ORIGINAL

IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

TANYA GIDDINGS, BERNALILLO COUNTY ASSESSOR, Petitioner-Appellant,

v.

No. 35,643
No. D-202-CV-2014-07148

SRT-MOUNTAIN VISTA LLC, Respondent-Appellee.

TANYA GIDDINGS, BERNALILLO COUNTY ASSESSOR, Petitioner-Appellant,

v.

No. 35,643
No. D-202-CV-2014-07149

ROBERT AND LINDA FOX, Respondents-Appellees.

PETITIONER-APPELLANT'S REPLY BRIEF

ORAL ARGUMENT IS REQUESTED

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Statement of Compliance

Pursuant to the provisions of Rule 12-213(G), NMRA, I hereby certify that this Reply Brief complies with the provisions of Rule 12-213(F), NMRA. The brief uses the Times New Roman proportionally-spaced type style and contains 4,154 words in the body of the brief.

INTRODUCTION

Petitioner-Appellant Tanya Giddings, Bernalillo County Assessor ("Assessor"), submits this Reply Brief pursuant to the provisions of Rule 12-213(C). This case involves the assessor's petitions for writ of certiorari in two matters decided by the Bernalillo County Valuation Protests Board ("Board"). The two cases are valuation protests by property owners SRT-Mountain Vista, LLC, and Robert and Linda Fox. The district court consolidated the two cases, and the assessor submitted a single brief in chief to this Court. The respondents, however, filed separate answer briefs. Rather than submit separate reply briefs, the assessor will jointly address the matters raised by each of the respondents, referring to the given respondent where necessary. References to the respective answer briefs will identify the respondent and the page number. (e.g., Fox AB 1).

ARGUMENT AND AUTHORITIES

I. The district court has jurisdiction over this matter pursuant to the provisions of N.M. CONST. Article VI, § 13 providing the district court with appellate jurisdiction over all cases originating in inferior courts and tribunals.

The assessor has argued this issue in her brief in chief by citations to the certiorari provisions of Article VI, Section 13 of the Constitution and Rule 1-075, NMRA, together with a detailed discussion of the relevant cases. The Fox respondents, however, did not address any of these authorities in their answer brief, and instead discussed the relationship among the Department of Taxation and

Revenue, the assessor, and the valuation protests board. With all due respect, the assessor refers this Court to her arguments and authorities in her brief in chief and the controlling law, but will briefly reply to the Fox arguments here.

The answer brief cites to various provisions of the property tax code in an effort to show that both the assessor and the board are simply sub-agencies of the department subject to the department's control, and that the assessor therefore should not be heard to object to the board's decisions. Specifically, after noting the department's supervisory authority over the assessor, the Fox respondents state that the board "does not possess the administrative functions or funding to be considered a separate 'agency' apart from the department." (Fox AB 7). Their argument is that the department controls the board and, since it also controls the assessor, the board cannot be considered separately from the assessor. Neither the statutes, nor the regulations, nor the case law support this claim.

It is correct, as the respondents note, that the chair of the board is an appraiser employed by the department and that the department pays the per diem expenses of the county-appointed board members. *See* NMSA 1978, § 7-38-25. These factors were noted by this Court in *Addis v. Santa Fe County Valuation Protests Board*, 1977-NMCA-122, 91 N.M. 165, 619 P.2d 822. The Court there was faced squarely with the question of whether the assessor or the board was the proper adversarial party in the appeal of the board's decision. The issue arose because the board was

named as the appellee and the department's attorneys represented both the board and the department, and, as noted, the department had supervisory control over the assessor. This Court expressed concern as to the board's independence from the department, based on the unity of legal representation and the composition and payment factors noted above. *Id.* ¶¶ 11-12. However, the Court made a clear distinction between the assessor and the board, finding that the assessor was the adversarial party and that the board was an impartial body that conducted a quasi-judicial hearing between the assessor and the taxpayer. *Id.* ¶¶ 5, 18. The result is that neither the department nor the board is the opposing party, but rather that the assessor is. There is no provision of any kind for the department to control the decisions of the board, and the issue has not arisen since *Addis*.

The current status is controlled by statute and by the department's duly adopted administrative rules. Prior to creation of protest boards, property owners challenged valuations by appealing to the county's board of equalization, which was the county commission, with further appeal to the state tax commission. NMSA 1953, §§ 72-6-13; 72-6-13.1 to 72-6-13.7. The tax commission's decision was originally not appealable to court, but provision for appeal was added in 1955. *See Id.* § 72-6-13.8. Legislation in 1973 enacted the property tax code and replaced the board of equalization with the valuation protests board, comprised as it is today. *See*

Laws, 1973, Ch. 258. That was the configuration at the time of the *Addis* decision in 1977.

Since *Addis*, both the statutes and the rules have clarified the board's procedures and independence. The board's specific function is to hear and decide protests of the assessor's determinations. NMSA 1978, § 7-38-25(D). While the technical rules of evidence and procedure do not apply, as is usually the case at administrative hearings, the board is directed to conduct the hearing "so that an ample opportunity is provided for the presentation of complaints and defenses," with all testimony taken under oath and a verbatim record made. *Id.* § 7-38-27(A).

The administrative rules provide greater detail. They provide for discovery, with sanctions comparable to those of the rules of procedure for the district courts. *Compare* § 3.6.7.36(B), NMAC *with* Rule 1-037(B), NMRA. The rules provide for the introduction of evidence, testimony given under oath, and the right of cross-examination. § 3.7.7.36(F)&(G), NMAC. All relevant and material evidence is to be admitted, with the opportunity for objections and rulings on the objections made and recorded by the board. *Id.* § 3.6.7.36(H). The board issues a final decision in writing. *Id.* § 3.6.7.36(I). There is no provision, nor any implication or inference, that the department may direct either the conduct of the hearing or its outcome, and the courts have clearly ruled that the hearings are quasi-judicial in nature and that the board has the obligation of fairness and due process. *First National Bank v. Bernalillo*

County Valuation Protests Board, 1977-NMCA-005, ¶ 18, 90 N.M. 110, 560 P.2d 174 (board is quasi-judicial body with duty of fair hearing). Respondents claim that the assessor and the department are essentially the same entity and that the board exercises the authority of the department, thus making for a three-part entity without meaningful separation among the parts. (Fox AB 7). The actual structure of the board and interpretation by the courts refutes this claim.

The Fox respondents also claim that for purposes of the district court's constitutional jurisdiction, the board is not an inferior tribunal and is not a separate agency, but "in effect, it exercises the power of the Secretary of the Department of Taxation and Revenue to direct the Assessor." (Fox AB 10). As explained above, the allegation that the Board, as an agent of the department, directs the assessor has no basis whatever. As for being an inferior tribunal for purposes of Article VI, Section 13 of the Constitution, there is no question but that it is such a tribunal.

Section 7-38-27, providing for taxpayer appeals, specifically references the provisions of section 39-3-1.1 regarding the district court's appellate jurisdiction. That section defines "agency" as "any state or local public body or officer placed under the authority of this section by specific statutory reference." NMSA 1978, § 39-3-1.1(H)(1). The appellate provision of the property tax code specifically does that. The district court provision of section 39-3-1.1 also specifically defines "final" decision as "an agency ruling that as a practical matter resolves all issues arising

from a dispute within the jurisdiction of the agency . . ." *Id.* § 39-3-1.1(H)(2). The board's written decision does that. § 3.6.7.36(I), NMAC (board to issue written decision); NMSA 1978, § 7-38-25(D)(board shall hear and decide protests). And "hearing on the matter" is defined as "a formal proceeding conducted by an agency or its hearing officer for the purpose of taking evidence or hearing argument concerning the dispute resolved by the final decision." NMSA 1978, § 39-3-1.1(H)(3). The board's rules clearly provide for such a hearing. *See Moriarty v. Public Schools Ins. Authority*, 2001-NMCA-096, ¶¶ 35-36, 131 N.M. 180, 34 P.3d 124 (inferior tribunal involves quasi-judicial proceeding with record adequate for meaningful judicial review); *State ex rel. ENMU Regents v. Baca*, 2008-NMSC-47, ¶ 12, 144 N.M. 530, 189 P.3d 663 (Article VI, Section 13 requires only that administrative tribunal be impartial).

The valuation protests board is clearly an inferior tribunal subject to the district court's jurisdiction. The Fox respondents apparently would agree that it is such a tribunal for purposes of an appeal, but not for purposes of review by certiorari. This aspect of the court's jurisdiction, which is central to the jurisdictional question posed by this Court, was analyzed by this Court in *Moriarty*, and is discussed in detail in the assessor's brief in chief, to which the assessor respectfully refers the Court. (BIC 11-13).

Respondent SRT-Mountain Vista takes the position in its answer brief that the legislature intended only for the taxpayer to have the right of appeal of the board's decision, and that the assessor therefore is foreclosed. (SRT AB 10-11). This is the same argument that has been made throughout these proceedings, and it is answered by the provision for review by writ of certiorari. This jurisdictional basis is discussed in the assessor's argument and authorities in her brief in chief, to which she respectfully refers the Court. (BIC 12-17). Respondent further contends that the applicable appellate statute provides that the department shall direct the assessor to take appropriate action to comply with the district court's decision and order, thus implying finality to decisions made in the taxpayer's favor. (SRT AB 12). That argument, however, overlooks the provision of NMSA 1978, § 39-3-1.1(E), which provides for review by certiorari in both the court of appeals and the supreme court for any party to the appeal in the district court.

Respondent SRT's second argument is that the assessor has not met the requirement of Rule 1-075 that she make a threshold showing of entitlement to relief. (SRT AB 13-14). The assessor has addressed this argument in her brief in chief, showing that the threshold requirement is met by showing that the board's decision is not in accordance with law. (BIC 16-17). Respondent continues to dispute this showing, arguing that the assessor's claim is "merely a disagreement with the board's interpretation" of the statute. (SRT AB 14). Respondent, citing to Am. Jur.,

also apparently argues that the threshold showing of illegality must be made without regard to consideration of the merits, in which the illegality is shown. (SRT AB 15). This argument makes no sense, as it would prevent the illegality from ever being shown. The controlling law is found in Rule 1-075, which states that the cert. petition shall contain "a concise showing that the petitioner is entitled to relief." Rule 1-075(C)(4), NMRA. The district court does not decide the merits at this point; it simply issues the writ if it determines, among other things, that the petition has made a prima facie showing "that the petitioner is entitled to relief." *Id.* Rule 1-075(G)(2). Among the grounds for relief is the question of whether the action of the agency was in accordance with law. *Id.* Rule 1-075(R)(4). In the present case, the assessor's petition alleges that the board's decision is not in accordance with law, and it contains both citation of authority and, to the extent permitted by the rule, application of that authority to the board's ruling. SRT's entire approach in this case has been to prevent the district court from reviewing that argument on any level. Its current argument that the district court cannot consider the illegality in making its determination of illegality is just another manifestation of the argument, but this time it is nonsensical.

II. The assessor is an aggrieved party for purposes of Rule 1-075, NMRA.

Respondent SRT also challenges the assessor's standing as an aggrieved party under Rule 1-075, and argues the applicability of Article VI, Section 2 of the

Constitution and of various criminal cases. The assessor has addressed these arguments in her brief in chief and respectfully refers the Court to that discussion. (BIC 18-21).

SRT adds to its previous argument a reference to *State ex rel. Overton v. New Mexico State Tax Comm'n.*, 1969-NMSC-140, 81 N.M. 28, 462 P.2d 613. SRT cites to the case for the proposition that the assessor lacks standing to challenge the tax commission's instructions because the assessor had no personal stake in the matter. (SRT AB 18).

The *Overton* opinion is distinguishable and not on point. That case involved a declaratory judgment action by the assessor against the state tax commission. The commission had issued a directive to the assessor regarding application of a provision of the tax code regarding veteran's exemptions, which the assessor considered to be unconstitutional. The court considered whether there was an actual controversy for purposes of establishing jurisdiction under the declaratory judgment act. *Id.* ¶ 8. The court observed that the assessor was subject to the direction of the state tax commission and otherwise had no personal stake in the matter, no duty to protect taxpayers or veterans, and no authority to represent them. *Id.* ¶ 10. The court further observed that the duty of applying the exemption was on the tax commission, and that the assessor, subordinate to the commission, could not challenge its directive on the basis of the constitutionality of the statute. *Id.* ¶ 11. Accordingly,

the court found that the requisite actual controversy was not established. *Id.* ¶¶ 19-20.

The case is distinguishable. First, it was not an appeal of an actual valuation protest, but rather was a declaratory judgment action requiring an actual controversy but that did not involve any actual valuations or property owners. More important, it was a challenge by an assessor to a directive by his governing authority, the state tax commission, involving the commission's interpretation of a statute. To be comparable in the current case, it would require that the assessor challenge the department's supervisory control. That is not the case, as the department is not involved and no question as to the department's application of the law is involved. Instead, it is a question of the board's statutory interpretation in the course of a quasi-judicial hearing in which the assessor and the taxpayer are positioned as adversaries. The board's decision on the matter had a direct effect on both the taxpayer and the county, which the assessor represents in matters of valuation and assessment. (BIC 18-19). Unlike the assessor and the tax commission in *Overton*, the parties here occupy the same positions in the district court review as they did before the board. For this reason and those stated in the brief and chief, the assessor maintains that she is an aggrieved party for purposes of compliance with the provisions of Rule 1-075.

III. The Board's decision is not in accordance with law.

The merits of this case are not complex. It is a straightforward matter of applying the provisions of the residential valuation statute to the subject properties. The statute is NMSA 1978, § 7-36-21.2, which provides simply that residential property shall be valued at its current and correct value, provided that the value shall not exceed 103% if its value from the prior tax year. *Id.* § 7-36-21.2(A). Stated differently, any increase in value is capped at 3%. There is no dispute in this case as to the method of valuation or to values assigned by the assessor. The dispute is as to the 3% cap. The statute provides that the cap shall not apply to the valuation of residential property for which "a change of ownership of the property occurred in the year immediately prior to the tax year for which the value of the property for property taxation purposes is being determined." *Id.* § 7-36-21.2(A)(3)(a). In such event, the value shall be "its current and correct value." *Id.* § 7-36.21.2(B). The statute defines change of ownership as "a transfer to a transferee by a transferor of all or any part of the transferor's legal or equitable ownership interest in the residential property . . ." *Id.* § 7-36-21.2(E). There is no dispute in these cases that each of the subject properties was transferred by warranty deed either to or from a Limited Liability Company in the prior tax year. The board correctly found that an LLC is an entity distinct from its members. There is no dispute over this finding. But the board then engaged in statutory construction and determined that the transfers were not of a type envisioned by the legislature since the ultimate beneficiaries were

the same both before and after the transfers. It is this finding that the assessor states is contrary to law. In her brief in chief, the assessor has presented and discussed the relevant authorities regarding statutory construction. (BIC 26-27). The assessor contends that the principles of statutory construction stated therein are applicable and controlling, and respectfully refers the Court to that discussion.

Both respondents, however, continue to challenge this statutory construction, and continue either to avoid the application of the legal principles, or to assign a different intent to the legislature. The assessor maintains that the statute is clear and unambiguous and that there is no room for further statutory construction. Nevertheless, the assessor will respond as necessary to the arguments in order to show that they are not applicable and do not serve to support the board's decision.

Both respondents address the nature of an LLC in attempts to show that there is no distinction between the LLC and its members in terms of beneficial interest and therefore no changes of ownership occurred. In addition, SRT discusses federal tax regulations in an effort to show that the LLC in its case should be disregarded. At the outset, the assessor would note that the statute does not use the term "beneficial interest." That term was inserted by the board in contravention of the statute, further indicating error, as explained in the brief in chief. (BIC 26-27).

Respondents Fox contend that a conveyance between an LLC and its owners is not a conveyance at all. (Fox AB 13). They cite to NMSA 1978, § 53-19-29(E),

which provides that property purchased with funds of the LLC is presumed to be owned by the LLC even if acquired in the name of a member. The respondents assert that that is the situation in their case, where the properties were owned by the LLC, transferred to the individual members, and then transferred back to the LLC. (Fox AB 14). This assertion confuses the nature of the LLC with the plain language of the valuation statute, which does not discuss the identity of the owners.

The Foxes essentially maintain that any distinction between an LLC and its members is meaningless. That claim simply ignores the entire policy and structure of the Limited Liability Act. The policy is "to give maximum effect to the principle of freedom of contract and to the enforceability of operating agreements of limited liability companies." NMSA 1978, § 53-19-65(A). The salient feature of any LLC is its limitation of liability. The act provides that the debts, obligations and liabilities of the LLC, whether founded in contract, tort or otherwise, are solely the debts, obligations and liabilities of the company and not of the members. *Id.* § 53-19-13. This is the primary reason for forming an LLC, and it does not matter that there is a unity of identity between the members and the company; indeed, that is the whole purpose. *See Id.* § 53-19-10(A)(the LLC is a separate legal entity). Moreover, the property conveyance provisions of the Act make it clear that the property that is either titled in the LLC's name or purchased with LLC funds is property of the LLC, not of the members. *Id.* § 53-19-29(A)-(E). Most important, the interests of the

members of the LLC are personal property interests that can be conveyed, with the assignee acquiring the financial interest and becoming a member. *Id.* § 53-19-31 (membership interest is personal property); § 53-19-32 (membership interest is assignable in whole or in part). This is the essential flaw in Respondents' argument: the financial interest can be transferred without an actual conveyance of the real property, thereby defeating the intention of section 7-36-21.2 and resulting in property that is never brought up to its current and correct value.

Respondent SRT cites to the Internal Revenue Code, arguing that since that code considers a single-member LLC to be a "disregarded entity," that is, disregarded from its owner, it should be disregarded for purposes of the state property tax code. This argument confuses federal income tax law applicable to organizations with state property tax law. The IRS regulations do not recognize LLC's. Rather, they recognize "organizations" and "associations" formed pursuant to state law. The regulations provide for taxation of any type of business organization as a corporation, partnership, trusts or sole proprietorship. 26 C.F.R. § 301.7701-2(a). As stated, there is no mention of an LLC, but rather only of a single-owner business entity, which may include an LLC. While the taxpayer may elect to treat the LLC as a sole proprietorship, it is not required to do so. In fact, there are exceptions for a variety of reasons. *See e.g., Id.* § 301.7701-2(c)(2)(iv)(B)&(C)&(c)(2)(v)(treatment as corporation for employment taxes,

backup withholding, and certain excise taxes). Most important, the code specifically provides that "whether an organization is an entity separate from its owners for federal tax purposes is a matter of federal tax law and does not depend on whether the organization is recognized as an entity under local law." *Id.* § 301.7701-1(a)(1). SRT's reliance on the Internal Revenue Code is misplaced and simply is not applicable here.

Both SRT and Fox also emphasize that the purposes of the transfers in these cases were simply for purposes of refinancing and otherwise have no significance. This assertion is misleading. The lender's requirements were that the subject properties be held by single-asset entities for bankruptcy purposes. This is far from inconsequential, and it has no application to ordinary residential property. The purpose of a single-asset entity is to facilitate creditor's actions in bankruptcy proceedings. Single-asset real estate is defined in the bankruptcy code as "real property constituting a single property or project, other than residential property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto." 11 U.S.C. § 101(51B). The code permits the creditor to obtain relief from any stay of proceedings against the debtor in cases of single-asset real estate. *Id.* § 362(d)(3). The formation of the LLC's and transfers of

properties in the current cases were not for the purpose of protecting a residential homeowner, as claimed by Respondents; they were for the purpose of facilitating the lender's interests in obtaining expedited relief against income-producing rental properties.

These facts also answer the arguments of Respondents that the legislative intent was to exempt properties whenever the beneficial interests remain the same. The legislative intent regarding beneficial interest, to the extent that it should be considered at all, can be gleaned from the list of exceptions found in section 7-36-21.2(E). The exceptions apply only to clearly defined family members, including surviving spouses and children, in clearly defined circumstances. There is no suggestion that the exception should apply to the transferor himself in situations that do not involve the specified family members in any way. As noted by SRT and Fox, the intention is to protect residential homeowners from dramatic increases in value. *See Zhao v. Montoya*, ¶ 46, 2014-NMSC-025, 329 P.3d 676 (§ 7-36-21.2 furthers interest of neighborhood preservation and stability). It has no application to rental property. SRT cites to a law review article on the subject, but that article specifically distinguishes rental and investment properties:

> Such a scheme favors established businesses over new entrants. It also favors owners over renters, who, unless they secure a long-term lease, cannot be sure their rent will remain predictable from year to year. *This argument applies to both nonresidential property and residential property purchased for rental or investment purposes*.

Mary LaFrance, *Constitutional Implications of Acquisition-Value Real Property Taxation: the Elusive Rational Basis*, 1994 UTAH L. REV. 817, 838 (emphasis added). The subject properties in this case are rental properties intended for rental or investment purposes, and in no way consist of family residences that the statute does seek to protect. Accordingly, even if legislative intent is considered, it does not support Respondent's arguments or the board's decisions.

CONCLUSION

For the reasons stated herein and in her brief in chief, the assessor requests that this Court reverse the decision and order of the Bernalillo County Valuation Protests Board in each of the consolidated cases.

REQUEST FOR ORAL ARGUMENT

The assessor requests oral argument. These consolidated cases have had multiple hearings in the district court, with the issues becoming increasingly confused. The standard for granting a writ of certiorari in the district court requires that the petitioner make "a prima facie showing that the court has jurisdiction over the agency, that the petitioner is entitled to relief, and that the petitioner does not have a right to review by appeal." Rule 1-075(G)(2), NMRA. Prior to the court issuing a writ, both respondents filed motions to dismiss, challenging jurisdiction. However, the challenges mixed up the requirements of jurisdiction and entitlement to relief. The assessor argued that a prima facie case was made by showing that the

board's decisions were not in accordance with law, while the respondents argued that the assessor had not shown that the board's decisions were illegal. Without issuing a writ, the district court certified the matter to this Court, which granted the certification and directed the parties to address the jurisdictional issue as well as the substantive issues. Meanwhile, the judges of three other divisions in the second judicial district issued writs and reversed the board's decisions in cases presenting the identical issues as in the current case. Those three cases are identified in the assessor's brief in chief. The assessor believes that the confusing and conflicting positions regarding issuance of a writ can be better examined with full oral argument.

Respectfully submitted,

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