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Administrative Law - Notice of Special Assessment

Harry G. Holz

RECENT DECISIONS

Administrative Law — Notice of Special Assessment — Action in equity to set aside special assessments. The City of Milwaukee levied special assessments for street improvements against property owned by the plaintiff. Abutting landowners were given notive of the assessments by publication, in compliance with the City Charter which provided that notice of an assessment for street improvement benefits was sufficient if given by publication.[1] Plaintiff brought this action against the City alleging that: 1) it had no actual notice of the assessment until it was too late to protect it; 2) notice by publication was inadequate to comply with the requirements of due process of law;[2] and that, therefore, the City Charter provisions were unconstitutional.[3] The Supreme Court of Wisconsin held for the defendant (City). *Wisconsin Electric Power Company v. Milwaukee,* 263 Wis. 111, 56 N.W.2d 784 (1953).

In 1955, plaintiff obtained leave of the court to plead over and served an amended complaint. The Supreme Court of Wisconsin again held for the defendant.[4] Plaintiff's prime reason for filing the amended complaint was that subsequent to the decision of the principal case, the Supreme Court of the United States again considered the sufficiency of notice given by publication and broadened a principle which it had previously announced.

The case upon which plaintiff based its amended complaint involved an action in equity to enjoin the enforcement of lien claims. A city made street improvements upon real estate owned by a railroad and obtained liens for the work done. The railroad was reorganized under Section 77 of the Bankruptcy Act and the court issued an order directing creditors to file their claims by a prescribed date or be denied participation. The railroad was required to send copies of the court order to mortgage trustees and to all creditors who had already appeared in court. Other creditors had to depend for their notice on publication of the order in newspapers. The city never saw the published notices and consequently its lien claims were never filed in the reorganization. The Supreme Court of the United States reversed the trial court and held that the notice by publication was insufficient.[5] In its opinion the Court relied on the case of *Mullane v. Central Hanover Fire Insurance Company.*[6] This case arose when a trust company published notice of judicial hearings on settlement of accounts of the

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[1] CITY OF MILWAUKEE CHARTER, §§11.20, 12.07, and 14.24.
[2] WIS. CONST. Art. I, §13.
[3] *Supra,* n. 1.
[4] Wisconsin Electric Power Company v. Milwaukee, 272 Wis. 575, 76 N.W.2d 341 (1955).
[5] New York v. New York, N.H. & H. Ry., 344 U.S. 293 (1953).
[6] Mullane v. Central Hanover Fire Insurance Company, 339 U.S. 306 (1949).

trustee of a common trust fund. The attorney representing the interests of the beneficiaries in the income of the fund objected on the ground that the notice by publication was inadequate to afford due process of law under the Constitution.[7] The Court held that the notice by publication was insufficient and stated the doctrine that publication affords sufficient notice where the names and addresses of interested persons are unknown but does not afford notice compatible with the requirements of due process where the names and addresses of interested persons are known or could be ascertained with reasonable diligence. What the Supreme Court of the United States did in the *New York, N.H. & H. Ry.* case[8] was to extend the doctrine of the *Mullane* case[9] to another fact situation. What plaintiff attempted to do in the principal case was to persuade the Supreme Court of Wisconsin to extend the *Mullane* doctrine to cases of notice of a special assessment. The Wisconsin Court refused to do so, and was entirely correct in its refusal.

The rules concerning notice in cases involving tax assessments stand clearly and distinctly apart from the rules concerning notice in all other types of cases. No attempt should have been made to draw an analogy between notice in a bankruptcy case and notice in a tax assessment case.

Tax cases stand apart because the power given the taxing authorities is broad, and therefore less notice need be given in tax cases than is required in other types of cases. The Wisconsin Court illustrated this when it set forth some fundamental principles with reference to the subject of taxation in the case of *Milwaukee County v. Dorsen,*[10] where it said:

> "It is well settled by our decisions that the legislature has plenary power to deal with the whole question of taxation subject to the constitutional limitations that taxes can be imposed only for public purposes and that the rule of taxation must be uniform. Its power is supreme in the selection of objects of taxation, determining the amount of taxes to be levied thereon and the purposes thereof, . . ., and in devising the machinery for assessing the taxable property imposing taxes thereon, and in collecting and disbursing the same."

Another indication of the broad power of the taxing authorities in the area of taxation is the presumption which prevails in favor of the regularity of the acts of taxing authorities.[11]

Since tax cases stand apart from other cases in this manner, the

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[7] U.S. CONST. Amend. XIV, §1.
[8] *Supra,* n. 5.
[9] *Supra,* n. 6.
[10] Milwaukee County v. Dorsen, 208 Wis. 637, 242 N.W. 515, 640 (1932).
[11] *Ibid.*

form of notice required to be given in tax cases is not as strict and personal as the form required in other types of cases. It is generally recognized that a landowner is entitled to and must be given actual or constructive notice of an assessment at some time during the proceedings.[12]

> "Due process of law, in the constitutional sense, is satisfied by the giving of notice to the party of a proceeding in which his rights may be affected, together with an opportunity to appear therein and be heard."[13]

However, the notice need not be given at any set time but rather, it is sufficient to sustain the assessment if given at any stage of the proceedings prior to a conclusive judgment.[14]

Although there must be some notice given, this need not be served personally. Constructive service, that is, any form of service other than actual personal service,[15] has been held sufficient to satisfy the requirements of due process of law. The Supreme Court of the United States recognized this in the case of *Londoner v. Denver*[16] when it said:

> ". . . the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication or by a law fixing the time and place of hearing."

Thus, it appears that notice in tax assessment cases may be so general as to rest only in the provisions of a statute, of which the taxpayer is required to take notice. This has also been recognized by the Supreme Court of the United States in the case of *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus,*[17] and by the Supreme Court of Wisconsin in the *Milwaukee County v. Dorsen* case when it said:

> ". . . notice, however, may be general and rest only in the provisions of the statutory law of which the taxpayer must take notice."[18]

Notice by statute is much less likely to reach the taxpayer than notice by publication, and yet the courts uphold it as sufficient in tax cases, so there can be no question of the sufficiency of notice by publication in tax cases.

Still another indication of the manner in which tax cases stand apart and the broad power of taxing authorities is the distinct liberality,

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[12] Armory Realty Co. v. Olson, 210 Wis. 281, 246 N.W. 513 (1933).
[13] Stone v. Little Yellow Drainage District, 118 Wis. 388, 394, 95 N.W. 405 (1903).
[14] McEveney v. Town of Sullivan, 125 Ind. 407, 25 N.E. 540 (1890).
[15] Black, LAW DICTIONARY 1533 (4th ed. 1951).
[16] Londoner v. Denver, 210 U.S. 373, 385 (1908).
[17] Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus, 154 U.S. 439 (1894).
[18] *Supra,* n. 10, at 641.
[19] Meggett v. Eau Claire, 81 Wis. 326, 51 N.W. 566 (1892).

from the point of view of the taxing authorities, which prevails throughout *all* rules relating to notice of tax assessments. This is apparent in the rules relating to what a statute must prescribe in regard to notice. The Wisconsin case of *Meggett v. Eau Claire* held that the charter of the City of Eau Claire was valid even though it did not require notice to be given to the lot owner as to the amount of special assessments with which the lots were charged.[19] It said that the due process clause is not violated if the owner has an opportunity to question the validity of the amount of the special assessment either before the amount is determined or in a subsequent proceeding for its collection. A subsequent case held that a city charter which contained no provision for the giving of any notice either actual or constructive was unconstitutional and void.[20] However, this has been expressly overruled by the *Armory Realty Company* case which stated the rule in Wisconsin to be that the failure of a statute specifically to require or prescribe the method of giving notice does not render it unconstitutional.[21] This liberality in rules relating to notice of tax assessments is also apparent in the rules relating to the form of notice that must be given. It must conform substantially to the requirements of the law providing therefor,[22] but beyond this point there is much flexibility. A Wisconsin case has held that the annual entry of an assessment on the tax rolls is sufficient notice of the assessment, where no other notice is required by law.[23] Minor irregularities in a notice, such as a mistake in or an omission of the name of a property owner will not invalidate it, if it is otherwise correct and sufficient.[24] It has also been held that defects in the notice may be waived by the conduct of the property owner.[25] Notice which will disclose to persons of ordinary intelligence in a general way what is proposed will suffice.[26] However, it should be noted that even under these liberal rules, a line must be drawn at some point. The Wisconsin Court drew such a line in the case of *Boden v. Town of Lake* in which it held a notice of special assessment to be insufficient because it did not inform the property owner that his property would be specially assessed, but implied that the cost of the improvement would be paid by the whole town.[27]

The basic reason why tax cases stand apart from other types of cases in regard to the type of notice that must be given is that of tradition — it has always been so.

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[20] Dietz v. Neenah, 91 Wis. 422, 64 N.W. 299 (1895).
[21] *Supra*, n. 12.
[22] People v. Smith, 216 N.Y. 95, 110 N.E. 174 (1915).
[23] Hennessy v. Douglas County, 99 Wis. 129, 74 N.W. 983 (1898).
[24] West Chicago Street Ry. v. People, 155 Ill. 299, 40 N.E. 599 (1895).
[25] Blake v. City of Spartanburg, 185 S.C. 398, 194 S.E. 124 (1937).
[26] Escott v. Miami, 107 Fla. 273, 144 So. 397 (1932).
[27] Boden v. Town of Lake, 244 Wis. 215, 12 N.W.2d 140 (1943).

> ". . . it has *always* been recognized by the courts that in matters of assessment and taxation, the same character of notice is not required as in ordinary actions."[28] (emphasis added)

A second, and perhaps the most practical reason why tax cases stand apart, is that of public policy. The Wisconsin court recognized this public policy in the *Milwaukee County v. Dorsen* case[29] when it said that:

> "The proper discharge of governmental functions depends upon the regular collection of taxes, and the machinery of administration by which taxes are collected is often in the hands of those untutored in the law, courts should not inject into the plan set up by the legislature technicalities which may result in depriving the government of the funds necessary for the discharge of its functions."

The courts have decided that this public interest must prevail over the interest of the individual in having his constitutional rights preserved.

A second aspect of this public policy is apparent in cases involving special assessments for street improvements, such as the principal case. Special assessments are:

> ". . . those special and local impositions upon property in the immediate vicinity of municipal improvements, such as grading and paving streets, improving harbors or navigable rivers within the limits of the municipality, . . ., which are necessary to pay for improvements, . . ."[30]

This definition indicates that special assessments result from improvements made upon property which are crucial to the well-being of the public. It is essential to the well-being of the public that roads and sidewalks be kept in good repair. Not a day passes in which nearly every citizen does not make use of roads or sidewalks in his chosen municipality. A break or obstruction in any part of one of them would destroy its usefulness and result in the greatest inconvenience to the general public. To require a personal notice to the landowner before the repairs could be made would too greatly handicap and delay the municipality in performing this vital public function. Even though in some specific instances it may be possible, and even easy, for the municipality to give personal notice to the landowners, the rule must be designed to fit the general situation and not the exceptional one. This was recognized in a Wisconsin case which held that, as regards sidewalk assessments, provision for notice to the property owner before construction or repair is not essential to the validity of a statute

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[28] 26 R.C.L., TAXATION, §303, at 345.
[29] *Supra*, n. 10, at 644.
[30] Hale v. Kenosha, 29 Wis, 599, 605 (1872).

providing for the repair of sidewalks.[31] The reason given was that the absence of sidewalks or the presence of defective sidewalks may be a serious public inconvenience, if not a menace to life and limb, and therefore a municipality may be clothed with power to build a walk or repair an existing walk at once without notice to landowners. This case went to the extent of saying that in such a situation the act of the municipality is really an exercise of the police power.

A third reason why the rules concerning notice in tax cases stand apart from the rules concerning notice in other cases was suggested by the Court in the *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* case.[32] The Court suggested that owners of property who must file schedules showing their taxable property with a tax assessment board, know that they have a tax assessment pending and are bound to take notice of the time and place fixed by a statute for a meeting of the tax assessment board for the purpose of making assessments as much so as parties who have a case pending in court are bound to take notice of a statute fixing the time when the term opens for the disposition of cases, and that no personal notification is necessary to meet the requirement of due process. Similarly, abutting lot owners where special improvements have been made must as reasonable persons know that special assessment proceedings are pending and notice by publication of the time and place of assessment is sufficient. The class of taxpayers being dealt with in special assessment cases are landowners, and they certainly should realize that street improvements have to be paid for and that the common method of paying for them is by special assessment.

The rules relating to notice in tax assessment cases stand clearly and distinctly apart from such rules in other types of cases. Thus, the Wisconsin Court rightly refused to apply a doctrine concerning notice in bankruptcy cases to a tax assessment case.

HARRY G. HOLZ

Publication of Court Room Proceedings By Television, Photography and Radio — The Supreme Court of Colorado recently approved the finding of a court appointed referee that Canon 35 of the CANONS OF JUDICIAL ETHICS should be revised. After a formal hearing, the referee recommended that with certain provisos the judge should have the discretion to permit the use of cameras, radio, and television instruments in court room proceedings. The provisos would prohibit photographing or broadcasting the likeness or testimony of witnesses or of jurors if such parties express objections.

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[31] Lisbon Avenue Land Co. v. Town of Lake, 134 Wis. 479, 113 N.W. 1099 (1907).
[32] *Supra*, n. 17.