

Ohio Supreme Court Dismisses Taxpayer's Appeal for Failure to Specify Error

If you have any questions about this Client Alert, please contact:

Anthony L. Ehler
614.464.8282
tlehler@vorys.com

Steven L. Smiseck
614.464.5438
slsmiseck@vorys.com

On December 3, 2009, the Ohio Supreme Court issued a decision styled *Ohio Bell Tel. Co. v. Levin*, Slip Opinion No. 2009-Ohio-6189, in which the Court addressed the sufficiency of Ohio Bell's notice of appeal to the Ohio Board of Tax Appeals ("BTA") to confer jurisdiction upon the Board. The decision is of special interest to all taxpayers and practitioners who seek administrative review of Ohio tax matters.

As required by R.C. 5727.08, Ohio Bell filed an annual report for 2003, in which it reflected \$2,416,838,541 as the value of its personal property used in business in Ohio. Upon review of the report, the Tax Commissioner issued a preliminary assessment increasing the true value of Ohio Bell's property to \$2,466,082,652. The Commissioner's assessment was premised on the valuation method prescribed by R.C. 5727.11(A), which uses cost, as capitalized on the public utility's books, less industry-specific allowances prescribed by the Commissioner.

Ohio Bell filed a petition for reassessment, claiming the Commissioner's assessment did not reflect true value in money because the Commissioner's method overstated both the cost and service lives of Ohio Bell's property. In support, Ohio Bell submitted a depreciated replacement cost study, which asserted alternative cost figures and new depreciation rates. The Commissioner denied the petition, and Ohio Bell appealed to the BTA.

In its notice of appeal, Ohio Bell specified that the Commissioner's valuation was erroneous in that "it overstates both costs and service lives and utilizes a method that does not reasonably reflect true value." Ohio Bell submitted to the BTA the same depreciated replacement cost study it had relied upon

when before the Commissioner. However, prior to Ohio Bell's merit hearing, the BTA issued a decision in which it declined to accept a depreciated replacement cost study similar to the one that Ohio Bell had submitted. See *Cincinnati Bell Tel. Co. v. Zaino* (June 10, 2005), BTA Nos. 2003-K-765, 1612, unreported. In response, Ohio Bell abandoned its cost study and subsequently submitted to the BTA an appraisal, which valued Ohio Bell's property using the cost, income, and sales comparison methods to value. The BTA accepted the appraisal evidence and issued a decision decreasing the true value of Ohio Bell's property to \$1,702,157,675.

The Court, however, ruled that the BTA had no jurisdiction to modify the Commissioner's valuation based upon Ohio Bell's unit appraisal. R.C. 5717.02 requires that a notice of appeal to the BTA "specify the errors therein complained of." The Court noted that this specificity requirement is "stringent," necessitating that specifications of error be both explicit and precise. Reviewing previous case law, the Court stressed that the specificity requirement is not met where the specification of error is so generic that it "fails to set the case apart from any other case involving the same tax." *Ohio Bell*, supra, at ¶17.

The Court held that Ohio Bell's notice of appeal had essentially stated two errors. The Court found that the first stated error, that the Commissioner's determination "overstates both costs and service lives," was not sufficiently explicit to encompass Ohio Bell's unit appraisal. The Court explained that the specification of error only asserted that the Commissioner's cost and depreciation figures should be revised because they were set too

high. According to the Court, this did not place the Commissioner on notice that Ohio Bell claimed that the Commissioner should have found value using an income-based market appraisal *as an alternative* to the cost-based approach contained in R.C. 5727.11(A). Thus, the BTA had no jurisdiction to consider the appraisal evidence.

As to the second of the stated errors, that the Commissioner's method did "not reasonably reflect true value," the Court determined that the error was too broad in that it did little more than to state Ohio Bell's general disagreement with the Commissioner's determination. The Court stated that Ohio Bell's declaration "in no way 'tie[s] the facts of the case' to the alleged error by explaining 'how' the commissioner erred in valuing its property." *Id.* ¶28. The Court reasoned that, because the statement was broad enough to encompass any alternate theory of valuation, it essentially "specifies no error at all." *Id.* Accordingly, the Court reversed the BTA and reinstated the Commissioner's determination of value.

Finally, in dicta the Court observed that Ohio Bell's appraisal-related theory was not advanced in its notice of appeal to the BTA because Ohio Bell did not present an appraisal-based case to the Commissioner. The Court cautioned that its cases "suggest that such a failure to *present* an issue to the commissioner precludes the BTA from taking jurisdiction over that issue – even if the issue is specified in the notice of appeal" *Id.* at ¶33. Compare R. C. 5727.47(A) ("The petition shall indicate the utility's objections, but additional objections may be raised in writing *** prior *** final determination.") and R. C. 5717.02 ("notice of appeal *** shall also specify the errors therein complained of").

Ohio Bell is an important reminder that taxpayers must be meticulous in the drafting of petitions, notices of appeal, and other pleadings related to the review of tax matters. The failure to be clear, precise, and comprehensive is a trap for the unwary and may be fatal to otherwise meritorious claims.

Although not specifically addressed by the Court, *Ohio Bell* also raises serious questions about the manner in which taxpayers should pursue applications for refunds, especially where the Commissioner has notified the taxpayer that the amount to be refunded is less than that claimed in the application. See R.C. 5703.70(A). *Ohio Bell* arguably requires taxpayers to specifically plead their theories for refund upon receipt of the Commissioner's notification and to offer related evidence to support those theories. Failure to do so could result in the taxpayer being barred from raising theories and presenting evidence at a later time.

Perhaps equally important is the Court's suggestion that taxpayers must be thoughtful about the evidence presented for administrative review. The Court's closing statement implies that, even if a theory of error is specified, a failure to present supporting evidence at the earliest opportunity may preclude consideration of that evidence in later proceedings. *Ohio Bell* instructs taxpayers before the Ohio Department of Taxation to reexamine both the contents of their petitions and the information they intend to present. For those currently before the Ohio BTA, *Ohio Bell* may provide food-for-thought about the true nature of the Board's *de novo* review.

IRS CIRCULAR 230 DISCLOSURE: In order to ensure compliance with requirements imposed by the U.S. Internal Revenue Service, we inform you that any federal tax information contained in this communication (including any attachments) is not intended or written to be used, and it cannot be used, by any taxpayer for the purpose of (i) avoiding penalties that may be imposed under the U.S. Internal Revenue Code; or (ii) promoting, marketing, or recommending to another person, any transaction or other matter addressed herein.

This client alert is for general information purposes and should not be regarded as legal advice.