Clerical Omissions and Mistakes

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Municipal taxation of real property is, in Connecticut, controlled almost exclusively by statutes, many of which have been around, in one form or another, for many, many years. These statutes are, quite often, lacking as models of clarity. Such was the case in *Wilton Campus 1691, LLC v. Wilton*, SC 20388, released as a slip opinion on May 26, 2021.

As framed by Justice D'Auria, the issue in *Wilton Campus* involved "the temporal limits of a municipal assessor's authority to impose penalties on taxpayers." Peering into the weeds, however, the real question was "whether the assessor for … the town of Wilton … must impose late filing penalties on taxpayers pursuant to General Statutes § 12-63c(d), if at all, before taking and subscribing to the oath on the grand list for that assessment year pursuant to General Statutes § 12-55(b), or may impose the penalties later." The answer is "before" and not "later," but how Justice D'Auria got to that answer provides a useful guide to how courts will go about their business of trying to work through a thorny statutory analysis.

The facts relied on by the Court were undisputed. The plaintiffs own a retail shopping center in Wilton and were required by General Statutes § 12-63c(a) to provide a 2013 income and expense report to the Wilton assessor no later than June 1, 2014. The plaintiff's report did not arrive in the assessor's office until June 3, 2014. As a result, the plaintiffs were subject to the penalty provision in § 12-63c(d), which provides that a taxpayer who fails to submit the information required by subsection (a) "shall be subject to a penalty equal to a ten per cent increase in the assessed value of such property for such assessment year."

The plaintiffs did not dispute that they were subject to the penalty. Instead, they claimed that the assessor waited too long before invoking and applying the penalty provision to the assessment of their property. The assessor, it turns out, did not actually impose the penalty until April 29, 2015 and did so under the supposed auspices of General Statutes § 12-60, which provides that any "clerical omission or mistake in the assessment of taxes may be corrected according to the fact by the assessors or board of assessment appeals, not later than three years following the tax due date relative to which such omission or mistake occurred, and the tax shall be levied and collected according to such corrected assessment." By long-standing practice, the Wilton assessor imposed § 12-63(d) penalties retroactively under § 12-60. The problem? General Statutes § 12-55(b), which mandates that "[p]rior to taking and subscribing to the oath upon the grand list, the assessor or board of assessors shall equalize the assessments of property in the town, if necessary, and make any assessment omitted by mistake or required by law." Section 12-55(a) requires the assessor to publish the finalized grand list "on or before" January 31st of each year.

And thus, the battle was drawn, with the plaintiffs claiming that the penalty was "required by law" and needed to be imposed and included in the grand list by no later than January 31, 2015, while the assessor claimed that not including the penalty in the certified grand list was a "clerical omission or mistake" that could be cured by way of § 12-60. The Appellate Court agreed with the plaintiffs. So did the Supreme Court.

Justice D'Auria's trip to the finish line is well worth the read. That journey begins with the question of whether the § 12-63c(d) penalty was "required by law." The Court's analysis involved consulting dictionaries both old and new (the statutory phrase went into the books in 1849), from which the Court concluded that the phrase "required by law" is "commonly understood to include at the very least, official actions 'commanded' by a state statute." Thus, if the penalty is mandatory, it is "required by law."

But that only raised the question of whether the penalty provision in § 12-63c(d) is mandatory, an inquiry predicated on the imprecise nature of the word "shall" ("a property owner shall be subject to a penalty upon late filing"). Because "shall" sometimes means "must" and other times can mean "may," Justice D'Auria needed to determine which version of "shall" the legislature intended in § 12-63c(d). This became a two-step process, the first of which was to note that the statute, as a whole, included both "shall" and "may" ("shall be subject to a penalty," the assessor "shall waive" the penalty if the party required to submit the income and expense report does not own the property, and the assessor "may waive" the penalty upon receipt of the report if the town has an ordinance allowing for such a waiver). The use of both "shall" and "may" in the same section, although not dispositive, indicated that the legislature understood and intended the difference in their meaning. The second step in the Court's analysis hinged on the fact that the plaintiffs did not qualify for either of the two exceptions provided for in the penalty provision. That being the case, the expression of the two exceptions operates to exclude any others (the doctrine of *expressio unius est exclusio alterius*). Thus, the penalty provision is mandatory and, accordingly, "required by law."

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Next, the Court turned to the assessor's assertion that a penalty is not an "assessment" for purposes of § 12-55. This particular claim was probably doomed once the Court realized that removing the penalty from the purview of § 12-55(b) would result in there being no deadline at all for imposing the penalty, "as the text of § 12-63c(d) contains no date by which the assessor must act." Regardless, the Court sets off to determine the meaning of "assessment" in this context, but with dictionary definitions and case law not conclusive, the Court moved on to its next statutory interpretation tool: "the broader statutory scheme and … case law interpreting our taxing statutes."

That review "makes clear that, although a municipal assessor's powers are abundant during the statutory time period for performance of the assessor's duties, the assessor's authority to act is strictly time bound." And while there are several express extensions of time allowed to the assessor by way of other statutes, the lack of any time extension in § 12-63c(d) is telling, because without an extension, the deadline in § 12-55(b) controls. This, according to Justice D'Auria, is the only reasonable interpretation of "assessment" as used in § 12-55(b).

With "required by law" and "assessment" out of the way, the Court's next task was to determine whether the assessor's actions could be saved by § 12-60, which allows the assessor to correct any "clerical omission or mistake." Up to this point, Justice D'Auria wrote for a unanimous Court. But on the question of clerical omissions or mistakes, Chief Justice Robinson had a different take. The source of disagreement proved to be two prior cases: *Reconstruction Finance Corp. v. Naugatuck*, 136 Conn. 29 (1949) and *National CSS, Inc. v. Stamford*, 195 Conn. 587 (1985). According to Justice D'Auria, both of those cases stand for the proposition that "when the mistake consists of a deliberate action taken to effect a particular intended result, . . . the mistake cannot be clerical." And because "clerical" had previously been held to modify both "omission" and "mistake" in § 12-60, the assessor's deliberate action in delaying imposition of the penalty could not be "clerical" and, thus, neither an "omission" nor a "mistake."

Chief Justice Robinson had a different view of *Reconstruction Finance* and *National CSS*, concluding that those cases "hold that an error is not clerical when it pertains to the substance or subject of the assessment." With that understanding, the Chief Justice concluded that neither case was controlling because they both dealt with situations that involved the substance of the assessment and not "mistakes made during the execution of ministerial duties." For the chief justice, the assessor's "mistake" was one of timing and not one of substance and, therefore, qualified as having been "clerical."

We leave it to you to agree or disagree with the outcome, but *Wilton Campus* should be at the top of your reading list the next time you are confronted with a knotty, puzzle of statutory interpretation. ■

■ Any views expressed herein are the personal views of DASA Weiner and do not necessarily reflect the views of the Office of the Chief State's Attorney and/or the Division of Criminal Justice.

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