2010 WL 6782538 (S.C.Admin.Law.Judge.Div.)

Administrative Law Court

State of South Carolina

OCONEE COUNTY ASSESSOR, PETITIONER
vs.
DOUGLAS CHIRILLO, CHARLOTTE CHIRILLO, AND GEORGIA POWER COMPANY, RESPONDENTS

Docket No.: 09-ALJ-17-0079-CC
November 23, 2010

FINAL ORDER AND DECISION

***1** This contested case comes to the Court from a decision of the Oconee County Board of Assessment Appeals concerning the assessment of property located on Lake Yonah. After notice of the date, time, place and nature of the hearing was given to all parties, this matter came before the Court for a hearing on the merits on May 25, 2010. Present at the hearing on behalf of the Petitioner, the Oconee County Assessor, were William Douglas Gray and Jeffrey T. Allen of the McNair Law Firm, P.A.; on behalf of Respondents Douglas and Charlotte Chirillo were W. Howard Boyd, Jr. and Thomas E. Vanderbloemen of Gallivan, White & Boyd, P.A.; and on behalf of Respondent Georgia Power Company were Roger Reigner of Troutman Sanders LLP and John C. von Lehe, Jr. of Nelson, Mullins, Riley & Scarborough LLP. Testifying at the hearing were Former Oconee County Assessors Leslie Smith and Roger Williams, Oconee County Appraiser II Carl Hudson, Jr., Garol Orr, and Charlotte Chirillo.

BACKGROUND & PROCEDURAL HISTORY

Several decades ago, Georgia Power Company created Lake Yonah when it erected a hydroelectric power facility on the Tugaloo River, which runs between South Carolina and Georgia. Georgia Power owns the land surrounding Lake Yonah, but leases individual lots to residents, who have erected cabins, docks, and other structures there. Some of these lots are located in Oconee County, but are generally only accessible by boat coming from the Georgia side of the lake.

As discussed below, the remoteness and inaccessibility of the Lake Yonah properties in Oconee County presents a unique situation, making it difficult if not impossible to provide regular County and government services, including police and fire protection. Former County Assessor Roger Williams was aware of these properties and the challenges they posed while he was assessor. During his tenure, Williams consulted with other County officials concerning the tax treatment of these properties. Due in part to the inability to provide emergency and other services to the properties, and out of concern over liability in the event an emergency situation did occur, Oconee County decided it would not require residents of the lots to pay ad valorem property taxes.

In 2008, a new Oconee County Assessor, Leslie Smith, decided to start assessing ad valorem taxes for the properties. The Assessor performed assessments for 2008, and, claiming the properties had "escaped taxation" pursuant to S.C. Code Ann. § 12-39-220 (2000), also sought back taxes for 2005, 2006, and 2007.

Douglas and Charlotte Chirillo lease one of the Oconee County lots at Lake Yonah and own a cabin and boat dock located there. Their lot and property were assessed a value of $143,760 for the improvements and $25,000 for the land. The 2008 taxes, as well as the back taxes for 2005, 2006, and 2007 were based on this value. After meetings with the Assessor's office, the Chirillos requested a review by the Oconee County Board of Assessment Appeals. On January 22, 2009, the Board upheld the assessed value of the property and the 2008 taxes, but ruled that no back taxes were due for 2005, 2006 or 2007.

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***2** The Oconee County Assessor petitioned this Court for review, arguing that the Chirillos were not the proper taxpayer to appeal and that the Assessor was permitted by Section 12-39-220 to seek back taxes for 2005, 2006, and 2007. The Court permitted the intervention of Georgia Power Company. The Court subsequently entered a Consent Order permitting the Chirillos to appeal the taxes on the improvements and Georgia Power to appeal the taxes on the land.

The Assessor argues that the Board of Assessment Appeals should have permitted it to collect back taxes for 2005, 2006, and 2007 because the property "escaped taxation" during those years. The Chirillos respond that the Assessor's prior knowledge and decision not to tax the properties preclude it from seeking back taxes as the properties had not been "omitted" or "escaped taxation" within the meaning of Section 12-39-220.

The Chirillos further argue that the Assessor needed to wait until the next countywide reassessment year, which is 2010, to revisit the decision not to tax the Lake Yonah properties. Therefore, according to the Chirillos, the 2008 decision was an improper "spot" reassessment in violation of S.C. Code Ann. § 12-43-210 (Supp. 2009). The Chirillos also argue that the assessed values were too high. Finally, the Chirillos seek reimbursement for their costs and attorney fees incurred in responding to the Assessor's argument that the Chirillos were not the proper party to appeal. The Chirillos contend the Assessor's argument contradicted the Assessor's own instructions to the Chirillos that they had a right to appeal and therefore needlessly increased the time and expense associated with this matter.

Georgia Power does not dispute the assessed value of the land, but joins in the other arguments by the Chirillos concerning back taxes and the improper ""spot" reassessment.

ISSUES

1. Did the Assessor perform an improper "spot" reassessment outside of a countywide reassessment year?

2. Can the Assessor seek back taxes for 2005, 2006, and 2007?

3. Is the assessed value of the Chirillos' improvements correct?

4. Are the Chirillos entitled to their costs and attorney fees incurred in responding to the Assessor's Motion for Summary Judgment concerning the right to appeal?

FINDINGS OF FACT

Based upon the parties' Preliminary Tax Appeal Statements, other submissions, and the testimony and evidence offered at the hearing, and taking into consideration the burden of persuasion and the credibility of the witnesses, I make the following findings of fact by a preponderance of the evidence:

1. Lake Yonah is partly in Oconee County, South Carolina and partly in Georgia.

2. Georgia Power Company owns the land surrounding Lake Yonah. It leases lots on both the South Carolina and Georgia sides of the lake. Georgia Power permits the lessees to erect cabins, docks, and other structures for residential and recreational use.

***3** 3. The lots on the Oconee County, South Carolina side of Lake Yonah are essentially inaccessible from South Carolina, and can only be accessed by boat from the Georgia side of the lake. Due largely to this inaccessibility, the residents on the Oconee County side receive virtually no police, fire, emergency response, or other services from Oconee County.

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4. Roger Williams was the Oconee County Assessor for several years leading up to 2005, including during the mid to late 1990s. During that time, he and other county officials were aware of the existence of the leased lots located on the Oconee County side of Lake Yonah. They were also aware that residential cabins had been built and were being used by the residents. In the mid to late 1990's, the Assessor and other county officials, including the County Auditor, conducted an official visit to Lake Yonah in a boat and viewed the cabins. The Assessor learned that there were virtually no county services being provided to the residents, including any emergency, police, or fire protection. The Assessor also learned of concerns that, if the residents were taxed, such services might need to be provided to avoid possible liability to the County in the event an emergency at Lake Yonah occurred. Based on these investigations, the inability to provide services, and concerns over liability, the Assessor and other county officials made an official determination that ad valorem property taxes would not be sought for the Lake Yonah properties.

5. The Chirillos lease one of the lots located in Oconee County. The lot is denominated “Lot 1” by Georgia Power. The Chirillos own a cabin and boat dock situated on the lot. They took over the lease from Ms. Chirillo's father, Stanley Turpin, who originally built the cabin in 1996. Prior to that time, there was a smaller cabin on the land that the Turpins used. Mr. Turpin took over the lease from his father, who originally acquired the lease from Georgia Power several decades ago.

6. Because Lake Yonah is owned and used by Georgia Power in its operations, the Chirillos' lease contains a number of restrictions. A survey of the lot and the Chirillos' lease were introduced into evidence as Respondents' Exhibits 2 and 8 respectively. According to this and other evidence, the Chirillos' cabin appears to be entirely situated within the “project boundary,” which is the boundary that defines the high water mark of the lake. The lease gives Georgia Power the sole discretion to require the Chirillos to remove their cabin on 90 days' notice and flood the lot up to the project boundary. Georgia Power also limits the Chirillos' ability to renovate or expand on the cabin.

7. To build the cabin and also to comply with Georgia Power's requirements, Mr. Turpin obtained a building permit from the Oconee County Assessor's office in 1996, demonstrating that the County and Assessor were on notice of construction of a residential cabin on the property as early as 1996. The building permit was introduced into evidence as Respondents' Exhibit 10. Because the only access to the lot is by boat across the lake from the Georgia side, materials were barged over to construct the cabin. Most of the construction was performed by Mr. Turpin, not by professionals. The cabin is not tied into any public sewer service, and electricity is provided directly from the hydroelectric facility. The Chirillos bring in bottled water for drinking, and use lake water for showers.

***4** 8. Due to the remoteness and inaccessibility of the lot, the Chirillos and other lessees are not able to receive fire protection services from Oconee County. In fact, because their property is inaccessible from public roads, the Chirillos did not even have a legal street address for the property inside the County. The lack of fire protection services made it difficult to obtain any insurance on the cabin. In light of the limited fire protection, they and other lessees raised money through bake sales and other means to purchase a fireboat for use by officials in Stephens County and Habersham County in Georgia. Oconee County was offered a chance to participate in the fireboat, but it declined. A 2003 agreement related to the fireboat was introduced as Respondents' Exhibit 15. Oconee County is not a party to the agreement. Once fire protection was made available through the fireboat, Ms. Chirillo's father was able to secure an insurance policy for the cabin. However, the maximum amount of available insurance coverage he or the Chirillos have been able to obtain for the cabin is $100,000.

9. Garol Orr and her husband are also lessees on the Oconee County side of Lake Yonah, and, like the Chirillos, face many of the same restrictions relevant to the issues before the Court. The Orrs also own a cabin on their lot. When building their cabin between 2000 and 2001, Ms. Orr made several visits and inquiries at Oconee County government offices to obtain the necessary permits. During this time, Ms. Orr also accompanied an Oconee County official to her lot to conduct an inspection. Ms. Orr's conduct, including obtaining necessary permits, demonstrates that the County again knew about residential cabin construction at Lake Yonah as early as 2000 and 2001, as it had earlier when the Assessor and other County officials visited the lake and when Mr. Turpin obtained his building permit.

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10. The Orrs lived at the lake for an extended period of time. During that time, the Orrs attempted to send their children to the Oconee County Schools but, due to the inaccessibility of the property from South Carolina, they did not even have a South Carolina street address. As a result, the Orrs encountered resistance from the Oconee County school system, prompting them to instead send their children to the schools in Stephens County, Georgia. Furthermore, on one occasion, Ms. Orr also needed the assistance of law enforcement but was unable to obtain any such assistance from Oconee County. Instead, law enforcement from Stephens County, Georgia responded.

11. Leases for lots at Lake Yonah have been recorded with the Oconee County Register of Deeds. At least one lease introduced at the hearing bears a stamp from the Oconee County Assessor's Office. The lease, which was introduced as Respondents' Exhibit 40, was recorded in 2000 and contains a 1996 survey showing the existence of a structure and a boat dock. This evidence also shows that the Assessor and the County have known about residential cabin construction at Lake Yonah.

***5** 12. Oconee County, including the Oconee County Assessor's Office, has for years been aware of and on notice of the existence of the leased lots at Lake Yonah and the residential cabins located there. Knowing about these properties and the substantial restrictions that made provision of county services all but impossible, the County, including the Assessor's Office, made a conscious, deliberate decision not to assess taxes on the properties.

13. The last countywide legal reassessment year in Oconee County was 2005. This year, 2010, is a countywide legal reassessment year in Oconee County, but the County's decisions at issue in this case all occurred prior to 2010.

14. In 2008, which was not a legal reassessment year, the Assessor revisited the County's prior decision not to tax the properties. As to the Chirillos' leased property, the Assessor valued the land at $25,000 and the improvements, which include a fishing cabin valued at $128,760 and a floating pier valued at $15,000. Pursuant to the Consent Order mentioned in the Procedural History above, Georgia Power owns the land and is responsible for taxes on it, and the Chirillos own the improvements and are responsible for taxes on them.

15. Oconee County assigned a tax identification number to the large tract of land, approximately 3,000 acres, owned by Georgia Power and the Chirillos' leased property is included within the large tract of land. A tax identification number must be assigned to a parcel of land before property can be assessed, and, thus, a tax bill can be issued to the property owner. Prior to this matter, Georgia Power paid taxes on this property to the Department of Revenue as it was submitted as “operating property.”

16. The leased lots at Lake Yonah vary in size, shoreline, and other aspects. However, the Assessor's office assessed each lot a uniform value of $25,000 for the land.

17. A “project boundary” runs across each lot, including the lot the Chirillos lease. The project boundary defines the boundary of Georgia Power's hydroelectric power facility at Lake Yonah and represents the high water mark up to which point Georgia Power can flood the lake in connection with the generation of power. The Chirillos' cabin is within the project boundary, meaning that Georgia Power can require the Chirillos to remove the cabin and can flood the area according to notice provisions set forth in the Chirillos' lease. Ms. Chirillo testified that she recalled the lot having been flooded in the past. She also testified that, because the cabin is within the project boundary, Georgia Power restricts her right to make any substantial alterations or additions to the cabin.

18. The Assessor's office assessed the improvements by using the “cost” method. As a result, the assessment did not take into account the lack of government services, the project boundary and its restrictions, Georgia Power's ability to require removal of the cabin and to flood the area, the limitations and restrictions on the Chirillos' ability to modify the cabin, or the fact that the Chirillos cannot obtain more than $100,000 in insurance for the property. As noted above, the Assessor's Office valued the total improvements at $143,760, of which $128,760 was assessed to the cabin and $15,000 to the floating pier.

CONCLUSIONS OF LAW

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***6** 1. This matter is properly before the Court pursuant to S.C. Code § 12-60-2510 *et seq.* “[A]lthough a case involving a property tax assessment reaches the ALJ in the posture of an appeal, the ALJ is not sitting in an appellate capacity and is not restricted to a review of the decision below. Instead, the proceeding before the ALJ is in the nature of a *de novo* hearing.” *Reliance Ins. Co. v. Smith*, 327 S.C. 528, 534, 489 S.E.2d 674, 677 (S.C. Ct. App. 1997). As a result, the Court may consider *de novo* all arguments bearing on the validity and correctness of the assessment. [1]

A. The Assessor Performed an Improper “Spot” Reassessment Outside of a Legal Reassessment Year

2. The Chirillos argue that the Assessor conducted an improper “spot” reassessment outside of a legal reassessment year. I agree. South Carolina law only permits county tax assessors to reassess property values every five years. *See, e.g.*, S.C. Code Ann. § 12-43-217. “No reassessment program may be implemented in a county unless all real property in the county ... is reassessed in the same year.” S.C. Code Ann. § 12-43-210; *see also Long Cove Homeowners' Assoc. v. Beaufort County Tax Equalization Board*, 488 S.E.2d 857 (S.C. 1997). A “spot” reassessment outside of a legal reassessment year is only permitted in limited circumstances, such as where there is a change in the condition of the property. *See* SC Revenue Advisory Bulletin # 02-07 (citing *Long Cove* and explaining that mere change in ownership of property does not permit spot reassessment outside of legal reassessment year because there has been no change in the condition of the property).

3. It should be noted here that this case differs from *Long Cove, id.*, in that in the latter, there had actually been an assessment of $0.00 on the property in question, *id.*, p. 138, whereas in the instant case, there was no assessment but instead a refusal to tax. Under these circumstances, the County and the Assessor made an assessment decision concerning these properties, which I conclude effectively amounted to a “zero” or minimal assessment at that time. The Assessor can change this decision in the future, but not by conducting a ““spot” reassessment outside of a legal reassessment year under the guise of seeking so-called “back” taxes. Rather, the Assessor must wait until the next legal reassessment year to revisit its prior decision not to assess these properties. I conclude that the decision by Oconee County and its Assessor not to tax is legally tantamount to the “zero” assessment in *Long Creek, id.*

4. As noted above, the last legal reassessment year for Oconee County was in 2005. 2010 is a legal reassessment year, but the actions involved in this case occurred prior to 2010.

5. I conclude that there has been no change in the condition of the property to justify a spot reassessment outside of a legal reassessment year. *See* SC Revenue Advisory Bulletin # 02-07 (explaining that spot reassessments outside a legal reassessment year should not be based on clerical or ministerial events that do not reflect changes in the condition of property, such as mere transfer of ownership or platting of property for subdivisions). As a result, this case is distinguishable from cases upon which the Assessor relies, which involved situations where inadvertent errors occurred in assessments, improvements or ““new structures” were made between legal reassessment years, or other distinguishable circumstances existed. Here, the Assessor and County were well aware of the properties but deliberately decided not to assess taxes, and there has been no change in the condition of those properties since that time to justify revisiting this issue.

***7** 6. The Assessor has argued that because no formal, written “assessment” had been conducted, the 2008 decision to begin assessing taxes could not be a ““re”-assessment. This argument, however, is not persuasive, because, as stated above, the decision not to tax was the equivalent of an assessment of zero. Moreover, one of the many purposes behind South Carolina's prohibition on spot reassessments is to provide some measure of certainty to taxpayers that decisions concerning the taxes they pay will not be constantly or arbitrarily changed, especially when government officials retire or are replaced. The evidence demonstrates that county officials, including the Oconee County Assessor's Office, made a deliberate, conscious decision in the 1990s that ad valorem property taxes should not be assessed on these remote properties that received little or no government support. There is also no question that the residents were aware of the lack of these services and made other arrangements in reliance on the County's position, including by privately contributing to the purchase of a fireboat for use by Georgia officials, contacting Georgia law enforcement authorities when Oconee County officials would not respond, and sending their children

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to Georgia schools. The Assessor's decision in 2008 was an attempt to revisit the County's prior decision on assessments, and undermines the predictability and purposes achieved by the state's ban on improper "spot" reassessments outside a legal reassessment year.

7. For similar reasons, the Assessor cannot overcome the ban on improper spot reassessments by instead claiming the property had "escaped taxation" under S.C. Code Ann. § 12-39-220. To hold otherwise would create an exception swallowing the rule and would permit assessors to bypass the restrictions on spot reassessments by claiming instead to be collecting amounts that had allegedly "escaped taxation."

8. The Assessor's decision in 2008 to change its previous assessment decision was an improper "spot" reassessment outside of a legal reassessment year. As a result, I conclude that the assessments are void. The Court is not holding that the property is forever exempt from taxation. Rather, the Court is holding that, as with all assessment decisions, the Assessor must honor its prior assessment decision at least until the next legal reassessment year. [2]

9. In the alternative, if the Assessor's decision in 2008 is determined **not** to be an improper spot reassessment as to the Chirillos, I conclude that the decision in 2008 was an improper spot reassessment as to the real property owned by Georgia Power. The real estate was previously assigned a tax identification number, and Georgia Power paid taxes upon such property. Because the real property of Georgia Power was taxed, and thus previously assessed, the Assessor's decision in 2008 was an improper spot reassessment.

B. **The Assessor Cannot Collect Back Taxes for 2005, 2006 or 2007**

***8** 10. The Assessor contends that S.C. Code Ann. § 12-39-220 permits the collection of back taxes in this case. According to that section,

If the county auditor shall at any time *discover* that any real estate or *new* structure, duly returned and appraised for taxation, has been omitted from the duplicate, he shall immediately charge it on the duplicate with the taxes of the current year and the simple taxes of each preceding year it may have *escaped taxation*.... And if any real estate shall have been omitted in any return, the auditor of the county shall appraise it immediately for taxation, file such appraisement in his office and charge it with the taxes of the current year and the simple taxes of preceding years it may have escaped taxation.

S.C. Code Ann. § 12-39-220 (2000) (emphasis added).

Thus, I make the following alternate conclusion which is to be effective in the event that my previous conclusion regarding the invalidity of the entire assessment is found to be incorrect.

The Court rejects the Assessor's argument and instead agrees with the Board of Assessment Appeals and Respondents that back taxes for 2007, 2006, and 2005 are not permitted in this case. Section 12-39-220 only permits the collection of **back taxes** for property that has "escaped taxation." *Id.* The evidence discussed above demonstrates that the County, including the Assessor's Office, was well aware of and on notice of the existence of residential cabins on Lake Yonah for years but consciously decided not to assess ad valorem property taxes. And, as stated above, the refusal by the county to tax was equivalent of a zero assessment.

11. Based on the lack of services and concerns over liability, the County decided that it would be inappropriate to assess taxes on these properties, a decision well within its authority based on the limitations and unique circumstances of the properties. *See, e.g.*, S.C. Const., Art. VIII § 7 ("The General Assembly shall provide by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties, including the power to tax different areas *at different rates of taxation related to the nature and level of government services provided*") (emphasis added); S.C. Code Ann. § 4-9-30 ("[E]ach county government within the authority granted by the Constitution and subject to the general law of this State shall have

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the ... power[] ... to assess property and levy ad valorem property taxes and uniform service charges, including the power to tax *different rates related to the nature and level of governmental services provided*.") (emphasis added).

12. Courts generally construe revenue statutes in favor of the taxpayer and against the taxing authority. *See, e.g., Clark v. South Carolina Tax Commission*, 259 S.C. 161, 169, 191 S.E.2d 23, 26 (1972). Under these circumstances, and based on the evidence and conclusions of law, the Court concludes that the back taxes did not "escape taxation" within the meaning of S.C. Code § 12-39-220. The Board of Assessment Appeals correctly ruled that the Assessor could not collect taxes for 2005, 2006, and 2007.

***9** However, should it be found that Section12-39-220 does apply in that the Chirillo property "escaped" taxation, then the following still applies to prevent taxation for the years 2007, 2006 and 2005.

13. I conclude that Oconee County waived the right to collect "back" taxes for the years 2007, 2006 and 2005. Waiver is the voluntary and intentional relinquishment of a known right. *Parker v. Parker*, 313 S.C. 482, 443 S.E.2d 338 (1994). The evidence here is clear and virtually undisputed that a decision was made by Oconee County officials not to tax the improvements on the lot leased by the Chirillos.

For Oconee County to levy taxes on the Chirillo's cabin for the years 2007, 2006, and 2005 — years in which the county did not provide any services — is clearly unconscionable. *See* 7 S.C. Jur. Estoppel and Waiver § 17. "Waiver is distinct from equitable estoppel in that no detrimental change of position in reliance on conduct need be shown." *See also Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992).

Waiver generally must be pleaded but the requirement is not so strict as to insist on the use of the word "waiver" and allegation of facts sufficient to constitute waiver is adequate. *Carolina Mechanical Contractors, Inc. v. Yeargin Const. Co., Inc.*, 261 S.C. 1, 198 S.E.2d 224 (1973). That is more so the case in proceedings before an administrative tribunal.

Pleading requirements in administrative proceedings are traditionally more informal than judicial proceedings. *Nelson County Schools and CompManagement, Inc. v. Woodson*, 45 Va. App. 674, 613 S.E.2d 480 (2005).

Administrative complaints are not required to state the charges with the same precision, refinements, or subtleties as pleadings in a judicial proceeding. *Vuagniaux v. Department of Professional Regulation*, 208 Ill. 2d 173, 802 N.E.2d. 1156 (Ill. 2003).

The pleadings required in an administrative proceeding are governed by the rules and regulations of the administrative body; pleadings are liberally construed and are not subject to the strict rules applicable to pleadings in judicial proceedings. 73A C.J.S. Public Administrative Law and Procedure § 231 (2004).

I conclude as a matter of law that "waiver" is sufficiently pleaded in the Chirillos' Preliminary Tax Appeal Statement, page 3, saying:" Oconee County had known about Lake Yonah and its leaseholders long before the 2008 decision to begin taxing the Chirillos. In fact, due in part to the considerable lack of any public and governmental services that it could provide to the leaseholders given their remote and inaccessible location, Oconee County had elected not to tax the leaseholders at all...."

C. The Assessed Value of the Chirillos' Improvements is Correct

15. The Chirillos argue alternatively that the assessed value of their improvements is too high. I disagree. Again, if the conclusion regarding invalidity as a spot reassessment is found invalid and any tax is found to be due, then I find and conclude that the value of the improvements on the lot leased by the Chirillos as found by the Assessor to be correct.

***10** 16. The cost approach is an acceptable method of valuation. *Atkinson v. Oconee County Assessor*, 95-ALJ-17-0256-CC, citing 84 C.J.S. Taxation § 410 (1954).

17. South Carolina courts, as well as other jurisdictions, have relied on the Marshall & Swift valuation.[3] See, e.g. *In Re Willis*, 115 B.R. 518 (D.S.C. 1989); *In Re Johnson*, 2000 WL 33710883 (Bankr.D.S.C. 2000); *W. A. Atkinson vs. Roger Williams, Oconee County Assessor*, 95-ALJ-17-0256-CC (October 16, 1995); *Albert Sprague v. Lexington County Tax Assessor*, 04-ALJ-17-0311-CC (June 14, 2005).

18. The boat dock was valued based on the appraisal experience of the Assessor's staff. The Assessor valued the residence using the cost method. The Chirillos have not proven any errors in the data used by the Assessor in applying the cost method. The Assessor also compared the value determined under the cost method with available market data. The available market data indicates that market prices for property located on Lake Yonah substantially exceeded the value of such properties determined under the cost method. The Chirillos alleged that the Assessor's value determined using the cost method was not appropriate because it failed to account for restrictions on the property and an alleged lack of Oconee County services. The Chirillos offered no evidence as to the value of the improvements, as to the impact restrictions may have on the value of the Improvements, as to whether the level of county services impacted the value, or any estimate of the value of the improvements. The impact of restrictions and county services on the value of the Improvements is not a factor under the cost approach. The only evidence offered by the Chirillos tending to show value of the improvements was an insurance policy covering the Improvements with a policy limit of $100,000. Whether a policy with greater limits could have been obtained is not determinable from the evidence proffered by the Chirillos. The policy limit of the insurance policy is insufficient to rebut the presumed correctness of the Assessor's valuation of the improvements and the Chirillos have failed to establish that the value of the improvements was incorrect or erroneous. Thus, I conclude the value of $15,000.00 for the dock and $128,760.00 for the improvements is correct.

D. **The Chirillos Are Not Entitled to their Costs and Reasonable Attorney Fees**

19. The Chirillos also argue that they are entitled to their costs and reasonable attorney fees for having to respond to the Assessor's Motion for Summary Judgment, and, specifically, the Assessor's arguments that the Chirillos were not the proper "taxpayer" to appeal the assessments. I disagree and conclude that they are not entitled to fees and costs.

20. Rule 72 of this Court's Rules provide that "[i]f the presiding administrative law judge determines that a contested case, appeal or motion is frivolous or taken solely for purposes of delay, the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." Rule 72, SCALC. As the 2009 Revised Notes to the Rule explain, "Rule 72 provides that an administrative law judge may impose sanctions for contested cases, appeals, or motions which are determined to be frivolous or taken for purposes of delay," and that "[t]he amount and type of sanction to be imposed is within the discretion of the presiding administrative law judge." *Id.* (2009 Revised Notes).

***11** "In determining whether a case is frivolous, the administrative law judge may refer to S.C. Code Ann. § 15-36-10, the Frivolous Civil Proceedings Sanctions Act." *Id.* S.C. Code Ann. § 15-36-10 permits sanctions in the form of reasonable costs and attorney fees where a party or its attorney asserts a position that was frivolous, intended merely to harass or injure the other party, was merely brought for a purpose other than adjudication of the claim or defense upon which the proceedings are based, and for other reasons.[4]

I conclude that the actions of the Assessor are neither frivolous nor were they taken for the purpose of delay or to injure or harass. Nor were they taken for any purpose other than the adjudication of the claim upon which the proceeding is based. Rather, we have county officials, charged with the collection of taxes, have a factual situation that is *sui generis* and statutes that are open to interpretation when applied to the facts. There is no malice here. Instead it is a classic adversarial confrontation with each side trying to gain the advantage.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, **IT IS THEREFORE ORDERED** that

1. The Assessor performed an improper “spot” reassessment outside of a legal reassessment year and is not entitled to the taxes for any year based on the “ “spot reassessment”, nor shall it be permitted to assess taxes until the next legal reassessment year.

2. In the alternative, if the reassessment is found not to be an improper ““spot” assessment, then, either because Section12-39-220 does not apply, or, because of waiver, the Assessor is not entitled to collect back taxes for 2005, 2006 or 2007 but may collect taxes for 2008 and subsequent years. Further, if it should be determined that it was not a spot reassessment as to the Chirillo improvements, the same does not apply to the real estate underlying the lease which is owned by Georgia Power. The Georgia power real estate had been previously taxed and thus assessed which makes it clearly within the protection of the prohibition on “spot reassessment.”

3. The valuation placed upon the improvements upon the property leased by the Chirillos is correct, to wit: $128,760 for the improvements to the lot and $15,000 for the boat dock, totaling $143,760, provided, nothing herein contained shall prevent the Chirillos from contesting the valuation in subsequent years in the manner provided by law.

4. The Chirillos are not entitled to collect attorneys' fees and costs.

5. It is further Ordered, that notwithstanding SCALC Rule 29(C) and the last paragraph of SCALC Rule 29(D), any issues raised in this proceeding but not addressed in this Order will **not** be deemed denied. In order to preserve any unaddressed issues for appeal, a party must file a Motion for Reconsideration pursuant to SCALC Rule 29 (D). See SCALC Rule 29 (D) (incorporating the grounds for relief set forth in Rule 59, SCRCP); *Home Medical Systems, Inc. v. S.C. Dept. of Revenue*, 382 S.C. 556, 677 S.E.2d 582 (2009) (finding that Rule 59(e), SCRCP motions are permitted in proceedings before the ALC).

***12 AND IT IS SO ORDERED**.

Columbia, SC

November 23, 2010

John D. McLeod
Judge
S.C Administrative Law Court

Footnotes

1 The Assessor previously suggested that this contested case be limited only to the issue of back taxes, the issue the Assessor raised in its request for a contested case hearing. However, the Assessor did not press this argument at the hearing, and has abandoned it. Nevertheless, because this is a *de novo* review of the assessment, and because the Assessor did not file a motion to remand, all issues presented by the Chirillos are properly before the Court.

2 For the same reasons, any taxes assessed in 2009 are also void.

3 Marshall & Swift Handbook is a book commonly used throughout the state and the country by appraisers for cost estimates.

4 *See also* Rule 11(a), SCRCP; Rule 68, SCALC.

2010 WL 6782538 (S.C.Admin.Law.Judge.Div.)

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