

ORAL ARGUMENT — 11/19/98
98-0219
ATASCOSA COUNTY ISD V. ATASCOSA CAD

MCILHANEY: The issue on this appeal is the construction of the tax code specifically...

BAKER: There are matters that have been filed with us that "the case has been settled," but there seems to be a disagreement between the parties on how far the settlement goes. Is that a correct assessment of where we are today?

MCILHANEY: Yes.

BAKER: May I ask to get this down to what's left to be talked about. Has the issue of the tax treatment for years 1995-1998 been settled?

MCILHANEY: Yes.

BAKER: And has that also decided the charitable tax exemption for those years?

MCILHANEY: To the extent that the hospital association concedes that they are not entitled to the exemption in 1995, yes, that issue has been settled.

BAKER: Does that leave us to resolve or argue about whether limitation bars the actual taxes that may be due for 1990 - 1994?

MCILHANEY: That is correct.

BAKER: And then finally whether they can seek them?

MCILHANEY: Correct. We still have at issue a financial stake in the controlling issue on this appeal, the substantive issues that I would like to discuss. And that is, the construction of the tax code relative to §11.43i, §25.21, §41 and §43 that relate to the procedure by which a taxing entity has a constitutional obligation to back appraised property that was erroneously exempted, and therefore, omitted from past years of tax rolls.

To understand and appreciate the concept of the procedure that the tax code encompasses, we need to look back and see historically what the Texas tax scheme has been. Since 1879, the Texas legislature has provided for recapture of property that has been omitted in the past because of an erroneous exemption. The legislature at that time mandated that omitted property was supposed to be - there's a constitutional obligation to place onto the current years tax rolls property that has been erroneously exempted, and therefore, omitted from previous years tax rolls. So onto the current year's tax rolls in this case it would have been 1995.

There is a statutory and constitutional obligation that the proper taxing entity or officer place onto the 1995 tax roll those pieces of property that were improperly omitted because they were erroneously exempted. That's an obligation that we find statutorily since 1879 and we also see a constitutional obligation in art 8, §21, which requires for uniform and equal taxation. Also, we see that in art. 8, §11, that constitutionally requires the proper taxing officer to assess all property that has not been rendered. And that is in effect what happened in this case.

BAKER: The property's been rendered, but they've got an exemption for those years, isn't that correct - there's no question that it was not rendered? When you have to render it and then tell them. But so be it, is to be exempt, isn't that right?

MCILHANEY: Under §11.18, which is the operative exemption statute or the property at issue in this case, it was a charitable exemption. And back in 1988, the property was rendered. And the appraisal district at that time made the erroneous conclusion that the property was exempt. Because they had the misunderstanding that the hospital association was using the property for charitable purposes. However, since 1988 - and at that point, the property became considered exempt and every year the hospital association was not required to reapply for that exemption, as is common with quite a number of exemptions, like the Homestead exemption, the Freeport exemption, the agricultural rollback exemption. A taxpayer is not required to reapply every year for that exemption. So the property goes off the roll in 1988. And it stays off the roll every year after that until something like this may happen, or until the taxpayer does what the taxpayer is required to do under the constitution and under the tax code, and that is render the property back, provide notice to the taxing entity that in fact they are not entitled to the exemption. That didn't happen in this case.

What happened in this case was that the appraisal district and Jourdanton ISD realized that 11.18 does not apply, that in fact what has happened is the hospital association has leased that property to a For-Profit hospital - Tri-City Community Hospital. Since 1988, that property then was used for profit and was not actually entitled to the exemption.

So what we see happening is in Dec. 1994, the first step that Atascosa county and Jourdanton ISD took was that these taxing units approached the chief appraiser of Atascosa appraisal district and pointed out to their chief appraiser that the exemption was improper. The appraiser took no action. So what happened was, the taxing units did exactly what the tax code requires them to do, and they filed a challenge petition within the timely framework to challenge...

HANKINSON: And they disputed all the time periods required under the statute were complied with in 1995?

MCILHANEY: Yes, that is correct. There is no dispute regarding that. What's important to note conceptionally is that the taxing units were contesting the 1995 tax roll. And the 1995 tax roll could contain a lot of things, but the two things that are most important for our appeal is that it was supposed to contain the property for 1995 assessed at its 1995 value. That is the issue that has been

resolved by the parties. The second category of property that the tax roll was supposed to have on it in 1995, and the subject of this lawsuit, is the property from 1990-1994. According to 25.21, the proper procedure is for the appraisal district to place on the 1995 tax roll the property and note the year it was omitted and the value of the property on those years. That is the aspect of the 1995 tax roll that we are currently disputing in this appeal.

It is our belief that when you look at the language of 11.43i and 25.21, when you look at the extensive legislative history that discusses the long standing principle within the tax code to permit - not just permit back appraisal- but in fact to constitutionally obligate back appraisal of property that has been improperly omitted because of an erroneous exemption.

SPECTOR: What showing does the taxing unit have to make that there was an error?

MCILHANEY: The answer to that is really twofold. The first is that the taxing unit can present that, what is a factual and legal argument to the chief appraiser. That's the first step. At least that's what was taken in this case. And the chief appraiser took no action at that time. So because this is a constitutionally mandated obligation, the taxing units of Atascosa county and Jourdanton ISD took it to the next step, which was to follow the section 41 procedure, which is to challenge the 1995 tax roll. Because when the tax roll was sent by the chief appraiser to the appraisal district, the appraisal district did not and the chief appraiser had not placed onto the 1995 tax roll, the omitted property for years 1990 - 1994.

ENOCH: In the year 1999 when it goes off the tax rolls, the taxing unit could have contested that?

MCILHANEY: That is correct.

ENOCH: In 1991, when it didn't appear on the rolls could the taxing unit in 1992 have contested the fact it was not on the rolls in 1990?

MCILHANEY: According to the Texas constitution and our interpretation of the tax code, yes, based on §11.43i.

ENOCH: And that is, that as long as it's within 5 years of when it was put on exemption, the taxing unit can challenge at anytime?

MCILHANEY: That is absolutely correct.

ENOCH: So you're not relying on a chief tax appraiser who corrects a mistake within a 5 year period. You're simply saying that if there's an independent authority of a taxing unit that challenges an exemption at anytime within the 5 years of it being granted.

MCILHANEY: What they are challenging is they are challenging the chief appraiser's failure to satisfy his constitutional obligation to back assess property that has been erroneously exempted.

ENOCH: The only reason you say a taxing unit can attack the tax exemption given to some property over a 5-year period is because the chief appraiser has been given the authority to correct a mistake within the 5 years of having granted the exemption?

MCILHANEY: That's partially correct. We do rely on 11.43, which I wouldn't say gives the chief appraiser the authority. I would say it gives the chief appraiser the constitutional obligation to back assess improperly exempted property. In addition, we rely on §43, that says that a taxing unit can compel a taxing officer, be it a chief appraiser, appraisal review board or appraisal district to satisfy their obligations under the code. Actually there is two avenues that can be taken. The first avenue is §41, the taxing units are requesting that the chief appraiser perform his obligations pursuant to 11.43.

ENOCH: Sort of like a mandamus?

MCILHANEY: Very similar to a mandamus. Section 43 is very much like mandamus.

ENOCH: You envision remedy from this court to order the tax appraiser to do what?

MCILHANEY: That the tax appraiser would put onto the 1995 tax roll the specific property noting the years 1990-1994 and noting the value of that property in years 1990-1994. That's what 25.21, that's the procedure.

ENOCH: But you don't need the chief appraiser to do that.

MCILHANEY: The chief appraiser acts as the agent of the appraisal district. The proper procedure is for the appraisal district to order the chief appraiser to perform this task, or make a finding and then the chief appraiser is supposed to follow that finding. In this case, that...

ENOCH: So that's all you're seeking, is that he assess a value to them for those years?

MCILHANEY: Exactly.

ENOCH: You're not really asking that any taxes be collected as a result of that?

MCILHANEY: That's correct, because tax collection is a responsibility - we go one step further than where we are right now. The first step is to get the property on the tax roll for 1995 and get it appraised on the tax roll. The second step then is for the taxing units to go and assess the property. After they assess the property, then they can collect the tax. But we haven't gotten to assessment and we haven't gotten to collections because we can't get to the first step, which is

appraisal. And we see that that is both under §41 and §43.

I wanted to point out that there is not a time bar in this case. Certainly it's not limitations. The only limitations that would be applicable in this case is the 5-year limitations that provides that an erroneous exemption can be rescinded and the omitted property can be recaptured for a 5-year period. In this instance it would be 1990-1994. There is no question that that limitations period has not been implicated in this case.

The issue that has been misconstrued is the time bar under §41. And the reason why there is a misunderstanding is because there is a misunderstanding of what a tax roll contains. That's the point I would like to make today is, that the tax roll contains two categories of property. The first is, the property by its value on that current year, that is 1995. And then, the second category is the property based on its value in those omitted years. In this instance, 1990-1994.

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RESPONDENT

HARRISON: I represent Atascosa Hospital Association, a Texas non-profit hospital association, which recovered summary judgment at the DC level and an affirmance of that judgment by the CA.

SPECTOR: If the taxing unit is able to put the hospital on the rolls, disregarding any settlement, the hospital would then have an opportunity to contest that appraisal?

HARRISON: That's correct. We are talking about a partial exemption. There's mention that Tri-city as a for-profit lessee. And this hospital has always been partially on the rolls to the extent of the lessee's interest. There is §23.13 of the Tax code that deals with the taxation of a lessee interest in that case. And that's always been the situation or was from 1988 - 1995. But you're right. In fact the challenge petition they filed was timely in 1995. The appraisal review board granted them relief for 1995; refused to give them back their relief; eliminated the partial exemption; put the property on the rolls for 1995 only. We ultimately appealed that decision against the appraisal district in DC where most of these battles are customarily fought and that was part of our recent settlement that's been settled.

HANKINSON: Do you agree or disagree that there is a duty and in fact a constitutional provisions that provide for back appraisal?

HARRISON: We have to be careful with our terminology because you have one set of rights, responsibilities and powers preserved to the appraisal districts and chief appraisers verses the powers reserved for the taxing units.

HANKINSON: But the chief appraiser and then the appraisal district can in fact go in and in addition to putting in an appraised value for the property in the current year can also put in the omitted values for other years on a then current roll?

HARRISON: Under 11.43i, clearly if a chief appraiser finds that an exemption previously granted or a partial exemption was erroneous, then it is his/her obligation to then add the property back onto the rolls...

HANKINSON: No one's challenging anymore whether or not that was erroneous?

HARRISON: No that's not correct.

HANKINSON: I thought what we were challenging here is the procedure. Isn't that what your challenge is to?

HARRISON: Well part of the problem is here is petitioner's briefing kind of assumes away the merits, but we did not reach the merits of the case and we do not concede the merits of the case.

HECHT: I thought you had settled?

HARRISON: We had have entered into a settlement agreement which has certain settlement recitals and provides for certain agreed values in tax...

HECHT: But you agree exemption was wrong in the prior years?

HARRISON: We have a settlement agreement which recites language to that effect for purposes of resolving all of our tax liability.

HECHT: How is that different from yes? You've agreed that the exemption was wrong in the prior years?

HARRISON: I certainly don't concede that the exemption was erroneous in the prior years. We never got to the merits of the case. When we settled our tax liability and settled the values, the tax units insisted on a recital in there that the exemption was - that we are not entitled to the exemption. There was no monetary impact to that for us, so we put that in there.

HECHT: Well you're not taking it back.

HARRISON: We're not taking back the terms of the settlement agreement. The DC never reached the merits of the exemption issue.

HECHT: But it's been foreclosed by your agreement since?

HARRISON: There is that recital in the settlement agreement.

HARRISON: So all we're talking about now is the procedure. Isn't that what's at issue, what can and cannot happen? We're not dealing within the exemption itself anymore?

HARRISON: We are dealing with the procedure and to whom the legislature has reserved the rights to carry-out this process because essentially the taxing units are claiming the right to step into the chief appraiser's shoes themselves and go...

HANKINSON: They are claiming the right to challenge what happens during the appraisal process.

HARRISON: They are claiming the right to challenge outside of the time constraints of chapter 41.

HANKINSON: What time constraints are they operating outside of?

HARRISON: The provisions of Ch. 41 concerning challenge petitions establishes a May 31, or a certain time frame before the certification of the roll deadline to filing...

HANKINSON: And then the question is, what's in the roll for that year? Isn't that then the underlying question?

HARRISON: No, because what they are challenging is 5 separate decisions. In 1990, the chief appraiser determined that this property was entitled to a partial exemption. They are challenging that 1990 decision. A similar decision in 1991, 1992, and 1993...

HANKINSON: Do you agree that the appraisal roll for a particular year can include, in fact the value for that year plus omitted values for previous years within the limitations period? Yes or No. Can the roll include it or not - omitted values?

HARRISON: Would that omitted value be added on to this year's appraisal roll?

HANKINSON: Yes.

HARRISON: Yes it would.

HANKINSON: So the appraisal roll for 1995 then could include the value for 1995 plus the omitted values for other years?

HARRISON: If the chief appraiser made that determination.

HANKINSON: And if they decided not to put the omitted values on there, then the taxing authority can in fact challenge, correct?

HARRISON: In that tax year.

HANKINSON: In that tax year for what's on the roll in that year which would include the omitted values?

HARRISON: No, they have to challenge in the year that the decision is made. They're challenging the chief appraiser's decision.

HANKINSON: But how are omitted values ever a factor if once the year is gone it's gone, and you can never do anything about it?

HARRISON: Because the legislature has distinguished between the powers it reserved to independent chief appraisers of separate and part from taxing units and they carved out a set of responsibilities for appraisers, and that said: Chief appraiser, you're the professional independent body, you can go back up to 5 years if you make that determination. Taxing units, we are not going to give you open-ended rights to second guess everything the appraisal districts do.

OWEN: I thought her question was, Once the chief appraiser determines that the exemptions were erroneous, and adds them into a current year, then the taxing units are free to say, Well you didn't appraise even though you are now taking away the exemption, you still haven't appraised them at a high enough value. You can still challenge once they are put on the rolls in that current year.

HARRISON: You can't file a challenge petition on a particular property value. Section 41 prohibits that. But the other problem here is what are the petitioners trying to challenge. Not some act that occurred in 1955. They were timely there, but the decision in 1990 to grant the partial exemption in 1991, 1992, 1993 and 1994. Those decisions had to be challenged back then.

OWEN: But once a chief appraiser says, Whoops in 1995, I should have not granted these exemptions; goes back and brings them current and puts them on the 1995 roll. What rights do the taxing units have to challenge the valuation or anything else they want to challenge about bringing those onto the current roll?

HARRISON: Once they are actually put on the rolls, then there are not tax unit rights to challenge a particular property value. They can challenge the erroneous grants of an exemption. But the property is not put on the rolls.

ENOCH: Your argument it seems to me is that the decision whether to go back and take the previous 4 years of tax exempt status and put it on the current appraisal is a discretion exercise

solely by the chief tax appraiser on behalf of the appraisal district. There is no authority for a taxing unit to compel the chief tax appraiser to put those units on that tax year?

HARRISON: Not once the time frame for a timely challenge petition has run.

ENOCH: That's what I am saying because they have within 1 year of the exemption being exercised, the taxing unit has to challenge that exemption. After having failed to do that, the only person who can put that property back on the tax rolls for a retrospective period time, previous years over which the appeals have already run, is a taxpayer as the chief tax appraiser. That is your issue, that's your point?

HARRISON: That's correct.

ENOCH: And the taxing unit's point is, Oh, no, if a tax appraiser can do that, then we have the authority to compel the tax appraiser to do that by looking at the general scheme of the taxing statutes. And your argument says, Well that's inconsistent with the fact that the statute specially requires them to make an objection to the exemption during the year that the exemption is granted.

HARRISON: It's also inconsistent with the carving out of certain responsibilities to the chief appraiser.

HANKINSON: Well there is no question that the code gives the taxing authority the right to file a challenge petition.

HARRISON: That's correct within the time limitations...

HANKINSON: And so you are penning all that you've got on the fact that the statute in §11.43(f) talks about a chief appraiser discovering. And that that's the only mechanism in which a back appraisal can be done. If the chief appraiser chooses not to do a back appraisal then, too bad, no challenge.

HARRISON: Not too bad, because there is a window and the window was carefully created to hopefully allow to be addressed before the appraisal roll is certified. There is a window for the tax unit to come in and say, Hey you left this off the roll.

HANKINSON: I understand. But you're talking about one year at a time. And basically what you're saying is when it comes to back appraising, the authority to back appraise sits with the chief appraiser and no one else and his decision cannot be challenged in the year that he makes the decision to back appraise or not to back appraise, right?

HARRISON: There is. That there is no independent right to compel a chief appraiser to go

back and back appraise.

HANKINSON: So if in this instance the county and the school district in 1992 had said, We don't like that exemption and filed a challenge, at that point in time they can go forward with the challenge petition...

HARRISON: It would be timely for that year.

HANKINSON: And in 1995, if the chief appraiser decides or does not decide to back appraise in 1995, the taxing authority at that point in time can have no say one way or the other on what the chief appraiser decides to do?

HARRISON: As to prior years, there is no independent statutory mechanism to make him find what the taxing units want him to find. That's the hallmark of our independent central appraisal system. It worked pretty well. It doesn't always work perfectly, but it worked pretty well here. Two chief appraisers refused to knuckle under to that pressure and they refused to make that finding.

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LOW: I represent the Atascosa CAD. I've taken the position all along that this case has been off on the wrong track from the day it was filed. It is critical to point out in this case that the hospital has never had an ARB hearing. This court has held and other courts have held any number of times that the cornerstone of the property tax code is the administrative review protest. And without going through the administrative review protest there is no jurisdiction to levy a tax.

I've lost track of the number of cases that have held that. The hospital has never had an ARB hearing. They are not a party to the challenge hearing. The challenge is between the appraisal district and the taxing units. The way the system works, and the way the system did work was that the hospital as soon as the ARB ruled that the appraisal district must place the property on the tax roll, the order which is in the record requires the chief appraiser to go out and appraise the property. First of all we get a market value put on it, then we notify the hospital that they are entitled to protest the ARB and they are entitled to protest both the market value of the property and the fact that the exemption has been denied. That hasn't been done yet.

OWEN: But isn't that the whole point that that's what they are trying to get at? Isn't that what the taxing units want to happen? They want it to be put on the rolls so that there can be this hearing and all of this can be determined.

LOW: Yes, but they didn't go about it with the mechanism that's designed to do that.

OWEN: Why does it undermine the independence of a chief appraiser to have some sort of oversight in his decision on whether to back appraise or not?

LOW: The problem arises with the direct intervention of the taxing units to the chief appraiser. The appraisal district is an independent political subdivision in the State of Texas. As such, the board of directors of the appraisal district runs an independent political subdivision. You've got the taxing units independent themselves political subdivisions telling the chief administrator of another political subdivision how to appraise property.

OWEN: You're not telling. You're saying, I raised the issue and then it has to be resolved. They don't dictate.

LOW: Exactly. And the remedy for the taxing units if they feel a chief appraiser is doing a sorry job, or they think the chief appraiser is not doing his job, or the chief appraiser is rude to them, is to go to the board of directors of the appraisal district and say, We're unhappy.

OWEN: In any given year they can challenge a failure to include property on the rolls?

LOW: This property has been on the roll all the time. There is a misconception that it's omitted. I've seen that stated.

OWEN: A party can challenge the partial exemption at any given year?

LOW: Right.

OWEN: How does it undermine the chief appraiser's independence to have his decision not to do a back appraisal questioned?

LOW: Where do you stop?

OWEN: You stop 5-years back.

LOW: If you can challenge one decision of the chief appraiser why can't you challenge any decision of a chief appraiser? My concern and it's a very real concern based on my experience in this practice is that if the taxing unit - I'm not going to cry 1/10th of a tear if our taxing units get more money. But I say to the court I'm very concerned about the prospects in the future. If you're saying to appraisal districts anytime the taxing units think you've under-appraised something, they can challenge it, ought to be able to. And really that's kind of fine with me, but I don't think that's good law.

HECHT: What does 43.01 mean?

LOW: It says, you can sue the appraisal district. It doesn't say the chief appraiser as the petitioners repeated over and over and over in their brief appraisal district and chief appraiser.

HECHT: So when it says in 11.43i, the chief appraiser shall add the property, if he doesn't the remedy is political?

LOW: First of all, they are assuming that the property was erroneously exempted.

HECHT: Assume that with me, the only remedy is political. Just get him fired if you don't like what he's doing.

LOW: Or recall the board of directors and get some board of directors in there who will.

HANKINSON: Well what is ch. 41 supposed to do then?

LOW: It puts very strict limitations on what taxing units can challenge. In fact, §41.04 gives you till June 1 or 15 days, and that's it. And they are very strictly laid out.

HANKINSON: I understand that. But we don't have any debate that in 1995 they met those particular deadlines?

LOW: No debate.

HANKINSON: In 1995, if we look at the calendar year everything was timely in 1995?

LOW: That's correct.

HANKINSON: And the argument is that they could file a challenge and they could challenge the rolls for 1995?

LOW: They could challenge the exemption.

HANKINSON: Exemption. Excuse me. As it stood on the rolls in 1995.

LOW: Correct. And they did properly do that.

HANKINSON: But they cannot file a challenge in 1995 as to whether or not the roll includes a back appraiser?

LOW: That's correct if you believe §41.04 means what it says. It clearly says, June 1 or 15 days within notice of the appraisal records.

HANKINSON: And those appraisal records for 1995 did or did not include back appraised property for other years? Did it include back appraised property on other properties, or could it

have?

LOW: It could have. But I don't know how they would go about challenging.

HANKINSON: But the point is, when you look at an appraisal roll in 1995, it would include as your opponents say, The appraisal for 1995, plus they could include, assuming omitted property, they could include appraisals for other years?

LOW: Technically, I believe the way that would be done is they would supplement the appraisal rolls for 1994, 1993, 1992, 1991 and issue a change order to the taxing units.

HANKINSON: The 1995 records only include appraisals for that particular year?

LOW: That's correct.

OWEN: Where is the term appraisal district defined?

LOW: It's constitutional. In the constitution, art. 8, basically it's defined as: A board of equalization shall sit for each county.

OWEN: Is a chief appraiser a part of the appraisal district?

LOW: He is the chief administrator of the district, and I believe that is addressed in the tax code. He is hired by the board of directors and that's all laid out in ch. 6 of the Property Tax Code.

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REBUTTAL

MCILHANEY: First, I think this court is right that the chief appraiser should not be allowed to have complete discretion to choose not to perform as a constitutionally and statutorily mandated obligation.

OWEN: Why should you have 5 years instead of 1 to ferret out exemptions that shouldn't have been granted?

MCILHANEY: I think that's a real good question. What you need to look at is the entire tax code. The tax code is created with the underlying premise that mistakes are going to be made. And that if those mistakes happen that the taxing units and the taxing entities, like the chief appraiser, have the ability to go back and recapture. We see that throughout the tax code. We see it in the homestead exemption. We did an extensive review of the legislative history in this case. And quite a bit of the legislative history talked extensively about the underlying premise of the taxing system,

whether it was code or pre-code, that there is this ability to go back and recapture property that was incorrectly omitted from...

OWEN: But the legislature could have reasonably said that with respect to taxing units, You've got a year to examine these rolls and if you think there are exemptions or partial exemptions that shouldn't have been granted, you've got 1 year to bring it up. We're going to give 5 years to the chief appraiser. We're going to give him more latitude to come back and sweep up the mistakes. But keeping it opened up to the whole world we'll only give you 1 year. What's wrong with that kind of regulatory scheme?

MCILHANEY: It's contrary to the rest of the tax code. The tax code includes provisions. The one that jumps out to mind is the agricultural exemption, which includes a 5-year rollback, so that if a landowner classifies a property as agricultural, and then the next year classifies the property as commercial, then the tax code requires a rollback of 5 years to recapture the higher value of the property.

OWEN: How is that at odds with confining taxing units giving them 1 year to make whatever challenges they want to make, yet giving the chief appraiser an additional 4 years if there are other errors?

MCILHANEY: It's contrary to the tax code. And what we see as an example in the agricultural exemption, because the idea of the legislature was to allow an opportunity for taxing units and for those who benefit from the taxes, the school districts require that money to be able to have the schools and to educate the school, give them the opportunity to review the tax rolls to find out if there's been an improper exemption.

SPECTOR: If the chief appraiser decides in his discretion that there was no mistake, then that can be litigated, is that correct?

MCILHANEY: The proper method would be through §41. Because §41 would then allow the taxing units to go to the appraisal review board and say, This analysis was improper. And that's exactly what happened. The taxing units went to the appraisal review board and said, Look at this exemption, this exemption that was started in 1988. In fact, this exemption is incorrect.

SPECTOR: Did that happen here on the back appraisal?

MCILHANEY: Yes. The same set of facts that the appraisal review board used to determine that the exemption was incorrect in 1995, was the same set of facts that would have been applicable to 1990-1994.

ENOCH: Then that means that the provision that says, The appraisal unit should challenge this within the year is just superfluous, because really what controls is the appraisal district

can challenge it up to 5 years after the exemption has been granted?

MCILHANEY: It's not superfluous. What would be superfluous is if we were not allowed to go back and challenge the failure to back assess, because then - in fact there could be a constitutional obligation and a statutory obligation to back assess, and then no method by which to make sure that that constitutional obligation was satisfied.

HANKINSON: Your opponent says that the appropriate way to deal with this, since this was not omitted property under the statute, do you agree with that it was omitted property or not?

MCILHANEY: I disagree with that.

HANKINSON: So you think that property that's included partially but not completely then does qualify as omitted property under §25.21?

MCILHANEY: Yes.

HANKINSON: Is there any case law for that?

MCILHANEY: Yes.

HANKINSON: He says that the appropriate way for the appraiser to deal with this is not by using the current year tax rolls, the year in which the mistake is discovered and the effort to back appraise is undertaken, but in fact, to supplement previous years tax rolls?

MCILHANEY: I respectfully disagree with counsel. The *Friedrich* case illustrates that the proper thing to do is to, and 25.21 specifically states that what you are supposed to do is put on the current year tax roll that property and note the year that it was omitted, and the value of the property for that year.