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Construction Law - Corporate Law - Education Law - Labor Relations - Municipal Law - Real Estate Law - Real Property Taxation

Tax Certiorari Newsletter Winter 2013

COMMUNITY IMPROVEMENT TAX FOUND NOT TO BE A TAX UNDER RPTL §102(20)

Matter of Piccolo v. New York State Tax Appeals Tribunal, 108 A.D.3d 107 (3d. Dep't 2013)

Qualified Empire Zone Enterprise (QEZE) Piccolo Properties owns five parcels within the Auburn Empire Zone, itself within the Auburn Downtown Business Improvement District (ADBID), which levies a "downtown improvement tax" on district properties to pay for beautification projects, cultural events, business promotions, and other projects. The Tax Appeals Tribunal reversed an administrative law judge's cancellation of deficiency notices the state's tax agency-sent Piccolo's members-to recover QEZE tax credits for the 2004, 2005, and 2006 tax years. The Appellate Division Third Department, confirmed the tribunal's determination, finding that petitioners did not establish that the term "eligible real property taxes" in Tax Law §15(e) included an exemption from ad valorem levies or special assessments, nor did they show that the tax exemption under Tax Law §15(e) applied to the downtown improvement tax. The ADBID met RPTL §102's definition of a special district, and the downtown business tax was a charge to support the district's services. Noting the Auburn City Council's finding that Piccolo's parcels were among those benefitted by the ADBID's creation, the Tribunal reasonably concluded that the downtown improvement tax was not actually a tax.

LEAD PAINT IN PROPERTY WON'T DIMINISH ITS VALUE FOR TAX PURPOSES IF PROPERTY IS RENTED AND THE RENTALS CONTINUE

Roth v. City of Syracuse, 2013 WL 2475867

The Court of Appeals has previously held that environmental contamination must be considered in a municipality's evaluation of its real property for tax purposes. See *Commerce Holding Corp. v. Bd. of Assessors*, 88 N.Y.2d 724 (1996). In a proceeding under Article 7 of the Real Property Tax Law, the municipality's assessment enjoys a "presumption of validity" which the owner has the burden of rebutting. The properties involved were "five single-family, five- bedroom houses near Syracuse University used as rental housing for local college students". Both sides presented expert testimony on the value of the properties due to the presence of lead paint. Not surprisingly, the owner's expert said the properties were worth little-maybe a dollar apiece on the market-while the city's expert said their value was not diminished at all.

The owner argued diminution in value, but didn't offer any proof of it, such as proof that he was having trouble renting. And there was apparently no proof of any transactions that failed, or faltered, because of the mere presence of the lead paint in the premises.

In addition, although in *Commerce* the Court allowed consideration of cleanup costs, in this case the Court found no evidence that a buyer would have insisted on an abatement of the purchase price because of the lead paint.

As a result, the Court concluded that the owner's "proposed remediation costs are not an appropriate factor to be considered in evaluating the tax assessments".

DIVIDED PANEL SUGGESTS APPRAISERS SHOULD USE CAUTION WHEN RELYING ON "PERSONAL EXPOSURE TO COMPARABLE PROPERTIES

Board of Managers of French Oaks Condo v. Town of Amherst, 103 A.D.3d 1102 (4th Dep't 2013)

Board of Managers of French Oaks Condo began an RPTL Article 7 action seeking review of the real property tax assessments for its condominium complex for the 2009-2010 tax year. Town of Amherst and others, appealed from an order determining the value of the complex for tax assessment purposes after a hearing before a referee. The divided panel affirmed, ruling petitioner met its initial burden of showing a valid and credible dispute regarding valuation. It also concluded that the referee's

determination regarding the final capitalization rate was supported by a fair interpretation of the evidence.

However, the dissent found the conclusion of petitioner's appraiser with respect to his capitalization rate to be legally and factually flawed. They, therefore, argued petitioner failed to meet its ultimate burden of establishing that the subject property was overhauled, holding it would have adopted the value set forth in the respondents' trial appraisal. The dissent noted that the legal flaw underlying the capitalization rate analysis of petitioner's appraiser was that he relied on his "personal exposure" to at least three of the four comparable properties to justify the financial figures that he used to calculate his capitalization rate.

REQUEST FOR SPECIFIC PERFORMANCE OF ORALLY NEGOTIATED CONSENT JUDGMENT DENIED

Matter of American Independent Paper Mills Supply v. Tarrytown , 2012 WL 1570970 (N.Y.Sup.)

In a tax certiorari matter relating to tax years 2003, 2004, and 2006 through and including 2008. The petitioner sought an order "which would compel adherence by respondent (Village) with a Consent Judgment negotiated by prior counsel representing petitioner." In the alternative, the petitioner sought an order, "pursuant to RPTL 718(1) (§718), extending the time, nunc pro tunc, within which it may file a note of issue...as to tax year 2007, in excess of four years having elapsed since the inception of the matter."

The petitioner asserted that its prior counsel and counsel for the Village, negotiated a consent judgment with respect to some of the tax years at issue, including tax year 2007. The petitioner alleged that in a pretrial conference in July, 2010, an oral agreement was reached as to tax years 2004, 2007 and 2008. In October 2010, the petitioner sent a consent judgment to the Village. The Village's counsel rejected the proposed consent judgment as inconsistent with his understanding of the agreement as it related to tax year 2007. In December 2010, the petitioner sent a new consent judgment incorporating the Village's proposed changes for tax year 2007 to the Village's counsel.

The Village's counsel amended the new proposed consent judgment to change the assessment for a different tax year, 2008, "in conformity with his understanding of the agreement." The petitioner declined to sign the consent judgment containing the Village's proposed changes, and inquired "why the changes were made." In February 2011, the petitioner sent an appraisal to the Village, and "by letter invited a conversation regarding a revised settlement in light of this new appraisal."

Thereafter, the petitioner sought to have the matter restored to the trial calendar, but had "neglected to file a Note of Issue for tax year 2007 on or before April 30, 2011, pursuant to RPTL §718.

The petitioner asked the court to "nunc pro tunc, extend the four-year time period within which the Note of Issue is to be filed...." The petitioner argued that its prior counsel had "relied on the reaching of a stipulated settlement of the matter in declining to file the...Note of Issue in a timely manner."

In opposition, the Village cited the language of §718 which specified that "the failure to file a Note of Issue and to place the matter on the court calendar, within the four year period, shall be deemed to have been an abandonment of the action;" and "that an order dismissing the petition must be entered without notice." The Village emphasized that the "sole exception to such an 'abandonment', ...is triggered only: where the parties otherwise stipulate or a court or judge otherwise orders on good cause shown within such four-year period."

Here, the parties had not agreed to a stipulation nor did the court order, "on good cause shown, an extension of the four year time period within which a note of issue was required to be filed" within the four-year period. Accordingly, the court held that the matter must be deemed to have been abandoned at the end of the four-year period.

The court, citing CPLR §2104, also rejected the petitioner's request for an order that the Village must adhere to the amended consent judgment as the petitioner had not argued that the consent judgment constituted a settlement in "open court." Rather, the petitioner argued that "it was a writing subscribed by counsel for the [Village], and thus" was "binding on [the Village]." However, the petitioner's prior attorney had rejected the corrections made by the Village's counsel and "[s]uch corrections were, in effect, a counter offer by [Village] to the draft stipulation/Consent Judgment submitted by her."

The court explained that "[i]t is simply too late now for petitioner to argue that the Court should ignore those several acts of rejection by respondent, the objection by petitioner to the changes, the sending of a new appraisal, the request for renewed negotiations based on this appraisal, and the request that the matter be scheduled for trial, and, instead, compel respondent to adhere to the rejected December counter-offer." Finally, the court explained that "any suggestion that the petitioner somehow relied on the stipulated settlement in neglecting to file the Note of Issue in a timely manner, is thoroughly belied by the above-mentioned acts, which together signaled, not acceptance of and reliance on the settlement by petitioner, but, instead, its complete rejection."

COURT ERRED WHEN IT DISREGARDED SALE AS BEST INDICATOR OF VALUE

Matter of Rite Aid v. Otis, 102 A.D.3d 124 (3d Dep't 2012)

Town of Malta assessor appealed from an order granting Rite Aid's application to reduce tax year 2008, 2009, 2010 assessments on its leased real property. Rite Aid challenged the tax assessment imposed and the Supreme Court credited its proof; granting the petitions. The Supreme Court noted that while a municipal tax assessment enjoyed a presumption of validity, it could be overcome by producing "substantial evidence" the property was overvalued. It noted that such burden may be satisfied by submitting a "detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser." The assessor contended the Supreme Court erred in disregarding the 2005 sale of the property as the best indicator of value. This court agreed stating the best evidence of value was a recent sale between arm's length parties. Thus, as the parcel was sold in 2005 for $3.6 million in an arm's length transaction, the price paid by petitioner was consistent with the value of the property as determined by assessors' expert. As a result, the Supreme Court's decision to credit the appraisal offered by petitioner was against the weight of the evidence. Hence, the court reversed the order and judgment, dismissing Rite Aid's underlying petitions.

REASSESSMENT DUE TO RESIDENTIAL PROPERTY'S OCCASIONAL COMMERCIAL USE WAS SELECTIVE REASSESSMENT

Matter of Karmel v. Assessor, City of White Plains, 950 N.Y.S. 2d 674 (Sup.Ct. 2012)

Petitioners sought a refund from defendants of property taxes paid since 2002 regarding an allegedly illegal increase in the subject property's assessment. Respondents, including the assessor of White Plains, alleged the property was used as a bed-and-breakfast, not a single-family residence. Petitioners argued the property was only used as a bed-and-breakfast occasionally, contending this was not an improper use of a single-family home. They argued the reclassification from a single-family residential use to a commercial-use classification as an inn was improper and could not serve as a basis for the assessment increase. Petitioners claimed that, as there was no physical change to the property and no citywide assessment in 2002, the reassessment violated Real Property Tax Law §305(2) and constituted "selective reassessment." The court agreed, finding respondents reclassified the property then reassessed it based on the reclassification at a higher value, in violation of the RPTL. It found the 2002 assessment was not part of a citywide program; that reassessment based on change of use had no rational basis, weak selective reassessment and failed to meet §305(2) requirements of uniformity.

SELECTIVE REASSESSMENT FOUND WHEN ASSESSOR COULD NOT JUSTIFY THE CHANGE IN TAX ASSESSMENT

Matter of Carroll v. Assessor, City of Rye, 2012 WL 5933039 (N.Y.Sup.)

Property owner Carroll challenged the assessments on the subject property in this Real Property Tax Law Article 7 tax certiorari proceeding alleging selective reassessment. The court noted a municipal tax assessor seeking to reassess individual properties must be prepared to explain and justify the changes and offer proof of the assessment methodology to successfully withstand any challenge. It was undisputed that assessor Whitty reassessed the subject property, but no evidence was presented that a municipal-wide reassessment took place in the respondent City of Rye in 2003. The court found Whitty failed to explain and justify the changes, noting she kept no notes of land sales she considered. Further, the court found Whitty's changes did not appear to have been based on objective data, nor to have been calculated on an accepted approach or methodology. Thus, the assessor failed in her burden to explain and justify the 2003 and 2004 reassessments. Accordingly, the court concluded the assessor's actions constituted selective reassessment of the subject premises. The petitions were sustained, the assessment rolls were to be corrected and overpayments refunded with interest.

INDIAN LAND MAY BE TAXABLE, BUT RULING BLOCKS COLLECTION OF TAXES

Cayuga Indian Nation of NY v. Seneca County, 890 F.Supp.2d 240 (W.D.N.Y 2012)

Communities have the right to obtain property taxes from American Indians, but they can't foreclose to collect those taxes. The dispute involves land in Seneca County that was part of a 64,000-acre Cayuga Reservation 200 years ago, when large tracts were sold off. In recent years, the Cayuga have been buying parcels on the open market that had once been part of the reservation. The Cayuga Nation argues that the re-claimed land is "Indian Country" and exempt from property taxes.

The Court held that U.S. Supreme Court precedent makes

clear that newly acquired land is not tax exempt; however, the county is without a remedy to collect those taxes.

In its holding, the Court was bound by a 2012 U.S. Court of Appeals for the Second Circuit decision, Oneida Indian Nation of New York v. Madison County and Oneida County, 605 F. 3d 149 (2010), which held that even though the Supreme Court authorized the imposition of property taxes on re-claimed land, it did not permit counties to take legal action to collect taxes.

NEW ASSESSMENT ON IMPROVED HOMES MUST BE APPLIED TO TENTATIVE ROLL FOR NEXT TAX YEAR

Matter of Seidel v. Board of Assessors, County of Nassau, 88 A.D.3d 369 (2d. Dep't 2011)

Nassau County homeowners made improvements increasing their houses' market value after Jan. 2, 2007, but before Jan. 2, 2008. The improvements were thus made after the taxable status date for the 2008/2009 tax year. Nevertheless, in assessing the properties for the 2008/2009 tax year, the county retroactively assessed the property using its condition as improved after the taxable status date. A small claims assessment review (SCAR) hearing officer found his jurisdiction limited to whether the challenged assessments were unequal or excessive. Thus, the officer disregarded the legality of the retroactive assessments as an issue. The Second Department ruled that Supreme Court properly annulled the SCAR officer's determinations and required that the properties be valued as of Jan. 2, 2007. Interpreting Nassau County Administrative Code §6-24.1, the panel found that §6-24.1 did not give the county authority to consider evidence of an improvement occurring after the taxable status date, and then apply it to the tax year. Instead, §6-24.1(e) requires that the new assessment be applied to the next following tentative assessment roll, here corresponding to the 2009/2010 tax year.

COUNTY PROPERLY WITHDREW LANDFILL FROM FORECLOSURE, TIMELY SOUGHT LEAVE TO COLLECT DELINQUENT TAXES

County of Orange v. Al Turi Landfill Inc., 75 A.D.3d 224 (2d Dep't 2010)

Respondent landfill operator owed more than $3 million in unpaid back taxes on parcels in the petitioner county. The landfill operator failed to respond to foreclosure petitions filed by the County. After discontinuing foreclosure proceedings because acquisition of the subject landfill property would subject it to risk of liability exceeding recoverable taxes, the County sought leave to bring supplementary proceedings under Real Property Tax Law§§ 990 and 1138(5) to collect delinquent taxes. In a separate tax certiorari proceeding under RPTL Article 7, the landowner challenged the property's allegedly inflated assessed value. A court granted the landowner's request that the County's petition be transferred for consolidation or joinder with the tax certiorari proceeding. The Second Department ruled the County properly withdrew the landfill from foreclosure and timely sought leave to begin supplemental proceedings, which could be litigated independently of the tax certiorari proceeding. Noting the landowner's concession of personal liability for unpaid property taxes, the panel determined the County established, *prima facie*, its entitlement to leave to institute a supplementary proceeding against the landowner to collect taxes, interest and penalties due.