

05-1842
TAX TYPE: PROPERTY
TAX YEAR: 2005
SIGNED: 10-9-2007
COMMISSIONERS: B. JOHNSON, D. DIXON, M. CRAGUN
RECUSED: P. HENDRICKSON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER Petitioner,</p> <p>v.</p> <p>BOARD OF EQUALIZATION OF SALT LAKE COUNTY, UTAH,</p> <p>Respondent.</p>	<p>INITIAL HEARING ORDER</p> <p>Appeal No. 05-1842</p> <p>Serial No. #####</p> <p>Tax Type: Property Tax/Locally Assessed</p> <p>Tax Year: 2005</p> <p>Judge: Phan</p>
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This Order may contain confidential "commercial information" within the meaning of Utah Code Sec. 59-1-404, and is subject to disclosure restrictions as set out in that section and regulation pursuant to Utah Admin. Rule R861-1A-37. The rule prohibits the parties from disclosing commercial information obtained from the opposing party to nonparties, outside of the hearing process. However, pursuant to Utah Admin, Rule R861-1A-37, the Tax Commission may publish this decision, in its entirety, unless the property taxpayer responds in writing to the Commission, within 30 days of this notice, specifying the commercial information that the taxpayer wants protected. The taxpayer must mail the response to the address listed near the end of this decision.

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE
For Respondent: RESPONDENT REPRESENTATIVE 1, Deputy Salt Lake
County District Attorney
RESPONDENT REPRESENTATIVE 2, Tax Administration

STATEMENT OF THE CASE

Petitioner had originally filed pursuant to Utah Code Sec. 59-2-1006 this appeal from the decision of the County Board of Equalization, which found the property at issue to be subject to the privilege tax for tax year 2005. Subsequent to filing the appeal, the parties submitted a Stipulation dated REMOVED, 2006 in which they agreed the property was exempt. The Tax Commission issued an Order of Approval, approving the Stipulation on REMOVED, 2006. On REMOVED, 2007, Respondent filed with the State Tax Commission a Motion of Entry of Order Granting Relief from Judgment Pursuant to the U.R.C.P. Rule 60(b) (“Rule 60(b) Motion”). This Motion was combined with the underlying issue for purposes of the Initial Hearing, which was held pursuant to the provisions of the Utah Code Ann. Sec. 59 -1-502.5, on June 21, 2007.

APPLICABLE LAW

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court. (Utah Rule Civil Procedure 60(a).)

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party of his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (6) any other reason justifying relief from the operation of the judgment. The motion shall

be made within a reasonable time and for reasons (1), (2) or (3), not be more than 3 months after the judgment, order or proceeding was entered or taken. (Utah Rule Civil Procedure 60(b).)

Except as provided in Subsections (1) (b) and (c), a tax is imposed on the possession or other beneficial use enjoyed by any person of any real personal or property which for any reason is exempt from taxation, if that property is used in connection with a business conducted for profit. (Utah Code Sec. 59-4-101(1) (a))

All tangible taxable property shall be assessed and taxed at a uniform and equal rate on the basis of its fair market value, as valued on January 1, unless otherwise provided by law.

Any person dissatisfied with the decision of the county board of equalization concerning the assessment and equalization of any property, or the determination of any exemption in which the person has an interest, may appeal that decision to the commission by filing a notice of appeal specifying the grounds for the appeal with the county auditor within 30 days after the final action of the county board. (Utah Code Sec. 59-2-1006(1).)

DISCUSSION

The subject property is parcel no. (PARCEL NUMBER 1) and is located at (ADDRESS REMOVED) Salt Lake City, Utah. The County Assessor's Office had originally set the value of the subject property, as of the lien date at \$\$\$\$\$. The Salt Lake County Board of Equalization sustained the value and denied Petitioner's request for exemption from privilege tax. The subject property is an (PROPERTY REMOVED),

situated on ##### acre of land. It is located near the (NAME OF BUSINESS REMOVED). The subject property is owned by (NAME REMOVED 1) and is leased to Petitioner.

The history of the procedural process both at the County level and the appeal filed with the State Tax Commission is relevant to this decision. It was Petitioner's contention on appeal to the County Board of Equalization that this property should not be subject to the privilege tax imposed at Utah Code Sec, 59-4-101, arguing it was not used in a commercial business operation. As part of this process Petitioner had submitted documents to Respondent including articles of incorporation and information supporting Petitioner's contention that is was not performing any type of commercial (PORTION REMOVED). Petitioner had provided the documents requested by the Hearing Officer for the County Board of Equalization. In addition he indicated the hearing officer may have pulled some documents from on line records. The County Board of Equalization denied Petitioner's appeal. Petitioner then appealed the County Board's decision to the State Tax Commission. An Initial Hearing was scheduled on June 26, 2006.

Prior to the Initial Hearing Petitioner's representative had not submitted additional documents with the Tax Commission appeal that had not been submitted at the County Board level. Petitioner's representative had no discussions with County representatives after filing the appeal to the State Tax Commission until (REMOVED), 2006, when (RESPONDENT REPRESENTATIVE 3) Deputy County Assessor, called him and offered to enter into a stipulation of exempt status. In the affidavit of (RESPONDENT REPRESENTATIVE 3), dated, (REMOVED) 2007, (RESPONDENT REPRESENTATIVE 3) stated, at prgh 5, "I received mistaken information that

(PETITIONER) was a non-profit corporation. Based on this erroneous information, I agreed to enter into a stipulation that would resolve the appeal.” Neither in the affidavit, nor during the hearing did Respondent point to any specific document that may have been provided by Petitioner that was erroneous. There is no indication that Petitioner provided mistaken evidence. For this reason it appears the mistake was in the interpretation of the evidence submitted by Petitioner or evidence Respondent had obtained independently.

(RESPONDENT REPRESENTATIVE 3) prepared the Stipulation and faxed in to Petitioner. However, the Stipulation, as (RESPONDENT REPRESENTATIVE 3) acknowledged in his affidavit, had an inadvertent transposition error as to the parcel number. The parcel number stated on the Stipulation had been (PARCEL NUMBER REMOVED 2) (“(PARCEL NUMBER REMOVED 2), while the subject parcel was in fact (PARCEL NUMBER REMOVED 1). (RESPONDENT REPRESENTATIVE 3) thought that he was entering into a stipulation with Petitioner concerning the correct parcel, (PARCEL NUMBER REMOVED 1), and Petitioner thought that he was signing a stipulation regarding (PARCEL NUMBER REMOVED 1) as well. Petitioner signed and returned the stipulation. It was submitted to the Tax Commission, which issued an Order of Approval on (REMOVED), 2006, but the order listed the incorrect, (PARCEL NUMBER REMOVED 2) that was listed in the parties’ stipulation. It was clear from the appeal file that the parcel number on the Stipulation was erroneous and not the parcel that Petitioner had appealed to the Tax Commission. The error was merely carried over into Order of Approval.

Petitioner’s representative thought that the matter was resolved and he waited for the refund check. As he hadn’t received the expected refund he asked (NAME

REMOVED), Salt Lake County Assessor, about the refund in November 2006. He indicates that the County had not informed him until he asked about the refund that there was a problem with the stipulation. Later on (REMOVED), 2006, Petitioner received from the County a Stipulation and Motion for Entry of Order Granting Relief, which had Petitioner, signed it, would have been a joint request to set aside the Tax Commission's Order of Approval. Petitioner did not sign that stipulation. On (REMOVED), 2007, Respondent filed its Rule 60(b) Motion.

Eventually from this request, the matter proceeded to the Initial Hearing at which the parties were expressly to address the issue of whether the original stipulation and Tax Commission Order of Approval should be set aside as requested in the Rule 60b Motion, or whether they should instead be corrected to state the parcel number that was the subject of this appeal. The parties were also to address the merits of the appeal, which was whether Petitioner was subject to the privilege tax imposed tax at Utah Code Sec. 59-4-101, for the property at issue.

Considering the first issue, Respondent's Rule 60(b) Motion, the Commission first notes that although Respondent argued that the judgment should be set aside under Rule 60(b)(4), which provides that a judgment that is void may be set aside, this is not the subsection of 60(b) that the Commission would find to be applicable. As Respondent noted courts have limited this provision to where the judgment is void because the court lacked jurisdiction to adjudicate the matter.¹ The Commission disagrees with the Respondent as to how this applied in the case at hand. The Tax Commission clearly has jurisdiction pursuant to the Utah Code 59-2-1006 over the subject matter and parties.

¹ Courts have held that a judgment is void under Rule 60(b) "only is the court that rendered it lacked jurisdiction of the subject matter or of the parties" (citation omitted.) *Richins v. Delbert Chipman & Sons Co.*, 817 P.2d 382, 385 (Utah Ct. App)

Petitioner had filed the appeal using the correct number with the Tax Commission and the appeal had been opened as an appeal regarding the correct parcel number. It was the correct parcel that was the subject of this appeal. The problem was one of a mistake or clerical error. Respondent's request would fit more properly under Rule 60(b) 1. The Commission would note that pursuant to this subsection, Respondent's request should have been filed within three months of the date the Tax Commission issued its Order of Approval, and Respondent missed that deadline by several months. However under Rule 60(a) the Commission may correct a clerical error at any time.

In determining whether the stipulation should be set aside, or the clerical error corrected, the Commission notes that parties are typically bound by their stipulations.² Secondly, it is clear from (RESPONDENT REPRESENTATIVE 3), (Affidavit that the stipulation error was an inadvertent transposition error. (RESPONDENT REPRESENTATIVE 3) thought he was signing a stipulation regarding the subject property. Clearly Petitioner's representative signed the stipulation thinking it was in regards to the subject property. Respondent had originally agreed that the subject property was not subject to privilege tax and then, changed its position after the Order of Approval had been issued.

Respondent now argues that the Tax Commission should set aside the Stipulation and Order of Approval based on the County's error regarding the legal status of (PETITIONER) or, in the alternative, set aside the Stipulation and Order as being contrary to law. Respondent points to three cases supporting its contention that erroneous

² See the decision in *Dove v. Cude*, 710 P. 2d 170 (Utah 1985); *First of Denver Mrtg. Investors v. C.N. Zundel and Associates* 600 P. 2d 521 (Utah 1979); and *Alliant Techsystems, Inc. v. Salt Lake County Bd. Of Equalization*, 110 P.3d 691 (Utah 2006).

stipulations could be set aside.³ However, upon consideration in this matter, the Commission concludes that setting aside the Stipulation is not the appropriate remedy. An Order of Approval had been issued by the Tax Commission that continued the inadvertent transposition error on the Stipulation. Utah Rule of Civil Procedure 60(a) provides that clerical mistakes in orders may be corrected by the court at any time.

The courts have defined ‘clerical error’ as “a type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment. See *Stranger v. Sentinel Sec. Life Ins. Co.*, 669 P.2d 1201, 1206 (Utah 1983). In this case it is clear from the appeal file and the record that the correct parcel number was (PARCEL NUMBER REMOVED 1). The correct parcel number does not involve legal decision or judgment. Additionally, it is clear that both parties intended at the time they entered into the Stipulation that the Stipulation be in regards to the correct parcel number. Correcting its Order of Approval under Rule 60(a) to the parcel number properly before the Commission on appeal would be reflective of the parties’ intent at the time they submitted the Stipulation to the Tax Commission. The Courts have upheld correction of errors in reliance on Rule 60(a) even when one of the parties argued that the order should instead be vacated. See *Hansen v. Kik*, 142 P.3d 558 (UT Crt. App. 2006).

Respondent does argue that regardless of the clerical error in the Order of Approval, the Tax Commission should set it aside on the basis that it is violation of the statutes or constitution. Respondent points to the Court’s decision in *Alliant Techsystems, Inc. v. Salt Lake County Bd. Of Equalization*, 110 P.3d 691 (Utah 2005). In

³ Respondent cites to *Dove v. Cude*, 710 P. 2d 170 (Utah 1985); *First of Denver Mrtg. Investors v. C.N. Zundel and Associate* 600 P. 2d 521 (Utah 1979); and *Alliant Techsystems, Inc. v. Salt Lake County Bd. Of Equalization*, 110 P. 3d 691 (Utah 2006).

Alliant the Utah Supreme Court set aside a settlement agreement as unenforceable because it violated fundamental constitutional and statutory provisions governing tax law. Respondent argues that the subject property pursuant to the constitution and Utah statutes was subject to the privilege tax, therefore, the stipulation to the contrary should be set aside.

At the Initial Hearing the parties did present their positions regarding whether the property was subject to the privilege tax, which turned on whether or not it was used in a business for profit under Utah Code Sec. 59-4-101. Petitioner's representative explained that he and two others had set up Petitioner as a "C" corporation as a way to share the costs of owning a (PROPERTY), operating and maintaining the (PROPERTY) for private use, and to protect the principals of the corporation from liability to the extent possible. He indicated that they set the corporation up in this manner on advice of an attorney and they had determined that it should be a "C" Corporation instead of an "S" Corporation because they did not want to mingle the corporate tax issue with the personal tax issues. Petitioner's representative indicates that Petitioner does not have a business license, collect sales tax, have employees, distribute profits, pay dividends, do any business with the public, advertise or have a telephone directory listing. The only business that Petitioner conducts is the corporate principals' personal use of (PROPERTY). The amounts that the corporate principals pay into the corporation are to cover the costs of owning and maintaining the (PROPERTY). The only income Petitioner received were these payments from the principals that included some fixed monthly payment amounts and then an additional amount for the hours of (USE).

Petitioner provided information that clearly indicated the business was private (PROPERTY) operations, not commercial operations. Petitioner's representative and the other two principals of the corporation had private (NAME REMOVED 3) licenses. The insurance policy was for private use of the (PROPERTY). It specifically prohibited any commercial use. Petitioner indicated, and it was not refuted by Respondent, that if Petitioner's (PROPERTY) were to be used in any commercial capacity, this would be in violation of the (AGENCY NAME REMOVED) regulations and the (AGENCY NAME REMOVED) would put a halt to such use.

Respondent points out that Petitioner is set as a "for profit" corporation. The entity was not a nonprofit corporation. Respondent points out that Petitioner do receive income, even if it is from the principals. The business then pays expenses, claims depreciation of assets and required to file tax returns.

The Tax Commission concludes that it would be inappropriate to set aside its Order of Approval and the parties' stipulation on the basis that the stipulation is in violation of statute or constitution. There are arguments in support of either parties' position, and unlike the facts in *Alliant*, the stipulation in this matter does not clearly disregard the law. The parties chose to settle an issue bases on the information they had at the time. The Commission will not set aside the parties' stipulation now that one side has changed its position.

The parties should not infer from this decision that the Tax Commission has decided one way or the other that the property is subject to privilege tax. If that issue is properly brought before the Commission for subsequent years, the Commission will review the issue at that time and make a determination.

DECISION AND ORDER

Based upon the foregoing, the Tax Commission denies Respondent's Motion and hereby corrects its Order of Approval dated July 5, 2006 by the following:

The Order of Approval dated (REMOVED), 2006 is hereby set aside. Based on the Stipulation of the parties dated (REMOVED), 2006, which the parties intended to submit in regards to (PARCEL NUMBER REMOVED 1), but which contained a transposition error as to the parcel number, the Commission finds that from the 2005 tax year parcel (PARCEL NUMBER 3)-is not subject to the privilege tax. It is so ordered. The County Auditor is hereby ordered to adjust its records in accordance with this decision.

This Decision does not limit a party's right to a Formal Hearing. Any party to this case may file a written request within (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed to the address listed below and must include the Petitioner's name, address, and appeal number.

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

Failure to request a Formal Hearing will preclude any further appeal right in this matter.

DATED this ____ day of _____, 2007

Jane Phan
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION.

The agency has reviewed this case and the undersigned concur in this decision.

DATED this ____ day of _____, 2007

RECUSED

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner