

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

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

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellants Belhaven Production, LLC and Little River Drilling, LLC certifies that the following listed persons have an interest in the outcome of this case.

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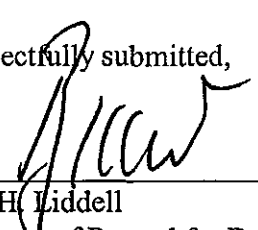
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FORM OF CITATIONS TO THE RECORD

References to the record on appeal shall be designated "R" followed by the applicable page number in the record. (E.g., "R-1" as applied to page one of the record.) References to record excerpts shall be designated "RE" followed by the applicable excerpt number.

STATEMENT OF THE ISSUES

The following issues are presented by this appeal:

1. Whether the chancery court erred in granting summary judgment in favor of Defendants/Appellees EOG Resources, Inc. et al. (collectively, "EOG") as per the order entered on June 26, 2008 in the Chancery Court of Covington County, Mississippi (R. 1787-1796).
2. Whether the 1942 tax sales of the subject real property for non-payment of 1941 ad valorem taxes (through which EOG claims) are void or voidable.
3. Whether the 1942 tax sales of the subject property for non-payment of 1941 ad valorem taxes (through which EOG claims) are void or unconstitutional due to the failure of the Board of Supervisors to equalize the real property tax rolls after the supplemental assessment in 1941 and before the 1942 sales.
4. Whether the notice requirements to assess, seize and sell private property under the 1930 Mississippi Code, as applied in this case, are constitutionally deficient or fail to satisfy the due process requirements of the Fourteenth Amendment to the U.S. Constitution, to the extent they permit a sale for non-payment of taxes prior to equalization and an opportunity to object.
5. Whether the notice given of the purported 1941 supplemental assessment or the 1942 tax sales of the subject property (through which EOG claims) are constitutionally deficient and fail to satisfy the due process requirements of the Fourteenth Amendment to the U.S. Constitution.
6. Whether publication notice of the 1942 tax sales of the subject property for non-payment of 1941 ad valorem taxes (through which EOG claims) was sufficient to satisfy the due process requirements of the Fourteenth Amendment to the U.S. Constitution.

7. Whether the 1942 tax sales of the subject property for non-payment of 1941 ad valorem taxes (through which EOG claims) are void notwithstanding a purported "supplemental assessment" in 1941, because the land having been assessed at blank or nothing, it was not left unassessed and could therefore not be additionally assessed or back-assessed via the purported supplemental assessment.

STATEMENT OF THE CASE

Appellants Belhaven Production, LLC and Little River Drilling, LLC (collectively, "Belhaven" or "Appellants") appeal the order of the Chancery Court of Covington County, Mississippi dated June 26, 2008 granting summary judgment in favor of Appellees/Defendants EOG Resources, Inc., et al. (collectively, "EOG") and declaring that EOG has title to certain real property in Covington County, Mississippi.

This is a title dispute that is ultimately determined by the validity of two tax sales covering the subject property in April of 1942 for non-payment of ad valorem taxes in 1941. EOG claims title through a forfeiture of the property in the 1942 tax sales and subsequent conveyances of that forfeited interest. Belhaven contends the tax sales were void and ineffective to pass title for several reasons, and claims title through a chain of title going back to the purchasers of mineral interests in the subject property in 1940. Unlike EOG's claim of title, Belhaven's chain of title has been consistently and repeatedly recognized as valid through regular leasing activities since the 1940's.

Belhaven claims the tax sales in 1942 are void because: the 1942 tax sales occurred before any equalization of the 1941 supplemental assessment on which the sales were based (the mineral owners through whom Belhaven claims were never given any notice of the assessment or equalization and an opportunity to object to same, making the sale an unconstitutional taking); the notice given of the 1942 sales was constitutionally deficient (publication notice is legally insufficient in this context to validate a sale); and, finally, the subject property, when last assessed and equalized, was state property that was assessed at blank or nothing, and therefore could not legitimately be sold for non-payment of taxes; any purported assessment of the property in 1941 was an improper attempted back-assessment.

In light of the invalidity of the 1942 tax sales as a matter of fact and law, Belhaven respectfully asks that the Court reverse the order of the chancery court granting summary judgment to EOG, and render judgment in favor of Belhaven.

STATEMENT OF THE FACTS

This case involves a dispute over title to the minerals under two tracts of land (collectively, "the Lands") in Covington County, Mississippi: Tract 1 is described as: NW/4 SE/4; SE/4 SE/4; SE/4 NE/4 of Section 9-T7N-R16W; and SW/4NW/4 of Section 10-T7N-R16W; and Tract 2 is described as: SW/4 SE/4 of Section 9-T7N-R16W.

All parties claim title through forfeited tax land patents from the State of Mississippi in November of 1940 to private individuals. Tract 1 was conveyed by the state to R. J. Graves ("Graves") (R. 539) and Tract 2 was conveyed to J. D. Nobles ("Nobles") (R. 563). The minerals under Tract 1 were then conveyed in 1940 by Graves, ½ to J. S. Wheless, Jr. (R. 540) ("Wheless") and ½ Aaron Cohen ("Cohen") (R. 541), and were then further conveyed in various transactions and fractions to successors-in-interest to Wheless and Cohen. The minerals under Tract 2 were similarly conveyed in 1940 by Nobles, ½ to H. Guin Lewis ("Lewis") (R. 565) and ½ to Jim H. Pugh ("Pugh") (R. 564), and were then conveyed in various transactions and fractions to successors-in-interest to Lewis and Pugh.

Belhaven, through an assignment, took leases of various mineral interests in Tracts 1 and 2 from certain of the successors-in-interest to Wheless, Cohen and Nobles. (R. 1518-1580) These successors-in-interest (Belhaven's lessors) include: Wheless Investment Company; J. T. Trotter, Trustee of the Joseph Sydney Wheless, Jr. 1974 Trust; J. T. Trotter, Executor of the Estate of Ada Nance Wheless; Paige Holloway, Successor Trustee of the Paige Holloway Trotter GST Exemption Trust; Compass Bank, Trustee of the Barbara Trotter Collins GST Exemption Trust; Fielding Cocke; Camille Cocke Patton; Tamara C. Jenkins; Aarco Oil and Gas Company; Harrell Energy Corporation; Glenn C. Mortimer, III; Anne Mortimer Ballantyne; and Dorchester Royalty Company. *Id.*

EOG claims through a chain of title that is also derived originally from above-mentioned forfeited tax land patents to Graves and Nobles. However, unlike Belhaven's chain of title, EOG claims title through an alleged forfeiture of the interests of Wheless, Cohen and Lewis (Belhaven's predecessors-in-interest). This alleged forfeiture is based on two 1942 tax sales covering Tracts 1 and 2 for non-payment of 1941 ad valorem taxes on the Lands arising from an "off year" supplemental assessment of the Lands in 1941. (R. 550-551 and 797-798)¹

The real property tax rolls in Covington County, Mississippi were prepared and equalized in 1940 as required by state law. (R. 1702-1703; RE-1) At the time the real property rolls were prepared in 1940, the Lands were assessed at blank or nothing as state-owned lands. (R. 895; RE-2) As such, the Lands were not subject to ad valorem taxation. Later, in November of 1940, the minerals under the Lands were transferred to individuals at which time they became privately-owned property. (R. 540-541 and 564-565; RE-3)

In 1941, the tax collector added real property assessments to the tax roll "to be payed [sic] on for Tax year 1941 & 42." (R. 896; RE-4) These additional assessments included Tracts 1 (tax receipt number 2243) and 2 (tax receipt number 2244) of the Lands.²

Notably, the Board did not equalize the real property rolls in 1941 (relating to these additional assessments of Tracts 1 and 2 in 1941). (R. 1177-1351) Nor did the Board publish notice of any real property equalization and the right to inspect the rolls and object in 1941. *Id.* This is because equalization of the real property rolls had occurred a year earlier in 1940. (R.

¹ EOG also asserted in summary judgment pleadings that it owns the property through adverse possession, but this claim was appropriately withdrawn at the hearing in the chancery court on EOG's motion. This claim is without merit for many reasons not pertinent to the validity of the subject tax sales and forfeitures through which EOG claims.

² The record is unclear as to whether these additional assessments actually occurred in 1941 or 1942, but EOG contends they occurred sometime in 1941.

1702-1703)³ The Board did equalize the personal property roll and entered an order accordingly.

(R. 1264-1265; RE-6)

On April 6, 1942, Tracts 1 and 2 of the Lands were sold for non-payment of 1941 ad valorem taxes allegedly due by virtue of the additional or supplemental assessments of the Lands. (R. 550-551 and 572) The tax collector sold Tract 1 on April 6, 1942 to Mrs. R. L. Windham for unpaid ad valorem taxes as recorded in Tax Sale Book 7, Page 140 of the records of Covington County. (R. 550-551) The tax collector sold Tract 2 to Independent Trust Fund on April 6, 1942 for unpaid 1941 ad valorem taxes, as recorded in Tax Sale Book 7, Page 159 of records of Covington County, Mississippi. (R. 572)

These tax sales occurred before the next scheduled equalization of the real property rolls in July of 1942. The Lands were thus sold before the mineral owners could have been notified of the supplemental assessments, before they could have inspected the equalized rolls, and before they could have registered any objections to the assessments.

Prior to these 1942 tax sales of the Lands, the tax collector published notice of the sales in the local newspaper. No other notice was provided. The tax collector made no effort to directly mail notice to the mineral owners (Wheless, Cohen and Lewis) or to otherwise advise the mineral owners of the impending forfeiture of their interests. Wheless and Cohen resided in Texas at the time and had no notice of the tax sales or any opportunity to protect their property

³ Section 3144 of the Mississippi Code of 1930 required the compilation and equalization of the real property tax roll every other year, and not in each successive year. Hence, the next equalization of the real property rolls following 1940 did not occur until 1942. (R. 1428, 1445-1446) The personal property roll was equalized in 1941 at the Board's July meeting, and an order "approving the 1941 personal roll" was placed in the Board's minutes, along with notice of the right to inspect, examine and object to same. (R. 1264-1265) But equalization of the personal property rolls was inconsequential as to real property in Covington County.

interests.

Never having been made aware of the sales, Wheless filed his Application for Ad Valorem Tax Exemption of the Lands on December 23, 1946 and paid the mineral documentary tax. (R. 914) The estate of Cohen did likewise. (R. 932)

Amoco Production Company, Humble Oil and Refining Company, Mallard Exploration and others leased the interests of Wheless, Cohen and Lewis on several occasions from the 1940s to the present. (R. 905, 916) This was done with the understanding and advice of counsel that the tax sales in 1942 were void. (R. 972 and R. 892-894; RE-5 and RE-7) It was not until Belhaven took its subject leasehold interests that anyone claiming through the defective 1942 tax sales challenged the title emanating from Wheless, Cohen and Lewis.

SUMMARY OF THE ARGUMENT

The 1942 tax sales under which EOG claims are void for several reasons:

First, the 1942 tax sales are derived from supplemental assessments of real property in 1941 that were never equalized before the 1942 sales occurred and were never the subject of any opportunity of the land owners to inspect the rolls and object before the sales. The real property rolls had been equalized in 1940 at a time when the Lands were state-owned and were assessed at blank or nothing. They were not equalized again until 1942, after the subject tax sales in April of 1942. Because the 1942 tax sales were not based on a valid assessment and equalization of the real property rolls in 1941, they are void as a matter of law.

Second, the sale of the subject property for alleged non-payment of ad valorem taxes under nothing more than notice by publication has been held to be violative of the due process clause of the Fourteenth Amendment to the U.S. Constitution. The only notice given of the 1942 tax sales was publication notice in a local newspaper. Such notice is constitutionally deficient as a matter of law, and the 1942 tax sales were an improper taking of property without due process of the law.

Finally, at the time the 1940-1941 assessment roll of Covington County, Mississippi was compiled and approved by the Board of Supervisors, the subject property was state-owned property valued at blank or nothing, and was exempt from ad valorem taxation. This was the only equalized assessment applicable to the subject property at the time of the 1942 tax sales. Any sale of land assessed to the state was void, because one cannot sell exempt property for non-payment of taxes. Moreover, the lands having been assessed in 1940 at blank or nothing, they were not left unassessed and could not be back-assessed or additionally assessed in 1941 by the tax collector as a matter of longstanding Mississippi law.

The 1942 tax sales through which EOG claims are void for each of these reasons. The lower court's grant of summary judgment in favor of EOG should therefore be reversed.

ARGUMENT

1. The applicable standard of review is *de novo*.

This case is on appeal from the trial court's entry of summary judgment in favor of EOG. In reviewing a trial court's entry of summary judgment, the Supreme Court employs a *de novo* standard of review. *Franklin County Mem'l Hosp. v. Miss. Farm Bureau Mut. Ins. Co.*, 975 So. 2d 872, 874 (Miss. 2008).

2. Absence of notice and equalization of the 1941 assessment before the 1942 tax sales renders the 1942 tax sales void as a matter of law.

The trial court entered summary judgment in favor of EOG, based on a finding that the 1942 tax sales through which EOG claims were valid and effective to pass title. In doing so, the chancellor erred. The 1942 tax sales were invalid because they were based on a 1941 assessment of which the mineral owners were not given notice and an opportunity to object before the 1942 sales. There was no equalization of the tax rolls taking account the 1941 supplemental assessment before the 1942 tax sales. As shown below, this defect renders the 1942 tax sales void as a matter of law.

At the time of the 1941 supplemental assessment under which the 1942 tax sales occurred, Section 3162 of the Mississippi Code of 1930 (Section 9786 of the Code of 1942) required the board of supervisors to equalize the rolls at the July board meeting and complete equalization at least ten days before the August meeting. Section 3162 further required publication of immediate notice to taxpayers of the right to inspect and examine the rolls. Section 3165 of the Code of 1930 (Section 9789 of the Code of 1942) required the board to hear any taxpayer objections to the assessments at the August board meeting.

In order for a tax sale to be valid, notice and an opportunity to object to the assessment on

which the sale is based must be given to the landowner and must be recorded on the minutes of the Board of Supervisors. *White v. Merchants & Planters Bank*, 90 So.2d 11, 14 (Miss. 1956). The "giving of such notice is jurisdictional and is necessary to confer on the board of supervisors the jurisdiction to equalize and approve the assessment rolls, and the fact that such notice was given must affirmatively appear upon the minutes of the [board of supervisors' meeting]." *Matthieu v. Crosby Lumber & Mfg. Co.*, 49 So.2d 894, 895 (Miss. 1951). Absent such notice and an opportunity to be heard, the tax sale is "void." *White*, at 16. Such a sale without notice "[does] not vest [in the purchaser] any title to the land." *Matthieu*, at 895. Indeed, where no notice (or insufficient notice) is given, the entire assessment roll is to be stricken. *Berryhill v. Johnston*, 39 So.2d 530, 532 (Miss. 1949).

The record is unclear as to exactly when the 1941 supplemental assessment occurred, as it refers to taxes to be paid "for Tax year 1941 & 42." (R. 896; RE-4) The record is clear, however, that the board did not provide any notice of this supplemental real property assessment to taxpayers or give them the right to object in accord with the law and applicable statutes. The board minutes for the July 1941 meeting reflect an "Order Approving 1941 Personal Roll" that dealt only with personal property assessments and provided notice and an opportunity to object to them. (R. 1264-1265; RE-6) But no such order appears in the minutes of board's meetings with regard to real property assessments. This is a jurisdictional defect in the assessment process which renders the derivative 1942 tax sales void as a matter of law. *Matthieu*, 49 So. 2d at 895.

3. **The statutory scheme in the 1930 Code for the assessment and equalization of real property rolls was unconstitutionally applied as regards the 1941 supplemental assessment and the 1942 tax sales.**

At the time of the 1941 supplemental real property assessment, the real property tax rolls were assessed and equalized every other year (1940, 1942, 1944, etc.). See Section 3144,

Mississippi Code of 1930. In light of this, EOG contended at the hearing on its motion for summary judgment that the 1940 equalization was sufficient to validate the 1941 interim supplemental assessment and 1942 tax sales. See Reply of EOG at R. 1660-1663. EOG bases its argument on Section 3230 of the Code of 1930, which authorizes the tax collector to assess and collect taxes on land "that has become liable to taxation since the last assessment." *Id.*, citing Section 3230 of the Mississippi Code of 1930. But the statute EOG relies on does not dispense with notice and equalization requirements.

While the land had become liable to taxation as privately-owned land, the 1941 supplemental assessment and 1942 tax sales did not comport with due process. In 1940, the subject property was state-owned land assessed at blank or nothing, and was exempt property as of the time of the biannual 1940 assessment and equalization process. The land was then sold to individuals in late 1940 and, as a result, became "liable to taxation since the last [1940] assessment." Section 3230, Code of 1930. Thus, it is undisputed that since the land had become liable to taxation, it was proper for the land to be assessed and added to the tax rolls. But it is also the case that the 1941 supplemental assessment had to be noticed and equalized before the 1942 tax sales for the 1942 sales to pass constitutional muster.

As discussed above, Section 3162 of the Code of 1930 (Section 9786 of the Code of 1942) required the board to equalize the rolls and provide notice to taxpayers of the assessments and the opportunity to be heard on any objections. This process is constitutionally mandated under Article IV, Section 112, of the Mississippi Constitution of 1870, which provides for "uniform and equal" taxation. This constitutional requirement of uniform and equal taxation requires equalization of the rolls with regard to an assessment before any valid taking of property can occur. *Id.*

Since the 1941 supplemental assessment of the subject real property fell in an "off year," the lower court's analysis presumes there was no requirement that the assessment be validated through the statutory assessment and equalization process before the 1942 sale. Taking this reasoning to its logical end, the tax collector could assess the property without notice to anyone and beyond supervision of the board of supervisors (as occurred in this case), have it placed on a list of lands to be sold for taxes, and then sell the property. This could occur without any opportunity ever having been given to the taxpayer to review the assessment, receive notice of the assessment and, if necessary, object. If this reading of the statutory requirements were accepted, then one could only conclude that the statutory scheme for assessment and equalization of real property is patently unconstitutional as applied in this instance.

In *Adams v. Tonella*, 14 So. 17 (Miss. 1893), the Mississippi Supreme Court struck down, as unconstitutional, a statute that permitted state revenue agents to audit local tax assessors' books, identify undervalued property and collect additional taxes on the undervalued property. The agent could do this outside the process for assessment and equalization of property and outside the supervision of the boards of supervisors around the state. In declaring the scheme unconstitutional, the Supreme Court noted that uniformity of taxation would be abandoned and the judgment of the boards of supervisors nullified if such a scheme were given credence. 14 So. at 20. The court further noted that such a procedure was not really an "assessment" because there was no opportunity of the taxpayer to be heard in reference to the assessment. *Id.*

Just as in *Adams*, the tax collector performed a supplemental assessment of real property in 1941 and added the property to the rolls. But this was done outside the assessment and equalization process. There was never any opportunity given to taxpayers to appear and object to the supplemental assessment. The Board of Supervisors was not involved in the supplemental

assessment and no equalization occurred before the sale in 1942 for non-payment of taxes. In sum, the tax collector, like the revenue agent in *Adams*, became the judge, jury and executioner of the property and took the property without due process.

4. **Notice of the 1942 tax sales was constitutionally deficient.**

The tax collector published notice of the 1942 tax sales in a local newspaper, but did not provide direct or actual notice to the mineral owners/taxpayers by mail or otherwise. The mineral owners lived out-of-state and had no access to publication notice of the sale. As shown below, the manner of notice given (notice by publication) did not meet the requirements of the Due Process Clause of the Fourteenth Amendment.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), the Supreme Court held that prior to an action that will affect an interest in property affected by the Due Process Clause of the Fourteenth Amendment, a State must provide “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” The Court in *Mullane* further explained that notice by publication was not reasonably calculated to provide actual notice of a proceeding and was constitutionally inadequate. *Id.* This principle has since been applied specifically in the context of taking property through tax sales. See *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) (holding that notice by publication to a mortgagee of tax sale of mortgaged property did not meet due process requirements of the Fourteenth Amendment). Personal service or mailed notice is required in the context of a tax sale. *Id.*

Because the tax collector provided publication notice of the 1942 tax sales, but did not provide personal service or mail notice of the proceeding, the 1942 tax sales did not comport

with the requirements of the due process clause of the Fourteenth Amendment of the U.S. Constitution. The 1942 tax sales were therefore invalid. The 1942 tax sales being invalid, the lower court erred in declaring title in EOG through the 1942 tax sales.

5. **The 1941 supplemental or back assessment was void as an improper back-assessment of land already assessed at blank or nothing in 1940.**

EOG's title is dependent on the validity of the 1942 tax sales which, in turn, are conditioned on the validity of the 1941 supplemental assessment of the property. As shown below, the 1941 supplemental assessment was void as an improper back-assessment, making the 1942 sales likewise void.

The subject property (both Tracts 1 and 2) was assessed at blank or nothing in the 1940-1941 land assessment roll as state-owned land. (R. 895) As such, these lands were exempt from taxation insofar as the 1940-1941 assessment roll was concerned. The lands having been assessed at blank or nothing, they were not left unassessed by the tax assessor. Because the lands were not left unassessed, they could not be back-assessed or additionally assessed by the tax collector. *Long Bell Co. v. McLendon*, 90 So. 356 (Miss. 1922) (affirming that land not left unassessed, but rather assessed at "blank or nothing" is not subject to additional or back assessment, making any such assessment void and any related tax sale likewise void).

Yet this is precisely what the tax collector attempted to do with regard to the subject lands via the 1941 supplemental assessment. This was a purported reassessment of land that had already been assessed as exempt land in 1940 at blank or nothing. Consequently, the 1941 supplemental assessment is void, and the 1942 tax sales through which EOG claims, are likewise void and of no effect. The chancellor erred in holding otherwise.

CONCLUSION

For each of the foregoing reasons, Belhaven requests that the Court reverse the lower court's grant of summary judgment and enter judgment in favor of Belhaven.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Roy H. Liddell, hereby certify that a true copy of the foregoing Brief of Appellants Belhaven Production, LLC and Little River Drilling, LLC was served on the following by being deposited in the U.S. Mail, first-class postage prepaid, on this 23rd day of January, 2009:

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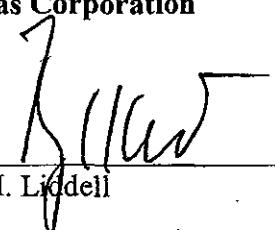
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CORRECTED CERTIFICATE OF SERVICE
OF BRIEF OF APPELLANTS

I, Roy H. Liddell, hereby certify that a true copy of the foregoing Corrected Certificate of Service of Brief of Appellants Belhaven Production, LLC and Little River Drilling, LLC was served on the following by being deposited in the U.S. Mail, first-class postage prepaid, on this 26th day of January, 2009:

Honorable Joe Dale Walker (w/Brief and Record Excerpts of Appellants)
Covington County Chancery Judge
P. O. Box 909
Monticello, MS 39654-0909

Chancery Judge

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