REPRESENTATIVE FOR PETITIONER: James Gilday. Gilday & Associates, P.C.

REPRESENTATIVE FOR RESPONDENT: Jess Reagan Gastineau, Office of Corporation Counsel

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BEFORE THE
INDIANA BOARD OF TAX REVIEW

Gilday & Associates, P.C.,	)	
	)	Petition Nos.: 49-400-14-1-5-00149-19
Petitioner,	)	49-400-15-1-5-00150-19
	)	49-400-16-1-5-00151-19
v.	)	49-400-17-1-5-00152-19
	)	
Marion County Assessor,	)	Parcel No.: 4022191
	)	
Respondent.	)	Assessment Years: 2014 – 2017
	)	

Date: December 4, 2020

FINAL DETERMINATION DISMISSING APPEAL PETITIONS

The Indiana Board of Tax Review, having reviewed the facts and evidence and having considered the issues, now finds and concludes the following:

Findings of Fact and Conclusions of Law

I. Introduction

1. The threshold issue in this case is whether the petitioner, Gilday & Associates, P.C., had statutory authority to bring these appeals. It bought the property under appeal at sheriff's sale in July 2018 and filed appeals claiming that the previous owner, Dr. Paul Terry Batties, had been improperly denied the standard deduction for homesteads from 2014-2017. Gilday argues that it was the taxpayer for the years at issue because its successful

bid paid the judgment of Green Tree Servicing, LLC, the senior mortgagee,[1] and Green Tree's judgment against Batties included the taxes for those years, which Green Tree had paid out of escrow. Gilday also claims that the sheriff's deed passing title to Gilday made it Batties' successor.

2. We disagree on both counts. Even if Green Tree's payment of the taxes would have qualified it as a taxpayer for purposes of the appeal statutes, buying the property at sheriff's sale is not the same as paying Green Tree's judgment or receiving an assignment of whatever appeal rights Green Tree might have had. And simply conveying title to real estate, as the sheriff's deed did, does not convey non real-estate interests, such as the right to pursue a property tax appeal or refund. We therefore dismiss Gilday's appeals.

II. Procedural History

3. On November 13, 2018, Gilday filed Form 130 petitions for assessment years 2014 through 2018, the first three of which are at issue in these appeals (Gilday settled the 2018 appeal at the local level, which we will discuss in more detail in our statement of Gilday's factual allegations). In those petitions, Gilday claimed that it was entitled to the "homestead exemption" (apparently referring to the standard deduction for homesteads under Ind. Code § 6-1.1-12-37) on a property it bought at sheriff's sale in July 2018. The Marion County Property Tax Assessment Board of Appeals ("PTABOA") issued notices denying Gilday relief for each year currently at issue.

4. Gilday responded by timely filing Form 131 petitions with us. Disputes arose during discovery, leading Gilday to file a motion for leave to propound more than 25 interrogatories and the Marion County Assessor to file a motion to quash subpoenas duces tecum that Gilday had served on nonparties. The Assessor, however, indicated that

[1] Green Tree was the original mortgagee. According to Gilday, Green Tree is now known as Ditech Financial, LLC. *See Petitioner's Response in Opposition to Respondent Assessor's Motion to Dismiss*, at 7; *see also Response to Mot. to Dismiss, Ex. B at 7* (indicating that Green Tree assigned its mortgage to Ditech). For ease of reference, we will follow Gilday's lead and refer to the mortgagee as Green Tree throughout this determination.

he planned to file a motion to dismiss that would moot the pending discovery motions. We therefore issued a Case Management Order explaining that we would hold those discovery motions under advisement until we had the chance to consider the Assessor's promised motion to dismiss.

5. The Assessor followed through and filed his motion to dismiss, to which Gilday responded. After reviewing the motion to dismiss and Gilday's response, we noted that Gilday's own filings appeared to foreclose its authority to bring the appeals, prompting us to issue an order for rule to show cause why the appeals should not be dismissed:

> 1. [I]n response [to the Assessor's motion to dismiss], Gilday made a number of factual representations and attached evidence in support of them. Among those representations, Gilday has averred that:
>   a. Paul Batties owned the subject property during the assessment years 2014, 2015, 2016, and 2017.
>   b. Gilday acquired the subject property in 2018 via sheriff's sale.
>   c. Property taxes for the assessment years on appeal were paid by Paul Batties' mortgage lender, Green Tree Servicing.
>
>   These facts appear to establish that Gilday, for the relevant years on appeal, was not an owner and did not pay the taxes owed on the property.
>
> 2. In its motion to dismiss, the Assessor did not directly challenge whether Gilday was a "taxpayer" statutorily entitled to appeal the assessments for 2014, 2015, 2016, and 2017. Gilday briefly anticipated this issue in his response and addressed the refund statute, I.C. 6-1.1-26-1.1(a), but not the appeal statute, I.C. § 6-1.1-15-1.1, which is the statute under which Gilday has filed for relief in this matter. These statutes must be construed and interpreted independently. *See Hutcherson v. Ward*, 2 N.E.3d 138 (Ind. Tax Ct. 2013).
>
> 3. The Board therefore moves and orders Gilday to show cause why these appeals should not be dismissed for failure to state a claim; namely the statutory right for Gilday to appeal, under I.C. § 6-1.1-15-1.1, the assessments for the 2014, 2015, 2016, and 2017 tax years. The Board raises this issue sua sponte, as a motion and order pursuant to 52 IAC 2-10-2(b). Gilday shall have until 30 days from the date of this order to respond to this motion. The Assessor shall have 30 days following Gilday's response to file a brief in response.

4. The Board will not rule on the Assessor's motion to dismiss until the parties have responded to this motion and order for rule to show cause.

Sua Sponte Motion and Order for Rule to Show Cause (citations to record omitted).

6. The parties both responded to the show cause order, so we now turn to whether the appeals should be dismissed.

III. Factual Allegations

7. Given the current procedural posture, we will accept all Gilday's factual allegations as true, viewing them in the light most favorable to Gilday and drawing all inferences in its favor. *See Muir Woods Section One Ass'n v. Marion Cty. Ass'r*, 2020 Ind. Tax Lexis 41 * 6 (2020). Because neither the appeal statutes nor our procedural rules call for notice pleading comparable to what the trial rules require,[2] we look at all Gilday's allegations—not just those contained in its Form 131 petitions. That includes facts contained in materials Gilday offered in connection with its various motions and responses, all of which we accept as true. But we will dismiss if those allegations demonstrate that Gilday is not entitled to relief under any theory or basis found in the "record/complaint." *Muir Woods*, 2020 Ind. Tax Lexis at *6.[3]

8. Batties owned the property from sometime in the 1980s until Gilday bought it at sheriff's sale on July 18, 2018. At all times through the sheriff's sale, Batties used the property as his "exclusive residential dwelling," and he had previously been granted a homestead

[2] Our procedural rules now affirmatively state that the "provisions of the trial rules pertaining to notice pleading . . . do not apply to appeals before the board." 52 IAC 4-4-1(b) (filed May 15, 2020).

[3] Although we may consult the trial rules and accompanying case law to assist in handling property tax appeals, we are not required to do so. 52 IAC 4-4-1(a) (filed May 15, 2020); *see also* 52 IAC 52-2-2.1 (repealed May 15, 2020). We therefore need not convert the Assessor's motion to dismiss or our show cause order into summary judgment proceedings simply because Gilday offered materials outside his petition. *See* Ind. Trial Rule 12(b) (providing for conversion of T.R. 12(b)(6) motions to summary judgment motions if matters outside the pleadings are offered by a party and not excluded by the trial court). As a practical matter, however, the result is the same. Gilday had ample opportunity to and did offer factual materials to support its authority to file the appeal petitions, and we take all those facts as true for purposes of this determination.

deduction. At some point before the 2014 assessment date, the Marion County Auditor removed the deduction. *Form 131 pets.; Response to Mot. to Dismiss,* at *2-7.*

9. As early as 2013, Batties became delinquent on a loan held by Green Tree and secured by a mortgage on his property. Gilday also held a mortgage on the property. Green Tree filed a complaint for foreclosure. Gilday then filed cross- and counter-claims, naming the same defendants (other than Gilday) that Green Tree had named in its complaint. *Form 131 pets.; Response to Mot. to Dismiss, at 7, Ex. D; Petitioner's Motion. for Leave to File a Reply to the Assessor's Response Re: Order to Show Cause ("Mot. for Leave"), Exs. A-B; Petitioner's Reply to the Indiana Board's Sua Sponte Motion and Order for Rule to Show Cause ("Pet'r Reply"), at 2-3.*

10. In December 2014, the Marion County Superior Court issued an Agreed Default and Summary Judgment Entry and Decree of Foreclosure, in which it entered a finding of default and/or summary judgment on Batties' promissory note to Gilday. The court also foreclosed Batties' equity of redemption, adjudicated Gilday's interest superior to the interests of all crossclaim defendants (but not to Green Tree's interest) and ordered the property to be sold by the Marion County Sheriff. Three days later, the court entered a judgment of foreclosure for Green Tree, adjudicating its lien superior to the interests of all other parties, including Gilday and Batties, and again ordering the property to be sold by the Sheriff. Green Tree's judgment included property taxes Green Tree had paid out of escrow. The court also granted judgment for interest as it accrued and all sums advanced by Green Tree, including taxes, through the date of a sheriff's sale. *Form 131 pets.; Response to Mot. to Dismiss, at 6-7, Ex. D; Mot. for Leave, Ex. B.*

11. Green Tree continued to pay taxes on the property through the date of the sheriff's sale. Gilday bought the property after bidding $375,000. Of that amount, Gilday wrote a check to the Marion County Sheriff for $280,467.86, which was the amount of Green Tree's judgment at the time of sale. Gilday bid the remainder of the purchase price from

its own judgment. *Form 131 pets.; Response to Mot. to Dismiss, at 7; Pet'r Response to Show Cause Order at 2-3, Ex. A at ¶¶ 8-10, Ex. 1; Pet'r Reply at 6*.

12. Following Gilday's successful bid, the Sheriff issued a deed to Gilday, in which he conveyed the property "to have and to hold . . . with the privileges and appurtenances to [Gilday], their grantees and assigns, forever, in full and ample manner with all rights, title and interest held by the aforesaid Defendants." *Pet'r Response to Show Cause Order, Ex. A at ¶ 11, Ex. 2; Pet'r Reply at 2-3.*

13. Approximately three months later, Gilday sold the property to Lawrence and Delinda Kindig for $427,000. Gilday then filed a Form 130 petition for the 2018 assessment year. In that petition, Gilday alleged that it had prepaid to the Kindigs part of the taxes that were based on the 2018 assessment and were billable in 2019. Gilday sought to have the assessment reduced from $593,000 to $427,000 and to have the homestead "exemption" to which Gilday alleged Batties was entitled for 2018 figured into the taxes that would be recalculated on the new assessment. Gilday and the Assessor signed a Form 134 joint report in which the parties agreed to the reduced assessment and in which Gilday noted that, "concomitant" with the settlement, the Marion County Auditor recognized the homestead deduction for the parcel and made two corrections for the 2018-pay-2019 tax bill, "thereby fully resolving all issues" on the Form 130 petition. The PTABOA issued a Form 115 determination reducing the assessment. *Response to Mot. to Dismiss, at Exs. J-L*.

IV. Analysis

A. Gilday lacked authority to file these appeals because it is neither a taxpayer nor a successor to a taxpayer within the meaning of the appeal and refund statutes.

14. Gilday filed its appeal under Ind. Code § 6-1.1-15-1.1, which provides that a "taxpayer" may file an appeal. After the PTABOA issued its determinations, Gilday appealed to us

under Ind. Code § 6-1.1-15-3. That statute similarly gives a "taxpayer" the right to obtain review of a county PTABOA's determination. I.C. § 6-1.1-15-3(a).

1. Gilday is not a taxpayer: simply buying a property at sheriff's sale is not the same as paying the taxes or paying the judgment of the mortgagee who paid the taxes.

15. Gilday referred to itself as the taxpayer in its Form 131 petitions. It argues that we must accept that allegation as true, which should end our inquiry. But the question of whether Gilday is a taxpayer within the meaning of the appeal statutes is a mixed question of fact and law. Gilday's conclusory allegation therefore does not suffice if the underlying facts it has alleged clearly show that it did not qualify as a taxpayer.

16. The legislature has not defined "taxpayer" for purposes of the appeal statutes. But one of our procedural rules—52 IAC 4-2-11—implicitly interprets that term in defining who qualifies as a party in proceedings before us. In relevant part, it defines a party as a participant in an appeal governed by our rules, including the owner of a property under appeal, the "taxpayer responsible for the property taxes payable on" the property, and "[a]ny other party with a statutory or contractual right or duty to appeal from or defend a determination." 52 IAC 4-2-11 (filed May 15, 2020).

17. A person who owns a property on an assessment date undoubtedly qualifies as a taxpayer for purposes of an appeal concerning that date. A person who is either statutorily or contractually liable for paying the taxes based on that assessment or who has a contractual or statutory right or duty to appeal the assessment would likewise qualify. Finally, for purposes of this decision, we will also assume that someone who pays the taxes based on an assessment can file an appeal for that assessment date, even if that person did not own the property and would not be statutorily or contractually liable for those taxes.

18. Gilday's own allegations show that it does not qualify under any of those scenarios. It did not own the property on the assessment dates in question. It bought the property at

Sheriff's sale in July 2018—the year following the last assessment date at issue. Similarly, Gilday was not statutorily or contractually liable for the taxes that were based on those assessments. It did not own, hold, possess, control, or occupy any part of the property on the assessment dates. *See* I.C. § 6-1.1-2-4 (laying out who is liable for taxes assessed to property, including the owner and people other than the owner of the land who own, hold, possess, control, or occupy improvements on an assessment date). Nor does Gilday allege it was a party to any contract obligating it to pay or reimburse taxes that were based on those assessments or giving it the right to appeal the assessments.

19. Gilday, however, alleges that it paid the taxes for the assessment years under appeal when it bought the property at sheriff's sale and wrote a check paying Green Tree's judgment, which included taxes that Green Tree paid for those assessment dates. We disagree. Gilday misconstrues what happens when a successful bidder buys a property at sheriff's sale. The bidder does not pay either the judgment creditor who forced the sale or anyone else with an interest in the property. It simply pays the sheriff, who divides the proceeds from the sale according to statutorily determined priority. I.C. § 6-30-10-14. The fact that those proceeds might ultimately satisfy the judgment of a mortgagee does not somehow transform the transaction or operate as an assignment of rights from the mortgagee to the bidder.[4]

2. The sheriff's deed conveying title to Gilday did not convey intangible personal property, such as the right to bring an appeal or seek a refund, and therefore did not make Gilday Batties' successor.

20. Undeterred, Gilday argues that it had a statutory right to appeal the assessments as Batties' successor. It points to the refund statute, which allows "a person, including heirs, personal representatives, or successors," to file a claim for refund of "all or part of a property tax paid." I.C. § 6-1.1-26-1.1(a). Gilday then argues that the refund statute

[4] Batties in fact paid Green Tree's judgment (including charges for property taxes) through the sale of his house – it was Batties' own assets that "paid the taxes" in the judgment. Gilday simply bought a house and flipped it for profit.

should be read in conjunction with the appeal statutes, because the refund statute further provides: "With regard to a taxpayer filing an appeal under IC 6-1.1-15, the notice of appeal shall be treated as a claim for refund by the taxpayer filed as of the date of the final disposition of an appeal. . . ." *Id.*

21. Gilday necessarily reads the term "successor" to mean anyone who buys real property. Indeed, Gilday grounds its claim on the conveyance language in the sheriff's deed. But that language simply conveyed rights and interests in the *real estate*. While the right to appeal property taxes or to receive a refund may relate to real estate, they are not real-property interests. Instead, they are rights of action, which are intangible personal property. *See Herr v. United States Forest Serv.*, 803 F.3d 809, 821 (8th Cir. 2015) ("Once a right of action accrues, it becomes a 'piece' of intangible personal property called a 'chose in action.'"). Absent a covenant assigning those rights, they do not transfer with the land. *See id.* The sheriff's deed did not—and could not—transfer to Gilday Batties' intangible right to bring an assessment appeal and claim a refund.

22. To illustrate the fallacy in Gilday's position, assume a property owner paid taxes and successfully appealed his assessment, thereby reducing his taxes and entitling him to a refund. Before filing his refund claim, however, he sells the property. The purchase agreement says nothing about the appeal. Under Gilday's theory, the deed passing title to the buyer makes the buyer a successor who may claim the refund, even though he neither paid the taxes nor prosecuted the appeal.[5]

3. The Assessor did not admit that Gilday is Batties' successor.

23. Gilday nonetheless argues that the Assessor admitted that Gilday is Batties' successor. First, Gilday points to its Request for Admission No. 25 and the Assessor's response:

[5] Likewise, Gilday does not allege, nor could he reasonably argue, that if both Gilday and Batties had filed appeals, that Gilday could claim the refund to the exclusion of Batties.

> **REQUEST FOR ADMISSION NO. 25**: A successor residential real property owner who paid the real estate taxes assessed to and owed by a previous owner of the subject real estate has a right under Indiana law to claim a refund for such overpaid real estate taxes.
> **RESPONSE**: Respondent admits that successors may file a claim for refund of all or part of a property tax paid, according to limitations set forth in I.C. 6-1.1-26.

Pet'r Reply at 13; *Pet'r Mot. for Leave to Propound, Ex. A at 9*.

24. According to Gilday, the Assessor's response is a binding admission that Gilday has "the right as a successor to bring this particular appeal." *Pet'r Reply at 13*. But that plainly misreads both the request and the Assessor's response. Neither says anything about *Gilday* having paid the real estate taxes for the assessment years at issue in these appeals or *Gilday* qualifying as a successor within the meaning of the refund statute. Indeed, as we have explained, Gilday's own factual allegations conclusively show that Green Tree—not Gilday—paid the taxes and that buying property at sheriff's sale is not the same as paying Green Tree's judgment.

25. Gilday also claims that the Assessor's execution of the Form 134 report for its 2018 appeal is an admission that "a successor taxpayer like [Gilday] can go back to a tax year in which the previous owner, Batties, occupied the property as a primary residence, and effect the change in the homestead deduction and classification of the Subject Real Estate." *Pet'r Reply at 15*. The Form 134 report says nothing of the sort. The Assessor simply agreed to settle Gilday's appeal by reducing the property's valuation.

26. Even if, as Gilday seems to allege, the Assessor implicitly endorsed the Auditor's agreement to recognize the homestead deduction for 2018 and to correct the tax bills that were based on that assessment, that endorsement does not matter. As the Tax Court has repeatedly explained, "each tax year stands alone for property tax assessment administrative and judicial appeals." *Garrett, LLC v. Noble Cty. Ass'r*, 112 N.E.32 1168, 1175 (Ind. Tax Ct. 2018). While that doctrine is normally applied to substantive

questions—such as where parties try to use an assessment or determination from a prior year to prove the value of a property for a later assessment date—we believe it applies equally to procedural questions like the one at issue here. The fact that an assessing official did not raise a procedural issue in an appeal for one year has no bearing on his right to do so in separate appeals for other years.

27. Gilday's attempt to use the Form 134 report as some sort of admission also runs counter to the well-recognized judicial policy favoring settlements. As the Indiana Supreme Court has explained, the law encourages parties to engage in settlement negotiations in several ways, such as by "prohibit[ing] the use of settlement terms or even settlement negotiations to prove liability for or invalidity of a claim or its amount." *Dep't of Local Gov't Fin. v. Commonwealth Edison Co.*, 820 N.E.2d 1222, 1227 (Ind. 2005) (*citing* Ind. Evidence Rule 408). It also provides that a settlement is neither a judgment nor an admission of liability. *Id*. at 1227-28 (*citing Four Winns, Inc. v. Cincinnati Ins. Co.*, 471 N.E.2d 1187, 1190 (Ind. Ct. App. 1984)). That strong policy justifies denying settlements precedential effect in property tax cases; to do otherwise would have a "chilling effect on the incentive of all assessing officials to resolve cases outside the courtroom." *Id*. at 1228 (*quoting Boehning v. State Bd. of Tax Comm'rs*, 763 N.E.2d 502, 505 (Ind. Tax Ct. 2001)).

B. The Assessor did not waive the right to contest Gilday's authority to file these appeals.

28. Finally, Gilday argues that the Assessor waived the right to contest whether Gilday has standing to bring these appeals both through its execution of the Form 134 report and by failing to raise that issue in his motion to dismiss.

29. The Assessor's execution of the Form 134 report does not operate as a waiver for the same reasons it does not constitute an admission. As for the Assessor failing to raise the issue of "standing" in his motion to dismiss, nothing in our procedural rules requires an assessor to use a motion to dismiss as the sole vehicle for contesting a taxpayer's

authority to bring an appeal. The Assessor could raise the issue at any time, including at a hearing on the merits. More importantly, we raised the issue in our show cause order, something our procedural rules allowed us to do. *See* 52 IAC 2-10-2(b) (repealed May 15, 2020); *see also*, *Muir Woods, Inc. v. O'Connor,* 36 N.E.3d 1208, 1211 (Ind. Tax Ct. 2015) ("The Indiana Board could dismiss a case *sua sponte*; therefore, it necessarily had the authority to determine whether it should dismiss Muir Woods's case by issuing the Show Cause Order *sua sponte*."). Whether or not the Assessor also raised the issue is beside the point.

V. Conclusion

30. Taking all Gilday's factual allegations as true, and drawing all inferences in Gilday's favor, those allegations demonstrate that Gilday is neither a taxpayer nor a successor within the meaning of the relevant appeal and refund statutes. It therefore lacked the authority to bring these appeals, which we DISMISS.

We issue this Final Determination on the date written above.

_____
Chairman, Indiana Board of Tax Review

_____
Commissioner, Indiana Board of Tax Review

_____
Commissioner, Indiana Board of Tax Review

- APPEAL RIGHTS –

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5 and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required not later than forty-five (45) days after the date of this notice. The Indiana Code is available on the Internet at <http://www.in.gov/legislative/ic/code>. The Indiana Tax Court's rules are available at <http://www.in.gov/judiciary/rules/tax/index.html>.