

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS**

In the Matter of )  
 )  
 NO NAME, INC. ) OAH No. 04-0321-TAX  
 )  
 Oil and Gas Production Property Tax )  
 1997, 1998, 1999 Tax Years )

**ORDER GRANTING SUMMARY ADJUDICATION**

**I. Introduction**

The Tax Division of the Alaska Department of Revenue (Division) audited the 1997-1999 Oil and Gas Production Property Tax returns of No Name, Inc. (Taxpayer) and concluded that the assessed value of certain property should be decreased. The City of No Name (No Name) challenged the reduced valuation, but the Division upheld the reduction at informal conference. No Name appealed, contending that the Division had no authority to conduct the audit in question and thereby open the valuation to reduction. The parties have filed and responded to motions for summary judgment.

Administrative Law Judge Mark T. Handley of the Office of Administrative Hearings was assigned to hear this appeal. Bonnie E. Harris, Assistant Attorney General, represented the Division. Attorney A represented No Name. Attorney B represented the Taxpayer.

Having reviewed those motions I have determined that summary adjudication is appropriate in this case. The law that controls the collection of the disputed taxes in this case is administered by the Division, although No Name receives these taxes. A municipality's right to a review of the assessments for these years is limited. The statutes under which municipality seeks relief gives the Division discretion in administration of the tax. This discretion includes the authority to conduct an audit of a tax return. The authority to decide whether or not to conduct an audit after the appeal period for an assessment has passed is vested in the Division rather than the municipality in which the property is located.

## II. Facts

No Name is appealing the supplemental assessment for properties located in No Name in 1997 through 1999.<sup>1</sup> The Taxpayer reported these properties as AS 43.56 taxable property on its returns for each of the tax years at issue. This property was assessed for the first time in 1997 based on a decision by the Division that the property was taxable. The taxability determination was appealed by both parties, but that taxability determination is not part of this appeal.

This appeal is based on the procedural issue of whether the Division improperly conducted an audit in response to a letter from the Taxpayer. The Taxpayer filed a letter dated March 23, 1999, notifying the Division of errors on its assessments for 1997-1999 with respect to the age-date of one of the properties.<sup>2</sup> The Division treated this letter as a late-filed request for an administrative appeal for the 1999 assessment and sent the Taxpayer a decision denying the request, but indicating that adjustments were possible in an audit and inviting the Taxpayer to schedule one.<sup>3</sup> In its motion, the Division points to documents it provided in discovery that indicate that the Division had already planned to audit the Taxpayer's 1997-1998 returns, before it received the March 23, 1999 letter.

The Division conducted an audit of the Taxpayer's 1997-1998 returns, which resulted in a net decrease in assessed value for the properties of \$00,000,000. The Division issued supplemental assessments reflecting the changes in value and the resulting decrease in tax liability. No Name appealed the supplemental assessments. The supplemental assessments were upheld in the Division's informal conference No. 00-00-00, which is the subject of this appeal.

No Name filed a request for a formal hearing, and some discovery was conducted before the parties reached an impasse on discovery issues. Meanwhile, appeals on taxability related to the original assessment covering these properties continued to work their way through the appeals process, and action on this appeal was put on hold. After final administrative decisions were issued on the taxability issues in the original assessments, the parties in this appeal were directed, over No Name's objection, to file briefing on the threshold issue of whether this case

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<sup>1</sup> Barges 450-3 & 450-8 and Responder 500-2.

<sup>2</sup> Responder 500-2.

<sup>3</sup> The Division's decision and invitation to schedule an audit is found at Exhibit 6, which is attached to the Division's motion.

could be decided without additional discovery based on the scope of the Division's audit authority.

The Division filed a motion for summary adjudication. The Taxpayer filed a brief in support of this motion and No Name filed opposition briefing.

### **III. Discussion**

No Name argues that the Division improperly decided to conduct the audit that led to the supplemental assessments under appeal in response to the March 23, 1999 letter.<sup>4</sup> The letter pointed out an error that related back to the Taxpayer's 1997 and 1998 returns, and No Name argues that the audit was an improper circumvention of the administrative appeal deadlines for the original assessments relating to those returns. The Division asserts that the audits were made because the Taxpayer was scheduled for an audit as part of the Division's three-year audit program.

There are facts in this case that may be in dispute, but the disputed facts are not material to a summary disposition of No Name's appeal. While No Name asserts that the audit that led to the supplemental assessment was initiated in response to the Taxpayer's notification letter, and the Division and the Taxpayer assert that the audit was conducted as part of the Division's regular three year audit schedule, the Division is entitled to judgment as a matter of law. Even accepting, for the purpose of the Division's motion, that the audit was partly or wholly conducted in response to the notification of error made by the Taxpayer, the Division had the authority to conduct the audit that resulted in the supplemental assessment on appeal.

#### *A. Division's Authority to Conduct Audits for Supplementary Assessments*

There is no dispute that the Division conducted the audits that led to the supplemental assessment under appeal within the three-year deadline set by AS 43.05.260(a). This general limitation on the Division's authority to conduct audits on tax returns is explicitly made applicable by regulation to the Oil and Gas Production Property filed under AS 43.56 in this appeal.<sup>5</sup> While the language of the audit regulation uses the term "property that escaped assessment" to describe the subject of an audit, that term is later defined broadly as any property that is included or not included on a return that includes a return, or "property statement," that

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<sup>4</sup> The Taxpayer's letter is found at Exhibit 5 attached to the Division's motion.

<sup>5</sup> 15 AAC 56.045(a).

has any inaccuracies.<sup>6</sup> The parties have not made an assertion that the original returns were completely accurate.

*B. Importance of Accurate Assessments*

The Alaska State Assessment Review Board, which hears AS 43.56 property tax appeals that are based on valuation issues, has discussed the importance of ensuring that assessments are accurate when addressing taxpayer concerns about increases in the assessed valuation. In its 2009 Certificate of Determination on the appeal of the assessed valuation of the Trans Alaska Pipeline (the TAPS), the Alaska State Assessment Review Board recognized that much of the growth in the assessed value of the TAPS was due to improvements in the accuracy of the assessments, rather than the increasing value of the property, and explained why concerns about the impact of changes in assessments on particular parties should not outweigh an assessor's commitment to accuracy in the assessment process as follows: "The Board believes that the best way to achieve equity in assessments is for the assessor to value taxable property accurately."<sup>7</sup>

In the present case, the Division was in the role of the assessor when it decided to exercise its authority to conduct an audit. Using its authority to conduct audits to adjust incorrect assessments is one way to ensure that assessments are accurate. The appeal period is a limit imposed on the taxpayers and municipalities. The administrative appeal deadline does not impose additional limits on the time period during which the Division can conduct an audit after the appeal period has past. The audit and appeals provisions are two separate processes. The appeals provisions set out the rules to appeal the Division's assessments, including time limits for taxpayers and municipalities to appeal assessments and supplemental assessments. The audit provisions provide the Division with a mechanism to ensure accuracy and enforce compliance, by giving the Division an opportunity to more thoroughly review returns filed within the prior three years and make any necessary adjustments.

The provision for auditing oil and gas production property returns for up to three years, which far exceeds a taxpayer's or municipalities' thirty-day limit for filing an appeal of an assessment, gives the Division the authority to make adjustments to correct inaccurate assessments. The Division's decision to use its limited resources to use the audit process to

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<sup>6</sup> 15 AAC 56.045(a) & (b).

<sup>7</sup> 2009 Certificate of Determination of the Alaska State Assessment Review Board, *In the Matter of the Trans Alaska Pipeline*, OAH No. 09-SARB-TAX, at page 27.

attempt to discover or correct an error is within its discretion under this provision, and it serves the policy objective, identified by the Board, to improve the accuracy in the assessment process.

*C. Exercise of Audit Authority Generally Not Subject to Review.*

Courts have recognized the broad sweep of the power to enforce revenue laws, including the broad discretion in the decision to conduct an audit. Federal courts generally are unwilling to look beyond the actual audit notice to review the propriety of the taxing authority's decision to conduct an audit. An exception that does not apply to this case is when there is evidence of unconstitutional conduct on the part of the taxing authority's agents. The motivations of the taxing authority and the evidence on which the determination to conduct an audit were based are generally not subject to review.<sup>8</sup> Even if the audit was initiated improperly, at most the result on appeal would be a shift in the burden of proof on the merits of the audit conclusions.<sup>9</sup>

Both No Name as an interested municipality and the Taxpayer have the right to appeal the merits of the supplemental assessment. The Division's decision to exercise its authority to conduct the audit that led to the assessment is not generally subject to review or a legitimate subject for a request for discovery in an appeal of the supplemental assessment. A member of the public does not have the right to force an agency to prosecute an alleged violation if the agency has declined to do so in the exercise of its discretion, the decision to prosecute is also not subject to review, in part because allowing an interested party to force an agency to initiate enforcement actions and take them through the appeals process would waste government resources.<sup>10</sup> Similarly, making a taxing authority's legitimate exercise of its discretionary authority to conduct an audit the subject of an administrative appeal and associated discovery, would unnecessarily reduce the control of a taxing authority, such as the Division, over its resources.

*D. Reasonable Basis for Audit*

The Division's exercise of its discretionary authority to conduct the disputed audits would be upheld under the reasonable basis standard.<sup>11</sup> Even if, as No Name alleges the audits were made in response to the Taxpayer's letter notifying the Division of an error, that notice was

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<sup>8</sup> *Lizcano v. C.I.R.*, 95 T.C.M. (CCH) 1157 (T.C. 2008).

<sup>9</sup> *Greenberg's Express, Inc. v. Comm'r of Internal Revenue*, 62 T.C. 324, 329 (1974); *Strickland v. C.I.R.*, 79 T.C.M. (CCH) 1647 (T.C. 2000).

<sup>10</sup> *Vick v. Board of Elec. Examiners*, 626 P.2d 90, 94 (Alaska, 1981).

<sup>11</sup> *Stosh's I/M v. Fairbanks North Star Borough*, 12 P.3d 1180, 1183 (Alaska 2000).

a reasonable basis to conduct an audit. As noted above, the Division should strive for accuracy in its assessments. When the Division is made aware of an error in an assessment, that is a reasonable basis to conduct an audit, whether the error resulted in a deficiency or an overpayment. The Division is not required to conduct an audit under such circumstances, but it has the authority to conduct an audit even if the appeal deadlines have passed.

Neither the Division's decision to audit, or the Division's informal conference decision on the audit results are, however, a final administrative determination for purposes of appeal to the superior court.<sup>12</sup> Prior to judicial review the Commissioner must issue a final decision on the Division's actions that are on appeal, and the Commissioner is not bound by the deferential reasonable basis standard in an administrative adjudication. The Commissioner of Revenue may adopt or reject the proposed decision before a final decision in this case can be appealed to superior court.<sup>13</sup>

While the Commissioner may chose to give deference to determinations made by a subordinate agency that are supported by a reasonable basis, the Commissioner may also choose to substitute another interpretation of how that agency should apply the Department's discretionary authority for that chosen by the Division. As noted above, initiation of enforcement actions, such as the decision to conduct an audit, are generally beyond the scope of review in the adjudicatory process, and thus rarely be subject to close scrutiny or amendment by the final decisionmaker in the administrative appeals process, especially in this case where there was clearly a reasonable basis for that action.

#### *E. Summary Adjudication*

In administrative adjudications such as this tax appeal, the right to a hearing does not require development of facts through an evidentiary hearing when no dispute of a material fact exists.<sup>14</sup> Summary adjudication in an administrative adjudication uses the same standard as summary judgment in court: if the material facts are undisputed, they are applied to the relevant

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<sup>12</sup> 15 AAC 05.020(c).

<sup>13</sup> 15 AAC 05.040; Alaska R. App. P. 602.

<sup>14</sup> See *Smith v. Dep't of Revenue*, 790 P.2d 1352, 1353 (Alaska 1990).

law and the resulting legal conclusions determine the outcome. Only if the parties genuinely dispute a material fact is it necessary to hold an evidentiary hearing.<sup>15</sup>

The material facts in this case are not in dispute. The Division had the authority to conduct the audit under appeal, whether it was for the reasons given by the Division or the reason asserted by No Name. Although the Division asserts that the disputed audit was part of a regularly scheduled audit, and was not conducted in response to the Taxpayer's notification of error, the Division had the authority to conduct this audit.

No Name argues that additional discovery is required before the Division's motion is ruled on. The documentary evidence provided by the Division in discovery supports the Division's and the Taxpayer's positions that the audits were conducted as part of the three-year audit schedule (the Division provided a letter dated June 8, 1998 listing the Taxpayer as a company that would fall into the three year audit category as well as other documentation indicating that the audits would have been held even if the Taxpayer had not notified the Division of its error). No Name argues that despite this evidence, it should be permitted to depose the Division personnel who may have knowledge of the Division's decision to conduct these audits.

The authority to order discovery under 15 AAC 030(b)(3) is discretionary. Discovery should not be ordered when, as in this case, an appeal of a supplemental assessment in gas property tax appeal can be resolved by ruling on the disputed legal issues. In this case, the summary adjudication ruling has assumed that No Name would have been able to prove its contention, and nonetheless No Name would not prevail as a matter of law. No Name's request for additional discovery is therefore denied.

#### **IV. Conclusion**

DOR's motion for summary adjudication is GRANTED. DOR's Informal Conference Decision No. 00-00-00 is AFFIRMED.

DATED this 6<sup>th</sup> day of July, 2012.

By: Signed  
Mark T. Handley  
Administrative Law Judge

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<sup>15</sup> A fact is not "material" unless it would make a difference to the outcome. *Whaley v. State*, 438 P.2d 718, 720 (Alaska 1968).

**Adoption**

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. I, Angela Rodell, on behalf of the Commissioner of Revenue, order that this Order Granting the Division’s Motion for Summary Adjudication concerning No Name’s appeal of the Division’s informal conference decision No. 02-56-01 is adopted as of this date and entered as the final administrative determination in this appeal.

Reconsideration of this decision may be obtained by filing a written motion for reconsideration within 10 days after the adoption of the written decision of the Administrative Law Judge, pursuant to 15 AAC 05.035(a). The motion must state specific grounds for relief, and be filed with the Office of Administrative Hearings. If mailed, it should be addressed to

P.O. Box 110231  
Juneau, Alaska 99811

If by hand delivery to

450 Whittier Street, Suite 210  
Juneau, Alaska 99801.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 23<sup>rd</sup> day of July, 2012.

By: Signed  
Signature  
Angela M. Rodell  
Name  
Deputy Commissioner  
Title

[This document has been modified to conform to the technical standards for publication.]