

REPRESENTATIVES FOR PETITIONERS:

Lawrence & Yolanda Vierra, *pro se*

REPRESENTATIVE FOR RESPONDENT:

Landon K. Richmond, Attorney

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**BEFORE THE  
INDIANA BOARD OF TAX REVIEW**

Lawrence & Yolanda Vierra	)	Petition No.:	20-015-15-3-5-00644-16
	)		
Petitioners,	)	Parcel No.	20-11-14-351-044.000-015
	)		
v.	)	County:	Elkhart
	)		
Elkhart County Assessor,	)	Township:	Elkhart
	)		
Respondent.	)	Assessment Year:	2015

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Appeal from the Final Determination of the  
Elkhart County Property Tax Assessment Board of Appeals

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**May 22, 2017**

**FINAL DETERMINATION**

The Indiana Board of Tax Review (“Board”) having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Auditor removed the homestead deduction from the subject property for 2015. The Board finds, however, that Petitioners were entitled to the deduction for that year.

## PROCEDURAL HISTORY

2. Petitioners initiated this appeal on August 5, 2015. On January 28, 2016, the Elkhart County Property Tax Assessment Board of Appeals (“PTABOA”) issued its determination denying Petitioners relief. Petitioners then filed their Form 133 with the Board on March 3, 2016, claiming there was a disagreement as to whether the subject property was their principal place of residence and thus qualified for the homestead deduction. *Board Ex. A.*
3. On February 21, 2017, the Board’s administrative law judge Dalene McMillen (“ALJ”), held a hearing on the petition. Neither she nor the Board inspected the property.

## HEARING FACTS AND OTHER MATTERS OF RECORD

4. Attorney Landon Richmond represented Respondent. The following witnesses were sworn:

Lawrence Vierra, Owner  
Yolanda Vierra, Owner  
Anthony Vierra, Petitioners’ witness  
Cathy Searcy, Elkhart County Assessor  
Pauline E. Graff, Elkhart County Auditor  
Kris Jensen, Property Compliance Manager for Elkhart County Auditor<sup>1</sup>

5. Petitioners offered the following exhibits:

Petitioner Exhibit 1 – Letter from First Source Bank, mortgage documents, second home rider, subordination agreement, and U.S. Department of Housing and Urban Development settlement agreement,  
Petitioner Exhibit 2 – Credit application, disbursement authorization and cash payment summary, and mortgage documents.

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<sup>1</sup> Anthony Vierra, Pauline Graff, and Cathy Searcy did not testify.

6. Respondent offered the following exhibits:

- Respondent Exhibit A – Petitioners’ second home rider, dated November 30, 2009,
- Respondent Exhibit B – Page 1 of Petitioners’ mortgage, dated August 29, 2011,
- Respondent Exhibit C – Elkhart County Auditor’s notice of removal of homestead deduction, dated July 24, 2013,
- Respondent Exhibit F – Letter from Yolanda Vierra to Pauline Graff, Elkhart County Auditor, dated March 23, 2016,
- Respondent Exhibit H – Letter from Kris Jensen, Elkhart County Auditor’s office to Petitioners, dated April 4, 2016,
- Respondent Exhibit I – Letter from Yolanda Vierra to Kris Jensen, Elkhart County Auditor’s office, dated May 16, 2016,
- Respondent Exhibit J – Letter from Kris Jensen, Elkhart County Auditor’s office to Petitioners, dated May 23, 2016,
- Respondent Exhibit K – Elkhart County’s owner information, dated August 3, 2015,
- Respondent Exhibit L – Elkhart County’s owner information, dated April 4, 2016,
- Respondent Exhibit M – FedEx tracking information, dated February 14, 2017.<sup>2</sup>

7. The following additional items are part of the record:

- Board Exhibit A – Form 133 petition with attachments,
- Board Exhibit B – Hearing notice,
- Board Exhibit C – Hearing sign-in sheet.

8. The property under appeal is a single-family residential property located at 1912 Woodstone Court in Goshen.

**OBJECTIONS**

9. Petitioners objected to Respondent Exhibits A through C, F, and H through M. Respondent objected to Petitioner Exhibits 1 and 2. Both parties claimed that each other violated the Board’s evidence exchange rule by failing to provide exhibit lists or copies of exhibits prior to the hearing. The Board’s procedural rules require that each party

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<sup>2</sup> Respondent’s attorney did not submit Respondent Exhibits D, E and G.

provide all other parties: (1) a list of the witnesses and exhibits it intends to offer at the hearing at least 15 business days before that hearing, and (2) copies of documentary evidence at least five business days before the hearing. 52 IAC 2-7-1(b) (1) and (2). The Board may exclude evidence based on a failure to comply with those deadlines. 52 IAC 2-7-2(f).

10. Petitioners did not dispute Respondent's claim regarding failure to comply with the evidence exchange rules as they relate to Petitioner Exhibits 1 and 2. Therefore, Respondent's objection is sustained. These exhibits are excluded from the record with the exception of the second home rider, which was also submitted by Respondent. The Board notes, however, the exclusion of these exhibits is not determinative of the Board's ultimate findings in this matter.
11. Respondent's attorney claims Respondent did comply with the Board's exchange rules. In support of this claim, he submitted a copy of a FedEx tracking receipt showing a package was delivered to Petitioners' address listed on the Form 133 on February 14, 2017. *See Resp't Ex. M.* Consequently, the Board finds Respondent did in fact comply with the Board's exchange rules and Petitioners' objection is overruled.

#### **PETITIONERS' CONTENTIONS**

12. Petitioners purchased the subject property in 2007. Petitioners contend the subject property is their principal place of residence and that they do not own any other properties either in Indiana or elsewhere. They contend that they make regular mortgage, insurance, and utility payments on the subject property. Furthermore, they claim that they maintain Indiana drivers' licenses, that their vehicles are registered in Indiana, and that they also vote and pay income taxes in Indiana. *Lawrence & Yolanda Vierra testimony.*
13. Lawrence Vierra served as an orthopedic surgeon in the United States army for twelve years. Currently, he is licensed to practice in seven states and is subject to several

independent contracts to perform surgery at various trauma centers around the United States. He testified that he spends a majority of his time living in hotels. He spends the balance of his time living at the subject home in Goshen or at his father's home in California. Yolanda Vierra testified that she cares for her father-in-law on essentially a full-time basis at his home in California. *Lawrence and Yolanda Vierra testimony.*

14. Petitioners contend they have financed or re-financed the subject property on four separate occasions. According to them, only one of those mortgages contained a second home rider. Mr. Vierra claims that the 2009 second home rider was included in error and that, due to time constrictions at the closing, he was unaware of the document or its contents until Respondent raised it as an issue for denial of the homestead deduction. He also testified that the subject property has been refinanced since 2009 and that none of those subsequent mortgages showed the subject property as a second home, further demonstrating the 2009 second home rider was included in error. *Lawrence Vierra testimony.*

#### **RESPONDENT'S CONTENTIONS**

15. Petitioners' homestead deduction was removed by Elkhart County because, according to Respondent, Petitioners did not meet the necessary residency requirements. Respondent claims Petitioners have lived outside of Indiana for a number of years and are not using the subject property as their principal place of residence. *See Ind. Code § 6-1.1-12-37. Richmond argument.*
16. Respondent maintains that the Auditor's office became aware that Petitioners were not living at the subject property when she received a phone call from First Source Bank questioning the homestead deduction on Petitioners' tax bill. Respondent contends that the Auditor's office and Petitioners corresponded on several occasions concerning the removal of the homestead deduction and that, as discussed, the Auditor's office

eventually removed the homestead deduction for 2015. *Jensen testimony; Resp't Ex. C, F, & H-J.*

17. Respondent contends Petitioners' 2009 mortgage on the subject property included a second home rider that was notarized in California. The second home rider states that "Borrower shall occupy, and shall only use, the Property as Borrower's second home." Respondent also argues Petitioners have been associated with an additional California address for several years. *Jensen testimony; Resp't Ex. A-B.*
18. In response to questioning, Ms. Jensen admitted that none of the sources consulted by the Auditor's office show that Petitioners own any other properties or have filed for any other homestead deduction other than the one at issue. *Jensen testimony.*

#### ANALYSIS

19. The Board is a creation of the legislature and has only the powers conferred by statute. *Whetzel v. Dep't of Local Gov't Fin.*, 761 N.E.2d 904, 908 (Ind. Tax Ct. 2001) (citing *Matonovich v. State Bd. of Tax Comm'rs*, 705 N.E.2d 1093, 1096 (Ind. Tax Ct. 1999)). By statute, the Board conducts an impartial review of all appeals concerning the assessed valuation of tangible property, property tax deductions, property tax exemptions, and property tax credits that are made from a determination by an assessing official or county property assessment board of appeals to the Board under any law. Ind. Code § 6-1.5-4-1. Regarding the homestead deduction, Ind. Code § 6-1.1-12-37(o) states that if "the county auditor has determined that the property is not the property owner's principal place of residence, the property owner may appeal the county auditor's determination ... as provided in IC 6-1.1-15."
20. Petitioners' claim regarding the homestead deduction comes within the scope of appeals the Board is authorized to hear and determine. The homestead deduction statute provides:

(a) The following definitions apply throughout this section:

- (1) “Dwelling” means any of the following:  
(A) Residential real property improvements that an individual uses as the individual's residence, including a house or garage.

....

- (2) “Homestead” means an individual's *principal place of residence*:  
(A) that is located in Indiana;  
(B) that: (i) the individual owns; [or] (ii) the individual is buying under a contract, recorded in the county recorder's office, that provides that the individual is to pay the property taxes on the residence . . . ; and  
(C) that consists of a dwelling and the real estate, not exceeding one (1) acre, that immediately surrounds that dwelling.

....

(j) A county auditor may require an individual to provide evidence proving that the individual's residence is the individual's principal place of residence . . . . The county auditor may limit the evidence that an individual is required to submit to a state income tax return, a valid driver's license, or a valid voter registration card showing that the residence for which the deduction is claimed is the individual's principal place of residence.

Ind. Code § 6-1.1-12-37 (2013 supp.) (emphasis added).

21. Although Ind. Code § 6-1.1-12-37 does not define “principal place of residence,” the Department of Local Government Finance (“DLGF”) defines that term as “an individual’s true, fixed, permanent home to which the individual has the intention of returning after an absence.” 50 IAC 24-2-5.
22. Furthermore, in *Kellam v. Fountain County Assessor*, 999 N.E.2d 120, 124 (Ind. Tax Ct. 2013), the Indiana Tax Court stated that the legal standard for determining an individual’s principal place of residence depends on the intention to return to the property after an absence, not continuous physical presence. As further evidence that the subject property was the petitioner’s principal place of address in that case, the court noted the petitioner’s

use of the subject property's address as his mailing address, and as the address on his driver's license, bank statements, and tax returns.

23. The Board therefore must decide how the DLGF's definition of a taxpayer's principal place of residence applies to the facts presented in this appeal. Petitioners have presented evidence that during the year at issue they maintained the residence as their domicile, and their absence from the state had been due to Petitioners' employment requirements and the provision of out-of-state care to one of Petitioner's parents.
24. Respondent referenced a 2009 second home rider attached to a mortgage indicating the subject property as Petitioners' second home. However, Petitioners offered undisputed testimony that this inclusion was in error and Respondent failed to prove Petitioners owned any other home other than the subject property, or that they claimed a homestead deduction on any other property.
25. Petitioners also provided undisputed testimony that they maintain drivers' licenses, file income taxes, and are registered to vote in Indiana. They also make regular mortgage, insurance, and utility payments on the subject property. Respondent failed to offer any meaningful analysis as to how Petitioners' use of the subject property falls short of the definition of principal place of residence as defined by the DLGF or the Indiana Tax Court.
26. Based on the record, the Board finds Petitioners' evidence to be credible and that they have established that the subject property was their principal place of residence for the year at issue. Therefore, the Board finds that Respondent improperly removed the homestead deduction for 2015.

#### **SUMMARY OF FINAL DETERMINATION**

27. We find Petitioners are entitled to the homestead deduction on the subject property for 2015.



The Final Determination of the above captioned matter is issued by the Indiana Board of Tax Review on the date written above.

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Chairman, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

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