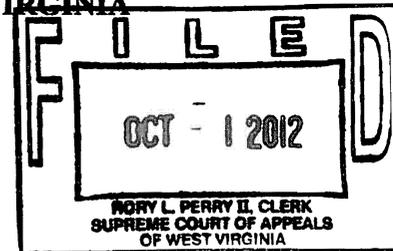


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-0638



**LEE TRACE LLC,
Petitioner,**

v.

**Respondent Brief In Support of The
Final Order of the Circuit Court of
Berkeley County (11-AA-2)**

**GEARL RAYNES, AS ASSESSOR FOR
BERKELEY COUNTY, WEST VIRGINIA,**

**BERKELEY COUNTY COUNCIL SITTING AS
BOARD OF REVIEW AND EQUALIZATION
and**

**BERKELEY COUNTY COUNCIL,
Respondents.**

**BRIEF OF
RESPONDENT COUNCIL, SITTING AS BOARD OF
REVIEW AND EQUALIZATION, AND AS THE GOVERNING BODY OF
BERKELEY COUNTY, WEST VIRGINIA**

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STATEMENT OF THE CASE

Petitioner, Lee Trace LLC (hereinafter, Petitioner), owns a complex of 156 apartment units, situate on slightly more than 17 acres at 15000 Hood Circle, Delmar Orchard Road, in Martinsburg, Berkeley County, West Virginia. Petitioner has insured the complex for purposes of fire insurance at \$17,000,000.00. Construction costs, as of February 11, 2011, amounted to \$12,927,378.00 on land which cost the Petitioner \$1,122,504.00. The undeveloped land was assessed for Tax Year 2009, as of July 1, 2008, at \$677,040.00. On July 1, 2009, the Assessor placed an assessed value on the property of \$7,895,530.00 for Tax Year 2010, accounting for both the buildings constructed and the land value.

The Assessor valued the complex for Tax Year 2010 using the cost approach to value, one of the three methods of valuation specified by the West Virginia Code of State Rules at 110-1P-2.2.1. The Rule provides, in pertinent part, “. . . the Tax commissioner will consider and use where applicable, three (3) generally accepted approaches to value: (A) cost, (B) income, and (C) market data.” Petitioner complains in its Statement of the Case, at page 2 of its brief, that the Assessor is required to use the income approach for valuation of commercial property. However, this Court has opined that the Tax Commissioner may exercise discretion in choosing and applying the most accurate method of appraising commercial and industrial property. The Respondent Council contends that such discretion is also granted to the local assessing officers performing the same function.

West Virginia Code Chapter 11, Article 3, Section 24 provides that an aggrieved taxpayer may seek an adjustment of his/her assessment by presenting objection to the county commission (in this case, the Berkeley County Council) sitting as the Board of Review and

Equalization. The Board meets no later than the first day of February each year to consider such objections. West Virginia Code 11-3-24. Taxpayers whose property is assessed at more than 10% above its assessment for the previous tax year when such assessment increase is \$1,000 or more are to be given notice by the Assessor on or before January 15 of the tax year. Such notice is, also, to advise the person so assessed of his or her right to appear and seek an adjustment in the assessment. West Virginia Code 11-3-2a.

In the instant case, Petitioner alleges that the Notice of Increase of Assessment which was timely sent to it was not adequate in that it failed to advise the Petitioner of its right to appear at the Berkeley County Council sitting as the Board of Review and Equalization on or before the February 25, deadline for purpose of appealing the 2010 tax assessment. Petitioner actually appeared approximately one year late before the Board in February, 2011, to lodge such appeal, arguing that the Assessor's Notice had deprived it of due process. It sought relief pursuant to West Virginia Code 11-3-27, claiming that the 2010 assessment on the real property resulted from a clerical error made by the Assessor's staff. The Board of Review and Equalization denied the Petitioner's application for relief by letter/order dated February 24, 2011. (Joint App. 32) The Board found that ". . . adequate notice was given to Mr. Cocker (Petitioner's alter ego) for the filing of a 2010 review and Equalization Application; that Mr. Cocker failed to timely file for a request or application for review during the 2010 Review and Equalization session . . . ; and, that it is without jurisdiction to hear this request from 2010, since the Board adjourned *sine die*, in February, 2010." Petitioner appealed the denial to the Circuit Court of Berkeley County which, by Order dated March 23, 2012, ruled that ". . . the notice sent by the assessor was clearly adequate." (J.App. 472); that West Virginia Code 11-3-2a only ". . . requires that notice

advise the person assessed . . . of his or her right to appear and seek an adjustment in the assessment.” (J.App. 472); that West Virginia Code 11-3-2a “. . . provides nothing further regarding the contents of the notice. . . .” and that the notice given to Petitioner indicates “. . . that the wording required by the statute was included in it.” (J.App. 472) The Circuit Judge found further that the Petitioner’s allegations of inadequacy of the Assessor’s Notice of Increase because such notice did not include a deadline date for the taxpayer’s appearance failed because the statute “. . . does not require the date be given.” (J.App. 472) The Judge went on to cite *State v. McCoy*, 107 W.Va. 163, 172 (1972) in quoting from the case that “All persons are presumed to know the law.” Additionally, the Circuit Judge found that the Petitioner “. . . did not challenge the assessment in a timely manner.” (J.App. 472)

The Circuit Order went on to include as to the charge that the Assessor committed a clerical error or mistake subjecting the taxpayer’s time to object to an extension and bringing the matter under Section 27 review, a finding that because the error in assessing the complex as it was assessed was intentional on the part of the Assessor and not inadvertent, Section 27 “. . . does not apply.” (J. App. 473)

The Circuit Court concluded its Order by noting that Section 24, Article 3, Chapter 11 of the West Virginia Code provides that if the taxpayer fails to apply for relief during the session of the Board of Review and Equalization immediately following receipt of the Notice of Assessment Increase by the taxpayer, he/she “. . . shall have waived the right to ask for correction in his assessment list for the current year, and shall not thereafter be permitted to question the correctness” The Circuit Court found that the Board’s conclusion that it was

without jurisdiction to hear the objection because the same had not been timely filed was correct
“ . . . and should be affirmed.” (J. App. 473)

SUMMARY OF ARGUMENT

The Circuit Court of Berkeley County did not err in its conclusions and findings set forth in its Order of March 23, 2012. (J.App. 467-475) The Circuit Court’s finding that the decision of the Board of Review and Equalization was correct in publishing its decision denying Petitioner’s request to adjust the 2010 Tax Year assessment based upon the untimeliness of the objection was correct. The Circuit Courts finding that the Notice of Increase in Assessment, dated January 5, 2010 (J.App. 5) was adequate and sufficient according to the Code and provided appropriate due process to the Petitioner was correct. The Circuit Court’s finding that the Assessor acted appropriately in utilizing the cost approach to value the Petitioner’s property and that such decision to use the cost approach was not inadvertent and a mistake but, rather was an intentional decision, making the Petitioner’s attempt to complain pursuant to West Virginia Code 11-2-27 inappropriate and making that statute inapplicable to the Petitioner’s circumstance was a correct interpretation of the law in West Virginia. And, that because of all of these factors, the Circuit Courts Order of March 23, 2012, should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent Board of Review and Equalization and Berkeley County Council waives oral argument and requests a decision based upon the briefs herein.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard; challenges to a circuit Court's findings of fact under a clearly erroneous standard but, conclusions of law *de novo*. *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W.Va. 14, 672 S.E.2d 150 (2008); *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996).

"As a general rule, there is a presumption that valuations for taxation purposes fixed by an assessor are correct; the burden is on the taxpayer challenging the assessment to demonstrate by clear and convincing evidence that the tax assessment is erroneous." Syl. Pt. 8, *Bayer Material Science, LLC v. State Tax Comm'r.*, 223 W.Va. 38, 672 S.E.2d 174 (2008).

II. THE CIRCUIT COURT DID NOT ERR IN FINDING PETITIONER WAIVED ITS RIGHT TO CHALLENGE THE 2010 TAX ASSESSMENT PURSUANT TO WEST VIRGINIA CODE 11-3-24; THAT THE CIRCUIT COURT DID NOT ERR IN FINDING THAT THE NOTICE OF INCREASE IN ASSESSMENT SENT BY THE ASSESSOR WITH RESPECT TO THE 2010 TAX ASSESSMENT WAS ADEQUATE AND IN CONFORMANCE WITH STATE LAW; THAT THE CIRCUIT COURT DID NOT ERR IN DENYING THE PETITIONER'S PETITION FOR APPEAL AS TO THE ALLEGATION THAT THE NOTICE OF INCREASE IN ASSESSMENT DID NOT MEET

MUSTSER WITH REGARD TO DUE PROCESS REQUIREMENTS; THAT THE CIRCUIT COURT DID NOT ERR IN DENYING THE PETITIONER'S PETITION FOR APPEAL AS TO THE ASSESSMENT OF 2010 REAL PROPERTY TAXES.

Respondent Council denies that the NOTICE OF INCREASE IN ASSESSMENT failed to meet the requirements of West Virginia Code § 11-3-2a, all as alleged by Petitioner. Section 2a provides, in pertinent part, that “The notice shall be given on or before January 15 of the tax year and **advise the person assessed or the person controlling the property of his or her right to appear and seek an adjustment in the assessment:** Provided, That this notification requirement does not apply to industrial or natural resources property appraised by the Tax commissioner under article six-k [§§ 11-6k-1 et seq.] of this chapter which is assessed at sixty percent of its true and actual value.” (Emphasis added) Petitioner correctly points out that the notice “simply stated that ‘If you believe an adjustment in the assessed value is necessary, you should contact the County Commission sitting as a Board of Review and Equalization.’” Even a cursory review of section 2a will reveal that the letter admittedly received by Petitioner prior to January 15, 2010, and entitled “Notice of Increase In Assessment”, conveyed the exact wording required by the statute.

Nor, should Petitioner be heard to complain that it was unaware of the dates on which the Board would meet. It is long settled law in West Virginia that “All persons are presumed to know the law.” State v. McCoy, 107 W.Va. 163, 172, 148 S.E. 127, 130 (1929). The statute

cited by the Petitioner, West Virginia Code § 11-3-24, clearly indicates that the County Council will meet annually, not later than February 1 of the tax year, as the Board of Review and Equalization, and shall adjourn *sine die* not later than the last day of February of the tax year. Petitioner having complained only to the Assessor in March, 2010, of the assessment for that tax year, did not meet the statutory requirements. Asking the Board to hear the case in February, 2011, was one year too late as the Board explained in its denial of the relief sought for the 2010 tax assessment. Further, § 11-3-24 provides, "If any person fails to apply for relief at this meeting, he shall have waived his right to ask for correction in his assessment list for the current year, and shall not thereafter be permitted to question the correctness of his list as finally fixed by the county commission, except on appeal to the circuit court."

Petitioner's complaint that because the Notice did not prescribe the exact dates when a request for adjustment could be heard by the Board of Review and Equalization there was a lack of due process of law is far too stringent a requirement for due process. West Virginia Code 11-3-24 provides clear guidance as to the time the Board of Review and Equalization sits each year. Contrary to Petitioner's assertion, it is not always possible for the Assessor to know the dates of the sessions of the Board at the time the Notice is sent to taxpayers. But, that knowledge is set out in Section 24 for all to see and, by contacting the Assessor and/or the Council office, as advised in the Notice, one can find out for oneself the details which will make the Notice fully meaningful. "But, where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officer in estimating the value act judicially; and in most of the States provision is made for the correction of errors committed by them, through boards of

revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law." *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 710, 4 S. Ct. 663, 668, 28 L.Ed. 569 (1884). So wrote Mr. Justice Field for the United States Supreme Court long ago, in an opinion which has weathered the test of time.

Additionally, this Court in *Calhoun County Assessor v. Consolidated Gas Supply Corp.*, 178 W.Va. 230, 358 S.E.2d 791 (1987), opined that, "Statutes governing the imposition of taxes are generally construed against the government and in favor of the taxpayer. However, statutes establishing administrative procedures for collection and assessment of taxes will be construed in favor of the government." This axiom quite appropriately governs the procedure for requesting an adjustment to the assessment via the Board of Review and Equalization in West Virginia. It is a request of a semi-judicial body to review and make an adjustment in the Assessor's assessment of one's property value. There follows, if needed, an appeal to the circuit court and, if needed, on to the Supreme Court. The Assessor, in the instant matter, followed the dictates of the statute in drafting her Notice of Increase in Assessment. Sufficient guidance was conveyed to the taxpayer with regard to obtaining relief from the increase through the administrative procedure provided by the Legislature. This Court should reaffirm the concept that the procedural aspects of tax collection and readjustment of assessment will be construed in favor of the government.

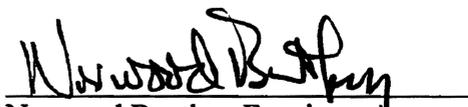
CONCLUSION

The Circuit Court of Berkeley County did not err in finding that the Petitioner failed in its responsibility, for purposes of availing itself of the opportunity to request adjustment of its assessment by the Board of Review and Equalization, by waiting nearly one full year to made its objection. The Board adjourned its 2010 session for review and adjustment of assessments in February, 2010. It was without jurisdiction after such *sine die* adjournment to hear the objection and/or make any change in the 2010 assessment. The Notice of Increased Assessment which was admittedly received by Petitioner prior to the January 15 deadline advised the Petitioner to present any objections to the Berkeley County Council, sitting as a Board of Review and Equalization. The Notice was in compliance with the applicable statute. It provided appropriate due process to the taxpayer who, with any effort at all, could have made its objection in a timely fashion. Due process requires some action by the taxpayer. The Circuit Court's decision to deny Petitioner's Petition for Appeal with regard to the 2010 Tax Assessment was proper and should be affirmed.

Respondent Council and Board respectfully request that this Court deny the Petition herein.

**BERKELEY COUNTY COUNCIL AND
COUNCIL SITTING AS BOARD OF REVIEW
AND EQUALIZATION**

By Counsel



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CERTIFICATE OF SERVICE

I, Norwood Bentley, do hereby certify that I have served a true and exact copy of the BRIEF OF RESPONDENT BERKELEY COUNTY COUNCIL, SITTING AS THE BOARD OF REVIEW AND EQUALIZATION AND AS THE GOVERNING BODY OF BERKELEY COUNTY, WEST VIRGINIA, upon the following by placing the same in the United States mail, postage pre-paid and directed as hereinbelow indicated, on this the 1st day of October, 2012.

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