



TN Registered Taxpayer Agents – Fall Review

Continuing Education Program
October 28, 2011
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Tennessee Board of Equalization



Introduction

This presentation reviews applicable statutes and rules and recent developments affecting property tax administrative appeals and appeal practitioners.



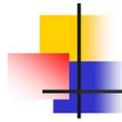
TN Agent Registration Statute – 'Assistance' vs. 'Appearance'

- Anyone may assist
- The following may appear for a taxpayer:
 - Immediate family
 - Attorneys
 - Officers/directors/employees
 - CPA on tangible personal property
 - Registered agents
- Who is the client?



'Assist' or 'Appear'

- Who may appear for assessor
 - Deputy
 - Attorney, inc. DPA attorney
 - CPA/PPS (personalty)
 - DPA designees (IAAO or TCA)
 - Registered agents



TN UAPA – Hearing ‘Contested Cases’

- Agency decides, administrative judge (AJ) alone or with agency
- Role of AJ alone
- Role of AJ with Commission or Board
- Substitution

5

TCA §4-5-301 (a); TCA §67-5-1505 (a) SBOE decides

Role of AJ alone or with agency, TCA §4-5-301 (b)

“Procedural question of law” TCA §4-5-301 (b)

Substitution, TCA §4-5-302 (e)



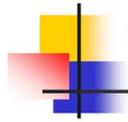
Disqualification & recusal

- AJ or panel may be disqualified for bias, prejudice, interest, or other
- Accused AJ or panelist rules on request for disqualification, subject to judicial review
- AJ rules on request to disqualify a representative

6

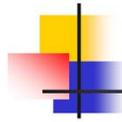
‘Bias’ and ‘prejudice’ are used interchangeably to refer to a mental attitude or disposition toward a party rather than a predisposition on issues in a case. ‘Interest’ generally refers to circumstances which might constitute a conflict of interest, as a financial interest in the outcome of a case. Other grounds might include failure of an incumbent to meet the statutory qualifications for office or for selection or appointment to office.

Recently interpreted in *Lofton v. Lofton*, 345 S.W. 3d 913 (Tenn. Ct. App. 2008): “Bias and prejudice are only improper when they are personal . . . Despite earlier fictions to the contrary, it is now understood that judges are not without opinions when they hear and decide cases. Judges do have values, which cannot be magically shed when they take the bench.” (*Caudill v. Foley*, 21 S.W. 3d 203, 215 (Tenn. Ct. App. 1999)). “The fact that the court points out Mr. Lofton’s deceit, however, goes more to the issue of his credibility as a witness rather than any personal bias toward Mr. Lofton.”



TN UAPA – Role of the Agent

- Appear
- Participate (testify, or examine witnesses)
- Analysis vs. appraisal
- Advocate



TN UAPA – Limits of the Agent

- Contingent fees and appraisals
- Opening, closing, briefing, motions
- Arguing assessment law
- Arguing administrative law

OAG 04-160: “The previous opinion distinguished the civil service commission hearings from Board of Equalization hearings at which the nonlawyer representation is so limited that it does not require the “professional judgment of a lawyer.” *[citing Burson]* As previously opined, “[e]ffective advocacy in such a hearing would, therefore, seem to require some legal training, skill and judgment.”



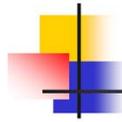
Before The Hearing – Prehearing Conference

- Specify issues, amendments
- Explore stipulations, admissions
- Regulate experts
- Schedule discovery & hearing
- Other matters



Before The Hearing – Case Management

- 30 days to request PHC
- 60 days to complete 'discovery' and explore settlement
- 75 days to settle/withdraw
- 90 days to prefile exhibits
- 120 days to file status report



Before The Hearing – ‘Discovery’

- Inspection of documents & things
- Interrogatories
- Depositions & affidavits, how used
- Requests for admissions of fact

11

TCA §4-5-311; TRCP 26.

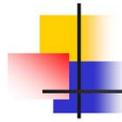
Use of depositions: to impeach a deponent as a witness; by designated official of public or private entities, for any purpose; for any purpose, if “unavailable”. TRCP 32

Requests for admission that are not timely and properly responded to, may be deemed admitted. TRCP 36.



Discovery – Scope and Limits

- Whatever may be 'reasonably calculated to lead to . . . admissible evidence'
- Limited if unduly costly or burdensome, cumulative, privileged, attorney work product, product of expert
- Protective order for trade secret or proprietary information
- Duty to supplement



Before the Hearing - Motions

- Requests for extension, continuance, intervention, *in limine*, default, dismissal, summary judgment
- Respond in 7 days or request extension
- To compel discovery, must demonstrate good faith effort to resolve informally
- Interlocutory review

13

Rule 1360-4-1-.09 Motions generally, inc. interlocutory review

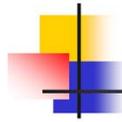
1360-4-1-.10 Continuances

Rule 1360-4-1-.11 Good faith in compelling discovery

Rule 0600-1-.13 Hearings before the Commission

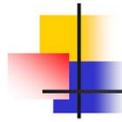
Intervention (4-5-310 & 1360-4-1-.12), seven days before hearing, subject to participation limits

Summary judgment, TRCP 56 “no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law”.



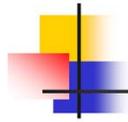
Counterclaims

- Must be filed no later than 30 days before hearing
- Survive withdrawal, but shift burden to counterclaimant
- Absence does not prevent assertion of higher value



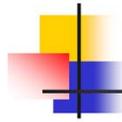
Ex parte communications

- No communications regarding 'issue in pending proceeding' without all parties present
- By AJ, panel member
- By parties, their representatives, other persons
- Limited exception for staff



Ex parte consequences

- Cure, by disclosure
- Recusal
- Default/dismissal
- Discipline



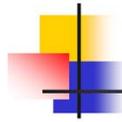
TN UAPA – At The Hearing

- Decorum
- Recusal
- Burden of going forward
- Burden of proof

17

“It is of critical importance in a contested case that both parties feel that they are getting a fair, impartial, and courteous hearing before the Board. . . . [P]lease be vigilant about the appearance of partiality that could be created by: joviality, over-familiarity or fraternization with an [attorney, party, agency staff, or witness] in the case, or on breaks, or recesses for meals, etc.”

--from training materials developed by the Administrative Procedures Division of the TN Secretary of State



TN UAPA – At The Hearing (cont'd)

- Rules of evidence, inc. hearsay
- 'Record' & transcripts
- Deliberation
- Decision

18

4-5-313 “The agency shall admit and give probative effect to evidence admissible in a court, and when necessary to ascertain facts not reasonably susceptible to proof under the rules of court, evidence not admissible thereunder may be admitted if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. The agency shall give effect to the rules of privilege recognized by law and to agency statutes protecting the confidentiality of certain records, and shall exclude evidence which in its judgment is irrelevant, immaterial or unduly repetitious.”



TN UAPA – After The Hearing

- Requests to reconsider
- Further administrative review
- Judicial review
- Corrections of error
- Special relief

19

Corrections 1360-4-1-.17

Special relief 1360-4-1-.01; TRCP 60.01 (clerical mistakes); TRCP 60.02 (mistake, inadvertence, excusable neglect)



Recent Developments – Cost Approach

- Bosch Braking Systems (7-19-11)
(segregated v. calculator)
- Sanford, LP (7-14-11)(same)
- Leon Amacher (5-12-11) (cost to cure access)
- Lawrence D. Stowell (5-2-11)
(superadequacy)

20

Bosch/Sanford: “unit-in-place” or segregated cost estimate vs. comparative unit method. Reduced value for these manufacturing facilities was justified on the basis of a segregated cost approach (versus calculator cost approach), particularly where the preferred approach (comparable sales) has been rejected due to methodological errors (reliance on a ‘price-quality’ model to adjust sales).

Amacher: Value of 5.88 ac. tract on Tims Ford Lake reduced by cost to cure access problem, contractor’s estimate provided

Stowell: property record card recognized only 2% depreciation—AJ allowed 10% functional (superadequacy)



Recent Developments – Income Approach

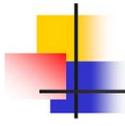
- 805 Realty Corp. et al (10-21-11) (F & E tax, reserves)
- Richland Country Club (10-21-11) (rejected cost app. for golf course)
- Perkins Corp. (10-6-11) (must stabilize income and expense data)

21

805 Realty: F & E tax properly excludable from operating expenses for this strip center, and reserves were permissibly accounted for as an operating expense

Richland: Confirmed use of income approach for 171 ac. private golf course, cost approach rejected. Cited, *Governor's Club* (Williamson Co., 11-30-10).

Perkins: Rejected 'comparative appraisals' as basis of alternative value for two small commercial tracts. Also rejected comparative sales unless the sale were properly adjusted for differences with the subject, and rejected an income approach in which the proponent limited the analysis to actual income and expenses rather than stabilizing data from the market.



Recent Developments – Income Approach, contd.

- Short Mountain Village, LP (10-5-11)
(LIHTC housing, treatment of credits)
- Logistics Way DCT/LWI, LLC (9-30-11)
(value increase from tenant reimbursements of property tax)

22

Short Mtn: Value for this IRC Sec. 42 housing was reduced from \$3.8M to \$3.2M based on income approach offered by taxpayer that assigned half or more of total value to net present value of remaining federal income tax credits. Assessor did not offer proof.

Logistics: AJ increased value for this Antioch warehouse from \$14.4M to \$14.9M reflecting tenant reimbursements to the owner for property taxes.



Recent Developments – Sales Approach

- Jas. J. Walsh & Lynette McCoy (6-24-11) (purchase price corroborated by list price/selling price study)
- *But, see* Carol Beilharz (6-15-11)
- Sarah Patton Gwynn (5-16-11 & 6-13-11) (cons. easement, submarket)
- Bosch/Sanford, *supra* (rejected 'price-quality' model for adjusting sales)

23

Walsh: Taxpayer was permitted to corroborate purchase price as value indicator by reference to index of list prices as percent of selling prices. Compare: *Carol Beilharz* (Blount Co., 6-15-11)

Gwynn: Conservation easement must be considered in valuation of 3,000 ac. tract. Easement was self-imposed, but ran with land. Judge has taken under advisement, issue of whether owner must apply under TCA 67-5-1009 to benefit from use value assessment.



Recent Developments – Impact of Foreclosures

- Michael Gross (10-24-11) (10% ext. obs. due to rate of foreclosures)
- Brent Watts (10-7-11) (TCA §67-5-1603 (d))
- Peter & Jody Konecny (10-4-11) (rejected bank sales)
- David & Margaret Eubanks (6-15-11)

24

Gross: 10 % external obsolescence granted due to rate of foreclosures

Watts: Interpreted recently enacted TCA 67-5-1603 (d) as warranting a value adjustment in the presence of a significant number of foreclosure sales. A local realtor testified there were more foreclosure sales in Rarity Ridge in 2009 than nonforeclosure sales in 2008 and 2009 combined. On this basis the AJ accepted a single nonforeclosure sale as a reasonable indicator of fair market value for the subject as of 1-1-10

Konecny: Rejected bank sales of subject properties as probative of fair market value.

Eubanks: Although taxpayer relied primarily on purchase price of subject, judge was also persuaded some adjustment was appropriate due to prevalence of foreclosures in market, and by deficiencies in assessor's proof that included failure to adjust comparable sales and coding of some comparable sales as 'disqualified' for ratio study.



Recent Developments – Tangible Personal Property

- ❑ Signal Mtn. Cement (10-7-11) (costs of freight, etc.)
- ❑ Kele, Inc. (9-30-11) (finished goods v. raw materials)
- ❑ Lynn Whitsett (9-27-11) (same)
- ❑ Armstrong Hardwood Flooring (9-29-11) (econ. obs. and reported cost)

25

Signal Mtn: The assessor back assessed the company for 2008-2009 on the basis it omitted to report costs of freight, installation, engineering and taxes incurred in 2001 as part of the installation of tangible personal property at its cement manufacturing location in Hamilton County. The company defended the back assessments with a nonstandard value posited via an appraisal by witness Roger Chantal.

The AJ accepted the taxpayer's characterization of the disputed costs as 'intangible' costs relevant only to value-in-use, and not assessable because TN does not assess intangible property in these circumstances. The AJ also rejected the assessor's argument that because these costs had been capitalized for federal tax purposes they should be includable in reported costs for TN ad valorem taxes.

Kele: Warehouse stored air conditioner parts, including valves and actuators. Some customers requested these two parts be assembled, a service which the taxpayer offered at no additional cost. Held, valves and actuators were not reportable as 'raw materials' to a manufacturing process

Whitsett: Brick and mortar supplies maintained by a repair/reconstructor of chimneys and kilns, were reportable as either raw materials or supplies.

Armstrong: Affirmed pre-2011 right to raise nonstandard value by amended schedule. Rejected economic obsolescence adjustment to cost reported in the schedule.



Recent Developments – Process

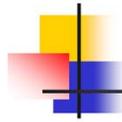
- Roane Co. Taxpayers (9-30-11)
(assessor bias)
- Wholesale Granite W'house (9-27-11)
(contesting orig. value in prorate appeal)
- Proving 'reasonable cause':
 - National Health Investors, Inc. (7-13-11)
 - Hendersonville Senior Living (7-13-11)

26

Roane Co.: Rejected claim that assessments should be voided because the assessor could not be impartial.

Wholesale Granite: Rejected taxpayer's attempt to contest original (Jan. 1) value in appeal of assessor's proration value for the flood of 2010.

National Health et al: Proving 'reasonable cause requires first-hand testimony

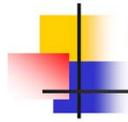


Pending Rules

- Amendment for subsequent yrs.
- E-signatures
- Exemption fees

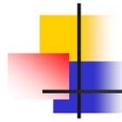
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An original real property appeal timely filed at the Board may be amended as of right to include an assessment year or years subsequent to the year for which the original appeal was filed, until the next reappraisal. An original real property appeal filed late may be amended to include an assessment year or years subsequent to the year for which the original appeal was filed, until the next reappraisal, if 1) the late appeal was nonetheless eligible for a reasonable cause determination under section 67-5-1412; and 2) the written order disposing of the original appeal was entered later than ten (10) days before the deadline for appealing the subsequent year assessment to the county or state boards of equalization. All other requests to amend shall lie within the discretion of the administrative judge. The appellant permitted to amend shall file a separate appeal form for the subsequent year or years if directed by the executive secretary or administrative judge, and the appellant shall be responsible for additional hearing or processing costs related to the subsequent year assessments.



Current TARP

- Larry Burks
- Davis Gravely
- Robert Kahn
- Doyle Monday (Chair)
- Robert (Mark) Parten
- Debbie Smith



Current AJ's

- Hon. Mark J. Minsky
- Hon. Brook Thompson
- Hon. Richard Collier
- Hon. Peter Loesch



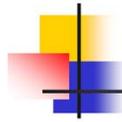
Current AAC

- **Ogden Stokes (Chairman)**
- **Jim Dooley**
- **N. Beth Ledbetter**
- **Vernon Long**
- **Michael H. Wills**
- **James Wade, Jr.**



Current SBOE

- Gov. Bill Haslam (Chair)(Herb Slatery, designee)
- Secretary of State Tre Hargett
- Treasurer David Lillard
- Comptroller Justin Wilson
- TDOR Commissioner Richard Roberts
- Hon. Randy Button
- Hon. Bill Bennett



Questions & information

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