BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203	Docket No.: 56263
Petitioner: **WILLIAM J. FRESCH, CUSTODIAN** v. Respondent: **DOUGLAS COUNTY BOARD OF COMMISSIONERS.**	

ORDER

THIS MATTER was heard by the Board of Assessment Appeals on August 1, 2012, James R. Meurer and MaryKay Kelley presiding. William J. Fresch appeared pro se. Respondent was represented by Robert D. Clark, Esq. Petitioner is appealing Respondent's denial of Petitioner's abatement petition for the 2007 and 2008 tax years. The parties have stipulated to the valuation of the subject property for the 2008 tax year.

The subject property is described as follows:

Douglas County Schedule No: R0041902

The subject property includes approximately 148 acres of land and three structures – a barn and two small sheds.

I. Factual Background

On July 27, 2007, Petitioner filed a protest with the Douglas County Assessor (the "Assessor") with respect to the 2007 notice of valuation issued by the Assessor. The Assessor issued a notice of determination on August 17, 2007. Petitioner disagreed with the Assessor's determination and appealed to the Douglas County Board of Equalization (the "CBOE") on September 14, 2007. The CBOE denied Petitioner's appeal on November 1, 2007. Petitioner appealed the CBOE decision to Douglas County District Court on November 30, 2007 (the "District Court Case").

On March 26, 2008, the District Court issued a "Notice of Dismissal for Failure to Prosecute" (the "Notice"). The Notice indicated a "Dismissal Date" of April 25, 2008, and stated that "this case will be dismissed without prejudice on the dismissal date noted above unless you show cause, by written motion and order prior to the date as to why this case should not be dismissed. YOU WILL NOT RECEIVE A COPY OF THE DISMISSAL ORDER." The Notice was signed by the Deputy Clerk for the District Court and included a certificate of mailing also signed by the Deputy Clerk. Although the certificate of mailing did not specifically indicate that the Notice was mailed to Petitioner, the District Court's electronic records on LexisNexis appear to show that the Notice was mailed to Petitioner at the address Petitioner listed on the petition to District Court. Petitioner denies ever having received the Notice from the District Court.

On November 26, 2008, Petitioner filed a "Supplemental" petition in the District Court Case. The supplemental petition was filed by Petitioner to address the 2008 valuation of the subject property. The reason given by Petitioner for filing the supplemental petition was to "combine both the 2007 and 2008 real property valuation assessment in this present case before the Court."

In July of 2009, Petitioner filed a protest with the Assessor with respect to the Assessor's notice of valuation for 2009. Petitioner disagreed with the Assessor's determination for 2009 and appealed to the CBOE. On October 30, 2009, the CBOE held a hearing on the 2009 valuation of the subject property. The CBOE lowered the actual value of the subject property for 2009 to $9,901. During the 2009 CBOE hearing, Petitioner asked the CBOE to order the Assessor to correct its 2007 and 2008 assessment to "mirror" the 2009 value determined by the CBOE, and Petitioner would then drop the case for 2007 and 2008 in District Court. The CBOE did not take action on this request by Petitioner at the 2009 CBOE hearing on October 30, 2009.

After the October 30, 2009 CBOE hearing, Petitioner attempted to schedule the District Court case for trial, but was told that the District Court case had been dismissed. On November 24, 2009, Petitioner filed a Motion to Vacate Notice and Order of Dismissal with the District Court. Douglas County subsequently filed a motion to dismiss. On January 14, 2010, the District Court denied Petitioner's Motion to Vacate Notice and Order of Dismissal, noting that, "This and all subsequent motions are DENIED as moot."

On March 10, 2010, Petitioner filed a "Claim for Refund of Property Taxes" with Respondent, seeking an abatement and refund of the 2007 and 2008 taxes Petitioner paid for the subject property (the "Abatement Petition"). The Petition includes a "General Affidavit" wherein Petitioner attests that after June 20, 1990, no improvement or other changes that would increase the value of the alleged agricultural residence were made by anyone including Petitioner as of December 15, 2009 and that after June 20, 1990, the building was used as a barn.

The Abatement Petition also includes a "Petition by Taxpayer – Affidavit for Tax Refund". In this affidavit, Petitioner concedes that it previously filed a protest for tax years 2007 and 2008, but claims that "the prohibition in Section 39-10-114(a)(I)(D), does not apply because the abatement is based on an 'erroneous valuation for assessment' rather than 'overvaluation'." Petitioner notes that "erroneous valuation for assessment" as used in Section 39-10-114(1)(a)(I)(A) refers to a legal issue, while "overvaluation" refers to a factual issue.

On September 1, 2010, a referee for Respondent heard Petitioner's Abatement Petition. On this date, Petitioner also submitted to Respondent "Petitioner's Final Arguments Re: Assessor's Erroneous Valuation for Assessment". In this document, Petitioner states that its "final argument centers on the doctrine of estoppel or estoppel at common law." Petitioner also argues the "rule of res judicata, by which a judgment estops the parties in future litigation between them, to question either a fact or a principal of law necessary to the first judgment and adjudicated therein."

On September 22, 2010, Respondent accepted the recommendations of the referee and denied Petitioner's abatement petition for 2007 and 2008. The reasons given by the referee for denying the abatement petition were: "For 2007, no change should be made to the actual value because (1) the applicable statute of limitations had run, and (2) petitioner had previously filed a protest and a notice of determination was mailed to petitioner. For 2008, petitioner did not submit any evidence supporting his claim that the subject had been over-valued. Assessor's evidence of value supports Assessor's determination of actual value."

On October 14, 2010, Petitioner appealed Respondent's denial of the abatement for 2007 and 2008 to this Board (the Board of Assessment Appeals or the "Board"). On the petition to the Board, Petitioner states the reason for the appeal as, "inconsistent with value assigned on October 30, 2009 for same property with same factual history".

On March 24, 2011, Respondent filed a motion to dismiss Petitioner's appeal to the Board. In the motion to dismiss, Respondent argued that the petition should be dismissed for tax year 2008 because Respondent agreed with the amount advocated by Petitioner in his appeal petition for tax year 2008. With respect to the 2007 valuation, Respondent argued that the Board did not have jurisdiction because Petitioner previously appealed the 2007 valuation decision of the CBOE to the District Court, and the District Court dismissed the appeal. Respondent claimed that Petitioner's only remedy was to appeal the District Court's dismissal to the Colorado Court of Appeals, but Petitioner did not do so. Respondent stated in the motion to dismiss that "[t]he BAA has no jurisdiction to hear appeals from District Court. Its jurisdiction is limited to appeals from county boards of equalization". Respondent also claimed that, "[t]he District Court's unappealed dismissal with prejudice of the Taxpayer's appeal of the Douglas County Board of Equalization's decision concerning the 2007 taxes is res judicata of the proper valuation and classification with respect to the 2007 taxes, and the BAA lacks subject matter jurisdiction to hear the Taxpayer's appeal of the [sic] his 2007 taxes."

Under the Board rules, Petitioner had until April 3, 2011 to file a response to Respondent's motion to dismiss. Petitioner did not file a response. On April 4, 2011 the Board issued an order granting Respondent's motion to dismiss with respect to tax year 2007, but denying the motion to dismiss with respect to tax year 2008 (the "April 4, 2011 Board Order").

On May 19, 2011, Petitioner filed a notice of appeal with the Colorado Court of Appeals – appealing the April 4, 2011 Board Order. The Court of Appeals dismissed the appeal without prejudice because the April 4, 2011 Board Order was not a final appealable order. The mandate from the Court of Appeals was issued on December 2, 2011.

On February 10, 2012, Petitioner notified the Board that the parties had settled the 2008 tax year. On April 5, 2012, the Board issued a notice of hearing to the parties. The notice of hearing indicated that the Board would hear: (1) arguments on whether the Board has jurisdiction over the 2007 tax year and should reconsider the April 4, 2011 Board Order; and (2) Petitioner's appeal of Respondent's denial of Petitioner's abatement petition. The hearing on this matter occurred on August 1, 2012.

Prior to the August 1, 2012 hearing, Respondent submitted a pre-hearing brief to the Board. During the August 1, 2012 hearing, Petitioner requested the Board strike or disregard Respondent's pre-hearing brief – arguing that Petitioner did not have an adequate opportunity to review and respond to the pre-hearing brief prior to the hearing. The Board accepted Respondent's pre-hearing brief, but allowed Petitioner an opportunity to respond to the pre-hearing brief in writing by September 4, 2012. Both parties were also given until September 4, 2012 to file written closing arguments.

During the August 1, 2012 hearing, Petitioner requested the Board consider a long list of documents as part of the record. The Board marked such documents as Petitioner's Exhibits 1 through 21. The Board has admitted all of Petitioner's exhibits into the record.

Subsequent to the August 1, 2012 hearing, both parties submitted timely written closing arguments. Petitioner also filed a brief responding to Respondent's prehearing brief. In addition, Petitioner filed a written motion to strike, requesting the Board strike Respondent's pre-hearing brief. Petitioner's motion to strike was based on the fact that Respondent did not provide its pre-hearing brief to Petitioner in accordance with Board Rule 11, which requires both parties to exchange all documentation at least 10 business days prior to the hearing. Respondent filed a written response to the motion to strike.

II. Motion to Strike Respondent's Pre-Hearing Brief

The Board finds that Petitioner was provided with a reasonable opportunity to respond to Respondent's pre-hearing brief. Respondent's pre-hearing brief was filed with the Board and mailed to Petitioner on July 24, 2012 – in advance of the August 1, 2012 hearing. In addition, Petitioner was given an opportunity after the August 1, 2012 hearing to file a written response to the pre-hearing brief, and Petitioner did in fact file a written response to Respondent's pre-hearing brief after the August 1, 2012 hearing. The Board also allowed Petitioner to file its own brief at the August 1, 2012 hearing, even though Petitioner's brief was not provided to the Board or to Respondent until the August 1, 2012 hearing. The Board finds that it is in the interest of justice and fairness to suspend Board Rule 11 with respect to the requirement, if any, that Respondent was required to provide the pre-hearing brief to Petitioner at least 10 business days prior to the hearing. Petitioner's motion to strike is denied.

III. Reconsideration of the April 4, 2011 Board Order

Based on the arguments submitted by the parties, the Board finds that it should reconsider the April 4, 2011 Board Order. The April 4, 2011 Board Order is rescinded to the extent that it dismissed Petitioner's petition for tax year 2007.

Section 39-2-125(1)(f), C.R.S. specifically provides jurisdiction for the Board to "hear appeals from decisions of boards of county commissioners filed not later than thirty days after the entry of any such decision when a claim for refund or abatement of taxes is denied in full or in part".

The Board finds that the abatement petition filed by Petitioner with the Board on October 14, 2010 was filed within thirty days after the entry of Respondent's decision denying Petitioner's claim for refund or abatement of taxes, which was entered on September 22, 2010.

The Board further finds that the abatement petition filed by Petitioner in this action is not precluded by the case previously filed by Petitioner in Douglas County District Court.

Petitioner filed the District Court Case in order to appeal the Douglas County Assessor's denial of Petitioner's protest filed pursuant to Section 39-5-122, C.R.S. and the Douglas County Board of Equalization's denial of Petitioner's petition filed pursuant to Section 39-8-106, C.R.S. A taxpayer may file a protest to the assessor and appeal the assessor's determination to the County Board of Equalization if the taxpayer, "is of the opinion that his or her property has been valued too high, has been twice valued, or is exempt by law from taxation or that property has been erroneously assessed to such person...". See Section 39-5-122(2), C.R.S.

Petitioner filed the current Abatement Petition with the Board, on the other hand, in order to appeal the Douglas County Board of Commissioner's denial of Petitioner's petition filed pursuant to Section 39-10-114, C.R.S. A taxpayer may file an abatement action under this section if "taxes have been levied erroneously or illegally, whether due to erroneous valuation for assessment, irregularity in levying, clerical error, or overvaluation...". Section 39-10-114 (1)(a)(I)(A), C.R.S. However, a taxpayer may not file an abatement action under this section "based on the ground of overvaluation of property if an objection or protest to such valuation has been made and a notice of determination has been mailed to the taxpayer pursuant to section 39-5-122...". Section 39-10-114(1)(a)(I)(D), C.R.S. (emphasis added).

The Board concludes that it has jurisdiction to hear this appeal pursuant to Section 39-2-125(f), C.R.S. The Board further concludes that Section 39-10-114(1)(a)(I)(D), C.R.S. bars the abatement petition to the extent it is based on arguments of overvaluation.

The Board also concludes that Section 39-10-114(1)(a)(I)(D), C.R.S. does not bar the abatement petition to the extent it is based on arguments of erroneous valuation for assessment. Where a taxpayer's petition for abatement is based upon erroneous valuation for assessment, which is a legal issue, rather than overvaluation, which is a factual issue, the taxpayer's petition for abatement and refund is not precluded by Section 39-10-114(1)(a)(I)(D), C.R.S. *See Boulder Country Club v. Boulder County Bd. of Comm'rs*, 97 P.3d 119 (Colo. App. 2003).

IV. Legal Arguments Raised by Petitioner

In order to maintain this abatement action, Petitioner asserts that the petition is based on erroneous valuation for assessment, which involves legal issues, rather than overvaluation, which involves factual issues. The legal issues raised by Petitioner are: (1) Respondent should be barred by the doctrines of estoppel/estoppel at common law and res judicata; and (2) the assessments for tax years 2007 and 2008 must be the same as a matter of law.

Petitioner's estoppel and res judicata arguments are based on the Douglas County Board of Equalization's valuation of the subject property for the 2009 tax year. Petitioner submitted a copy of the recorded County Board of Equalization hearing for tax year 2009, where the County Board of Equalization lowered the actual value of the subject property for the 2009 tax year to $9,901. In support of this argument, Petitioner also submitted a "General Affidavit" wherein Petitioner attests that after June 20, 1990, no improvement or other changes that would increase the value of the subject property were made by anyone including Petitioner and that after June 20, 1990, the building was used as a barn.

Petitioner argues that the property was in the same condition in 2007 as it was when the Douglas County Board of Equalization valued the property at $9,901 in 2009. Petitioner argues that Respondent should be estopped from arguing a different value for 2007 than the County Board of Equalization determined for 2009. Petitioner argues that the 2007 valuation has been already decided and is res judicata – based on the 2009 valuation of the subject property by the Douglas County Board of Equalization and Petitioner's affidavit. Petitioner also argues that the value for 2007 must be $9,901 because the parties stipulated to that value for 2008, and the values must be the same for 2007 and 2008 as a matter of law.

The Board finds that Respondent is not estopped from valuing the subject property differently for the 2007 tax year than the Douglas County Board of Equalization valued the property for the 2009 tax year. Petitioner appealed the 2007 valuation of the subject property to both the County Board of Equalization and the District Court. It was Petitioner's failure to prosecute that led to the dismissal of the District Court Case for the 2007 tax year. Petitioner had an opportunity to challenge the 2007 valuation under the statutory appeals process. Petitioner began the protest and appeal process for 2007, but failed to complete it.

The Board finds that the District Court gave Petitioner notice of its intent to dismiss the District Court Case for failure to prosecute. The Board finds the documentation in the record with regard to service of the notice by the District Court more credible than Petitioner's claim that it did not receive the notice. The Board also finds that Petitioner took no action to prosecute the 2007 tax year appeal in the District Court Case from the time Petitioner filed the action in November 2007 until approximately November 2009 when Petitioner filed its Motion to Vacate Notice and Order of Dismissal with the District Court. Petitioner's use of an estoppel argument in the abatement process to get around Petitioner's failure to complete the protest and appeal process is inappropriate.

The Board also finds that the 2009 valuation of the subject property by the Douglas County Board of Equalization does not preclude Respondent from valuing the property differently for the 2007 tax year based on the doctrine of res judicata. A successful res judicata argument requires a matter to actually have been decided in the earlier proceeding or at least a matter that could have been raised in the earlier proceeding. The value of the property for the 2007 tax year was not at issue during the 2009 County Board of Equalization hearing and legally could not have been at issue during the hearing, which was only for tax year 2009.

The Board also finds that Petitioner's arguments of estoppel and res judicata require the Board to make factual determinations as to whether there were any changes in the property from the 2007 tax year to the 2009 tax year. To the extent that Petitioner's argument requires determination of factual issues, it is based on overvaluation and is precluded by Section 39-10-114(1)(a)(I)(D).

Finally, the Board finds that the subject property need not be valued the same for 2007 and 2008 as a matter of law under the facts of this case. Petitioner cites *Boulder Country Club v. Boulder County Bd. of Comm'rs*, 97 P.3d 119 (Colo. App. 2003) as support for its argument that the 2007 and 2008 valuations must be the same.

In the *Boulder Country Club* case, the taxpayer filed a petition for abatement and refund regarding the property's 2000 valuation. The petition for abatement was based on the fact that the property's stipulated actual value for the tax year 1999 was $5,700,000. Then in tax year 2000, the Boulder County assessor set the actual value of the property at $7,433,900. The Court ruled that "[t]he valuation of a taxpayer's property for both years in the reassessment cycle should be the same, absent statutory exceptions." *Boulder Country Club*, 97 P.3d at 120, citing *Cherry Hills Country Club v. Bd. of County Comm'rs*, 832 P.2d 1105, 1109 (Colo.App.1992).

However, the *Boulder Country Club* case is distinguishable from the present case. In the *Boulder Country Club* case, the taxpayer stipulated to a value for the property for the 1999 tax year (the reassessment year). The parties were later in a dispute as to the value of the property for 2000 (the intervening year). In the dispute for the year 2000, the taxpayer correctly cited legal authority in support of the proposition that assessors are generally required to value a property the same for both years of a reassessment cycle. The Court agreed.

In the *Boulder Country Club* case, the taxpayer was contesting the valuation for the tax year 2000 – the intervening year. In the present case, Petitioner is contesting the valuation for 2007 tax year – the reassessment year, not the intervening year. The present case is also different than the *Boulder Country Club* case because the taxpayer in the present case actually began the protest and appeal process for the 2007 reassessment year, but failed to complete it. No case law has been cited for the proposition that the reassessment year and the intervening year valuations must be the same when the taxpayer fails to prosecute its protest and appeal for the reassessment year and the appeal is dismissed by the District Court. The Board declines to require the same valuation for the reassessment year and the intervening year under the facts of this case.

Furthermore, the Board notes that the statutory section cited for requiring the reassessment and intervening tax years to be valued the same absent unusual conditions is Section 39-1-104, C.R.S. This statutory section primarily describes duties of the county assessor. In the present case, it appears that the county assessor did in fact value the subject property the same for both the 2007 and 2008 tax years. It was Respondent's decision (not the assessor's decision) to reach a stipulated settlement agreement with Petitioner for tax year 2008 that is different than the value determined by the assessor for 2007 and 2008. A county board of commissioners may have very valid reasons for settling an intervening year appeal at an amount lower than the value that the assessor was required to apply to the property, and there is no direct statutory section prohibiting a county board of commissioners from doing so.

V. Statute of Limitations

Respondent cites the statute of limitations in Section 39-10-114(1)(a)(I)(A) as another reason to dismiss Petitioner's abatement petition with respect to tax year 2007. The pertinent part of this section states, "...in no case shall an abatement or refund of taxes be made unless a petition for abatement or refund is filed within two years after January 1 of the year following the year in which the taxes were levied."

The taxes for tax year 2007 were levied in 2007. Under Section 39-10-114(1)(a)(I)(A), C.R.S., a petition for abatement or refund for tax year 2007 must be filed within two years after January 1, 2008. This makes January 1, 2010 the deadline for filing an abatement or refund petition for tax year 2007.

Petitioner filed the abatement petition in this case with Respondent on March 10, 2010 – more than two months after the statute of limitations had run.

ORDER:

The petition is denied.

APPEAL:

If the decision of the Board is against Petitioner, Petitioner may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-five days after the date of the service of the final order entered).

If the decision of the Board is against Respondent, Respondent, upon the recommendation of the Board that it either is a matter of statewide concern or has resulted in a significant decrease in the total valuation for assessment of the county wherein the property is located, may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provision of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals

within forty-five days after the date of the service of the final order entered).

In addition, if the decision of the Board is against Respondent, Respondent may petition the Court of Appeals for judicial review of alleged procedural errors or errors of law when Respondent alleges procedural errors or errors of law by the Board.

If the Board does not recommend its decision to be a matter of statewide concern or to have resulted in a significant decrease in the total valuation for assessment of the county in which the property is located, Respondent may petition the Court of Appeals for judicial review of such questions.

Section 39-10-114.5(2), C.R.S.

DATED and MAILED this 4th day of October, 2012.

BOARD OF ASSESSMENT APPEALS

James R. Meurer

MaryKay Kelley

I hereby certify that this is a true and correct copy of the decision of the Board of Assessment Appeals

Mike Beery

STATE OF COLORADO SEAL BOARD OF ASSESSMENT APPEALS