Id.; State v. Ross (1973), 36 Ohio App.2d 185.

In this instance, the BOR accepted the complaint verified and filed by Mr. Dunkin. Subsequently, the BOR permitted his appearance as an attorney of record for the property owner in the proceedings before that tribunal. No objection was made to such agreement by counsel for the board of education. Such circumstances are an indication that the

tribunal had exercised its discretion by authorizing Mr. Dunkin to appear and act in all the proceedings before it.

Since the BOR permitted representation by an out-of-state attorney in this particular litigation, this Board will not disturb the BOR's decision in the absence of a showing, by probative evidence of record, of an abuse of discretion that the out-of-state attorney specifically did not have the legal authority to file the complaint, or that the out-of-state attorney was otherwise engaged in conduct inimical to the BOR's exercise of its jurisdiction or to the regulation of the practice of law by the Supreme Court.

By its decision and order issued November 22, 1996, the Board of Tax Appeals found that the original complaint filed with the BOR in the instant cause properly established subject matter jurisdiction. The Board finds no reason to change that conclusion at this point in time.

This Board now turns its attention to appellant's further request for the scheduling of an oral hearing on the merits of its appeal which request is presently in contravention of the previous waiver of such a hearing on the merits.

The appellant has failed to assert and show good cause why the scheduling of an oral hearing should now be approved or granted by virtue of merely having found the existence of subject matter jurisdiction. The prior formal waiver by all parties of the previously authorized and scheduled hearing upon the merits before this Board is still binding and controlling. The present request for an oral hearing on the merits is not meritorious and therefore is not granted.

Although the parties were heretofore granted the right to file briefs relating to the substantive merits of the case based upon the existing evidence of record, all parties failed to take advantage of such authority. Although not requested, additional authority to file briefs directed to the merits and limited to the existing evidence of record will be granted:

IT IS ORDERED that appellant be and hereby authorized to file a principal brief within two weeks following the date of this order.

IT IS FURTHER ORDERED that each appellee be and hereby authorized to file an answer brief within four weeks following the date of this order.

IT IS FURTHER ORDERED that appellant be and hereby is granted authority to file a reply brief to a timely filed answer brief, in the event that an appellee timely files an answer brief, within two weeks following such filing.

IT IS FURTHER ORDERED that a copy of this order be sent to each of the parties by and through their respective counsel.      ohiosearchkeybta