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Saturday, August 20, 2011

IND. DECISIONS - TAX COURT RULES IN PUPPY MILL CASE; HOLDS USE OF JEOPARDY ASSESSMENTS NOT WARRANTED

Late yesterday afternoon the Indiana Tax Court filed an opinion in the case of [Virginia Garwood, et al. v. Indiana Dept. of State Revenue](#). In the 19-page opinion, Judge Wentworth writes [*cites omitted by ILB in most instances*]:

On June 29, 2009, Virginia and Kristin Garwood (the Garwoods) initiated an original tax appeal, challenging the Indiana Department of State Revenue's (Department) issuance of sixteen jeopardy tax assessments for portions of the 2007 through 2009 tax years. The Garwoods and the Department subsequently filed motions for summary judgment.

In their motion for summary judgment, the Garwoods assert that the jeopardy assessments are void as a matter of law because the Department failed to provide them with an administrative hearing following their protest of the assessments, violating their procedural due process rights guaranteed under the Fourteenth Amendment to the United States Constitution. In its motion, the Department claims it is entitled to judgment as a matter of law because the Tax Court lacks subject matter jurisdiction over the Garwoods' appeal, the use of jeopardy assessments was warranted, and the use of best information available assessments (BIA assessments) was reasonable. * * *

The Department has the primary responsibility for administering, collecting, and enforcing Indiana's listed taxes, and in fulfilling its duties, it may exercise any power conferred on it under IC 6-8.1-1 et seq. To execute these duties, the Indiana Legislature has granted the Department authority to employ the powerful tool of jeopardy assessment in exceptional circumstances. Indeed, the use of a jeopardy assessment is an extraordinary measure because it allows the state to deprive a taxpayer of property without first providing constitutionally guaranteed notice or an opportunity to be heard. *Cliff v. Ind. Dep't of State Revenue*, 660 N.E.2d 310, 317-18 (Ind. 1995). As a result, our Legislature very narrowly tailored the Department's jeopardy assessment power to further the essential state interest of exercising its power to tax when collection is at risk. * * * To that end, IC 6-8.1-5-3 provides that one of four circumstances must exist for the Department to issue a jeopardy assessment. * * *

1. Intent to quickly leave the state. The Department may issue a jeopardy assessment when it determines a person owing taxes intends to quickly leave the state thereby avoiding tax collection. IC 6-8.1-5-3(a). The Department does not claim that the Garwoods were flight risks. * * *

2. Intent to remove property from the state. The Department may issue a jeopardy assessment

when it determines a person owing taxes intends to remove property from the state to avoid the collection of tax. IC 6-8.1-5-3(a). The Department does not claim that the Garwoods intended to remove property from the state. * * *

3. Intent to conceal property in the state. The Department may issue a jeopardy assessment when it determines a person owing taxes intends to conceal property in the state to avoid the collection of tax. I.C. § 6-8.1-5-3(a). The Department claims its investigation revealed evidence of this intent that is documented in its designated sales and income tax Investigation Summaries: "Further, as the taxpayer previously refused the officer of the Harrison County Animal [C]ontrol access to their property, the taxpayer maintains the appearance that they are attempting to conceal property in the state." Virginia's refusal to allow the Harrison County Animal Control Officer on her property in response to a consumer complaint is not evidence of her attempt to conceal property in the state within the meaning of IC 6-8.1-5-3(a). In fact, it is not reasonable to infer that her intent was to conceal property to avoid paying taxes because one would not normally expect an Animal Control Officer, who typically investigates matters involving animals, to be the emissary of the tax collector. * * *

4. Intent to do any other act that would jeopardize the collection of taxes. Finally, the Department may issue a jeopardy assessment when it determines a person owing taxes intends to "do any other act that would jeopardize the collection of [] taxes." IC 6-8.1-5-3(a) (emphasis added). The Department promulgated its interpretation of this statutory language in regulation 45 IAC 15-5-8, explaining that the use of a jeopardy assessment is permissible when "the taxpayer does any other act tending to prejudice or render wholly or partly ineffective proceedings to compute, assess, or collect any tax levied by the state." * * *

The actions recited include, among those discussed above, the advertisement of dogs for sale in local newspapers, the breeding and sale of dogs, the failure to register as a retail merchant, the failure to prepare and file sales tax returns, and the failure to report income earned from the retail sales of animals on their individual income tax returns. None of these actions alone constitute a litmus test for properly issuing a jeopardy assessment. Furthermore, taken as a whole, these actions suggest that the Garwoods were not properly reporting and paying taxes allegedly due, not that they intended not to pay, or preserve the wherewithal to pay, their taxes. The absence of facts demonstrating the Garwoods' intent to thwart collection is palpable.

Next, the designated facts show the Garwoods filed annual income tax returns prepared by an income tax professional. In fact, Virginia's tax preparer included income from the sale of dogs in her 2008 income tax return. Virginia stated that because her tax preparer never told her she should be collecting sales tax on her sales of dogs, she assumed, albeit incorrectly, that her sales of dogs, like her sales of livestock, were exempt from sales tax. While, the Garwoods' reliance on a tax specialist does not relieve them of personal responsibility to get their taxes right, it does not indicate their intent to thwart the tax system and circumvent the collection of taxes through regular proceedings. Thus, this is not a basis for the Department's use of jeopardy assessments in this case.

The Court holds that the Department did not show the presence of the statutorily prescribed exigent circumstances that the Garwoods' intended to quickly leave the state, remove their property from the state, conceal their property in the state, or do any other act that would jeopardize the collection of taxes. The Court's holding is consistent with the Indiana Supreme Court's explanation of the contours of jeopardy assessments. Indeed, in distinguishing the

State's power to tax from its power to punish crimes, Indiana's Supreme Court explained that the power to issue jeopardy assessments "is part of the State's power of the purse, not its power of the sword[.]"

It cannot reasonably be inferred that the jeopardy assessment procedure was used in this case to protect the State's fiscal interests. For example, the day after the Garwoods' 240 dogs were seized, the Department sold them all to the Humane Society for a total of \$300.00, yet logic dictates that the dogs had a value far greater than just over \$1.00 each. * * * Moreover, a media circus roiled on the very day the Department and the OAG served the jeopardy assessments, jeopardy tax warrants, and seized the Garwoods' assets. Within hours of the raid, individuals from the OAG were interviewed on television and by newspapers about shutting down a "puppy mill." The unusual occurrence of this media hype in conjunction with the Department's sale of the Garwoods' property for a nominal sum demonstrate that the Department wielded the power of jeopardy assessments as a sword to eliminate a socially undesirable activity and close down a suspected "puppy mill," [15] not to fill the State's coffers with the tax liabilities the Garwoods purportedly owed.

Jeopardy assessments are a powerful collection tool that, when properly used, further the important state interest of collecting state tax revenue needed to pay for critical governmental services and conducting the business of the state. The designated evidence shows that the Garwoods did not remit the proper amount of tax due to the state on their sales, a fact the Garwoods have repeatedly acknowledged. Nonetheless, the Department overstepped its authority in this case by issuing jeopardy assessments without having shown the exigent circumstances required by Indiana Code § 6-8.1-5-3 and 45 IAC 15-5-8. Consequently, the Court holds that the sixteen jeopardy assessments issued to the Garwoods for all or part of the 2007 though 2009 tax years are void as a matter of law. * * *

CONCLUSION. For all the foregoing reasons, the Court DENIES the Department's motion for summary judgment in its entirety and GRANTS summary judgment in favor of the Garwoods. The Court REMANDS the matter to the Department and ORDERS it to void all of the Garwoods' jeopardy assessments and take any other actions necessary to give full effect to this Order. The parties shall bear their own costs.

[15] 15 (See Petrs' Des'g Evid. Vol. 2, Ex. J at 1, 4 (article written by Andrew W. Swain, *Tax Ills Behind the Mills – the Advancement of Puppy Protection*, stating "[s]o far, using its state tax laws, Indiana has successfully closed two puppy mills and prosecuted their operators for various tax crimes") and (citing "*Puppy Mill Busted: Dogs Taken from Harrison County Farm to New Albany Warehouse*," Ind. Law Blog (June 3, 2009), available at http://indianalawblog.com/archives/2009/06/ind_law_puppy_m.html (discussing the Virginia Garwood case").)

ILB comments: What exactly happened the day the Office of the Attorney General and the Department of Revenue served the jeopardy assessments? From the opinion, pp. 5-6:

The following day, June 2 [2009], a tumultuous series of events took place as an unspecified number of individuals from the OAG and the Department went to the Garwoods' residence just after 7:00 a.m. to serve the jeopardy assessment documents and demand immediate payment of the tax, interest, and penalties allegedly owed. An investigator from the Department's special investigation unit explained to each of the women individually that the amount she owed was \$142,367.94 and that without immediate payment, the State would then

and there “levy [her] personal property to satisfy the taxes due[.]” When first Virginia and then Kristin stated that she could not pay that amount immediately, the investigator served each with the Jeopardy Tax Warrants and the associated Investigation Summaries. The Department and the OAG, assisted by the Indiana State Police and sixty volunteers from the United States and Missouri Humane Societies, seized all 240 dogs on the premises, including the Garwoods' house pets and farm dogs. Other property seized from the Garwoods included \$1,260 in cash, business records showing the Garwoods received \$25,274.31 from their dog sales, un-cashed checks totaling \$1,325 (two containing dog sale notations), and copies of Virginia's 2005, 2007, and 2008 federal and state income tax returns. Later the same day, the Department and the OAG filed with the Harrison Circuit Court all of the Jeopardy Tax Warrants and a Verified Petition for a Post-judgment Restraining Order and Injunction that sought to enjoin the Garwoods from doing business in Indiana until their tax liabilities were satisfied. That afternoon, the Attorney General held a television press conference and newspaper interview, publicizing the seizure of the Garwoods' dogs.

The next day, the OAG (on behalf of the Department) sold all of the 240 dogs seized to the Humane Society of the United States for a total of \$300.00.

The **ILB** has [a number of entries](#) on this case. Of particular interest, in addition to the [June 3, 2009 entry](#) cited in yesterday's opinion, is this [Dec. 22, 2010 ILB entry](#) re Judge Fisher's opinion denying the DOR's motion to dismiss on the ground's that the Tax Court lacked jurisdiction; and this [Dec. 25, 2010 ILB entry](#) quoting from several news stories, most notably one from **WTHI** that included:

In the case of Clark's business Love My Pets , located at 10203 East Dobson Road in rural Bloomfield, the business' inventory consisted of approximately 120 puppies and dogs.

On Wednesday, the Attorney General's Office served Clark with the jeopardy assessment after it was filed in court. Then volunteers from several animal-rescue groups began the process of removing the puppies and dogs from their enclosures in a building on the property. * * *

This is the third time in the past two years that the Indiana Attorney General's Office has taken legal action against commercial dog breeding operations for tax evasion offenses.

- In December 2008, under former Attorney General Steve Carter, 74 dogs and puppies were seized from a dog breeding business owned and operated by Tammy Gilchrist in Cloverdale, Ind. Gilchrist and two accomplices later pleaded guilty to failure to collect or remit sales taxes and were sentenced to probation.
- In June 2009, under current Attorney General Zoeller, 244 dogs and puppies were seized from a dog-breeding business operated by Virginia Garwood and Kristin Garwood in Mauckport, Ind. Both Garwoods later pleaded guilty to failure to collect or remit sales taxes and also were sentenced to probation.

Although the Attorney General's Office normally does not have legal jurisdiction to file criminal charges, sales tax and income tax evasion are the exceptions, and the Attorney General can file such charges directly. In today's tax enforcement action in Greene County, however, Clark has not been charged with any crime while the investigation continues into the delinquent taxes.

The filing of the jeopardy assessment in civil court triggers a legal process where the Attorney General, representing the Department of Revenue, seeks to collect the delinquent taxes. Clark, like any delinquent taxpayer, has the legal right to challenge the state's action in civil court.

The [most recent ILB entry](#) was from April 10, 2011, and headed "*Puppy mill case appears to be heating up*," worth reading in that it indicates that in March of this year Judge Wentworth admonished the parties - "As an initial matter, the court notes the increasingly inflammatory rhetoric by the parties in this cause," and ordered it to cease.

The "Al Capone strategy." Finally, **6News'** Rafael Sanchez had [an interesting story](#) on the August 2, 2011 evening news:

INDIANAPOLIS -- Taking a page from the history books, the Indiana Attorney General's Office is using tax law to prosecute those suspected of running illegal operations, but at least one defense attorney is questioning the tactic.

It's called the Al Capone strategy after the 1920s criminal mastermind who was finally brought to his knees for not paying taxes.

Attorney General Greg Zoeller is trying to do the same with Hoosiers who try to slip through the cracks.

"The common denominator in some these cases is that they been scamming the public, and the only thing we found to stop these activities is to file these tax charges," he told 6News' Rafael Sanchez.

All tax-related cases are heard in Indianapolis because it's where state taxes are sent. But noted Indianapolis defense attorney Jack Crawford argues that criminal jurisdiction should be local.

Crawford is representing Tuan Chu, a glass repairman accused of intentionally busting out windows and then charging his victims for the repair.

Chu beat prosecution in Boone County, but with new complaints in Marion County, the state managed to close his operations by filing tax evasion charges.

"The actual decision to bring a person to trial in a local jurisdiction should be made by locally elected prosecuting attorney," Crawford said.

The attorney general's office is defending its new tactic.

"These cases represent the worst of the worst," said Deputy Attorney General Andrew Swain. "We've exhausted our civil remedies to shut them down."

If Chu is convicted, Crawford could make his case to the Indiana Court of Appeals.

The accompanying video story, with Rafael Sanchez, includes clips of puppies being confiscated for failing to pay back taxes, with quotes from AG Zoeller and Deputy Swain on prosecuting the "worst of the worst," and ends with defense attorney Jack Crawford contending that the decision to prosecute should be made by the locally elected prosecuting attorney, not the AG.

Posted by Marcia Oddi on August 20, 2011 01:21 PM

Posted to [Ind. Tax Ct. Decisions](#)

