REPRESENTATIVES FOR PETITIONER:
Jeffrey Bennett, Bradley Hasler, Bingham Greenebaum Doll, LLP

REPRESENTATIVES FOR RESPONDENT:
Mark E. GiaQuinta, Melanie L. Farr, Haller & Colvin, P.C.

BEFORE THE
INDIANA BOARD OF TAX REVIEW

VERIZON DATA SERVICES, INC.,	)	
	)	Petition No. 02-073-07-1-7-00001
Petitioner,	)	
	)	Parcel No.: Personal Property located
v.	)	6430 Oakbrook Parkway
	)	Fort Wayne, IN[1]
ALLEN COUNTY ASSESSOR,	)	
	)	County: Allen
Respondent.	)	
	)	Township: Washington
	)	
	)	Assessment Year: 2007

FINAL DETERMINATION GRANTING VERIZON DATA SERVICE INC.'S MOTION FOR SUMMARY JUDGMENT AND DENYING THE ALLEN COUNTY ASSESSOR'S MOTION FOR SUMMARY JUDGMENT

I. Introduction

The parties have filed cross-motions for summary judgment on procedural matters related to the assessment of business personal property. Verizon Data Service, Inc. ("Verizon") seeks judgment on the grounds that Ind. Code § 6-1.1-16-1(a)(2) required the Allen County Property Tax Assessment Board of Appeals ("PTABOA") to make any change to Verizon's self-reported 2007 personal property assessment by October 30, 2007, and failed to do so. The Allen County

[1] The parties refer to the property by its location in their various motions and responses. The Form 131 petition also refers to the following parcel number: 02-073-0000590.

Assessor ("Assessor") seeks summary judgment on the grounds that Verizon was required to appeal to the Board within 45 days after the PTABOA's deadline to hold a hearing under the general appeal statute (Ind. Code § 6-1.1-15-1), and failed to do so.

II. Procedural History Before the Board

On July 12, 2012, Verizon filed a Form 131 petition with the Board seeking review of the 2007 assessment of its personal property.[2] Verizon moved for summary judgment. The Assessor responded with a cross-motion for summary judgment. The parties designated the following materials in their motions and responses:

Verizon

- Exhibit A: Affidavit of Richard R. Masching, including paragraphs 1-11 thereof;
- Exhibit B: Verizon's 2007 Business Tangible Personal Property Return for personal property located at 6430 Oakbrook Parkway, including supplemental schedules and forms attached thereto;
- Exhibit C: Form 113/PP Notice of Change in Assessment for the March 1, 2007 assessment date for the property located at 6430 Oakbrook Parkway;
- Exhibit D: October 9, 2007 letter from Bradley Hasler to the Allen County Assessor and the Washington Township Assessor with attached Form 113/PP Notice and power of attorney; and
- Exhibit E: July 26, 2012 letter from Bradley Hasler to the Allen County PTABOA with attached Petitioner's Request for Relief Pursuant to Indiana Code § 6-1.1-16-1, including Exhibit A thereto.

Assessor

(1) Affidavit of Leisa Patrick, including Exhibit 1 thereto—an October 12, 2007 e-mail from Kimberly Klerner to Bradley Hasler; and
(2) Verizon's Exhibits B - C

On June 12, 2013, administrative law judge, David Pardo, held a hearing on the parties' cross-motions.

[2] The property was located at 6430 Oakbrook Parkway in Fort Wayne.

III. Undisputed Facts

Verizon owned and operated a data center at 6430 Oakbrook Parkway in Fort Wayne. *Ex. A at ¶ 2.* On May 15, 2007, Verizon filed its business tangible personal property return, reporting a value before adjustment of $50,261,537.60. *Ex. B.* Verizon fully and completely disclosed the cost, value, location, and nature of all of its business personal property located in Washington Township. *Ex. A at 7; Ex. B.* Verizon did not omit from that return any business personal property that it owned or controlled. *Ex. A at ¶ 5; Ex. B.* The Assessor does not claim that Verizon's return was fraudulent or that Verizon intended to evade paying property taxes.

As part of its return, Verizon claimed an adjustment of $34,061,538, which it characterized as an "Adjust[ment] to Fair Market Model." *Ex. B at Form 103 Long p. 2 of 4; Ex. A at ¶ 8.* That adjustment led Verizon to report a true tax value of $16,200,000 for its business personal property at the data center. *Ex. B.* Verizon had claimed a similar adjustment in its return for the 2005 assessment year. *Patrick Aff. at ¶ 4.* Verizon appealed the 2005 assessment to the PTABOA and to the Board. *See Patrick Aff. at § 10 and Ex. 1.*

On September 17, 2007, the Washington Township Assessor issued a Form 113/PP Notice of Assessment/Change, increasing Verizon's assessment by $34,061,538. *Ex. C.* Twenty-two days later, on October 9, 2007, Verizon's lawyer, Bradley Hasler, sent a letter to the Allen County and Washington Township Assessors. Hasler indicated that the letter was to serve as a notice for review and as a request for a meeting with the assessor who made the disputed assessment. *Ex. D.* The letter did not refer to Ind. Code § 6-1.1-16-1 or to any obligation by the PTABOA to issue a determination by October 30th of the assessment year at issue. *Id.* As of the date of Hasler's letter, Verizon had not raised that issue in its appeal of the 2005 assessment year either.

On October 12, 2007, Kimberly Klerner sent Hasler the following e-mail:

> Please be advised, Washington Township will not be scheduling a meeting to discuss the 2007 personal property assessment for Verizon in Allen County. As you are aware, the 2005 & 2006 assessments are under appeal with the Indiana State Tax Board (sic). Pending a determination regarding the 2005 & 2006 assessments, a meeting to discuss the 2007 assessment will be 'on hold.'

Patrick Aff. at Ex. 1.[3]

Hasler did not respond to Klerner's e-mail, and the PTABOA did not hold a hearing on Verizon's notice for review or issue a determination. *See Ex. A at ¶ 11.* On July 26, 2012, Verizon filed with the PTABOA *Petitioner's Request for Relief Pursuant to Indiana Code 6-1.1-16-1*, asking for a determination finding that the assessed value of Verizon's business personal property was $16,200,000. *Ex. E.*

IV. Discussion

A. Summary Judgment Standard

Summary judgment motions on matters before the Board are made "pursuant to the Indiana Rules of Trial Procedure." 52 IAC 2-6-8. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Wittenberg Lutheran Village Endowment Corp. v. Lake County Property Tax Assessment Bd. of Appeals*, 782 N.E.2d 483, 487 (Ind. Tax Ct. 2002). The party moving for summary judgment must make a prima facie showing of both those things. *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522, 526 (Ind. Ct. App. 2004). If the moving party satisfies its burden, the non-moving party cannot rest on its pleadings, but instead must designate sufficient evidence to show

[3] The Board did not have an appeal for the 2006 assessment. At the summary judgment hearing, Verizon's counsel indicated that the PTABOA had not acted on Verizon's notice of review for that assessment year. But he explained that Ind. Code § 6-1.1-15-1(o), which allows a taxpayer to appeal to the Board if a PTABOA fails to hold a hearing or issue a determination within Ind. Code § 6-1.1-15-1's deadlines, does not apply to Verizon's 2006 appeal. *See* 2007 Ind. Act 219, § 156 (making the amendment adding Ind. Code § 6-1.1-15-1(o) applicable only to notices of review filed after June 30, 2007, and to subsequent proceedings on those notices).

that a genuine issue exists for trial. *Id.* In deciding whether a genuine issue exists, we must construe all facts and reasonable inferences in favor of the non-moving party. *See Carey v. Ind. Physical Therapy, Inc.*, 926 N.E.2d 1126, 1128 (Ind. Ct. App. 2010).

B. Verizon's Summary Judgment Motion

Verizon argues the PTABOA was required to issue a determination by October 30, 2007, in order to change the assessment. Its failure to do so makes Verizon's self-reported assessment final.

Verizon bases its claim on Ind. Code § 6-1.1-16, which read as follows at the time relevant to this appeal:

> Sec. 1. (a) Except as provided in section 2 of this chapter, an assessing official, county assessor, or county property tax assessment board of appeals may not change the assessed value claimed by a taxpayer on a personal property return unless the assessing official, county assessor, or county property tax assessment board of appeals takes the action and gives the notice required by IC 6-1.1-3-20 within the following time periods:
>
> (1) A township or county assessing official must make a change in the assessed value and give the notice of the change on or before the latter of:
>
> (A) September 15 of the year for which the assessment is made; or
>
> (B) four (4) months from the date the personal property return is filed if the return is filed after May 15 of the year for which the assessment is made.
>
> (2) A county assessor or *county property tax assessment board of appeals must make a change in the assessed value, including the final determination by the board of an assessment changed by a township or county assessing official*, or county property tax assessment board of appeals, and give the notice of the change on or before the latter of:
>
> (A) *October 30 of the year for which the assessment is made*; or
>
> (B) five (5) months from the date the personal property return is filed if the return is filed after May 15 of the year for which the assessment is made.
>
> (3) The department of local government finance must make a preliminary change in the assessed value and give the notice of the change on or before the latter of:
>
> (A) October 1 of the year immediately following the year for which the assessment is made; or

(B) sixteen (16) months from the date the personal property return is filed if the return is filed after May 15 of the year for which the assessment is made.

(b) Except as provided in section 2 of this chapter, if an assessing official, a county assessor, or a county property tax assessment board of appeals fails to change an assessment and give notice of the change within the time prescribed by this section, the assessed value claimed by the taxpayer on the personal property return is final.

….

Sec. 2. (a) If a county property tax assessment board of appeals fails to change an assessed value claimed by a taxpayer on a personal property return and give notice of the change within the time prescribed in section 1(a)(2) of this chapter, the township assessor or the county assessor may file a petition for review of the assessment by the Indiana board. The township assessor or the county assessor must file the petition for review in the manner provided in IC 6-1.1-15-3(d). The time period for filing the petition begins to run on the last day that the county board is permitted to act on the assessment under section 1(a)(2) of this chapter as though the board acted and gave notice of its action on that day.

….

Sec. 4. The provisions of this chapter do not extend the period within which an assessment or change in an assessment may be made. If a shorter period for action and notice is provided elsewhere in this article, that provision controls. However, if any other conflict exists between the provisions of this chapter and the other provisions of this article, the provisions of this chapter control with respect to assessment adjustments.

I.C. § 6-1.1-16-1(2004 & 2007 supp.) (emphasis added).[4]

Verizon focuses on the requirements in subdivision (a)(2) for a PTABOA to make a change in assessed value, "including a final determination by the [PTABOA] of an assessment changed by a township or county assessing official," and give notice of that determination by October 30. Failure to do so makes the taxpayer's self-reported assessment final under subsection (b).

[4] Indiana Code § 6-1.1-16-1(a)'s deadlines do not apply if a taxpayer: (1) fails to file a return that substantially complies with Ind. Code § 6-1.1 and the DLGF's regulations, or (2) files a fraudulent return with the intent of evading the payment of property taxes. I.C. § 6-1.1-16-1(d). The Assessor, however, makes no claim that Verizon acted fraudulently or that Verizon's return was not substantially compliant.

As explained in the Board's determination of Verizon's appeal for the 2005 tax year ("Verizon I"), Verizon is correct. There, the Assessor argued that Ind. Code § 6-1.1-16 had to be harmonized with the general appeal statute (Ind. Code § 6-1.1-15). From that, the Assessor concluded that the legislature intended for Ind. Code § 6-1.1-16-1(a)(2)'s deadline to apply to a PTABOA only when it acts as a primary assessing official and not when it acts as a quasi-judicial body deciding a taxpayer's appeal. The Board disagreed, finding that any potential conflicts between the statutes did not exist when the legislature originally enacted the predecessor to Ind. Code § 6-1.1-16-1(a)(2). In any case, that section's plain language, as well as the structure of chapter 16 as a whole, leads to the conclusion that the legislature intended that the deadlines in Ind. Code § 6-1.1-16-1(a)(2) apply to a PTABOA even when it addresses a taxpayer's appeal. The immediately following section (Ind. Code § 6-1.1-16-2) was intended to allow assessors to file protective appeals to the Board when a PTABOA's inaction jeopardizes their changes to a taxpayer's return.

In the current appeal, the Assessor makes little argument about how Ind. Code § 6-1.1-16 should be interpreted other than to contend that Verizon I was wrongly decided. Rather than rehashing the detailed reasoning supporting that determination, the Board incorporates the determination from Verizon I, which is attached to this Final Determination as Board Exhibit A.

The Assessor's chief argument is that Verizon waived its right to rely on Ind. Code § 6-1.1-16-1(a)(2). She alternatively argues that the PTABOA's failure to comply with that statute's deadline was harmless error.

1. Verizon did not waive its rights under Ind. Code § 6-1.1-16-1(a) by failing to respond to Klerner's ambiguous e-mail.

To support her waiver claim, the Assessor points to Verizon's failure to respond to Kimberly Klerner's October 12, 2007 e-mail. *Resp't Brief at 8.* Klerner's e-mail advised

Verizon's attorney that "Washington Township" would not be scheduling "a meeting to discuss the 2007 personal property assessment" and that the meeting would be put "on hold" pending the Board's determination of Verizon's appeals from the 2005 and 2006 assessment years. *Patrick Aff. at Ex. 1.* Thus, argues the Assessor, "[b]y acquiescing in the PTABOA's stated intention to delay [a] hearing on the 2007 appeal, Verizon waived its right to a PTABOA hearing." *Resp't Brief at 8*.

Waiver is "the intentional relinquishment of a known right; an election by one to forego some advantage he might have insisted upon." *Lafayette Car Wash, Inc. v. Boes*, 282 N.E.2d 837, 839 (Ind. 1972). Mere silence, acquiescence, or inactivity is not enough, unless there was a duty to speak or act. *Forty-One Associates, Inc. v. Bluefield Associates, L.P.*, 809 N.E.2d 422, 428 (Ind. Ct. App. 2004). While "the *existence* of facts necessary to constitute waiver is ordinarily a question of fact, . . . the question of what facts are necessary to constitute waiver is a matter of law." *Id*. (emphasis added). Thus, where the parties do not dispute the facts that are alleged to constitute a waiver but instead dispute the inferences and legal conclusions to be drawn from those facts, a court may appropriately consider the question as a matter of law on summary judgment. *Jackson v. DeFabis*, 553 N.E.2d 1212, 1217 (Ind. Ct. App. 1990).

The parties have designated little evidence and the facts are undisputed. The parties disagree about the inferences and legal conclusions that may be drawn from those facts. The Assessor does not point to any affirmative act by Verizon. She instead relies on Verizon's silence in the face of Klerner's e-mail. Thus, the waiver claim turns on whether Verizon had a duty to respond to that e-mail. At most, the e-mail arguably shows Klerner did not understand either the PTABOA's obligations under Ind. Code § 6-1.1-16-1(a)(2) or the right of the county

and township assessors to file a protective appeal under Ind. Code § 6-1.1-16-2. Verizon had no duty to educate her on those matters.

The Assessor cites to *State ex rel. Cheeks v. Wirt*, 203 Ind. 121, 177 N.E. 441 (Ind. 1931) and to cases addressing Rule 4(C) of the Indiana Rules of Criminal Procedure. *See Resp't Brief at 8-9* (*citing Wirt*, *Wright v. State*, 593 N.E.2d 1192 (Ind. 1992); *State ex rel Henson v. Washington Circuit Court*, 514 N.E.2d 838 (Ind. 1987); and *Blair v. State*, 877 N.E.2d 1225 (Ind. Ct. App. 2007)). According to the Assessor, those cases stand for the "well established" proposition that "a party waives any error with respect to the failure to schedule proceedings within established deadlines if the party has been advised that the proceeding will not take place within the deadline and fails to object." *Resp't Brief at 8*.

None of the cited cases is analogous to the issue at hand. *Wirt* was a mandate action involving a statutory precursor to what is commonly known as the lazy judge rule (Trial Rule 53.2). That statute allowed a party to move to disqualify a judge who took a case under advisement for more than 90 days as long as she filed her motion before the judge announced his decision. *Wirt*, 177 N.E. at 444. The trial court had actually entered findings and a judgment for the defendants on July 10, 1928, which was less than 90 days from when arguments had been concluded. *Id*. But in deference to (1) the realtrix attorney's urging that it had misconceived the evidence, and (2) the attorney's accompanying request for oral argument, the trial court struck the entry and indicated that it would let the matter go over to the September term. *Id*. at 445. The realtrix's attorney then sent an additional brief that raised new issues. *Id*. On September 4—more than 90 days after the case was submitted to the court's advisement—the realtrix moved to set aside the submission and appoint a special judge. The trial court overruled the motion, concluding that it did not have the case under advisement after July 10, and that because

the realtrix's additional brief raised new issues, it had 90 days from that date to decide the case. *Id*.

The Indiana Supreme Court rejected the notion that the trial court did not have the case under advisement after July 10. Nonetheless, it recognized that "the statute creates a procedural privilege of which a party may or may not take advantage, and, like other procedural privileges, it may be waived." *Id*. at 444. Thus, it was a trial court's duty to overrule a motion to withdraw submission "when the party making the motion is responsible for or consents to the delay." *Id*. at 445. On the facts before it, the supreme court affirmed the trial court's decision to overrule the realtrix's motion. *Id*.

Here, the issue is not a procedural privilege that a party may or may not take advantage of at its own option. A taxpayer need not file a motion or otherwise assert its rights under Ind. Code § 6-1.1-16-1(a). To the contrary, if an assessor or PTABOA fails to timely change a taxpayer's substantially compliant and non-fraudulent self-reported assessment and the township or county assessor does not file a protective appeal, that self-reported assessment becomes final by operation of law. I.C. §§ 6-1.1-16-1(b) and -2.

Regardless, and unlike the realtrix in *Wirt*, Verizon did not cause nor consent to any delay. At most, Verizon's attorney simply failed to respond to an ambiguous e-mail from Klerner, who signed as a deputy for the PTABOA, but in which she indicated that "Washington Township" did not intend to schedule a "meeting" on Verizon's appeal of the 2007 assessment pending the Board's decision on Verizon's 2005 and 2006 appeals.

Verizon's notice of review triggered its right to a hearing and determination from the PTABOA. I.C. § 6-1.1-15-1(g) (2007 supp.) ("The county board shall hold a hearing on a review under this subsection not later than one hundred eighty (180) days after the date of the

notice of review. . . ."). Under the statute as it existed at that time, before a PTABOA held its hearing, the taxpayer could request a meeting with the appropriate county or township official to attempt to resolve as many issues under review as possible. I.C. § 6-1.1-15-1(h) (2007 supp.). The official was required to honor that request. *Id*. But the PTABOA could accept or reject any joint recommendation from the parties, and nothing in the statute expressly made the meeting a prerequisite to the PTABOA scheduling a hearing. *Id*. Thus, Verizon's failure to respond to Klerner's e-mail cannot reasonably be construed as causing or acquiescing in the PTABOA delaying its hearing.

The Assessor's reliance on cases where criminal defendants waived the right to discharge under Ind. Criminal Rule 4(C) is similarly misplaced. That rule provides that a person shall not be held to answer a criminal charge "for a period in aggregate embracing more than one year. . . ." Ind. Crim. R. 4(C). Although Criminal Rule 4(C) differs from the "procedural privilege" at issue in the lazy judge statute, it also differs from Ind. Code § 6-1.1-16-1. As Verizon points out, Criminal Rule 4(C) is not self-executing—a defendant must move for discharge before trial. *See* Crim. R. 4(C) (providing that any defendant held past the time specified in the rule "shall, on motion, be discharged."); *see also*, *Martin v. State*, 419 N.E.2d 256, 259 (Ind. Ct. App. 1981) ("C.R. 4(C) is *not* a self-executing rule."). By contrast, where a PTABOA fails to comply with the Ind. Code § 6-1.1-16-1(a) deadline, the immediately following subsection makes a taxpayer's self-reported assessment final by operation of law, subject only to an assessor's right to file a protective appeal under Ind. Code § 6-1.1-16-2. *See* I.C. § 6-1.1-16-1(b).

The Assessor also cites to cases where the defendants failed to object to courts setting trial dates outside the rule's one-year aggregate period. Nonetheless, Criminal Rule 4 differs too much from Ind. Code § 6-1.1-16 for the Board to read case law interpreting that rule as imposing

an affirmative duty on taxpayers to object to a hearing being set outside of the deadline for a PTABOA to change a taxpayer's self-reported assessment.

For example, calculating the deadline to bring a defendant to trial under Criminal Rule 4(C) is fact sensitive. The rule provides that delays attributable to the defendant or to congestion of the court's calendar do not count toward the aggregate one-year period. Crim. R. 4(C). Indiana Code § 6-1.1-16-1(a)(2), by contrast, does not deal with an aggregate period that needs to be calculated after taking into account various facts. It instead lays out a straightforward deadline. Where, as here, the taxpayer files its return by May 15, the PTABOA's deadline is a date certain: October 30.

More importantly, the setting of a trial date is central to what Criminal Rule 4 enforces: the right to a speedy trial. By contrast, Ind. Code § 6-1.1-16-1(a)(2) is designed to limit the time within which a county assessor or PTABOA can change a taxpayer's self-reported assessment; it does not directly deal with the time within which a PTABOA must hold a hearing. In any event, a defendant's failure to object to the setting of an untimely trial under Criminal Rule 4 invites error that would otherwise be uncorrectable and that would entitle the defendant to be discharged from any underlying criminal liability. The same is not true where a taxpayer fails to object to a PTABOA's proposal to take action outside of Ind. Code § 6-1.1-16-1(a)(2)'s deadline. In that case, the onus shifts to the township or county assessor to file a protective appeal to preserve the assessment.

Regardless, Verizon's silence in response to Klerner's e-mail differs materially from a criminal defendant's failure to object to a court setting a trial date outside Criminal Rule 4(C)'s aggregate one-year period. Klerner's e-mail did not even purport to set a hearing date, much less to set a date outside the PTABOA's deadline for changing Verizon's self-reported assessment.

Again, while Klerner identified herself as the PTABOA's deputy, she did not refer to any intended action by that body. She instead spoke only about the intentions of the Washington Township Assessor—the opposing party in Verizon's appeal at that stage. Under those circumstances, Verizon's silence can be viewed as neither acquiescence to the PTABOA's failure to comply with Ind. Code § 6-1.1-16-1(a) nor as invited error.

2. The Assessor's passing use of the term "estopped" did not suffice to raise equitable estoppel as a defense. Regardless, she did not designate any evidence from which a reasonable trier-of-fact could find estoppel.

The Assessor also uses the term "estopped" once in her brief without citing to authority or explaining how any of the designated facts relate to the elements of any of the various theories of estoppel. *See Resp't Brief at 9*. That reference does not suffice to raise estoppel as a defense. *See In re: Marriage of Zoller*, 858 N.E.2d 124, 127 (Ind. Ct. App. 2006) (finding that party waived estoppel argument on appeal by failing to identify which particular estoppel theory he relied on, but addressing claim notwithstanding the waiver).

Regardless, the Assessor has not designated evidence from which a reasonable trier-of-fact could find that Verizon is estopped from asserting its rights under Ind. Code § 6-1.1-16(1). Equitable estoppel appears to be the only theory of estoppel upon which the Assessor might conceivably rely. Indiana courts have described the elements of equitable estoppel in various ways. For example, in *City of Crown Point v. Lake County*, the court described the elements as: "(1) lack of knowledge and of the means of knowledge as to the facts in question, (2) reliance upon the conduct of the party estopped, (3) action based thereon of such a character as to change his position prejudicially." *City of Crown Point v. Lake County*, 510 N.E.2d 684, 687 (Ind. 1987) (*quoting Dalmer v. Blaine*, 114 Ind. App. 534, 542-43, 51 N.E.2d 885, 889 (Ind. 1943)). In *Caito Foods v. Keyes*, the court offered the following slightly different description of those

elements: "1) a representation or concealment of a material fact; 2) made by a party with knowledge of the fact and with the intention that the other party act upon it; 3) *to a party ignorant of the fact*; and 4) which induces the other party to rely or act upon the fact to his detriment." *Caito Foods v. Keyes*, 799 N.E.2d 1200, 1202 (Ind. Ct. App. 2003) (*quoting Wabash Grain, Inc. v. Smith*, 700 N.E.2d 234, 237 (Ind. Ct. App.1998)).

However stated, Indiana courts have described the doctrine as being grounded on circumstances where a person has engaged in either actual or constructive fraud. *See Paramo v. Edwards*, 563 N.E.2d 595, 598-99 (Ind. 1990) (*citing Lawshe v. Glen Park Lumber Co, Inc*., 176 Ind. App. 344, 347, 375 N.E.2d 275, 278 (Ind. 1978)). However, as the Indiana Supreme Court clarified, the doctrine is not limited to an actual misrepresentation or concealment of material fact. *Id.* at 599. Instead, it includes conduct, which if sanctioned by the law, would secure an unconscionable advantage. *Id*.

Nonetheless, the doctrine has limits. For example, where one seeks to estop another from asserting the statute of limitations as a defense, the conduct must "be of such character as to prevent inquiry, or to elude investigation, or to mislead the party who claims the cause of action." *Id*. (*quoting Guy v. Schuldt* 236 N.E.2d 101, 107, 138 N.E.2d 891, 894 (Ind. 1956)). "Where people stand mentally on equal footing, and in no fiduciary relation, the law will not protect one who fails to exercise common sense and judgment." *Id*. (*citing Gatling v. Newell*, 9 Ind. 572 (Ind. 1857)).

By simply failing to respond to Klerner's e-mail, Verizon did not secure an unconscionable advantage over anyone. As explained above, Verizon had no duty to alert the PTABOA to its obligations under Ind. Code § 6-1.1-16-1(a)(2) or the assessors to their right to file a protective appeal under Ind. Code § 6-1.1-16-1(a)(2). To the contrary, "[a]ll persons are

charged with the knowledge of the rights and remedies prescribed by statute." *Middleton Motors v. Ind. Dep't of State Revenue*, 269 Ind. 282, 285, 380 N.E.2d 79, 81 (Ind. 1978) (finding that a taxpayer did not justifiably rely on a government official's erroneous representation about the time limits for claiming a tax refund).

Similarly, Verizon cannot reasonably be viewed as either (1) having misled the PTABOA, the Assessor, or the Washington Township Assessor about its intention to assert its statutory rights, or (2) having prevented them from inquiring about its intentions. Verizon did not owe a fiduciary duty to the PTABOA or the assessors. All three are sophisticated parties who routinely deal with property tax appeals in performing their statutory duties. They therefore stood on equal footing with Verizon.

In any case, the Assessor did not designate evidence to show detrimental reliance. One of the Assessor's employees, Leisa Patrick, gave an affidavit. But Patrick did not claim that the PTABOA would have issued a determination in Verizon's appeal or that the assessors would have filed a protective appeal had Verizon insisted on going forward with the pre-hearing meeting that Klerner said was being put "on hold." One might argue that the PTABOA or assessors would have taken those actions had Verizon informed them of their respective rights and obligations under Ind. Code § 6-1.1-16. But as already explained, Verizon had no duty to do so.

3. Verizon does not separately need to show prejudice because Ind. Code § 6-1.1-16-1(b) specifies the consequence of a PTABOA failing to timely act under Ind. Code § 6-1.1-16-1(a)(2).

The Assessor points to two cases to support her argument that the PTABOA's failure to act timely under Ind. Code § 6-1.1-16-1(a)(2) was harmless error: *Indiana State Bd. of Embalmers and Funeral Directors v. Kaufman*, 463 N.E.2d 513 (Ind. Ct. App. 1984) and *Ripley*

County Bd. of Zoning Appeals v. Rumpke of Indiana, Inc., 663 N.E.2d 198 (Ind. Ct. App. 1996). Unlike this appeal, neither case involved a statute or rule that provided a specific consequence for an entity's failure to act. *Kaufman* did not involve a failure to act at all—it instead dealt with an appeal from the denial of a motion to dismiss for lack of proper venue. *Kaufman*, 463 N.E.2d at 520. While *Rumpke* addressed Ind. Code § 36-7-4-919(f)'s requirement for a local zoning board to enter findings within five days of making its ruling, that statute did not provide any specific consequences if a board failed to do so. *See Rumpke*, 663 N.E.2d at 205 (citing to I.C. § 36-7-4-919(f)).

Here, by contrast, Ind. Code § 6-1.1-16-1(b) provides a clear, specific consequence for a PTABOA failing to comply with Ind. Code § 6-1.1-16-1(a)(2)—the taxpayer's self-reported assessment becomes final:

> Except as provided in section 2 of this chapter, if an assessing official or a county property tax assessment board of appeals fails to change an assessment and give notice of the change within the time prescribed by this section, the assessed value claimed by the taxpayer on the personal property return is final.

I.C. § 6-1.1-16-1(a)(2). That explicit legislative direction supersedes any general case law about harmless error or the need for an appealing party to show prejudice. Put another way, the legislature has conclusively presumed prejudice from a PTABOA's failure to timely issue a final determination of an assessment changed by a county or township assessor.

In sum, Ind. Code § 6-1.1-16-1(a)(2) required the PTABOA to issue a determination changing Verizon's self-reported assessment, including any determination on Verizon's appeal from the Form 113 notice issued by the Washington Township Assessor, by October 30, 2007. It failed to do so, and neither the Allen County Assessor nor the Washington Township Assessor filed an appeal under Ind. Code § 6-1.1-16-2. Neither party designates a material issue of fact on

these issues. Verizon's self-reported assessment therefore became final by operation of law, and Verizon is entitled to summary judgment in its favor.

C. The Assessor's Summary Judgment Motion

The Assessor seeks summary judgment solely on her claim that Verizon failed to timely file its Form 131 petition. The Assessor argues that once the maximum time for the PTABOA to issue a determination under Ind. Code § 6-1.1-15-1 lapsed, Verizon was required to file its Form 131 petition to the Board within 45 days and failed to do so.

Indiana Code § 6-1.1-15-1 lays out the general procedures for taxpayer appeals at the county level. To seek review of an assessment, a taxpayer must file a written notice no later than 45 days from being given notice of an assessment. I.C. § 6-1.1-15-1(c). The county or township official who receives the taxpayer's notice for review must immediately forward it to the PTABOA and attempt to hold a preliminary informal meeting with the taxpayer. I.C. § 6-1.1-15-1(h). The county or township official must also forward the meeting's results to the PTABOA within 10 days. I.C. § 6-1.1-15-1(i).[5] If (1) the informal meeting fails to resolve the issues, or (2) the PTABOA does not receive notice of the meeting's results within 120 days after the taxpayer's notice for review, the PTABOA must hold a hearing not later than 180 days after the date of the taxpayer's notice for review and must give notice of its determination not later than 120 days after its hearing. I.C. § 6-1.1-15-1(k)(2) and (n).

Here, the PTABOA neither held a hearing nor issued a determination. The following subsection of Ind. Code § 6-1.1-15-1 therefore applies:

> (o) If the maximum time elapses:
>
> (1) under subsection (k) for the [PTABOA] to hold a hearing; or

[5] The provisions governing the informal meeting differ slightly from what the statute required in 2007 when Verizon filed its notice of review. These differences are irrelevant to the Assessor's summary judgment motion. Because the Assessor cites to the current statute, we do likewise.

> (2) under subsection (n) for the county [PTABOA] to give notice of its determination;
>
> the taxpayer *may* initiate a proceeding for review before the Indiana board by taking the action required by section 3 of this chapter *at any time after the maximum time elapses*.

I.C. § 6-1.1-15-1(o) (emphasis added).

The Assessor recognizes that subsection (o) includes the phrase "at any time after the maximum time elapses." The Assessor argues that because the phrase is preceded by language directing a taxpayer to take "the action required by section 3," Ind. Code § 6-1.1-15-3(d) requires a taxpayer to file a petition for review to the Board no more than 45 days after the PTABOA gives the taxpayer notice of determination. Section 3 states:

> In order to obtain a review by the Indiana board under this section, the party must, not later than forty-five (45) days after the date of the notice given to the party or parties of the determination of the county board:
>
> (1) file a petition for review with the Indiana board; and
>
> (2) mail a copy of the petition to the other party.

I.C. § 6-1.1-15-3(d).

The Assessor argues that the PTABOA's statutory deadline must start the 45-day clock for a taxpayer to appeal to the Board, because the absence of that trigger would nullify Ind. Code § 6-1.1-15-3(d). This is based on the general rule that statutes must be read *in pari materia*. *See Hecht v. State*, 853 N.E.2d 1007, 1011 (Ind. Ct. App. 2006) ("When two statutes or two sets of statutes are apparently inconsistent in some respects, and yet can be rationalized to give effect to both, it is our duty to do so.").

The Board is not persuaded that the statutes require such an interpretation. Indiana Code § 6-1.1-15-1(o) is clear: when a PTABOA fails to meet its statutory deadline for holding a hearing or issuing a determination, a taxpayer "*may*" file a petition for review "*at any time after the maximum time elapses*." The subsection does require a taxpayer to take "the action required

by section 3" to initiate a review before the Board. The only "actions" that Ind. Code § 6-1.1-15-3(d) describes are filing a petition with the Board and mailing a copy to the opposing party.

A straightforward reading of subsection (o) does not, as the Assessor argues, nullify Ind. Code § 6-1.1-15-3(d). Subsection (o) does nothing to alter a taxpayer's obligation to file its Form 131 petition within 45 days after a PTABOA gives notice of its determination. Instead, that subsection creates a separate avenue for appeal where a PTABOA has not issued a determination. And the legislature plainly chose not to impose a specific deadline for taxpayers under that avenue.

The Assessor argues that our reading of Ind. Code § 6-1.1-15-1(o) could not be what the legislature intended, because it gives taxpayers a right to appeal to the Board "in perpetuity." *Resp't Brief at 8.* But that is true only if a PTABOA ignores its statutory duties and refuses to issue a determination. Once the PTABOA gives notice of its determination, a taxpayer has 45 days to appeal to the Board. Indiana Code § 6-1.1-15-1(o) simply offers a less onerous procedure for a taxpayer faced with a PTABOA's inaction than what previously existed. Before the legislature added subsection (o), a taxpayer had to either wait for a PTABOA to act on its own or seek a writ of mandamus compelling the PTABOA to act. *See State Bd. of Tax Comm'rs v. Mixmill Manufacturing*, Co., 702 N.E.2d 701, 704-05 (Ind. 1998) *amended* 1999 Ind. LEXIS 61 (Ind. 1999) (holding that the tax court lacked jurisdiction where the State Board of Tax Commissioners had not issued a final determination or even received a review petition because the county board had failed to act, and that the taxpayer's remedy was a mandamus action.) Under subsection (o), a taxpayer may still opt to wait for a PTABOA to act. But if the taxpayer does not want to wait, it now has an administrative option to move its appeal forward instead of having to pursue collateral litigation.

V. Conclusion

Because the PTABOA failed to issue a final determination changing Verizon's self-reported assessment within Ind. Code § 6-1.1-16-1(a)(2)'s deadline, that assessment is final. Although the Assessor claims that Verizon waived its rights under the statute, she did not designate any evidence from which a reasonable trier-of-fact could find waiver.

Notwithstanding the Assessor's argument to the contrary, Verizon did not need to file its appeal to the Board within 45 days after general the appeal statute's deadlines for the PTABOA to hold a hearing and issue a determination lapsed. Instead, Verizon had the option of waiting for the PTABOA to act or appealing to the Board at any time. Thus, Verizon's appeal was timely.

The Board therefore DENIES the Assessor's motion for summary judgment and GRANTS Verizon's motion for summary judgment. Because summary judgment in Verizon's favor is dispositive, the Board enters a final determination.

VI. Order

The Board enters its final determination in favor of Verizon and ORDERS that Verizon's March 1, 2007 personal property assessment be reduced to the amount reported by Verizon on its return.

Dated: July 3, 2014

_____
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 <http://www.in.gov/legislative/ic/code>. The Indiana Tax Court's rules are available at <http://www.in.gov/juciciary/rules/tax/index.html>.

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