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## How Not To Contest Property Tax Assessments In Oregon

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*Experience is simply the name we give our mistakes.*

Oscar Wilde

*Experience is the best teacher, but a fool will learn from no other.*

Benjamin Franklin

While experience may be the best teacher, when it comes to tax statutes that provide for damages and reimbursement of legal costs to the prevailing party, it is best to benefit from the experience of others. May the following review of *Freitag et al.*<sup>1</sup> give us pause to remember that statutes providing for attorney's fees to the prevailing party may be a double-edged sword, and that non-frivolous legal arguments should underlie all taxpayer claims and defenses.

### The Underlying Property Valuation Suit

*Freitag* involved property tax suits against the Oregon Department of Revenue in Oregon Tax Court based on the allegation that the county assessor had overvalued certain real and personal properties. Lincoln County intervened. The county moved to dismiss after the taxpayers' case in chief, but the court dismissed only one of the four suits. The other three suits survived the motion to dismiss because the plaintiff in those cases had testified to facts that, if proven, could sustain the taxpayer's suit.

After the taxing authority presented its case, however, the court concluded that the taxpayer's allegations, when put in proper context, amounted to "an ineffectual attack on a county's appraisal."<sup>2</sup> Freitag's only evidence as to value was his own testimony in which he offered a self-serving, unconventional theory of property valuation, and failed to substantiate the assertions of error by the appraisers. The court entered judgment for the taxing authority in the remaining cases, and Freitag's appeal was denied.

### The County's Suit For Attorney's Fees And Damages

After the denial of the appeal, the county taxing authority brought a claim against Freitag to recover \$2,600 in attorney's fees and \$5,400 for the cost of expert witness

<sup>1</sup> The underlying consolidated property valuation suits were ruled on in *Freitag v. Dep't of Revenue*, 18 OTR 368 (Or. T.C. 2005). Freitag's appeal was denied in *Freitag v. Lincoln County Assessor*, 2006 Or. Tax LEXIS 64 (Or. T.C. Mar. 28, 2006). The county's claim for attorney's fees and damages was ruled on in *Freitag v. Dep't of Revenue*, 2006 Or. Tax LEXIS 92 (Or. T.C. Apr. 27, 2006)

<sup>2</sup> 18 OTR at 376.

property appraisers. The county relied on an Oregon statute providing for attorney's fees and an Oregon tax court rule providing for "reasonable and necessary expenses incurred in the prosecution or defense of an action...."<sup>3</sup>

Under Or. Rev. Stat § 20.105(1) a prevailing party may recover attorney's fees if there is "no objectively reasonable basis" for the other party's assertion of a claim, defense or ground for appeal. Freitag argued that since three of the cases withstood a motion to dismiss, the claims necessarily had an objectively reasonable basis. The Oregon Tax Court rejected this argument, stating that the cases survived "not because [they were] supported by either law or fact, but because of the high bar the county had to overcome to succeed on its motion to dismiss." The court noted that once the county presented its case in chief, the "flimsy nature of [the taxpayer's] testimony became clear."<sup>4</sup>

The court declined to reward the county taxing authority its \$5,400 in costs of the appraisers. The appraisers were expert witnesses, and fees paid to them were not reimbursable "attorney's fees" contemplated by Or. Rev. Stat § 20.105(1). The court also declined to order reimbursement for the cost of the appraisers under Oregon Tax Court Rule 68 A(2), which provides for reimbursement of "statutory fees for witnesses" by the losing party. The court held that unlike statutory schemes governing other types of actions, there was no statute conferring the right to recover expert witness fees in the code sections governing property tax suits.

Instead, the court found another way to award damages for the frivolous suits. Without any evident urging by the taxing authority, the court stated that it must also award damages to the Department of Revenue under Or. Rev. Stat. § 305.437. The language of Or. Rev. Stat. § 305.437 states that the court must award damages if the taxpayer's position is "frivolous or groundless," and the statute defines "frivolous or groundless" as not having an "objectively reasonable basis"—the same standard in Or. Rev. Stat § 20.105(1). Thus, the county's motion to recover attorney's fees resulted in the court, apparently *sua sponte*, awarding \$1,000 in damages to the Department of Revenue as well.

## Conclusion

In the end, Freitag's property tax contest cost him an additional \$3,600. It is not hard to imagine attorney's fees in a larger cases greatly exceeding \$2,600. While few corporate taxpayers are likely to find themselves in Freitag's unrepresented shoes—this case should remind taxpayers to (1) pick your tax battles wisely, and (2) ensure counsel utilizes the "smell test" for frivolous legal positions before submitting your petition/answer.■

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<sup>3</sup> See Or. Rev. Stat § 20.105; Oregon Tax Court Rule 68 A(2).

<sup>4</sup> 2006 Ore. Tax LEXIS 92 at \*11-12.



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