BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203	Docket No.: 75342
Petitioner: **YEN, LLC,** v. Respondent: **JEFFERSON COUNTY BOARD OF COMMISSIONERS.**	
ORDER	

THE BOARD OF ASSESSMENT APPEALS ("the Board") set a briefing schedule in this matter on October 8, 2019. Petitioner in this matter is represented by Mark W. Gerganoff, Esq. Respondent Jefferson County Board of Commissioners is represented by Jason Soronson, Esq.

The Board gives effect to the parties' Stipulated Facts and Stipulated Exhibits A through I and admits them into evidence. The Board also admits into evidence both the Taxpayer's Affidavit of Managing Member and the PTA's responses to Taxpayer's open records request.

Petitioner requests an abatement/refund of taxes on the subject property for tax year 2017. Petitioner asks this Board to uphold the value stated on the assessor's April 20, 2017 Notice of Valuation, and to find that the subsequent May 15, 2017 Notice of Valuation is void because it was mailed after the statutory deadline of May 1.

I. ISSUE PRESENTED

The issue is whether a county assessor's Notice of Valuation ("NOV") is valid when it is mailed to a taxpayer after the statutory deadline of May 1, is stamped "CORRECTED," and is preceded by a timely-mailed NOV noticing a different valuation.

II. FINDINGS OF FACT

The subject property is a four-bay self-service car wash with address 1145 S. Union Blvd., Lakewood, Colorado. The Jefferson County Schedule Number for this property is 300143736.

On or about April 20, 2017, the Jefferson County Assessor's Office ("Assessor") mailed an undated Notice of Valuation to Petitioner for the 2017 tax year ("original NOV"), valuing the subject property at $99,715.

On May 15, 2017, the Assessor mailed another Notice of Valuation to Petitioner for the 2017 tax year ("corrected NOV"), which was dated May 1, 2017, stamped "CORRECTED", and which valued the subject property at $299,099. No evidence has been presented as to how this new valuation was reached.

On or about May 24, 2017, the Assessor declared on its public website that the June 1, 2017 deadline to file a protest with its office for the 2017 tax year was extended to June 15, 2017.

On May 24, 2017, the Property Tax Administrator emailed a memorandum to all county assessors, stating in part: "There is no provision in Colorado law for assessor generated 'corrected NOVs.'...Specifically, *In Stitches, Inc., v. Denver County Board of County Commissioners*, 62 P.3rd 1080 (Colo. App. 2002) provides that an assessor cannot apply retroactive assessments for previously taxed property that has been undervalued."

On May 31, 2017, Petitioner filed a timely protest with the Assessor challenging the value contained in the corrected NOV.

On or about July 24, 2017, the Assessor mailed a Notice of Determination dated August 25, 2017 to Petitioner denying Petitioner's protest.

Petitioner did not seek further review of the August 25, 2017 Notice of Determination with the Jefferson County Board of Equalization.

On October 4, 2018, Petitioner filed a timely Petition for Refund/Abatement of Property Taxes with Respondent. Raising the issue of erroneous valuation, Petitioner asserted that the original NOV controlled and that the corrected NOV generated by the Assessor was void.

Respondent denied Petitioner's Petition for Refund/Abatement of Property Taxes without a hearing.

Petitioner appealed Respondent's denial to the Board of Assessment Appeals.

III. ANALYSIS AND APPLICABLE LAW

A. Assessors' Statutory Deadline to Mail Notices of Valuation by May 1

Section 39-5-121, C.R.S. 2019, unambiguously mandates that NOVs must be mailed no later than May 1. That section states:

> No later than May 1 in each year, the assessor shall mail to each person who owns land or improvements a notice setting forth the valuation of such land or improvements.
> § 39-5-121(1)(a)(I), C.R.S. 2019.

The May 1 deadline has also been recognized in the Property Tax Administrator's (PTA's) publication of The Assessor's Reference Library at Volume 2 ("ARL"), which states in relevant part:

> No later than May 1 of each year, the assessor must mail an approved Notice of Valuation and Protest form to each property owner…
> 2 Div. of Prop. Taxation, Dep't of Local Affairs, *Assessors' Reference Library* § 2, at 2.24 (rev. Jan. 2020).

> A property owner must be sent a Notice of Valuation (NOV) every year … The notice must be mailed no later than May 1.
> *Id.* at 5.1.

> A Notice of Valuation (NOV) must be mailed annually to each owner of real property no later than May 1.
> *Id.* at 9.3.

B. Assessors' Authority to Correct Omissions and Errors

The statutes cited by Respondent include, in relevant part, the following:

> If the assessor finds any valuation to be erroneous or otherwise improper, the assessor shall correct that error.
> § 39-5-122(2), C.R.S. 2019.

> Omissions or errors in the assessment roll, when it can be ascertained therefrom what was intended, may be supplied or corrected by the assessor at any time before the tax warrant is delivered to the treasurer.
> § 39-5-125(2), C.R.S. 2019.

> [I]n no event later than January 10 of each year, the assessor shall deliver the tax warrant under his hand and official seal to the treasurer…
> § 39-5-129, C.R.S. 2019.

Respondent argues that assessors have authority to issue corrected NOVs at any time after the May 1 deadline, until January 10 of the following year, because *San Miguel County Board of Equalization v. Telluride Company,* 947 P.2d 1381 (Colo. 1997), recognized assessors' broad statutory authority to correct errors and because sections 39-5-122(2) and 39-5-125(2), quoted above, specifically grant this authority. We disagree.

First, Respondent's reliance on *San Miguel* is misplaced. In *San Miguel*, a taxpayer appealed a timely-issued NOV to the county assessor, who then issued a notice of determination raising the property's valuation above what was reflected on the NOV. 947 P.2d at 1383. The Supreme Court ruled in favor of the assessor, declining "to limit the assessor's broad correction authority without express statutory language to that effect..." *Id.* at 1384. Unlike the notice of determination in *San Miguel*, which was issued in response to a taxpayer's protest to the assessor, the corrected notice of valuation here was issued for a property whose value had not been protested. *San Miguel* does not suggest that assessors are permitted to issue NOVs past the express statutory deadline of May 1.

Second, Respondent's reliance on section 39-5-122(2) is also misplaced. That section, titled appropriately as "Taxpayer's Remedies to Correct Errors," describes a taxpayer's due process rights to correct errors by protesting to the assessor. If, as a result of that process, the assessor finds any valuation to be erroneous or improper, the assessor is required to correct the error. We read this section as authorizing assessors who have reduced a property valuation during the course of a formal protest to thereupon modify the listing of that property's valuation on the assessment roll. This section says nothing about correcting valuations outside of the protest process.

Third, section 39-5-125(2) deals with omissions and errors in the assessment roll, specifically when "it can be ascertained therefrom what was intended." For example, an assessor is authorized to correct an omitted dollar mark ($). *Haley v. Elliott*, 38 P. 771 (1894). An assessor is also authorized to correct a clerical error on a notice of valuation when the mistake is clear on the face of that notice. *See Modular Communities v. McKnight*, 536 P.2d 1168, 1170 (Colo. App. 1975) (noting that "this error was patent on the face of said Notice,") aff'd, 550 P.2d 866, 867 (Colo. 1976) (implying that the occurrence of error was credible because "the assessor's records always contained the correct (higher) figures and were properly certified on the tax assessment roll"). An assessor is also authorized to impose retroactive assessments against "omitted property," i.e., property that was never included on the assessment roll. *See, e.g. Cabot Petroleum Corp. v. Yuma County Bd. Of Equalization*, 847 P.2d 152 (Colo. App. 1992), rev'd on

other grounds, 856 P.2d 844 (Colo. 1993); *Jet Black, LLC v. Routt County Bd. of County Comm'rs*, 165 P.3d 744 (Colo. App. 2006); *Kinder Morgan v. Montezuma County Bd.*, 399 P.3d 735, aff'd, 396 P.3d 657. Such errors and omissions of property can be corrected at any time. But unlike the clerical error in *Modular Communities*, which was "patent on the face" of the original notice, the error here has not been shown to be a type that could be readily ascertained what was intended. No evidence has been presented that any such omission or error has occurred.

Further, the Board finds no support in *Bea Kay Real Estate Corp. v. Aragon*, 782 P.2d 837 (Colo. App. 1989) for extending the May 1 statutory deadline. There, the assessor had omitted the taxpayers' properties from the assessment roll as of May 1. Some months later, in a notice dated July 27, the assessor issued NOVs for the properties that had been omitted. The Court of Appeals held that the NOVs were not necessarily void for untimeliness; the untimely NOVs were still valid and the taxpayers were to proceed via the abatement procedure under section 39-10-114. However, unlike the untimely NOVs in *Bea Kay*, which corrected the omission of properties from the assessment roll, the untimely NOV here cannot be said to correct any omission, because the Assessor had already mailed an NOV for this property under the 2017 tax year on April 20, 2017. No evidence has been presented that any omission has occurred.

Respondent's reliance on section 39-8-108(5)(a), which authorizes a valuation on appeal to be adjusted higher than the valuation set by the county board of equalization, is equally unavailing. That section states:

> In any appeal authorized by this section or by section 39-5-122, 39-5-122.7, or 39-10-114: (a) the valuation shall not be adjusted to a value higher than the valuation set by the county board of equalization pursuant to section 39-8-107, except as specifically permitted pursuant to section 39-5-125 [authorizing assessors to correct omissions or errors].
> § 39-8-108(5)(a), C.R.S. 2019.

Neither section allows assessors to raise valuations after the May 1 deadline where no omission or error has occurred.

C. PTA Guidance

Respondent argues that *In Stitches* is a narrow decision confined to section 39-5-125(1), and that it does not extend to section 39-5-125(2) in the way that the Property Tax Administrator's ("PTA's") memorandum indicates. We disagree.

The PTA's memorandum on May 24, 2017 cautioned assessors against issuing corrected NOVs after the May 1 deadline, stating in part: "There is no provision in Colorado law for assessor generated 'corrected NOVs.'...Specifically, *In Stitches, Inc., v. Denver County Board of*

County Commissioners provides that an assessor cannot apply retroactive assessments for previously taxed property that has been undervalued." (Internal citation omitted.)

In *In Stitches, Inc. v. Denver County Board of Comm'rs*, 62 P.3d 1080 (Colo. App. 2002), the assessor issued timely NOVs on the taxpayer's personal property. After the May 1 deadline had passed, the assessor determined that the properties had been undervalued, and the assessor retroactively assessed additional taxes against that property for five previous tax years. A division of the Court of Appeals held that the statutory authorization for retroactive assessments of additional property taxes against "omitted property" does not apply to previously taxed property that has been undervalued. *Id.* at 1081. Specifically, "the provisions of §§ 39-5-125(1) and 39-10-101(2)(a)(I) do not authorize retroactive assessments against later increases in the value placed on previously undervalued property, because such undervaluation increases do not involve omitted property." *Id.* at 1082. The Court of Appeals determined that the retroactive assessment merely corrected an undervaluation, rather than an omission. As a result, the retroactive assessment was deemed to be void, and the assessor's original valuations were reinstated. *Id.* at 1081.

Like the Court of Appeals in *In Stitches*, we cannot say here that any property was omitted from the assessment roll.

The prohibition on issuing NOVs after the May 1 deadline is also recognized in the ARL. The ARL at 9.4, revised October 2019, states in relevant part:

> Assessors are not allowed under case law, specifically Athmar Park v. Denver, 151 Colo. 424, 378 P.2d 638 (Colo. 1963) to correct any undervaluation. Therefore, Special Notices of Valuation are **not** appropriate under the following circumstances:
>
> - Assessor clerical errors or valuation errors found after NOV's mailed May 1
> - Assessor clerical errors found in processing personal property declaration schedules after NOV's mailed June 15
> - Undervaluation for reasons other than new construction or omitted property"
>
> 2 Div. of Property Taxation, Dep't of Local Affairs, Assessors' Reference Library § 2, at 9.45 (rev. Oct. 2019).

The Board concludes that the directives in the PTA's May 24, 2017 memorandum, as well as her directives stated in the ARL at 9.45, are exactly on point in the resolution of this matter and are in line with Colorado case law and statutory authorities. The Board gives deference to the PTA's memorandum as well as to the ARL. *See Huddleston v. Grand Cty. Bd. Of Equalization*, 913 P.2d 15, 16-22 (Colo. 1996) ("Judicial deference is appropriate when the statute before the

court is subject to different reasonable interpretations and the issue comes within the administrative agency's special expertise").

D. Unfair Windfall

Respondent next argues that petitioning for abatement is the remedy for a late increase in valuation. Respondent cites *Modular Communities* and *Bea Kay* for the proposition that when local tax authorities fail to give timely notice of a tax valuation, the taxing authorities are not deprived of the tax increase but rather, the taxpayer is permitted to contest the valuation via an abatement procedure. However, here the issue is not the failure to give any timely notice but rather the failure to give a fixed notice by a date certain. The holdings in *Modular Communities* and *Bea Kay* does not authorize assessors, after May 1 and after the property has been properly listed on the assessment roll, to retroactively revalue properties for which NOVs have already been issued.

Respondent further alleges that invalidating NOVs issued after the May 1 deadline would absolve taxpayers of all obligations to pay that year's taxes. This, Respondent argues, has the potential to create an unintended and unfair windfall for the taxing county or the taxpayer, depending on whether the property was under- or overvalued in the notice. We disagree. The risk of windfall that Respondent cautions against is alleviated by Respondent's ability to correct its records in the following tax year.

E. PTA's Duty to Approve Forms

The Board does not reach the issues of whether the corrected NOV required approval by the PTA, or whether such approval had been given.

ORDER

Petitioner's appeal is hereby GRANTED. The Board concludes that the Assessor's corrected NOV is void, and that the value as stated on the original NOV should be reinstated.

The Jefferson County Assessor is directed to update his/her records accordingly.

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-nine 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 of the respondent county, 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-nine 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 within thirty days of such decision 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 of the respondent county, Respondent may petition the Court of Appeals for judicial review of such questions within thirty days of such decision.

Section 39-8-108(2), C.R.S. 2019.

DATED and MAILED this 18th day of February, 2020.

STATE OF COLORADO SEAL BOARD OF ASSESSMENT APPEALS

BOARD OF ASSESSMENT APPEALS:

Drafting Board Member:

Debra A. Baumbach

Debra A. Baumbach

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

Jacqueline Lim

Jacqueline Lim

Concurring Board Member:

Diane M. DeVries

Diane M. DeVries,
concurring without modification pursuant to section 39-2-127(2), C.R.S.