ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

TANYA GIDDINGS, BERNALILLO COUNTY ASSESSOR,
Petitioner-Appellant,

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

v.

SRT-MOUNTAIN VISTA LLC,
Respondent-Appellee.

TANYA GIDDINGS, BERNALILLO COUNTY ASSESSOR,
Petitioner-Appellant,

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

v.

ROBERT AND LINDA FOX,
Respondents-Appellees.

****

RESPONDENTS-APPELLEES ROBERT AND LINDA FOX'S ANSWER BRIEF IN CHIEF

****

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COME NOW the Appellees, by and through their counsel of record, Vance, Chavez & Associates, LLC (Claud Eugene Vance), and for their Answer Brief in Chief submit:

I. SUMMARY OF PROCEEDINGS

A. Brief Description of Case.

This is an appeal by the Bernalillo County Assessor from a decision by the Bernalillo County Valuation Protests Board (the Board). The appeal was certified by the Second Judicial District Court for an initial decision pursuant to Rule 1-075 S. There has been no decision by the District Court, and this case is essentially in the posture of a direct appeal from the Board.

B. Course of Proceedings and Disposition of Trial Court.

The Foxes agree with the course of proceedings as indicated by the Assessor. However, to be clear, there has never been a disposition by a "trial court" and this case is certified to this Court as an appeal directly from the decision of the Board.

C. Summary of Facts Relevant to the Issues.

The Foxes generally agree with the statement of facts of the Assessor with the following additions. The evidence before the Board was primarily documentary and by affidavit, without objection. Robert and Linda Fox were elderly individual owners of rental property whose income was there retirement. (See Fox Affidavit, Fox RP 108-110) Both were stricken with cancer, and only Robert survived. Id. In 2007 and 2010, the Foxes transferred most of their properties into LLCs bearing the name of the property addresses. (Id.) During the Board hearing, the Board directed that the 2007 transfers be checked to see if they resulted in revaluation and, and it was determined they did not. (Fox TR.11:41:22, 1:22:06- 1:26)[1].

1 The referenced to the transcript in this brief refer to the recording of the Fox hearing before the Board.

In 2013, the Foxes refinanced the properties. (Fox Affidavit, Fox RP 108-110) Because of the small size of their holdings, the refinance program required that the recorded title to properties be held in their name directly, and they executed deeds from their LLCs to themselves. (Id.) After the refinancing was completed, they executed deeds back to their LLCs. (Id) No purchase money changed hands. The beneficial ownership remained the same at all times. (Id).

Reversing course from 2007, the Assessor considered the transfer to and from the single member LLCs to be "a change in ownership," and reassessed the properties. The Foxes protested that reassessment to the Board.

II. ARGUMENT

Issue 1. There is no jurisdiction over this appeal.

NMSA 1978 § 7-38-28 provides:
Appeals from orders of the director or county valuation protests boards.

> A. A property owner may appeal an order made by a hearing officer or a county valuation protests board by filing an appeal pursuant to the provisions of Section 3931.1 NMSA 1978.
>
> B. The director shall notify the appropriate county assessor of the decision and order of the district court and shall direct the assessor to take appropriate action to comply with the decision and order.

The statute grants the right of appeal a taxation decision of a hearing officer of the Director (Secretary of Taxation and Revenue) or the Board only to the property owner. "The county assessor may not appeal the order of the VPB [Valuation Protests Board]; only the property owner may appeal." *Addis v. Santa Fe County Valuation Protests Board*, 91 N.M. 165, 167; 571 P. 2d 822 (Ct. App. 1977). *State v. Rosenwald Brothers*, 23 N.M. 578, 170 P. 42 (1918); See also, *City of Tucumcari v. Magnolia Petroleum Co.*, 57 N.M. 392, 1953-NMSC-046,

259 P.2d 351, (N.M. 1953). The Assessor attempts to distinguish those holdings, but still cites no authority for jurisdiction over her own appeal. There is no authority stating that one arm of the taxing authority may appeal a decision of the taxing authority.

(1) Structure of the Agency.

It is important to examine the structure of the administration of the taxation authority in New Mexico. Such an examination is needed both as a matter of statutory construction and constitutional rights as a "person aggrieved" or "aggrieved party." It is erroneous to see the Board as a separate state agency or tribunal. It is in fact part of the same system for administering property taxes as is the Assessor, and all are under the supervision of the Department of Taxation and Revenue. The Assessor is no more a completely separate party from the Board, than the investigator or staff of any agency which initiates a proceeding is separate from the Board which ultimately renders a decision on behalf of the Secretary of the Department of Taxation and Revenue.

A protest starts with a filing to the office or administrative appeals of the Department or to the Assessor. NMSA 1978 § 7-38-21. An appeal which will be heard by the Valuation Protests Board, is not submitted to the Board, but to the Assessor. NMSA 1978 § 7-38-24. The Assessor then decides whether to proceed with an informal meeting, or to schedule a hearing with the Board. NMSA 1978 § 7-38-25 It is also the Assessor who is charged with maintaining copies of the Board's decisions for public inspection. NMSA 1978 § 7-38-27 F.

Both the Valuation Protests Board and the Assessor are closely linked to the Department of Taxation and Revenue (sometimes referred to in the statutes as the Division). The Assessor is supervised by the Director and the Department may even perform the duties of the Assessor. NMSA 1978 §§ 7-35-3; 7-35-6. The Director (Secretary) of the Department has the power to

enact rulings, regulations and administrative directives, and the Assessor must comply. NMSA 1978 § 7-35-6.

The chairman of the Valuation Protests Board is an employee of the Department. NMSA 1978 § 7-38-25. All of the board members are paid by the Department. *Id.* Sec. E. The legal advisor to the BCVPB who participated in the hearing of the protest now before this court was selected by the Department. The taped record delivered to this court on appeal was prepared and maintained by the Department.

Consequently, in a protest, the functions of the Assessor and the Department which supervises her are intertwined with functions normally associated with the body hearing and deciding the issue. The Valuation Protests Board attempts to maintain fairness and impartiality, but it does not possess the administrative functions or funding to be considered a separate "agency" apart from the Department. The Board's decisions direct the Assessor and the Department to comply with its decision in the same manner as would a hearing officer of the Department. *Compare* NMSA 1978 § 7-38-27 D ("The board's order shall be dated, state the changes to be made in the valuation records, if any, and direct the county assessor to take appropriate action. The division shall make any changes in its valuation records required by the order.") with NMSA 1978 §7-38-23. D. ("The hearing officer's order shall be in the name of the secretary, dated, state the changes to be made in the valuation records, if any, and direct the county assessor to take appropriate action.") From the structure of the statute, it appears the Board is exercising the authority of the Department. Exactly the same appeal statute applies to a decision of the Board as to a decision of a hearing officer of the department. NMSA 1978 § 7-38-28. In either case, the appeal provided is only by the taxpayer.

Since the creation of property value protests boards, some degree of confusion has surrounded the place of the Assessor and Board in a judicial appeal of a tax protest. Some cases have been decided with the State Department of Taxation and Revenue as the respondent to a tax payer suit or appeal. See, *Grand Lodge of Ancient & Accepted Masons v. Taxation & Revenue Dep't*, 106 N.M. 179 (Ct. App. 1987). Some cases were decided with the Board as the respondent to appeals by a taxpayer. *E.g. Horn v. Bernalillo County Valuation Protests Bd.* 95 N.M. 38, 618 P. 2d 382 (Ct. App. 1980); *Peterson Props. v. Valencia County Valuation Protests Bd.*, 89 N.M. 239; 549 P. 2d 1074 (Ct. App. 1976). Most have been decided with the Assessor as the responding party. See, *Addis v. Santa Fe County Valuation Protests Board*, supra. The conclusion of this court in *Addis* was

> "The assessor is the proper appellee; the VPB [Valuation Protests Board] is not. Compare § 721339 (B), N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, Supp. 1975). ... The PTD's [Property Tax Department's] position as to a protest may be asserted through the assessor whose position is largely controlled by the PTD"

91 NM at 169.

"The State Tax Commission has the duty to direct the Assessor as to his duties under the law. The responsibility lies with the Commission, not the Assessor" *State ex rel Overton v. New Mexico State Tax Comm'n*, 81 N.M. 28, 32, 462 P.2d 613 (1969) (citation omitted). Thus, in an appeal, the party opposing the taxpayer is representing the position of the Department. That position may be derived from either the decision of a hearing officer issued in the name of the Secretary of Taxation and Revenue, or the decision of a valuation protests board.

(2) The legislative omission of an appeal by the Assessor was intentional and should be given effect.

Given the fact that the Assessor represents the position in an appeal as the Department of Taxation and Revenue, the choice of the Legislature in Section 7-38-28 NMSA not to have either the Assessor or the Department appeal a protest decision is logical. The decision to allow an appeal by the taxpayer and not the Assessor or any other body connected with the Department is also consistent with the structure of administrative appeals throughout our law. For example, under the Uniform Licensing Act, a petition for review of a licensing board's decision is limited to a "person entitled to a hearing...who is aggrieved." NMSA 1978 § 61-1-17. The only persons who are given the right to a hearing are a licensee or applicant. NMSA 1978 § 61-1-3. Neither the licensing board, nor the investigators or officers within the board who may present a disciplinary action to the board are granted an appeal to district court. Without examining every agency, it is difficult to conceive of any scheme of judicial review which contemplates an appeal by an arm of the agency which made the initial determination after it is overturned by the quasi-judicial arm of the agency.

In the case of property tax appeals, this one-sided judicial appeal also makes practical sense. Much of the work of the Board involves appeals by individual homeowners. The amounts of these taxes would never justify a court proceeding financed by the homeowner. Indeed, the Fox case would never have been brought if counsel had not worked without pay on the original protest and with the support of the Apartment Association of New Mexico on this appeal. The Bernalillo County Assessor has now filed multiple petitions for certiorari on the issue raised in this appeal. In some, taxpayer parties have not expended the funds to file motions to dismiss or statements of issues, and the cases are decided in favor of the Assessor. See Cause No. D-202-

CV-2016-00335. Having the Assessor run over the taxpayers with these kinds of appeals is a very good reason for the legislature's omission of a right to appeal by the Assessor.

The Valuation Protests Board is not a court under the district court's constitutional jurisdiction; nor is it an inferior tribunal. It is not even a separate agency by itself. In effect, it exercises the power of the Secretary of the Department of Taxation and Revenue to direct the Assessor. It is purely a creature of statute internal to the taxing agency. If the legislature which created the protest procedure did not see fit to give one arm of the taxing authority a right to appeal a decision by another arm of that taxing authority, then per *Rosenwald*, the constitution does not supply a substitute.

(3) The Assessor is not an aggrieved party entitled to constitutional review.

To be entitled to an appeal by Constitution or Rule 1-075 one must be an "aggrieved party." An aggrieved party is one whose personal interests are adversely affected by an order of the court. *Pernell v. State,* 92 N.M. 490, 590 P.2d 638 (1979). The Assessor does not fit this definition.

"The Assessor has no personal stake in the matter. He is under the direction of the State Tax Commission, a superior office." *State ex rel Overton v. New Mexico State Tax Comm'n, supra.* 81 N.M. at 31. (Denying Assessor standing to challenge a ruling of the predecessor to the Department). It is not, by any stretch of the imagination, the Assessor's personal interest which is at stake here. This is also a far cry from the differences in interests of two separately incorporated municipalities with separate treasuries as in cites *Town of Mesilla v. City of Las Cruces*, 1995-NMCA-058, 120 N.M. 69, 898 P.2d 121 cited by the Assessor. It is not the Assessor's separate treasury at issue, and she will be able to do her job regardless of how this court decides.

Moreover, a writ of certiorari can only be issued to a decision of a "state or local government administrative or quasi-judicial entity." NMRA 1-075 A. A particular facility operated by a government agency is not a separate government entity which can sue or be sued. *Abalos v. Bernalillo County Dist. Attorney's Office,* 105 N.M. 554, 734 P. 2d 734 (Ct. App. 1987) (BCDC not a separate entity from City/County) Likewise, the Board, as a quasi-judicial arm of the Taxation and Revenue Department reviewing an assessment in the same manner as a hearing officer of the Department is not a fully separate governmental entity from the Department or the Assessor.

As discussed at length above, the Assessor is a party to appeals by taxpayers from the Board as the representative of the interests of the Department of Taxation and Revenue. *Addis v. Santa Fe County Valuation Protests Board, supra.* 91 N.M. at 169. The Assessor cannot file an appeal as a party "aggrieved" by what is effectively an arm of the Department whose position she represents! In any case, she has no personal interest in the decision and she is not a party aggrieved by the decision regarding the Foxes. *State ex rel Overton v. New Mexico State Tax Comm'n, supra.* The Assessor is therefore not entitled by the New Mexico Constitution to overturn the decision of her supervising agency by certiorari.

Issue 2.

Statement of Issue, How Preserved and Standard of Review.

The Assessor has not shown the decision of the Board to be arbitrary, capricious or illegal.

In order to secure refinancing, the Foxes recorded conveyances from limited liability companies owned by their revocable trust to themselves and back again to the limited liability companies owned by their revocable trust. (Fox Affidavit , Fox RP 108110) All of the title documents to and from the companies were recorded between January and May of 2013. (Id.) At

no time did the right to use or enjoy the property change. At no time did the beneficial owner of the property change. (Id.) At no point was any compensation paid, profit taken or income tax paid on the changes in entity. (Id.)

DISCUSSION

The legal question before the Protest Board was whether a transfer from a limited liability company to its sole owners and back again, with use and beneficial ownership never changing, is a change of ownership which the legislature intended to void the limit on valuation increases contained in NMSA 1978 7-36-21. That statute provides that the three per cent limitation on valuation increases does not apply after a "Change of Ownership." The statute further provides:

A. As used in this section:

(1) "change of ownership" means a transfer to a transferee by a transferor of all or any part of the transferor's legal or equitable ownership interest in residential property except for a transfer:

(a) to a trustee for the beneficial use of the spouse of the transferor or the surviving spouse of a deceased transferor;

(b) to the spouse of the transferor that takes effect upon the death of the transferor;

(c) that creates, transfers or terminates, solely between spouses, any co-owner's interest;

(d) to a child of the transferor, who occupies the property as his principal residence at the time of transfer; provided that the first subsequent tax year in which that person does not qualify for the head of household exemption on that property, a change of ownership shall be deemed to have occurred;

(e) that confirms or corrects a previous transfer made by a document that was recorded in the real estate records of the county in which the real property is located;

(f) for the purpose of quieting the title to real property or resolving a disputed location of a real property boundary;

(g) to a revocable trust by the transferor with the transferor, the transferor's spouse or a child of the transferor as beneficiary; or

(h) from a revocable trust described in Subparagraph (g) of this subsection back to the settlor or trustor or to the beneficiaries of the trust;

From reviewing the language and the exceptions together, the clear intent of this section was to trigger a loss of the cap only on transfers which change the beneficial owner, i.e. right to use and occupy, but not to trigger the loss of the cap for changes in title which are merely formal. No such change occurs when a limited liability company changes the name on the deed briefly to its sole owners and then back again. If formal transfers of some arguable legal or equitable interest which do not result in a change of beneficial ownership would trigger the loss of the valuation cap, then every new deed of trust, mortgage, refinance, lien, contract which does not result in sale, easement, judgment, etc. would cause the cap to be lost. This cannot be the intent of the legislature.

A. Nature of a Limited Liability Company

While a limited liability company can be a separate legal entity, changing the name on title documents from a Limited Liability Company to its owners and back again is not a necessarily a conveyance. A limited liability company is not a corporation. It is a legal handyman. Depending upon how it is used, it functions as a trust, partnership or even sole proprietor. In the case of the Foxes, it most resembles a sole proprietorship. The current decision of the Board cites statutory language which states that a limited liability company is a separate entity. NMSA 1978 53-19-10. With all due respect, relying solely upon this one sentence, out of context, is not consistent with the legal treatment of property held by a limited liability company. To the extent there is any error in the Board's approach, it is in assuming that a change in the name on the title between a limited liability company and its sole owners is a conveyance at all.

"Property is presumed to be owned by the limited liability company if it is purchased with funds of the limited liability company, even if it is acquired in the name of a member or other person." NMSA 1978 53-19-29 E, F. The New Mexico Limited Liability Company Act thus expressly states that the name of the person or entity in title documents does not determine ownership as between the company and its owners. A limited liability company can thus own property when formal title is in the name of the members of the company. NMSA 1978 53-19-29 These statutory rules for limited liability companies look to the beneficial owner rather than the bare legal title, which is an approach which would normally apply to partnerships or trusts. See NMSA 1978 54-1A-204. (Partnership property may be in the name of partners but if purchased by partnership assets, it is owned by the partnership)

Based upon the specific statutes which apply to ownership of property by a limited liability company, there was no transfer at all under these facts. If the Fox properties can be said to have been owned by limited liability companies for years before the 2013 deed,[2] they continued to be owned by the companies even though the name on the recorded documents changed. According to the affidavit of Mr. Fox, no money changed hands when the name on the title of the properties changed from a limited liability company owned by the Foxes' inter vivos trust to the beneficiaries of that trust and then back. The properties were owned by the limited liability companies for years before the 2013 deeds to the Foxes, and even the bare name change on the deeds were undone within a matter of months or even weeks for some of the properties. The statutory presumption was that the ownership stayed with the limited liability company despite the substitution of the name of the beneficial owner for the name of the company on the deed. NMSA 1978 53-19-29 E. No evidence was introduced to change that presumption. While

2 From Mr. Fox's Affidavit, it appears he perceived the properties to have been owned by himself and his wife (while she was living) regardless of the form. (See Fox RP 108).

for most transactions that necessarily means something, in a transaction between a limited liability company and its members, it does not. NMSA 1978 53-19-29 E.

A single member limited liability company such as those of Mr. Fox (now that his wife has passed on), is not a separate entity for federal or state income taxes: "[A]n LLC with only one member is treated as an entity disregarded as separate from its owner for income tax purposes (but as a separate entity for purposes of employment tax and certain excise taxes), unless it files Form 8832 and affirmatively elects to be treated as a corporation." IRS guidance. http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Limited-Liability-Company-LLC. If it has more than one member, it is normally treated as a partnership, which is still not a separately taxed entity. Id. Transfers to and from a company by its members are generally not taxable events.

B. Application of The Law To Property Taxes

The Assessor did not and does not treat all conveyances of legal or equitable interests in property as triggering the loss of the valuation cap. Without a doubt, a mortgage or an easement to an unrelated party is a conveyance of a legal or equitable interest in property. E.g. *Kuntsman v. Guaranteed Equities, Inc.*, 105 N.M. 49, 50, 728 P.2d 459, 460 (1986) (Mortgage is conveyance of real estate, or some interest therein, defeasible upon the payment of money or the performance of some other condition.); *Skeen v. Boyles*, 2009 NMCA 80, ¶ 31, 146 N.M. 627, 213 P.3d 531 (distinguishing an easement from a mere license) However, the Assessor does not treat those as removing the cap. (TR 1:17:19) With the growing popularity of the deed of trust (utilized by the lender for the Foxes) it becomes even more obvious that there is a conveyance of some interest involved. The trustee in a deed of trust holds legal title. Unlike the deed to and from the limited liability company, conveyances of a mortgagee's interest or an easement have a

real and practical effect on the rights of the parties to that transfer. Yet these are not treated as conveyances.

The truth is that no one—not the Assessor, nor the Board nor the respondents—truly believes that legislature intended by NMSA 1978 7-36-21 C, that "*all or any part of the transferor's legal or equitable ownership interest*" be robotically interpreted. Indeed, no assessor would be re-elected if she or he removed the residential cap from every homeowner who refinanced, conveyed an easement to a utility, incurred a lien or in any other way conveyed "any part" of the legal or equitable ownership interest. If all parties are candid, then, with homage to George Bernard Shaw, we have established this section cannot be applied literally, and we are just haggling about the place to draw the line. The legislative treatment of changes in nominal title between limited liability companies and their owners is a strong indication that the legislature would not place a change in nominal title between limited liability company and its owners as a "conveyance."

There is no New Mexico case law on point, so we must look to other states for guidance as to where the line should be placed regarding limited liability companies. The California Board of Equalization has, by rule, interpreted a similar California law to mean that a transfer to a limited liability company "which result solely in a change in the method of holding title and in which the proportional ownership interests in each and every piece of real property transferred remain the same after the transfer" are not considered "transfers" for property tax purposes. Ca. BOE Rule 462.180 (b) (2). Other states have done so as well. The Supreme Court of Oklahoma has also addressed a very similar question in determining what kinds of transfers trigger its five per cent cap on property tax valuation increases. *Askins Props., L.L.C. v. Okla. County Assessor* (In re Assessments for 2005), 161 P. 2d 303 (Okla. 2007)

The Constitution of the State of Oklahoma required that the cap be lifted upon a transfer of residential property. The court addressed whether that provision would prohibit an exception for transfers from a trust to a limited liability company, where use and occupancy did not change, and the two entities were owned by the same individuals. The two individuals in Askins were the sole members of a trust which conveyed the property to a limited liability company of which the same two were also the sole members.

> The express and plain purpose of 8B is to put a five percent (5%) cap or limit on the increase in the fair cash value of real property in any year unless ownership of the property is transferred to another person or improvements are made to the property (the latter exception not being involved here). When only legal title is transferred but the equitable ownership is in the same two persons both before and after a deed is executed concerning the property we do not believe the intent of the constitutional provision had in mind the lifting of the five percent (5%) fair cash value cap. The Court on more than one occasion has considered tax related matters involving legal title and equitable title being in different persons or entities and we believe such case law points the way to a proper resolution in the instant case.

Askins at p 11.

The New Mexico property tax statute in question talks of a transferor and a transferee. As was set out in the Oklahoma constitution, this terminology implies that the two are different. In the case of a limited liability company solely owned by the same individuals, the two are in practice, the same, just as they are in a trust with the former owner as beneficial owner.

The Foxes changed the name of their legal identity, but not the control, use or any other aspect of equitable, beneficial ownership we normally associate with title. Their change of entity should not be considered a change in ownership which lost them the benefits of the three per cent cap.

If any party acted arbitrarily or capriciously, it was the Assessor's office. As was pointed out before the Board, the Assessor did not treat the original conveyance from the Foxes to their

limited liability companies in 2007 as conveyances. This was a new position which came in with the current Assessor and her advisors. Creating the perception among taxpayers that purely formal changes in title would not be treated as conveyances, and then changing that approach misleads taxpayers to make decisions about the structure of financing which they might not otherwise make.

CONCLUSION AND PRECISE RELIEF SOUGHT

Respondents-Appellees Fox ask for the following precise relief:

1. To dismiss this appeal for lack of jurisdiction or
2. To affirm the decision of the Board, and
3. For other relief the Court deems proper.

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PROOF OF SERVICE

I hereby certify that on this 16 day of February, 2016, six copies of this Brief in Chief was served upon the New Mexico Court of Appeals by hand delivery to Albuquerque Satellite Office, 2211 Tucker NE, Albuquerque, NM 87106; and one copy to Charles Rennick and Marcus J. Rael, Jr., Robles, Rael & Anaya, P.C., Counsel for Petitioner-Appellant, 500 Marquette Ave. NW, Suite 700, Albuquerque, NM 87102, and to Frank Salazar, Sutin, Thayer & Browne, Counsel for Respondent-Appellee SRT-Mountain Vista LLC, PO Box 1945, Albuquerque, NM 87103-1945.

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