BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203	Docket No.: 73962
Petitioner: **FOX RUN LOFTS,** v. Respondent: **ARAPAHOE BOARD OF COUNTY COMMISSIONERS.**	

ORDER

This matter came before the Board of Assessment Appeals on July 30, 2018, Diane M. DeVries and MaryKay Kelley presiding. Petitioner was represented by Kendra Goldstein, Esq. Respondent was represented by Benjamin Swartzendruber, Esq. Petitioner is requesting an abatement of 2015 taxes on the subject property.

As ordered by the Board at the conclusion of July 30, 2018 hearing, the parties filed legal briefs pertaining to the retroactive assessment and valuation of the subject property. Petitioner's Legal Brief was submitted on August 31, 2018. Respondent's Legal Brief was received by the Board on September 14, 2018. Petitioner filed a Reply Brief on September 28, 2018 and Respondent filed Combined Request for Leave to File Surreply and Surreply to Petitioner's Reply Brief on October 3, 2018.

Background

This matter concerns a petition for abatement of the 2015 real property taxes of a six-building multi-family condominium complex known as the "Fox Run Lofts" located at 7386 S. Blackhawk Street in Englewood, Colorado. As of the January 1, 2015 assessment date, the construction of the subject condominium complex was still underway.

In early 2015, the Arapahoe County Assessor's Office issued a Notice of Valuation for the subject property assigning a total actual value of $4,550,000 to the subject property. Out of $4,550,000 total value, $2,436,000 was attributed to the land and the remaining $2,114,000 was attributed to the value of improvements. The assessment of the improvements then under construction was set at a percentage complete based on permit values. According to Respondent, the 2015 valuation of the subject property was based on Respondent's belief that the subject was 10% complete as to the January 1, 2015 assessment date.

The Assessor's Office later determined that an error/omission was made regarding the subject's percentage of construction captured on the Notice of Valuation, resulting in significant undervaluation of the subject for tax year 2015. In order to correct the error, the Assessor's Office issued a Special Notice of Valuation ("SNOV") on February 14, 2017, reflecting a higher completion percentage for the improvements as of January 1, 2015 assessment date than was included on the original Notice of Valuation.

The Special Notice of Valuation assessed the improvements at approximately 75% complete as of January 1, 2015 and assigned a total actual value, including land and improvements, of $11,819,440 to the property. The actual value assigned to the land portion of the subject property remained unchanged from the original Notice of Valuation at $2,436,000.

After receiving Special Notice of Valuation, Petitioner filed a timely protest of the Special Notice of Valuation to the Assessor's Office, arguing that the increase in actual value was improper because it was related to "omitted value" rather than "omitted property."

The Assessor's Office issued a Special Notice of Determination on March 14, 2017, denying Petitioner's protest of the Special Notice of Valuation. Petitioner then filed a Petition for Abatement or Refund of Taxes to the Board of County Commissioners, which denied the Petition. This appeal to the Board of Assessment Appeals followed.

The central issue in this case is whether the additional 65% completion of the improvements, later discovered by the taxing authority, constitute "omitted property" or "omitted value." If the additional 65% completion rate constitute "omitted property," than they are subject to retroactive valuation. But if the additional 65% completion rate constitute "omitted value," than additional taxes may not be imposed. This legal issue is the sole issue to be determined in this proceeding. The valuation and completion percentage are not disputed issues which need to be determined by the BAA.

Omitted Property Statutes

Section 39-5-125, C.R.S. addresses the issue of when an Assessor may issue a Special Notice of Valuation for omitted property. It sets forth the following guidelines:

> (1) Except as otherwise provided in subsection (3) of this section, whenever it is discovered that any taxable property has been omitted from the assessment roll of any year or series of years, the assessor shall immediately determine the value of such omitted property and shall list the same on the assessment roll of the year in which the discovery was made and shall notify the treasurer of any unpaid taxes on such property for prior years.
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> (2) Omissions and errors in the assessment roll, when it can be ascertained therefrom what was intended, may be supplied or corrected by the assessor at any time before the tax warrant is delivered to the treasurer or by the treasurer at any time after the tax warrant has come into his hands.

(3) If taxable personal property that has been omitted from the assessment roll of any year or series of years is discovered due to a property owner or an agent of a property owner who advertises for rent furnished residential real property providing information to the assessor pursuant to section 39-5-108.5 (2), the assessor shall not notify the treasurer of any unpaid taxes on the taxable personal property for prior years and the property owner or agent shall not be liable for any such unpaid taxes for prior years.

(4) If omitted property is added by the assessor or the treasurer for a prior assessment year, then a petition for abatement or refund may be filed at any time after the taxes are levied and an amended tax bill has been generated, but before two years after January 1 of the year following the year in which the taxes are levied.

See also Section 39-10-101(2)(a)(I), C.R.S., providing similar statutory authorization for treasurers to make retroactive assessments against additional previously omitted taxable property.

Arguments Presented Before the Board

Petitioner argues that the omitted property statutes authorize retroactive assessments only where taxable property has been entirely omitted from the assessment roll, not where the property in question has been included in the assessment roll yet undervalued. According to Petitioner, because each of the six buildings was included and referenced on the assessment roll at the time the original Notice of Valuation was issued, the property was not omitted. Although an erroneous value based on incorrect percentage complete was assigned to each of those improvements, this was an error made by the Assessor's Office that resulted in omitted value, rather than omitted property. Therefore, the Assessor's Office was not authorized to conduct retroactive assessment, and the SNOV is not valid.

Respondent contends that the additional construction constitutes "omitted property" rather than "omitted value" and that Colorado's omitted property statute requires that it be valued and assessed upon discovery of the omission. According to Respondent, the Assessor's Office had never previously assessed or valued this additional 65% of the structures that existed as of the assessment date until the SNOV was issued. This is not a case of "undervaluation" or "omitted value" where the Assessor's Office simply revalued the same tangible property it had valued before, but rather one of "omitted property" where actual physical construction was omitted from the assessment rolls.

The Board's Findings

Section 39-5-125(1), C.R.S. addresses the ability of the assessor to add omitted property to the tax rolls:

> Whenever it is discovered that any taxable property has been omitted from the assessment roll of any year or series of years, the assessor shall immediately determine the value of such omitted property and shall list the same on the assessment roll of the year in

> which the discovery was made and shall notify the treasurer of any unpaid taxes on such property for prior years.

Hence, Section 39-5-125(1) authorizes retroactive assessments of taxes for prior years on previously omitted property, but not on omitted value. *See In Stitches, Inc. v. Denver County Bd. of Comm'rs*, 62 P.3d 1080, 1081 (Colo. App. 2002) ("the foregoing statutory provisions authorize retroactive assessments of property taxes only against "omitted property" and not against "omitted value"; *Cabot Petroleum Corp. v. Yuma County Bd. of Equalization*, 847 P.2d 152, 155 (Colo.App.1992), *rev'd on other grounds*, 856 P.2d 844 (Colo.1993) ("retroactive assessments of additional property taxes were not authorized by such statutes against property that was previously undervalued rather than omitted"); *Kinder Morgan v. Montezuma County Bd. of Com.*, 369 P.3d 657, 664 (Colo. 2017) ("[t]wo statutory provisions provide the authority for an assessor to retroactively assess taxes on 'omitted property'"); *Chew v. Bd. of Assessment Appeals*, 673 P.2d 1028, 1029 (Colo.App.1983) (upholding the Board's ruling that "the assessor had the authority to assess taxes retroactively on property previously omitted from the assessment rolls"); *Marsico Capital Management, LLC v. Denver Board of County Commissioners*, 342 P.3d 462 at 464 (Colo. App. 2013) ("Section 39-5-125(1), C.R.S. allows the assessor to add omitted property to the tax rolls"); *Bachelor Gulch Operating Company, LLC v. Board of county Commissioners of Eagle County*, 316 P.3d 43, 48 (Colo. App. 2013) ("section 39-5-125(1) unambiguously allows an assessor to conduct a valuation only when 'it is discovered that [the] taxable property has been omitted"); *24, Inc. v. Bd. of Equalization of Arapahoe County*, 800 P.2d 1366, 1368 (Colo. App. 1990)("statutory language and these cases make it abundantly clear that § 39-5-125 cannot be used to justify this increase in the value of taxpayer's property"); *Jet Black, LLC v. Routt County Board of County Commissioners*, 165 P.3d 744, 750 (Colo. App. 2006) ("§ 39-5-125(1) authorizes retroactive assessments of taxes for prior years on previously omitted property, but not on omitted value.")

Here, the statutory language is clear in that the directives in Section 39-5-125 apply "whenever it is discovered that any taxable property has been *omitted from the assessment roll*... the assessor shall determine the value of such omitted property and shall *list the same on the assessment roll* ..." (Emphasis added). The Court in *Chew v. Bd. of Assessment Appeals*, 673 P.2d 1028, 1029 (Colo.App.1983) expressly stated that Section 39-5-125(1) is "unambiguous" ("This statute is unambiguous and controls our determination that the trial court's order was correct"). Similarly, the Court in *Bachelor Gulch* referred to the directives in Section 39-5-125(1) as "unambiguously allow[ing] an assessor to conduct a valuation only when 'it is discovered that [the] taxable property has been omitted from the assessment roll of any year or series of years.'"). *Bachelor Gulch*, 316 P.3d at 48. "Where the statutory language is clear and unambiguous there is no need to resort to interpretative rules of statutory construction; the statute, in that instance, should be applied as written, since it may be presumed that the General Assembly meant what it clearly said." *Griffin v. S.W. Devanney & Co.*, 775 P.2d 555, 559 (Colo. 1989).

The evidence presented before the Board is undisputed that each of the six buildings was captured on the assessment roll at the time the original Notice of Valuation was issued to the Petitioner. Each of the improvements was valued and taxed accordingly. The value placed on the

tax rolls reflected a lower value due to Assessor's mistaken belief as to the level of completion of the subject property. However, no property was omitted from the tax roll. No property was required to be listed on the assessment roll after its discovery by the assessor. Assessor only increased the value of the property already listed on the assessment rolls after discovery that the property was valued too low based on the Assessor's error in valuing the subject on 10% complete.

The Board's review of the case law presented by both parties further supports the Board's application of the statutory language, as written, in resolving the parties' dispute in favor of Petitioner.

In *Marsico Capital Management, LLC v. Denver Board of County Commissioners*, 342 P.3d 462 at 464 (Colo. App. 2013), the court stated that Section 39-5-125(1) prevents taxing authorities from "imposing additional taxes based on revaluations of property that has already been valued and taxed." *Id.* at 464. In accordance with this statutory scheme, the court concluded that certain tenant improvements at issue that "*were previously omitted from the assessment roll*" and therefore not valued or taxed could be retroactively assessed because they were "distinct additions being taxed for the first time." *Id.* (Emphasis added). The court in *Marsico* found persuasive the reasoning of courts in other jurisdictions which concluded that "when all improvements at issue on the property are omitted, the assessor is assessing for the first time property which escaped assessment entirely." *Id.* at 465. The Court distinguished between "omitted value" and "omitted property" by describing the former as a result of an "error in judgment resulting in undervaluation" and the latter as "assessing for the first time property which escaped assessment entirely." *Id.*

In *Bachelor Gulch Operating Company, LLC v. Board of county Commissioners of Eagle County*, 316 P.3d 43 (Colo. App. 2013), the court analyzed the word "omitted" as contemplated in Section 39-5-125, C.R.S. The court held that the property that did not exist as of the assessment date could not be "omitted" because "it was not a property that existed but was *not captured on the assessment rolls.*" *Id.* at 48-49. (Emphasis added). The court cited Webster's and Black's Law Dictionaries' definition of the term "omitted" to mean, as pertinent here, "to have been left out or left unmentioned." *Id.* at 48. This definition, the court reasoned, "suggests that the omitted property could have been included in the first place." *Id.* The court also cited a definition from another jurisdiction that defines "omitted property" as "previously existing tangible real property not included in the assessment." *Id.*

In *In Stitches, Inc. v. Denver County Board of County Commissioners*, 62 P.3d 1080 (Colo. App. 2002), the court found that retroactive assessment was against the omitted value where the assessor initially taxed the entirety of taxpayer's personal property based on the assessor's best information available ("BIA") and later made additional assessments of the same property based on the determination from an audit that taxpayer's personal property had a substantially higher valuation. The court concluded that "...the entirety of taxpayer's personal property was previously taxed based on the assessor's BIA valuations, although it was undervalued, and we cannot say any property was *omitted from the assessment roll*." *Id.* at 1082. (Emphasis added).

In *Chew v. Board of Assessment Appeals*, 673 P.2d 1028 (Colo. 1983), the court affirmed a retroactive assessment of taxes on property improvements, after the property's initial appraisal,

where the "*property [was] previously omitted from the assessment rolls*." *Id.* at 2019. (Emphasis added). In *Chew*, the assessor issued notices of assessment on the land portion of the property but entirely omitted the value of the improvements from the assessment rolls. The Court held that Section 39-5-125 authorized retroactive assessment of improvements as "omitted property."

In *Cabot Petroleum Corporation v. Yuma County Board of Equalization*, 847 P.2d 152 (Colo. App. 1992), the court concluded that there has been no "omitted property" within the meaning of Section 39-5-125 where taxes were assessed against all of taxpayer's leasehold interests based on value of the production that was reported at the time of assessment. The court disallowed additional property tax assessments that were based on the additional proceeds taxpayer had received in the litigation settlement subsequently to the original assessment. *Id.* at 156. The court held that "no separate taxable property has ever been omitted, but instead, all taxable property has only been undervalued." *Id.* at 155. The Court in *Cabot* analyzed the holding in *Chew*, noting that improvements are required to be appraised and valued separately from land for property tax purposes and separate and distinct taxable property had been omitted from the assessment of property taxes in that case. *Id.*

This distinction between omitted property and previously undervalued property has also been recognized in the reference manuals published by the Property Tax Administrator (PTA). The Assessor's Reference Library ("ARL") promulgated by the State Property Tax Administrator pursuant to Section 39-2-109(1)(e), C.R.S., and binding on county assessors, supports the Board's position. The interpretations of statutory provisions by agencies charged with their administration must be given deference. *See Besch v. Jefferson County Bd. of County Comm'rs,* 20 P.3d 1195 (Colo. App. 2000). The ARL provides that "[o]mitted property consists of any taxable property, such as personal property, land, an improvement, or both land and improvement, that is *not listed on the current assessment roll*." ARL, Vol. 2 at page 3.20. (Emphasis added). The ARL goes on to state that "[i]f the item of personal property, the improvement, or the land *was not listed in the appraisal records and/or its value had not been placed on the assessment roll*, the property has been omitted. (Emphasis added). If a value had been placed on the property and the taxpayer received a Notice of Valuation, and it is later discovered that the property has a greater value, the property has been undervalued and the value cannot be increased." *Id.* at 3.21.

The Board's review of the authorities mentioned above weigh against retroactive taxation of the subject property for the 2015 tax year. Applying the statutory language as written, "omitted property" is that which was omitted from the assessment roll and which, upon discovery, must be added on the assessment roll. The property in question here, namely, the six buildings comprising a multi-family condominium complex, were all listed on the assessment roll, valued and taxed. Although, as Respondent argues, the property was valued at 10% complete instead of 75% as later discovered, the omitted 65% percent completion rate is not something that could be separately added to the assessment roll. Thus, the property in question here does not fit the statutory definition of the omitted property as the property "omitted from the assessment roll" and the legal consequences of the omission, which require the Assessor to add the newly-discovered taxable property to the assessment roll, does not apply in this case.

Review of the case law and the ARL further supports the Board's finding that the omission of the subject's 65% completion rate as of the January 1, 2015 assessment date could not be retroactively assessed and taxed. This case does not present a factual scenario where, as in *Marsico* and *Chew* cases, the subject property was omitted from the assessment roll escaping assessment entirely. To the contrary, each of the subject improvements was listed on the assessment rolls, valued and taxed. As such, the subject property could not be said to have been "left out" or "unmentioned" from the assessment rolls as that definition of "omitted" has been applied in *Bachelor Gulch.* Similar to the facts in *Cabot* and *In Stitches*, the entirety of the subject property was previously taxed based on the assessor's valuations, although it was undervalued, preventing the conclusion that any property was omitted from the assessment roll. Further, the Board finds that the language in the ARL provides additional support to the Board's finding in this case as the ARL's directive closely trail the statutory language, as written, in defining "omitted property" as one that has not been placed on the assessment roll.

Moreover, Respondent's legal position in arguing for increase in the subject's value based on the omitted 65% completion rate is weakened by significant factual discrepancies. First, although Respondent claims that the original NOV reflected 10% complete "based on permit values," the review of the building permits issued for the subject by the Building Department as of January 1, 2015 indicates a completion rate significantly higher than 10%. Second, the Board is troubled by Respondent's inability to provide any definitive evidence as to the subject's completion rate on January 1, 2015; the Board finds Respondent's aerial photographs of the subject from March, 2014 and April, 2015 inadequate indicators of the subject's condition on the relevant assessment date. And third, the mathematical calculations behind Respondent's argument do not support Respondent's claim that the subject was initially valued based on 10% complete and later re-valued at 75% complete (a 65% increase from the original valuation of $2,114,000 results in $15,855,000 yet Respondent's SNOV inexplicably reflects an improvement value of $9,383,400).

In sum, the Board finds that Respondent undervalued the property by applying an incorrect level of completion in determining the subject property's 2015 value. This was an error in judgment and Respondent's re-valuation of the same subject property using a higher percent complete rate is an impermissible attempt to recapture value which was previously omitted.

ORDER:

The Petition is granted.

APPEAL:

If the decision of the Board is against Petitioner, Petitioner may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-nine days after the date of the service of the final order entered).

If the decision of the Board is against Respondent, Respondent, upon the recommendation of the Board that it either is a matter of statewide concern or has resulted in a significant decrease in the total valuation for assessment of the county wherein the property is located, may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provision of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-nine days after the date of the service of the final order entered).

In addition, if the decision of the Board is against Respondent, Respondent may petition the Court of Appeals for judicial review of alleged procedural errors or errors of law when Respondent alleges procedural errors or errors of law by the Board.

If the Board does not recommend its decision to be a matter of statewide concern or to have resulted in a significant decrease in the total valuation for assessment of the county in which the property is located, Respondent may petition the Court of Appeals for judicial review of such questions.

Section 39-10-114.5(2), C.R.S.

DATED and MAILED this 13th day of November, 2018.

BOARD OF ASSESSMENT APPEALS

MaryKay Kelley

Diane M. DeVries

I hereby certify that this is a true and correct copy of the decision of the Board of Assessment Appeals.

Milla Lishchuk

STATE OF COLORADO SEAL BOARD OF ASSESSMENT APPEALS