2009-CA-00292COART

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Mississippi Code Ann.

PRELIMINARY COMMENTS

In their Statement of Facts Appellees Board of Supervisors of Lee County, Mississippi and Mark Weathers, Tax Assessor, Defendants in the Court below, state "The subject properties had been assessed in 2006 using the special income capitalization approach prescribed for determining the true value of property used as affordable rental housing." (Appellees' Brief p. 2.) Defendants make a similar incorrect statement in their Summary of the Argument. (Appellees' Brief p. 4) There is no evidence in the record which indicates how subject property was assessed for 2006. (R. Vol.1, pp. 45-86). Defendants further make the statement "The tax assessor later discovered the error and reassessed the subject properties using the ordinary method of valuation, rather than the special income capitalization approach ..." (Appellees' Brief p. 3.) This statement is not supported by the record. There is nothing in the trial record which indicates how the Assessor revalued subject property other than an increase in value of 300%. (R. Vol. 1 p. 47).

Defendants acknowledge that the Board of Supervisors can change Tupleo Trace and Pinecrest's assessments only if the reason for doing so fits the criteria set forth in *Miss. Code Ann. §27-35-147(3) or §27-35-143.* (Appellees' Brief pp. 4, 5).

ARGUMENT

VALUATION METHODOLOGY SET FORTH IN §27-35-50(4)(D) IS NOT AN EXEMPTION

Statutory construction is at the heart of this case. All tax statutes must be construed most strongly against the taxing authority and all doubts are resolved in favor of the taxpayer. *L.H. Conrad Furniture Co. v. Mississippi Tax Commission,* 160 Miss. 185, 133 So. 652 (1931); *Marx v. Broom,* 632 So.2d 1315, 1318 (Miss. 1994), citing *Lambert v. Mississippi Limestone Corp.,* 405 So.2d 131 (Miss. 1981). In the absence of a definition a statutory word or phrase must be given its common and ordinary meaning. *Tower Loan v. Mississippi Tax Commission,* 662

So.2d 1077, 1083 (Miss. 1995).

§27-35-50(4)(d) Miss. Code Ann. states:

> In arriving at the true value of affordable rental housing, the assessor shall use the appraisal procedure set forth in land appraisal manuals of the State Tax Commission. Such procedure shall prescribe that the appraisal shall be made according to the actual net operating income attributable to the property, capitalized at a market value capitalization rate prescribed by the State Tax Commission that reflects the prevailing cost of capital for commercial real estate in the geographical market in which the affordable rental housing is located adjusted for the enhanced risk that any recorded land use regulation places on the net operating income from the property..."

Utilizing common and ordinary meaning of the words of referenced statute it is clear that the statute sets out a valuation methodology, not an exemption. The definition of "exemption" cited by Defendants does not support their argument that the special valuation methodology is an exemption. (Appellees' Brief, p. 9). *§27-35-50(4)(d)* does not free Tupelo Trace or Pinecrest from their respective obligation and duty of paying taxes.

All property in this state, not exempt, is subject to taxation at its assessed value. The Legislature is tasked with the duty of determining the methods by which property is taxed. The Legislature is also given the authority to exempt "particular species of property" from taxation through general laws. *Miss Const. Art. 4, §112.*

It is evident the framers of the Mississippi Constitution viewed 'valuation of all property not exempt' separately and distinct from 'exemption of particular species of property'. Chapter 31 of the Mississippi Code, *§27-31-1 et seq. Miss. Code Ann.,* is an example of general laws passed by the legislature which provide exemptions for "particular species of property". *§27-31-1* itemizes specific types of properties which are exempt from taxation, ie, "free from an obligation or duty required of others". *American Heritage Dictionary* 474 (2d College Ed. 1985).

§27-31-1 et seq. states the general policy of Mississippi regarding exemptions. All property within the territorial limits of the state is taxable except that which is specifically

exempt. *Barnes v. Jones,* 139 Miss. 675, 103 So. 773 (1925). Examples of exemptions of "particular species of property" include *§27-31-5* - Little Theater Property; *§27-31-9* - Parking garages not operated for profit; *§27-31-31* - Structures within central business district of municipalities; *§27-31-35* - Property related to project defined in Mississippi Super-conducting Super Collider Act; *§§27-31-51 - 27-31-61 Miss. Code* - free port warehouses; *§§27-31-73;* non-producing gas, oil, and mineral interests; *§§27-31-101* - new factories and enterprises; and *§27-33-3* - homestead exemption.

As a general rule exemptions from taxation must be strictly construed. *Adams County v. Catholic Diocese of Natchez,* 110 Miss. 890, 71 So. 17 (1916). Those claiming the exemption have the burden to clearly show that the claimed exemption comes within the exemption law. *Willis Creek Drainage Dist. V. Yazoo County* 209Miss. 849, 48 So.2d 498 (1950).

§27-35-50 Miss. Code Ann. is a valuation statute, not an exemption statute. Just because the methodology specified by *§27-35-50(4)(d)* may result in a lower valuation on which ad valorem tax is assessed, such result does not convert a valuation statute into an exemption. Subsection *(4)(d)* does not excuse, release or otherwise exempt Tupelo Trace or Pinecrest from their respective obligations to pay ad valorem taxes.

Defendants' comparison of the valuation methodology for affordable housing to homestead and newly acquired railroad property exemptions is misplaced. (Appellees' Brief pp. 9, 11, 12). The homestead exemption statute excuses, releases or otherwise exempts an owner of homestead property from <u>all</u> ad valorem taxes which would otherwise be paid on a specified dollar amount of assessed value. The newly acquired railroad property statute allows as an exemption a percentage of assessed value. *§27-35-50(4)(d)* does not excuse or exempt the owner of an affordable housing property from any amount or percentage of tax assessed on a value

determined by the specific methodology.

§27-35-50(4)(d) is intended to recognize the increased risks of operating rental property subject to significant governmental controls. The methodology is designed to factor into the valuation process the effect of these increased controls on value.

Neither the homestead nor railroad property statutes has anything to do with determining true value and in turn assessed value. Once a valuation is determined in accordance with *§27-35-50* both statutes allow an exemption of a certain portion of the value so established. The methodology available to affordable housing properties is one of the three methods of valuation specified by *§27-35-50* for all properties within this state. Once value is established for an affordable housing property based on the methodology specified the prevailing tax rates are applied to determine the amount of taxes due without resort to application of any exemption.

Likewise, Defendants' reference to federal and state income taxation laws is misplaced. (Appellees' Brief pp. 9, 10). Under state and federal tax laws an individual is provided an exemption of a specific dollar amount which is used in determining income tax liability. The personal exemptions have nothing to do with the valuation of assets or determination of gross income.

Tupelo Garment Co. v. State Tax Commission, 173 So. 656, 660 (Miss. 1937) cited by Defendants (Appellees' Brief p. 10) involved the issue of whether the expense incurred by a corporation in setting up a charitable trust for the benefit of its employees should be allowed as a deduction for income taxation. *Tupelo Garment Co.* is not analogous to the case sub judice. Expenses incurred for charitable purposes would clearly be an allowable deduction and an exemption. The *Tupelo Garment Co.* court questioned whether the setting up of a charitable trust was legitimate in denying the deduction.

Defendants misinterpret *Riese-St. Gerard Housing Corp. v. City of Patterson,* 592 A.2d 270 (N.J. Super. App. Div. 1991) as being supportive of its position. (Appellees' Brief p. 10). *Riese-St. Gerard Housing Corp.* involved interpretation of specific sections of the Senior Citizens Nonprofit Rental Housing Tax Law (*N.J. Stat. Ann. 55:141-1 to 9; repealed L. 1991, c. 431, eff. April 17, 1992).* The issue involved the question of whether rent subsidies should be included in calculating annual gross rents. The New Jersey statute specifically mandated municipalities to exempt rent subsidies by federally funded nonprofit housing projects for senior citizens.

Unlike the New Jersey statute *§27-35-50(4)(d)* does not allow an exemption of any kind or amount. *§27-35-50(4)(d)* directs the Assessor to use one of the three methods of valuation (income, cost and market data) in determining the true value of affordable housing properties. Even without the directive contained in subsection *(4)(d)* the Assessor could choose to base a true value determination on the income approach when such approach would be more appropriate than the cost or market data approaches. An example would be when the age and condition of improvements and the lack of comparable sales would lessen the accuracy of these approaches.

Defendants also cite *1198 Butler Street Associates v. Board of Assessments Appeals,* 946 A.2d 1131 (Pa. 2008) (Appellees' Brief, p. 10) which does not support its position. The quote of concurring Judge Pellegrini is taken out of context. Judge Pellegrini was referring to *72 P.S. §§5020-402(c)(2)* which states "Federal or State income credits with respect to property shall not be considered real property or income attributable real property". By not allowing credits to be considered in determination of income Judge Pellegrini commented "that provision could be considered to have created a back door partial tax exemption". Obviously, this statement is an after thought which has no precedential value.

Except for the express provision mandating that federal or state tax credits shall not be considered income the Pennsylvania statute is similar to the Mississippi statute, to wit: *72 P.S. §§5020-402(c)(1)* states "In arriving at the actual value of real property, the impact of applicable rent restrictions, afford ability requirements or any other related restrictions prescribed by any Federal or State programs shall be considered." *§27-35-50(4)(d)* does not mention federal or state tax credits as an exemption, deduction or otherwise. What *§27-35-50(4)(d)* does state is the net operating income of the property is capitalized at a market value capitalization rate prescribed by the State Tax Commission which reflects the enhanced risk of restrictions placed on the property. Again, this is a prescribed method of valuation of a particular specie of property, not an exemption.

Defendants further argue regarding homestead exemption that should the Assessor fail "to learn of a change in ownership of homestead property and should continue to list the property as exempt despite the failure of the new owner to apply for the exemption, it is clear that the assessor and board of supervisors would be entitled under section 27-35-147(3)[4] to increase the tax assessment..." (Appellees' Brief p. 12). Defendants' homestead exemption argument provides no support for their position.

Defendants' argument is based on *§27-35-147(4)* which allows the Board of Supervisors to increase an assessment "when lands or improvements thereon have been listed as exempt from taxation, but were subject to assessment and taxation on the preceding tax lien date." In construing this portion of the statute the Court should look no further than the tax roll to conclude that the Legislature meant the exemptions which may be listed on the face of the roll itself. At the bottom of the form there is a specific reference to exemptions, both homestead and other. Defendants have presented nothing to suggest that subsection *(4)* refers to something other

than the exemptions which are listed on the roll.

There is a specific section of the Assessment Roll designated for exemptions. (R. Vol. 1, pp. 60,61, p. 107; R. Vol. 2, p. 14 lines 22-29, p. 15 lines 1-29, p. 16 lines 1-24). Neither Tupelo Trace nor Tupelo Seniors is shown as exempt. If the Legislature intended for affordable housing to be exempt, then it would have provided a place on the Assessment Roll to indicate an exemption as it did with homestead property, newly acquired railroad property and other exemptions to which certain species of properties are allowed.

§27-35-143 MISS. CODE DOES NOT AUTHORIZE THE BOARD OF SUPERVISORS TO CHANGE ASSESSMENT OF SUBJECT PROPERTIES

A. Tupelo Trace and Tupelo Seniors properly classified. Tupelo Trace and Pinecrest agree that under proper circumstances the Board can change/increase an assessment on property which has been improperly classified. (Brief of Appellant p. 4). Accordingly, Defendants' statement to the contrary is not correct. (Appellees' Brief pp. 13,14).

Defendants argue that subject properties were incorrectly classified; therefore, the Board can increase the assessment under *§27-35-143(11) Miss. Code Ann.* With deference, Tupelo Trace and Pinecrest submit that their respective properties were not "incorrectly classified" as contemplated by *§27-35-143(11) Miss. Code Ann.*

Defendants' reliance on *City of Jackson v. Mississippi Fire Insurance Co.,* 95 So. 845 (Miss. 1923) is misplaced. *City of Jackson* involved the single issue of whether a specific statute which provided for an express exemption of domestic insurance companies from taxation was constitutional. The statute in question, Chapter 184, Laws of 1922 was entitled " An act to aid and encourage insurance companies incorporated or organized under the laws of the state of Mississippi and to exempt such companies from taxation except on real estate for a period of five

years". *City* did not deal with classification, but rather the power of the Legislature to grant an exemption under the express authority given to it under the Constitution. "The Legislature may, by general laws, exempt particular species of property from taxation, in whole or in part." *Miss. Const. Ann. Art. 4, §112.*

It is evident that the Legislature properly exercised its authority by exempting a "particular specie of property" as contemplated by *§112. City* did not involve the methodology used in determining true value for there was no true value to be determined because of the exemption allowed domestic insurance companies. The exemption in *City* would have been shown/listed on the tax roll.

Further, *Riley v. Jefferson Davis County,* 669 So.2d 748 (Miss. 1996) cited by Defendants does not provide support for their theory of improper classification. *Riley* appealed the Board's decision to tax his property as residential instead of agricultural. Under either scenario Riley's property would have been shown on the Assessment Roll as either Class I residential or Class II and the assessment class as either 10% or 15%. Agricultural is not a classification of property. It is a particular specie of property for which the Legislature has provided a special methodology of determining true value similar to affordable housing.

The Legislature is reposed with the authority and duty to provide for taxation of all property through general laws. *Miss. Const. Ann. Art. 4, §112.* The State Tax Commission has prescribed a standard form of assessment rolls for assessing all real and personal property in each county. *§27-35-29 Miss. Code Ann.* In preparing the roll the assessor is required to show on the form the classification of each parcel of land in his/her county. *§27-35-55 Miss. Code Ann.* The standard assessment roll designates each parcel of real property as either class I or class II in accordance with the constitutional mandate that all property, not exempt, shall be assessed

according to the classes defined. *Miss. Const. Ann. Art. 4, §112.* If the framers of this state's constitution intended for there to be sub-classes, such would have been set out in the constitution.

If the Legislature had intended for *§27-35-143(11)* to refer to classifications other than those specified in *Miss. Const. Ann. Art. 4, §112.*, it is logical to assume it would have done so.

Defendants are mistaken in their statement that Tupelo Trace and Pinecrest's properties were classified improperly. Defendants admit that subject properties are "affordable housing" properties.(R. Vol. 1, p. 46, ¶5). Subject properties were "affordable housing" before the Board increased the values, and they were "affordable housing" properties after. Thus, no improper classification. More importantly, on the face of the 2007 Tax Roll Tupelo Trace and Tupelo Seniors were classified as Class II, not "affordable housing". (Vol. 1, pp. 28, 29.)

B. <u>No clerical error</u>. Defendants properly state that the Board can correct a clerical mistake under *§27-35-143(2) Miss Code Ann.* (Appellees' Brief p. 17). However, the alleged oversight made by the Assessor is not a "clerical mistake" contemplated by the statute. Subsection *(2)* states:

> "When a clerical error has been made in transcribing the assessment from the tax list to the assessment roll, or from the assessment roll to the copies, or in amending the original assessment roll, in making the equalization of assessments, or in carrying out the instructions of the State Tax Commission."

A careful reading of subsection *(2)* strongly suggests that the Legislature intended this section to apply to scrivener's (clerical) errors. Errors made in "transcribing the assessment from the tax list" is a scrivener's error which does not require any judgment or discretion. 'Clerical error' is defined as "generally, a mistake in writing or copying' *Blacks Law Dictionary 4th Ed.*, p. 319. (It may include error apparent on face of instrument, *In re Goldgerg's Estate,* 10 Cal.2d 706, 76 P.2d 508, 512;).

An example of clerical mistakes recognized by this Court is *Love Petroleum Co. v. Stone,*

186 Miss. 793, 191 So. 417 (1939) wherein a clerical error was deemed to have been made in the printing of a statute authorizing a tax on natural gas; the typesetter put in the wrong year for the effective date.

Board of Supervisors v. Dale, 110 Miss. 671, 70 So. 828 (1916) is another example of a "clerical error" which authorizes a change after the tax roll becomes final. *Dale* involved a suit by John Dale to abate an assessment made against the Estate of Mary Ella Nutt, instead of against John Dale. In affirming the abatement the Court held that such was a clerical error which gave the Board of Supervisors power to correct under *§4312 Code 1906.*

The Tennessee statute, *§67-5-509 TN Code*, quoted by Defendant is informative but of no help to Defendants. (Appellees' Brief p. 17). Referenced statute limits corrections to mistakes which do not involve judgment or discretions by the assessor which is apparent from the face of the tax records. (emphasis added).

Assessors are required to complete the assessment of all property in the county, real and personal, and file the tax roll with the Board on or before the first Monday in July. The Assessor is also required to make an affidavit stating that he has endeavored to ascertain and assess all persons and property in the county. *§27-35-81 Miss. Code Ann.* Boards have the responsibility of carefully examining the assessment roll submitted by the Tax Assessor and making a determination if a new assessment should be made as to each parcel of property in the county. *§27-35-129 Miss. Code Ann.*

In the case sub judice the Assessor and Board fulfilled these obligations at the Board meetings held on July 3, 2007 and August 13, 2007. (R. Vol. 1, pp. 46 ¶6 ¶8, 47 ¶9, 50, 57, 60.) The actions of the Assessor and Board required both judgment and discretion and there is no clerical error apparent on the face of the 2007 Roll. Actually, there is no mistake at all. The 2007

Assessment Roll of Lee County correctly shows Tupelo Trace and Tupelo Seniors as non-exempt Class II properties to which the correct assessment value has been applied.(R. Vol. 1, p. 47 ¶9, p. 60).

Even if Tupelo Trace and Pinecrest did not submit income data to the Assessor on or prior to April 1, 2007 the Assessor was still required to determine the true value of subject properties by consideration of, where appropriate, the income, cost and market data approaches. The Assessor is also directed to consider different approaches for differing categories of property. The ultimate selection of choice of method must be based on the "category or nature of the property, the approaches to value for which the highest quality data is available, and the current use of the property". *§27-35-50(2).*

Tupelo Trace and Tupelo Seniors are still affordable housing properties whether or not income information was submitted to the Assessor on or prior to April 1, 2007. These properties were still subject to the same restrictions and enhanced risks. Thus, to an investor these properties had the same value. In view of the Assessor and Board's duties in ascertaining true value of each parcel in Lee County it must be determined that the values approved by the Board at its August 13,2007 meeting were the result of substantive analysis by the Assessor. Therefore, the Assessor cannot now claim he made a clerical error.

This Court has previously disallowed the Board of Supervisors of Covington County's attempt to increase the assessment of a particular parcel of real property after the assessment roll became final. *Board of Supervisors of Covington County v. Conner Lumber Co.,* 107 Miss. 368, 65 So. 466 (1914). In *Conner* an increase was made to Conner's property at the September Board meeting. At the same meeting the assessment roll without the increased value being noted was finalized and approved. Subsequently, at the October meeting the Board realized that the change

had not been made to the roll and proceeded to make the change and increase the assessment on Conner's property. The Court held that the Board had no authority to increase the assessment after the roll became final. This situation is very similar to the case sub judice.

Except for specific circumstances enumerated by statute taxpayers should be able to rely on the finality of the assessment process. After the Roll became final the Assessor confirmed to Tupelo Trace and Pinecrest that the values for their respective properties had been finally determined in the sums of $2,862,210.00 and $317,420.00, respectively. Neither Tupelo Trace nor Pinecrest should be required to keep constant vigil on the activities of the Assessor's office. Once the Roll becomes final the power of the Board to make changes is restricted, and once the Roll is finalized no changes can be made unless the situation falls within one of the stated exceptions. *Hancock County v. John W. Simmons,* 86 Miss. 302, 38 So. 377 (1909).

CONCLUSION

The Order of the Circuit Court should be reversed and decision rendered in favor of Tupelo Trace and Pinecrest with direction to the Board of Supervisors of Lee County to forthwith reduce the 2007 true values of Tupelo Trace and Tupelo Seniors to $2,862,210.00 and $317,420.00, respectively and refund the overpayment in ad valorem taxes in the sums of $91,774.27 and $9,669.23, plus interest at the legal rate from and after January 17, 2008.

Respectively Submitted,

3545 MITCHELL ROAD, LLC
and PINECREST/TUPELO, LLC

By: _____
JAMES L. MARTIN, Their Attorney

CERTIFICATE OF SERVICE

I, James L. Martin, Plaintiff's attorney, certify that I have this day served a copy of the foregoing Reply Brief of Appellant, via U.S. Mail, First Class, Postage Pre-Paid on the following:

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CIRCUIT JUDGE

This 14th day of October, 2009.

JAMES L. MARTIN