

STATE OF MAINE  
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET  
Location: West Bath  
Docket No. BCD-WB-AP-09-19

STEWART TITLE GUARANTY COMPANY,

Petitioner

v.

ORDER ON PETITIONER'S MOTION FOR  
RELIEF FROM FINAL AGENCY ACTION  
AND ENTRY OF JUDGMENT ON REMAND  
FROM THE LAW COURT

STATE TAX ASSESSOR,

Respondent

This matter comes before the court on the Motion of Petitioner, Stewart Title Guaranty Company (hereinafter "Stewart Title" or "Petitioner"), for Relief From Final Agency Action Regarding Imposition of Interest and Penalties. In its memoranda and at oral argument, Petitioner clarified that it did not intend to include the issue of penalties in its motion.<sup>1</sup> Rather, Petitioner's original Motion only seeks relief from the denial by Respondent State Tax Assessor ("Assessor") of its request for a waiver or abatement of interest on unpaid premium taxes for tax years 1999 through 2002. Pursuant to a "Supplement" to its Motion, discussed more fully below, Petitioner also seeks a determination regarding the accrual of interest on Assessments issued for tax years 2003-2007.

#### FACTUAL BACKGROUND

Because the procedural background of this case is critical to an understanding of the issues presented by Petitioner, the court will briefly recite the procedural history of this case:

Stewart Title is an insurance company doing business in Maine. Between September 23, 2002 and February 5, 2004, the Assessor issued a series of tax assessments against Stewart Title

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<sup>1</sup> The parties appear to agree that no penalties accrued during the period of time at issue in Petitioner's Motion, , to wit: May 5, 2005 through January 20, 2009. *See* Truman Aff. ¶¶ 6-7.

claiming unpaid premium taxes pursuant to 36 M.R.S. § 2513, together with interest and penalties, for tax years 1999 through 2002 (the “Assessments”). Stewart Title requested reconsideration of each of the Assessments and, following denials of those requests, sought review in this court pursuant to M.R. Civ. P. 80C, 5 M.R.S. §§ 11002-11008<sup>2</sup> and 36 M.R.S. § 151.

On May 5, 2005, the Superior Court ruled in favor of Stewart Title and vacated the Assessments insofar as they were based on “gross direct premiums,” as that term is used in 36 M.R.S. § 2513. However, the court also remanded the case to the Maine Revenue Services for further proceedings on the Assessor’s argument that, in the alternative to the premium tax, the Revenue Service should consider the retaliatory tax provisions of 36 M.R.S. § 2519. *Stewart Title Guar. Co. v. State Tax Assessor*, KENSC-AP-04-17 (Me. Super. Ct., Ken. Cty., May 5, 2005) (Studstrup, J.).

Following the Superior Court’s order and remand to the Revenue Service, the Assessor filed an appeal with the Law Court. Stewart Title objected to the appeal, arguing that it was interlocutory. The Law Court agreed with Stewart Title and, on February 28, 2006 dismissed the Assessor’s appeal. *Stewart Title Guar. Co. v. State Tax Assessor*, 2006 ME 18, 892 A.2d 1162.

No further action was taken from February 28, 2006 through August 29, 2006. On August 30, 2006 the Assessor issued a Supplemental Assessment for retaliatory tax under 36 M.R.S. § 2519. Stewart Title requested reconsideration of that Supplemental Assessment and, as a result, the Assessor cancelled the assessment in its entirety. *See* Pet. Mot. Exh. C. Following the Assessor’s cancellation of the Supplemental Assessment and its decision not to pursue an alternative retaliatory

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<sup>2</sup> The court notes that Sections 11006 & 11007 of the APA do not apply to appeals taken under 36 M.R.S. § 151. 36 M.R.S. § 151 (“The assessor’s decision on reconsideration constitutes final agency action that is subject to review by the Superior Court in accordance with the Maine Administrative Procedure Act, except that Title 5, sections 11006 and 11007 do not apply.”)

tax, the Superior Court issued an order, dated January 17, 2007, stating that its prior judgment was final. The Assessor then appealed to the Law Court.

On January 20, 2009, the Law Court issued its opinion vacating the Superior Court's judgment. *Stewart Title Guar. Co. v. State Tax Assessor*, 2009 ME 8, 963 A.2d 169. The Law Court determined that the trial court erred in its interpretation of the term "gross direct premiums" and concluded that the deductions Stewart Title took were impermissible under the statute. *See id.*, 2009 ME 8, ¶¶ 16 (concluding that the deductions at issue "are solely for amounts retained by Stewart Title's independent agents for title search and examination fees") & 43 (concluding that taxable "gross direct premiums," include "the total consideration paid by the insured for the title insurance, including the cost of the title search and examination . . ."). The Law Court remanded the matter to the Superior Court "for further proceedings in accordance with this opinion."<sup>3</sup>

After the Law Court issued its opinion, Stewart Title sent a letter to the Assessor requesting a calculation of the premium tax, interest and penalties the Assessor believed would be due from Stewart Title for the Assessments. Included in the figure Stewart Title received in response was interest that had purportedly accrued since the Superior Court's May 5, 2005 decision.

Thereafter, Stewart Title sent a letter dated February 3, 2009 to the Assessor requesting, among other things, an abatement of that interest. According to Stewart Title, because the Superior Court's May 5, 2005 Order concluded that Stewart Title did not owe the premium taxes and vacated the Assessments, interest should not have continued to accrue on the Assessments after that date. Stewart Title further argued that the imposition of interest over the nearly four years that passed

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<sup>3</sup> In the prefatory paragraph of its opinion, the Law Court said: "We vacate the judgment and remand for entry of judgment in favor of the Assessor." *Id.*, 2009 ME 8, ¶1. At the end of the opinion, the Court said: "The entry is: Judgment vacated. Remanded for further proceedings in accordance with this opinion." Accordingly, this court understands the language "further proceedings in accordance with this opinion" to mean the "entry of judgment in favor of the Assessor." The court's file and the docket for this case do not reflect that such a judgment was, in fact, ever entered.

between the Superior Court's original order and the Law Court's 2009 opinion was largely the result of the Assessor's own conduct and/or procedural "missteps," namely the interlocutory appeal. Responding in a letter from its counsel, the Assessor denied Stewart Title's request on February 11, 2009.

On February 27, 2009, Stewart Title filed the instant Motion for Relief From Final Agency Action Regarding Imposition of Interest and Penalties in this case "pursuant to Rule 80C." The Assessor has opposed Petitioner's Motion. Then, on May 6, 2009, Stewart Title filed a "Supplement" to its Motion explaining that

On April 29, 2009, the Tax Assessor denied the Petitioner's request for reconsideration of interest and penalties relating to tax years 2003 through 2007. That request was based on the same grounds presented to the Tax Assessor in connection with the request for an abatement or waiver of interest and penalties for tax years 1999 through 2002. To the extent that the interest or penalties claimed by the Tax Assessor for 2003 through 2007 have accrued against the Petitioner over the same time periods challenged by the Petitioner's initial motion, that is between May 5, 2005 and January 20, 2009, the Court's determination of the Petitioner's motion will resolve the proper amount of interest and penalties to be imposed against the Petitioner for all tax years.

Pet. Supp. Mot. at ¶ 4. The Assessor also objected to Stewart Title's "Supplement" on the grounds that, among other things, interest assessed for tax years other than those that were the subject of Stewart Title's original 80C appeal are not properly before the court. In response, Stewart Title suggests that a consolidated review of its arguments as to all years is the more economical approach.<sup>4</sup> However, Stewart Title also indicated in its response that it would file a separate Rule 80C appeal regarding the Assessments for 2003-2007 in order to preserve its rights.<sup>5</sup>

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<sup>4</sup> The following chronology may aid an understanding of later discussions in this order. The Rule 80C petition in this case was originally filed in the Kennebec County Superior Court on March 17, 2004 and assigned Docket No. AP-04-17. It deals with Petitioner's claims regarding assessments for tax years 1999 through 2002. Upon its transfer to the Business and Consumer Docket, it was reassigned Docket No. BCD-WB-AP-08-19.

On May 6, 2009, Petitioner filed its Supplement in Docket No. BCD-WB-09-19 seeking to expand the reach of its Motion for Relief From Final Agency Action to include tax years 2003-2007.

## DISCUSSION

### I. Stewart Title's "Supplement" to its Motion for Review of Final Agency Action.

As an initial matter, it is necessary to clarify the proper scope of the court's inquiry in this matter. Stewart Title's initial motion was filed in connection with its 80C appeal of the Assessments, which related to the 1999-2002 tax years. Its so-called "supplement," however, seeks a determination regarding interest that has allegedly accrued on assessments issued for the tax years 2003-2007. Although the court understands and appreciates Stewart Title's desire to conserve judicial resources by asking the court to consider the propriety of accrued interest on all assessments issued against it, the 2003-2007 Assessments and the Assessor's Reconsideration Decision regarding those assessments constitute final agency action separate from the Assessments at issue in this case within the meaning of M.R. Civ. P 80C, the Maine Administrative Procedures Act, 5 M.R.S. §§ 11002-11008, and the Maine Tax Code. The claim of Stewart Title that the Assessor erred in the issuance of the 2003-2007 assessments must be the subject of a separate petition for judicial review of final agency action.<sup>6</sup> Therefore, the court's consideration of the instant motion will be limited to the issues raised by Stewart Title that are specific to the Assessments for the 1999-2002 tax years and, to the extent that Stewart Title's "supplement" requests relief related to the 2003-2007 tax years, it must be denied.

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On May 27, 2009, Petitioner filed another Rule 80C petition in the Kennebec County Superior Court. It was assigned Docket No. AP-09-26 and dealt with Petitioner's claims regarding assessments for tax years 2003 through 2007. Upon its transfer to the Business and Consumer Docket, it was reassigned Docket No. BCD-WB-AP-08-20. These two 80C appeals, BCD-WB-AP-08-19 and BCD-WB-AP-08-20, have not been consolidated.

<sup>5</sup> As previously noted, that 80C appeal was filed on May 27, 2009 and is now pending in the Business and Consumer Docket in Docket No. BCD-WB-AP-08-20.

<sup>6</sup> See note 6, above.

II. Request for Abatement of Interest on Assessments

Under the Maine Tax Code, “interest accrues from the date on which payment would have been due if there had been no administrative review.” *Precast Structures, Inc. v. State Tax Assessor*, 568 A.2d 517, 518 (Me. 1990) (citing 36 M.R.S. § 186 (1989)). 36 M.R.S. § 186 provides, in pertinent part:

Any person who fails to pay any tax, other than a tax imposed pursuant to chapter 105, on or before the last date prescribed for payment is liable for interest on the tax, calculated from that date and compounded monthly. . . . *A tax that is upheld on administrative or judicial review bears interest from the date on which payment would have been due in the absence of review.* . . . Interest accrues automatically, without being assessed by the assessor, and is recoverable by the assessor in the same manner as if it were a tax assessed under this Title. *If the failure to pay a tax when required is explained to the satisfaction of the assessor, the assessor may abate or waive the payment of all or any part of that interest.*

*Id.* (emphasis added).

In this case, Stewart Title contends that interest stopped accruing on the unpaid Assessments following the Superior Court’s May 5, 2005 order vacating those Assessments. According to Stewart Title, because there were no assessments upon which interest could accrue from May 5, 2005 until the Law Court issued its opinion in favor of the Assessor on January 20, 2009, the Assessor may not collect interest for that period. Stewart Title further argues that to the extent interest did continue to accrue after May 5, 2005 it should be abated because the passage of time since then is the result either of delay on the part of the Assessor or of procedural missteps by the Assessor that operated to the detriment of Stewart Title. Finally, to the extent that Section 186 can be read to permit the accrual of interest following an initial victory in the trial court, Stewart Title contends that the statute should be declared unconstitutionally vague such that it deprived Stewart Title of due process. *See* Pet. Mot. at 4 & 10.

In opposition, the Assessor argues that Stewart Title has waived any right to request abatement of interest because it did not previously raise the issue in either this court or in its arguments to the Law Court. In addition, the Assessor contends that Stewart Title's arguments regarding the accrual of interest were barred by the doctrine of collateral estoppel following the Law Court's January 20, 2009 decision in favor of the Assessor.

Finally, with regard to the merits of Stewart Title's Motion, the Assessor argues that the language of Section 186 makes clear that interest continues to accrue throughout the administrative and judicial appeals process and does not cease if the taxpayer temporarily prevails in the Superior Court but later loses upon final judicial review by the Law Court. After a review of the history of this case, the language of Section 186 and relevant and applicable case law, the court agrees with the Assessor.

A. Waiver

The parties do not dispute that in its request for Reconsideration of the Assessment, Stewart Title sought an abatement of interest or that that request for an abatement was denied. *See* Resp. Opp. Exh. C at 2-3 & D at 3. Under well-established principles of law, a party must affirmatively raise and argue those points of law it wishes to preserve for appeal. A failure to do so effectively waives any right a party may otherwise have to raise the issue on appeal. *Seider v. Board of Examiners of Psychologists*, 2000 ME 206, ¶ 37, 762 A.2d 551, 562. ("A failure to brief these claims constitutes an abandonment of the appeal on those claims.") A review of the record in this case reveals that Stewart Title's appeal has focused exclusively on the propriety of the Assessments themselves and not on the Assessor's denial of its request for an abatement of interest. *See* Petition. Although Stewart Title could have included an appeal of that denial in its petition for review to this

court, it opted not to do so and, as such, waived its right to now take issue with the Assessor's denial of its request.

Moreover, although Stewart Title argues that waiver does not apply because the conduct upon which it bases its current request for an abatement arose after the court's May 5, 2005 order such that it could not have previously raised and preserved its arguments, the court disagrees. Under the plain language of Section 186, the Assessor may abate interest if the *failure to pay a tax when required* is explained to the satisfaction of the assessor. 36 M.R.S. § 186. Thus, the only basis upon which the Assessor may exercise its discretion and abate interest is if a taxpayer sufficiently explains a failure to pay the tax when it is originally assessed and not, as Stewart Title contends, when the taxpayer offers an explanation for its ongoing failure to pay the assessment during the pendency of an appeal. In other words, despite Stewart Title's urging, the procedural delays in the resolution of this matter are not relevant to the propriety of the Assessor's abatement decision because those delays did not exist at the time the Assessments were originally due and therefore did not serve as the basis for Stewart Title's failure to pay the Assessments at that time.

Accordingly, because the court concludes that Stewart Title's request for an abatement was denied by the Assessor in its February 23, 2004 and June 23, 2004 Reconsideration Determinations, and because it was those determinations that constituted final agency action from which Stewart Title could appeal, Stewart Title's failure to preserve any arguments relating to the propriety of the Assessor's decision regarding interest resulted in the waiver of those arguments.

B. The Merits of Stewart Title's Request for an Abatement

Even if Stewart Title has not waived its arguments regarding the accrual of interest, the court concludes that the plain language of Section 186 makes clear that interest will continue to accrue automatically until such time as the administrative or judicial review process is completed. Under



the language quoted above, interest continues to accrue on a tax that is upheld following review. *See* 36 M.R.S. § 186. Although Stewart Title prevailed at the intermediate appellate level, the Law Court ultimately upheld the tax that was the subject of the Assessments. As such, under Section 186, interest continued to accrue from the date payment was due through the date that the judicial review of the Assessment was finally completed. Because the Law Court ultimately upheld the tax, interest on the Assessment continued to accrue until the tax was paid on March 2, 2009.<sup>7</sup>

Contrary to Stewart Title's assertions, "judicial review" of the Assessments is not confined to each individual step in the administrative and judicial process. Rather, in the court's view, "judicial review" as used in Section 186 refers, cumulatively, to the entire appellate process, from Reconsideration by the Assessor, to de novo review by the Superior Court under Section 151, and concluding either with an appeal to the Law Court or, in the absence of an appeal, the expiration of the appeals period. That is, until such time as all administrative and judicial remedies have either been exhausted or expired and a final determination has thus been made, "judicial review" remains ongoing and interest continues to accrue. To hold otherwise would be counter to the plain language of the statute and effectively undermine its express purpose: to make clear that the accrual of interest is as automatic and immediate as the underlying tax liability and is, therefore, not stayed during the pendency of an appeal.<sup>8</sup>

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<sup>7</sup> At oral argument on the instant motion, counsel for Stewart Title explained that the tax liability that is the subject of the Assessments was in fact paid on March 2, 2009, presumably under protest. The court also notes the Assessor's explanation that interest continues to accrue on the unpaid interest. *See Truman Aff.* at ¶ 5.

<sup>8</sup> While Section 186 makes clear that the accrual of interest is not stayed pending appeal, M.R. Civ. P. 62 makes clear that the Superior Court's substantive judgment vacating the Assessment was, in effect, stayed during the pendency of the appeal. *See also* M.R. Civ. P. 80C(m); and 5 M.R.S. § 11008. Therefore, contrary to Stewart Title's contention, because the Assessor timely appealed the Superior Court's January 17, 2007 final judgment, at no time was Stewart Title's tax liability invalidated in any final or enforceable way such that the Assessment "did not exist." *See Pet. Mot.* at 6.

The court's reading of Section 186 is bolstered by the Law Court's own analysis in *Precast Structures, Inc.* In that case, the Law Court rejected an argument nearly identical to the one put forth by Stewart Title:

Finally, although the State Tax Assessor was responsible for an eight-month delay in reaching a final calculation of the amounts due, that does not entitle Precast to avoid payment of interest and penalties for that period on a theory of estoppel. The statute provides that interest accrues from the date on which payment would have been due if there had been no administrative review. That is not surprising since one who is liable for the tax like Precast has the full use of the money during that period. Penalties likewise accrue automatically. Precast could have halted the accrual of interest and penalties by paying the State Tax Assessor at the outset without voiding its rights to challenge the assessment. What Precast really seeks is an abatement of interest and penalties for the eight-month period. Requests for abatement, however, are properly addressed to the State Tax Assessor in the first instance.

*Precast Structures, Inc.*, 568 A.2d at 518 (internal citations omitted).

As the Assessor in this case correctly notes, Stewart Title could have stopped the accrual of interest by paying the Assessment when due, albeit under protest pending the outcome of its appeal. Stewart Title chose not to do so and it must abide by that decision. Moreover, in light of the fact that the Law Court made clear in *Precast* that delays allegedly caused by the Assessor do not provide a proper basis for avoidance of interest, the court rejects the contrary argument by Stewart Title in this case.

Finally, although Stewart Title challenges the accrual of interest on constitutional grounds by arguing that Section 186 is void for vagueness, the court disagrees. As discussed above, the meaning of Section 186 is neither vague nor ambiguous and provides sufficient notice of its effect. *See Cobb v. Board of Counseling Professionals Licensure*, 2006 ME 48, ¶ 26, 896 A.2d 271, 278 (“A statute is considered unconstitutionally vague when it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.”) (citations and internal quotation marks omitted).

The court also rejects Stewart Title's argument that the Assessor's February 11, 2009 denial of Stewart Title's renewed request for an abatement of interest was affected by bias. Again, Section 186 clearly provides that interest accrues automatically and while the Assessor does possess some discretion to abate interest, Stewart Title has failed to sufficiently demonstrate that the Assessor's refusal to do so in this case was biased or constituted an abuse of discretion, particularly in light of the fact that the tax was ultimately upheld by the Law Court. As discussed above, under Section 186 the Assessor's discretionary abatement decision is based on the taxpayer's reasons for failing to pay the tax when due. Section 186 does not contemplate subsequent procedural delays in the appellate process as being relevant to the abatement decision.<sup>9</sup> See 36 M.R.S. § 186. Accordingly, given that Stewart Title's renewed request for an abatement was based upon conduct that is not relevant to the Assessor's discretionary abatement decision, and given that Stewart Title's bias arguments are limited to the rejection of its renewed request rather than the original abatement decision, the court concludes that Stewart Title has failed to sufficiently demonstrate bias in this case.

### III. Entry of Judgment on Remand

As noted earlier in this order, the Law Court vacated the Superior Court's January 17, 2007 judgment and remanded the matter "for entry of judgment in favor of the Assessor." *Stewart Title Guar. Co. v. State Tax Assessor*, 2006 ME 18, ¶1. Because the court's file and the docket for this case does not yet reflect the entry of judgment, as mandated, this court will so now.

### DECISION

Based upon the foregoing, and pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference, and the entry is

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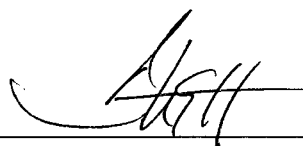
<sup>9</sup> In effect, the justification offered by Stewart Title for not paying the Assessments when they were due is that the case has been meandering through the administrative and judicial review process and Stewart Title should not be made to pay interest during the pendency of the appeal. However, that period of time is precisely what Section 186 contemplates and it is that period during which interest is statutorily mandated to continue to accrue.

Respondent's objection to Petitioner's Supplement to its Motion for Review of Final Agency Action is SUSTAINED, but without prejudice to Petitioner's claims in BCD-WB-AP-09-20, and the court's consideration of the Motion for Review of Final Agency Action is limited to the issues raised by Petitioner that are specific to the Assessments for the 1999-2002 tax years;

As limited by the foregoing, Petitioner's Motion For Relief From Final Agency Action is DENIED; and

Pursuant to the Law Court's mandate in *Stewart Title Guaranty Co. v. State Tax Assessor*, 2009 ME 8, 963 A.2d 169, Judgment is entered in favor of Respondent and the matter is remanded to Respondent for further proceedings in accordance with this order, including the calculation of final payoff amounts owed by Petitioner for tax years 1999 through 2002.

Date: October 15, 2009



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Chief Justice, Superior Court