PETITIONER APPEARING PRO SE:
RAYMOND L. CURTIS
Beverly Shores, IN

ATTORNEYS FOR RESPONDENT:
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IN THE INDIANA TAX COURT

RAYMOND L. CURTIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cause No. 71T10-0704-SC-21
	)	
INDIANA BOARD OF TAX REVIEW,	)	
	)	
Respondent.	)	

ORDER ON RESPONDENT'S MOTIONS TO DISMISS AND STRIKE AND PETITIONER'S MOTIONS TO AMEND AND SUPPLEMENT

NOT FOR PUBLICATION
September 24, 2007

FISHER, J.

Raymond L. Curtis (Curtis) appeals from five final determinations of the Indiana Board of Tax Review (Indiana Board) valuing his real property for the 1998, 1999, and 2000 tax years (years at issue). The matter is currently before the Court on the Indiana Board's motions to dismiss and strike and Curtis's motions to amend and supplement.

FACTS AND PROCEDURAL HISTORY

Curtis owns two parcels of land in Calumet Township, Lake County, Indiana. For the years at issue, the Calumet Township Assessor (Assessor) valued these parcels at

$40,500. Believing that the assessments were too high, Curtis appealed them first to the Lake County Property Tax Assessment Board of Appeals (PTABOA) and then to the Indiana Board. Both the PTABOA and the Indiana Board denied each of Curtis's appeals.

On April 9, 2007, Curtis filed an original tax appeal. Curtis's verified petition (Petition) named the Indiana Board as the respondent and elected small claims status. On May 11, 2007, the Indiana Board moved to dismiss Curtis's appeal pursuant to Indiana Trial Rules 12(B)(1), (5), and (6) (motion to dismiss #1). On June 10, 2007, Curtis filed two amended petitions for judicial review and therein moved to amend and supplement his Petition.[1] On June 25, 2007, the Indiana Board moved to strike both of Curtis's amended petitions. On July 18, 2007, the Indiana Board moved to dismiss Curtis's appeal for failure to prosecute (motion to dismiss #2). On July 27, 2007, the Court conducted one hearing on all of these motions. Additional facts will be supplied as necessary.

ANALYSIS AND DISCUSSION

The Indiana Board has moved to dismiss Curtis's appeal on various grounds. Each of those grounds will be discussed in turn.

I. Failure to Name the Proper Party

The Indiana Board first asserts that Curtis's appeal should be dismissed pursuant to Indiana Trial Rules 12(B)(1) and 12(B)(6) because he failed to name the proper parties as respondents in his Petition. More specifically, the Indiana Board claims that

[1] Specifically, Curtis sought to amend his original Petition by adding the Lake County Assessor, the Lake County Auditor, and the Lake County Property Tax Assessment Board of Appeals as respondents. Curtis also sought to supplement his original Petition with additional information with respect to his appeal.

this Court lacks jurisdiction over Curtis's appeal because he named the Indiana Board as the respondent instead of naming either the Assessor or the PTABOA, as required by the Administrative Orders and Procedures Act (AOPA) and Tax Court Rule 4(B). (*See* Mot. to Dismiss #1 ¶¶ 9-11; Hr'g Tr. at 13-14.) Furthermore, the Indiana Board asserts that both of Curtis's amended petitions should be stricken because they were filed beyond the applicable statute of limitations and could not, therefore, relate back to his original Petition to cure its defects. (*See* Resp't Mot. to Strike ¶ 12; Hr'g Tr. at 15-17.)

Indiana Code § 4-21.5-5-7 indicates that a petition for judicial review must identify the persons who were parties to any proceeding that led to the Indiana Board action. *See* IND. CODE ANN. § 4-21.5-5-7(b)(4) (West 2007). Indiana Tax Court Rule 4(B)(2)(a) provides that "the named respondent shall be the local governmental official or entity that made the original assessment valuation . . . that was the subject of the proceeding [ ] before the Indiana Board." Ind. Tax Court Rule 4(B)(2)(a). In this case, because the Assessor was the party that made the original assessment valuation, the Assessor should have been named as the respondent in Curtis's Petition.

Admittedly, the caption of Curtis's original Petition does not list the Assessor as the respondent. Nevertheless, the body of his original Petition states that the "Calumet Township Assessor [was a] part[y] to the proceedings that led to the final determination of the Indiana Board." (*See* Pet'r V. Pet. for Judicial Review (hereinafter, Pet'r Pet.) ¶ 4.) In addition, Curtis's original Petition attaches a copy of the Indiana Board's Findings and Conclusions, which also names the Assessor as a respondent. (*See* Pet'r Pet. Attachment 1 at 6.) This Court has previously held this to be sufficient to identify the

Assessor as a respondent in accordance with the requirements of AOPA and Tax Court Rule 4. *See Krol v. Indiana Bd. of Tax Review*, 848 N.E.2d 1185, 1186-87 (Ind. Tax Ct. 2006). Accordingly, the Court DENIES the Indiana Board's motion to dismiss pursuant to Indiana Trial Rules 12(B)(1) and 12(B)(6) and the Indiana Board's motions to strike.

II. Insufficiency of Service of Process

The Indiana Board next argues that Curtis's appeal should be dismissed for insufficiency of service of process pursuant to Indiana Trial Rule 12(B)(5). More specifically, the Indiana Board explains that Curtis failed to attach a certificate of service with his Petition and serve the proper parties. (*See* Hr'g Tr. at 14-15, 38-39.) *See also Munster v. Groce*, 829 N.E.2d 52, 57 (Ind. Ct. App. 2005) (stating that a "court does not acquire personal jurisdiction over a party if service of process is inadequate") (citation omitted).

"Personal jurisdiction is the court's power to bring a person into its adjudicative process and render a valid judgment over [him or her]." *Brockman v. Kravic*, 779 N.E.2d 1250, 1254 (Ind. Ct. App. 2002) (citation omitted). The assertion that a court lacks personal jurisdiction over a party must be raised at the first opportunity to avoid waiver. *See Harp v. Indiana Dep't of Highways*, 585 N.E.2d 652, 659 (Ind. Ct. App. 1992) (citations omitted). Thus, in this case, the Indiana Board should have moved for dismissal due to insufficiency of process by raising that affirmative defense in either its answer or in its motion to dismiss. *See Foor v. Town of Hebron*, 742 N.E.2d 545, 550 (Ind. Ct. App. 2001). The Indiana Board's answer, however, makes no mention of that affirmative defense. (*See* Resp't Answer.) Furthermore, while the caption of its motion to dismiss indicates it is seeking dismissal pursuant to Indiana Trial Rule 12(B)(5), the

body of the motion provides no argument, legal analysis, or any other reference to dismissal due to insufficient service. (*See* Mot. to Dismiss #1.) The only time the Indiana Board explained this theory was at the hearing. By then, however, it was too late. *See* Ind. Trial Rule 7(B) (stating "[u]nless made during a hearing or trial, or otherwise ordered by the court, an application to the court for an order shall be made by written motion. The motion shall state the grounds therefor and the relief or order sought"); 1 William F. Harvey, INDIANA PRACTICE, RULES OF PROCEDURE ANNOTATED at 481 (3d ed. 1999) (stating that "[o]ral motions may be made during a hearing or trial . . . [but] a hearing on a written motion previously made is not a 'hearing' within this provision of the Rule"). Consequently, the Court deems the issue of insufficiency of service of process waived.[2]

III. Failure to Prosecute

Finally, the Indiana Board claims that Curtis's appeal should be dismissed pursuant to Indiana Trial Rule 41(E). Indiana Trial Rule 41(E) provides in pertinent part:

> [W]hen no action has been taken in a civil case for a period of sixty [60] days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at [petitioner's] costs if the [petitioner] shall not show sufficient cause at or before such hearing.

Ind. Trial Rule 41(E).

This Court will balance several factors when determining whether a cause of action should be dismissed for failure to prosecute. These factors include: (1) the length of the delay; (2) the reason for the delay; (3) the degree of personal responsibility

[2] The Court also notes that because Curtis elected to have his appeal proceed on this Court's small claims docket, his Petition also constitutes a summons and he was only required to serve the Attorney General. *See* Ind. Tax Court Rule 16(C), (D).

on the part of the petitioner; (4) the degree to which the petitioner will be charged for the acts of his attorney; (5) the amount of prejudice to the respondent caused by the delay; (6) the presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion; (7) the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purposes of the rules and the desire to avoid court congestion; (8) the desirability of deciding the case on the merits; and (9) the extent to which the petitioner has been stirred into action by a threat of dismissal as opposed to diligence on the petitioner's part. *See Olson v. Alick's Drugs, Inc.*, 863 N.E.2d 314, 319-20 (Ind. Ct. App. 2007), *trans. denied*. The weight given to any particular factor depends on the facts of the case. *Id.* at 320.

The Indiana Board asserts Curtis has not diligently pursued his appeal for over 95 days. (*See* Mot. to Dismiss #2 ¶ 5.) More specifically, the Indiana Board explains that its "non-rule policy" requires petitioners to remit a $50.00 administrative fee before it will begin to prepare a certified administrative record. (*See* Mot. to Dismiss #2 ¶ 7, Ex. 1.) The Indiana Board sent three letters to Curtis on April 13, May 15, and July 3, 2007, requesting that he pay the fee, but as of July 17, 2007, Curtis had not paid the fee. (*See* Mot. to Dismiss #2 Exs. 2-4; Aff. of Nickita Brewer ¶ 11.) The Indiana Board asserts that Curtis's actions demonstrate his "intent to continuously ignore" this Court's rules. (*See* Mot. to Dismiss #2 ¶ 7.) Furthermore, the Indiana Board claims that Curtis's recalcitrance has hindered any ability to prepare a defense because "review is strictly limited to the evidence contained in the record . . . [and] the respondent has no access to the administrative record." (*See* Hr'g Tr. at 17.)

Curtis, however, asserts that he has diligently pursued his case. During the

hearing, he explained that during the month of May, when the second letter was sent, the post office inexplicably returned some of his mail to the senders. (*See* Hr'g Tr. at 30, 36.) Curtis maintains that he picked up his mail from the post office on a regular basis, never refused mail from the Indiana Board or the Attorney General's office, and paid the fee after receiving the third letter in mid-July. (*See* Hr'g Tr. at 26-27, 29-30, 36.) Curtis then produced a copy of a money order for $53.00, dated July 24, 2007, and made payable to the Indiana Board.[3] (*See* Hr'g Tr. at 20-21, 33; Pet'r Objection to Mot. to Dismiss #2, Attachment 1 at 6.) Curtis testified that he mailed the money order to the Indiana Board on July 24, 2007. (*See* Hr'g Tr. at 20.)

The Court cannot say that Curtis's delay in remitting the fee to the Indiana Board warrants dismissal of his appeal. While Curtis does not address whether he received the first letter requesting the fee, he appears to have tendered the fee once he actually received the third letter. Moreover, the facts as presented do not suggest that Curtis's delay was intentional. Furthermore, any prejudice the Indiana Board may have experienced with respect to its ability to prepare a defense was *de minimis*, as it was actively pursuing a number of other grounds for dismissal with respect to Curtis's appeal during that time. Thus, justice dictates that this case should be decided based on the merits. Indeed, in observing the balance between justice and the importance of our procedural rules, the Indiana Supreme Court has stated that:

> [a]lthough our procedural rules are extremely important, it must be kept in mind that they are merely a means for achieving the ultimate end of orderly and speedy justice. We must examine our technical rules closely when it appears that invoking them would defeat justice; otherwise we

[3] The additional $3.00 fee reflects a previously incurred copying charge. (*See* Pet'r Objection to Mot. to Dismiss #2 ¶ 5.)

> become slaves to the technicalities themselves and they acquire the position of being the ends instead of the means.

See S.T. v. State, 764 N.E.2d 632, 635 (Ind. 2002) (citation omitted). Consequently, the Court DENIES the Indiana Board's motion to dismiss for failure to prosecute.

CONCLUSION

For the foregoing reasons, each of the Indiana Board's motions to dismiss is DENIED. Additionally, Curtis's motions to amend are DENIED, but only to the extent that he seeks to add the Lake County Auditor and the PTABOA as respondents. Curtis's motions to supplement, however, are GRANTED in their entirety. Therefore, each of the paragraphs contained within both of Curtis's amended petitions shall be incorporated into his Petition. In addition, the parties are instructed to correct the caption in this case to reflect the Calumet Township Assessor as the respondent.[4] Finally, the Indiana Board's motions to strike are DENIED.[5]

SO ORDERED this 24th day of September, 2007.

Thomas G. Fisher, Judge
Indiana Tax Court

[4] Consequently, the Indiana Board is dismissed as a party to this case.

[5] On a final note, the Court reminds Curtis that *at the time* he sends a document to the Clerk for filing he is also required to send a copy of that document to opposing counsel.

DISTRIBUTION:

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