IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-01219

AARCO OIL AND GAS COMPANY, et al.

Appellants/Plaintiffs

vs.

EOG RESOURCES, INC., et al.

Appellees/Defendants

On Appeal from the Chancery Court of Covington County, Mississippi

REPLY BRIEF OF APPELLANTS BELHAVEN PRODUCTION, LLC AND LITTLE RIVER DRILLING, LLC

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Introduction

Both EOG and Fairchild acknowledge that the outcome of this appeal depends on the validity of the 1942 tax sales of the subject property. EOG and Fairchild also concede that there was no equalization or board approval of the 1941 supplemental assessment of the subject property on which the 1942 tax sales are premised. And, EOG and Fairchild admit that the mineral owners were not given actual notice of the 1942 tax sales; rather, only publication notice was utilized.

So, the dispositive issues concerning the validity of the 1942 tax sales can be distilled as follows:

1. Can a tax sale that is premised on an "off year" supplemental assessment of real property that was never equalized or approved by the Board of Supervisors pass valid title?

2. Are the tax sales void for failure to provide adequate notice and due process under the U.S. Constitution?[1]

As for the failure to equalize the 1941 supplemental assessment before the 1942 tax sales, EOG and Fairchild essentially contend that since the statutory scheme in place only required biennial assessments of real property, then a tax sale based on an off-year supplemental assessment of real property that was never equalized *must* have been permissible. But they cite no authority for this proposition, and they fail to sufficiently account for the authorities requiring that landowners be given notice and an opportunity to object to an assessment of their property after the assessment is equalized and finalized by the Board, as was required by Sections 3162, 3164 and 3165 of the Code of 1930 (examination and equalization and of the tax rolls in July;

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[1]Belhaven adopts and incorporates by reference the opening and reply briefs of Wheless Investment Company, et al. on the issues relating to the constitutional due process deficiencies in the notice by publication of the 1942 tax sales.

after corrections and adjustments, "entry of an order approving the assessments"; and then an opportunity for taxpayers to object).

EOG and Fairchild do not seriously dispute that there was never any order entered by the Board of Supervisors approving the 1941 supplemental assessment of real property on which the 1942 tax sales through which they claim are premised. Given the indisputable record evidence that the 1941 supplemental real property assessment was never noticed, equalized or made available for objections as required by the statutes in place, the 1942 tax sales are plainly invalid. EOG's reliance on a biennial assessment of the property in 1940 (when the property was valued at blank or nothing) to validate the 1941 supplemental assessment is misplaced as a matter of law. EOG/Fairchild cannot point to any statute or other law suspending notice and equalization requirements for the 1941 off-year supplemental assessment. Indeed, none exist.

To the extent the statutory scheme in place for assessing and taxing property failed to address procedures for off-year assessments (in terms of notice, equalization and an opportunity to object), the statutory scheme was applied in a patently unconstitutional manner by allowing the taxing authority to precipitate a forfeiture of property based on an off-year assessment without following the statutory protections in place for biennial assessments, such as notice, equalization and an opportunity to object, as required by Sections 3162, 3164 and 3165 of the Code of 1930.

For these reasons and others discussed below, the lower court's judgment should be reversed and rendered.

The absence of notice, equalization and an opportunity to object to the 1941 off-year assessment is fatal to the validity of the 1942 tax sales.

Fairchild continues to argue that the Board of Supervisors was not obligated to equalize real property assessments in 1941, including the 1941 supplemental real property assessment on

which the 1942 tax sales is premised. However, Fairchild cites no authority for its position on this core issue. Nevertheless, to cover the deficiency in its presentation, Fairchild tries to create the impression that some level of notice and taxpayer participation was provided. In a clever, but quite revealing, turn of phrase, Fairchild states: "the Board minutes indicate that the Board of Supervisors not only approved the personal property roll, but they also made reference to approval of the real property roll for 1941." Fairchild Br. at 10 (emphasis added). This statement, not followed by any citation to the record, impliedly acknowledges that only the personal property roll was actually equalized and approved by order of the Board in 1941. Careful scrutiny of the Board's minutes confirms that the only order approving an equalized roll was the order entered with regard to personal property. (R. 1264-1265) There was no notice, equalization and approval process in 1941 regarding the 1941 supplemental real property assessment. The record is clear on this point. The passing reference in the Board's 1941 minutes to "the filing of the real and personal assessment rolls" (R. 1783) falls far short of the statutory mandate of notice, equalization and an opportunity to object as to the real property assessment. Miss. Code of 1930, Sections 3162, 3164 and 3165.

Unlike Fairchild, EOG makes no effort to pretend that the 1941 supplemental real property assessment was noticed and equalized; instead, EOG simply argues that no such protections to the taxpayer were required. To support its position that equalization of the assessment was not required, EOG cites a single case, *Kuhn v. Hague*, 109 So.2d 627 (Miss. 1959), which merely holds that biennial assessments (that followed statutory requirements of notice, equalization and an opportunity to object) are sufficient to validate a tax sale premised on the failure to pay taxes assessed in the biennial assessment. This holding is certainly true and is hardly controversial. However, *Kuhn* fails to address the core question presented by this appeal:

whether an intervening and subsequent supplemental assessment *that is not equalized* can provide a valid basis for a subsequent tax sale. In *Kuhn*, the court upheld the validity of a tax sale in 1938 for non-payment of 1937 taxes due on a 1936 biennial assessment for the years 1936 and 1937. But in *Kuhn*, there was no subsequent intervening supplemental assessment that was never equalized and on which the tax sale was based. EOG is arguing that the 1941 intervening supplemental assessment or real property did not have to be equalized but was somehow automatically made legitimate by the fact that there had been a separate and earlier biennial assessment of real property in 1940. This is not what *Kuhn* says and is not supported by any authority cited by EOG.

Interestingly, in *Kuhn*, the court noted that the biennial assessment was "the proper and only method for assessing lands" under the Code of 1930. Since this is so, under *Kuhn*, the 1941 supplemental assessment–which not a biennial assessment--is facially improper and invalid as a matter of law. Thus, not only are the facts of *Kuhn* distinguishable, but *Kuhn* also appears to hold that interim assessments, like the 1941 supplemental assessment on which EOG relies, are not valid. So, instead of supporting EOG's argument, *Kuhn* undermines the most basic pillar in EOG's argument.

EOG's efforts to distinguish *Matthieu v. Crosby Lumber & Mfg. Co.*, 49 So. 2d 894 (Miss. 1951) and *White v. Merchants & Planters Bank*, 90 So. 2d 11 (Miss. 1956), are similarly flawed. These cases stand for a simple proposition of fundamental fairness--that "notice to taxpayers to appear and object to assessments is jurisdictional, and that it must affirmatively appear on the minutes of the board of supervisors that such notice was given, otherwise a tax sale under such an assessment is void...". *White*, 90 So. 2d at 14. The record makes clear that no such notice, equalization and an opportunity to object, as required by Sections 3162, 3164 and

3165 of the Code of 1930, was given with regard to the 1941 supplemental assessment. EOG glosses over this, merely noting that "notice was properly given of the *1940-1941 assessment*," a reference to the biennial assessment in 1940 for the years 1940 and 1941 (when the property was valued at blank or nothing), and not to the separate and distinct supplemental assessment in 1941 on which the 1942 tax sales is premised. EOG cites no authority for the proposition that a supplemental assessment of real property, that is never equalized and as to which no notice and an opportunity to object is provided, can provide an adequate foundation for a later tax sale. As *Matthieu* teaches, a tax sale premised on such an assessment as to which there is no notice and an opportunity to object does not "vest [in the purchaser] any title to the land." 49 So. 2d at 895.

Belhaven cited *Adams v. Tonella*, 14 So. 17 (Miss. 1893) as declaring unconstitutional a scheme by which the taxing authority could audit and assess undervalued property outside the statutory framework for assessing property and equalizing property assessments. The point was that performing an interim, off-year assessment and selling the property at a tax sale with no equalization ever having been performed, is just such an unconstitutional taking by the taxing authority. EOG tries to side-step this issue, claiming that the taxing authority did not go behind any board decisions to assess and sell the property without any equalization of the assessment. EOG Br. at 19. In doing so, EOG only magnifies the deficiency. There was no board approval of the 1941 supplemental assessment to go behind. The 1941 supplemental real property assessment is separate and additional to the 1940 biennial assessment on which EOG relies to validate the 1942 tax sales. The failure of the board to equalize this separate and additional assessment in 1941 is undisputed; it was undertaken in the absence of any of the constitutional protections mandated by Article IV, Section 112, of the Mississippi Constitution (providing for "uniform and equal" taxation), and by Sections 3162, 3164 and 3165 of the Code of 1930

(requiring notice, equalization and an opportunity to object).

EOG ultimately contends that since the biennial assessment and equalization statutory scheme does not affirmatively address equalization of supplemental, off-year assessments, then no such equalization was required by statute and, hence, there can be no defect in the 1942 tax sales. But this is not so. To the extent the statutes do not address equalization of off-year assessments, the scheme is constitutionally flawed as applied in this case, as was the scheme under which the taxing authority was operating in *Adams*. As EOG concedes, "the whole arrangement" was unconstitutional in *Adams*, 14 So. at 20. Just as in *Adams*, the role of the board in ensuring uniformity of taxation would be nullified if tax sales, like the ones in issue, could be effectuated without the board providing notice of the assessment, equalization and an opportunity of the taxpayer to object. Simply stated, an unequalized assessment cannot provide an adequate and constitutional basis for a related tax sale, and the entire supplemental assessment roll is to be stricken. *Berryhill v. Johnston*, 39 So.2d 530, 532 (Miss. 1949).

The mineral owners' failure to have their interests separately assessed does not cure the constitutional defects in the 1942 tax sales.

EOG argues that the mineral owners' failure to have their interests separately assessed, as permitted by Section 3146 of the Code of 1930, resulted in a tax sale of the surface that carried with it the mineral estate, citing *Stern v. Parker*, 25 So. 787 (Miss. 1946) and *Clement v. R.L. Burns*, 372 So. 2d 790 (Miss. 1979). This argument misses the mark, however, because it assumes that the 1942 tax sales were *otherwise valid* which, as demonstrated above, is plainly not so. Because the 1942 tax sales are indisputably premised on an unequalized supplemental assessment of the surface estate, they are patently invalid and defective to pass title of any kind in any estate. *Matthieu*, 49 So. 2d at 895. Any failure of the mineral owners to report their interests for separate assessment in 1940 or 1941 is inconsequential to this defect. Thus, EOG's

argument in this regard changes nothing in the legal analysis of the validity of the 1942 tax sales.

The unequalized supplemental assessment in 1941 was an improper back-assessment.

Belhaven argued in its opening brief that the 1941 supplemental assessment was an improper back-assessment. See *Long Bell Co. v. McClendon*, 90 So. 356 (Miss. 1922). EOG responds by saying the 1941 supplemental assessment was not a back-assessment, but instead was a new assessment in 1941 of property that had become privately-owned in 1940 after the 1940 biennial assessment and equalization. To bring the point home regarding the nature of the 1941 supplemental assessment, EOG states, "The lands were simply added to the role as taxable land. *No taxes were assessed or due for any time prior to 1941.*" EOG Br. at 24 (emphasis added)

In making this argument, EOG completely divorces the 1941 supplemental assessment leading to the 1942 tax sale from the 1940 biennial assessment and equalization on which EOG necessarily must rely to validate the 1942 tax sales (there having been no equalization of the 1941 supplemental assessment). In doing so, EOG underscores why the 1940 biennial assessment of the property at blank or nothing cannot possibly have validated a tax sale for failure to pay taxes under the 1941 supplemental assessment, and why an attempted back-assessment or additional assessment, without notice and equalization, is not valid.

In *Long Bell*, the land in issue was assessed for the years 1913 and 1914 as vacant land valued at "blank or nothing." 90 So. at 356. These assessments were approved by the board. *Id.* The tax collector then performed a later assessment for the same period that ultimately resulted in a tax sale based on the later assessment. The Court held that the later, intervening assessment was void, because the land had not escaped assessment, but instead had been assessed with no value. Since that was the case, and the assessment with no value had been approved by the

board, the later assessment was void as an improper attempted back-assessment.

This is similar to what occurred in the case at hand. The subject property was assessed at blank or nothing in 1940 for the years 1940 and 1941, in an assessment and equalization process that was board-approved, proper and compliant in every way. Then, the collector performed an intervening back-assessment or supplemental assessment in 1941 that was never equalized, and then sold the property for failure to pay taxes allegedly due in the intervening assessment. Whether considered a supplemental assessment or back-assessment, the 1941 assessment that was never equalized

If EOG is to be taken at its word, and the 1941 supplemental assessment does not apply to any taxes assessed or due for any time prior to 1941, then it logically follows that equalization of the 1940 biennial assessment of the property at blank or nothing as state-owned land does not provide an adequate foundation for the 1942 tax sales for non-payment of taxes assessed without equalization in 1941. Yet this is precisely what EOG argues–that the 1940 biennial assessment and equalization (wherein the property was valued at blank or nothing with no tax due) was sufficient to validate the 1942 tax sales premised on the subsequent intervening supplemental assessment in 1941 (wherein the property was assigned positive value and taxes were due), because the statutes only required assessment and equalization of real property in every other year. But if, as EOG argues in an effort to distinguish *Long Bell*, the 1941 supplemental assessment does not apply to any taxes "due for any time prior to 1941," EOG cannot rationally claim that the 1940 biennial assessment of the property at blank or nothing somehow validated the 1942 tax sales.

Conclusion

In the end, this case involves an effort by EOG to precipitate the forfeiture of Belhaven's

rights and those of its lessors (the mineral owners) by recognition of two facially defective tax sales in 1942. To permit such a result would play havoc with the most elementary notions of fairness and due process. If an assessor can assess property and conduct a sale of that property without having gone through any of the statutory procedures for notice and equalization of his assessment, and without having given the taxpayer an opportunity to object, then the assessor is just like the revenue agent in *Adams*. His actions, if condoned, will have made a mockery of the concept of uniformity of taxation, and the judgment of the board of supervisors called for in the statutes will have been nullified. The rule of law will have been rendered impotent. This is not contemplated in the statutes or the constitution.

For each of the foregoing reasons, Belhaven respectfully asks that the judgment of the lower court be reversed and rendered.

Respectfully submitted,

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