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

Tax Certiorari Newsletter Spring 2014

COUNTY BURDEN TO PAY PROPERTY TAX REFUNDS CANNOT BE TRANSFERRED TO LOCAL TAXING UNITS

Matter of Baldwin Union Free School District v. County of Nassau, 22 N.Y.3d 606 (2014)

Between 1936 and 1948, through acts of the New York State Legislature, Nassau County's administrative code was established to provide that property tax refunds resulting from a decrease in an assessment or tax or as a result of an exemption was a county charge. In 2010, in response to mounting financial burdens, Nassau County enacted Local Law 18 which attempted to change the county's administrative code and transfer the burden of paying tax refunds from the county to local municipalities, including school districts. Several challenges to the law were filed. Initially, the local law was upheld by the Nassau County Supreme Court. However, on appeal to the Appellate Division, the law was invalidated as inconsistent with the State Constitution.

The case eventually made its way to the New York State Court of Appeals for review. Before the court, the county argued that Local Law 18 was permissible based on the Municipal Home Rule Law which allows local governments to enact legislation concerning, among other things, the levy, collection and administration of local taxes, as long as the legislation is not inconsistent with the State Constitution. At the outset of its decision, published in February of this year, the Court of Appeals traced the history of Nassau County's administrative code via acts of the State Legislature. It then discussed the boundaries of the MHRL. The court went on to affirm the Appellate Division's decision invalidating Nassau County Local Law 18. It held that the prior State Legislature's acts were special state tax laws. The county did not have the authority under the MHRL to enact legislation that superseded a special state tax law. As such, Local Law 18 was invalid.

PAGAN GROUP WINS TAX EXEMPTION FOR CATSKILL PROPERTY

Maetreum of Cybele, Magna Mater, Inc. v. McCoy, 111 A.D.3d 1098 (3rd Dept. 2013), *leave to appeal granted*, 2014 N.Y. Lexis 596 (April 1, 2014)

Maetreum of Cybele, Magna Mater, Inc. ("Petitioner") is a not-for-profit religious corporation that owns a three-acre parcel of real property in the Town of Catskill, Greene County, which contains among other things, a three-story, 12-bedroom main house – formerly an inn – as well as a small caretaker's cottage, several out buildings, a recently constructed outdoor temple and "processional paths." Petitioner is the corporate entity for the Cybeline Revival, a pagan following founded in 1999, but which has ancient origins. Petitioner's fundamental religious principle is that the divine feminine, the mother goddess Cybele, is present in everything, thereby creating a connection in all living things, as well as giving rise to an obligation to do charitable work and a responsibility to improve the conditions of all people, particularly women. Petitioner applied to the Town of Catskill for tax exemption status for its real property as being used for religious and charitable purposes pursuant to RPTL §420-a. The application was denied.

The town's determination was upheld by the Board of Assessment Review as well as the Supreme Court. In its opinion, the Supreme Court held that the primary use of the property was to provide affordable housing for co-religionists with the religious and charitable uses of the property being incidental thereto. As such, the Supreme Court determined the property did not qualify for exemption. On appeal, however, the

Appellate Division, Third Department held that the Petitioner met its burden in demonstrating that it uses the property primarily for its religious and charitable purposes. In reversing the Supreme Court, the Appellate Division found: "The testimony established that the Cybeline Revival stresses communal living among its adherents, as well as providing hospitality and charity to those in need, and the members consider this property the home of their faith. They also conduct religious and charitable activities throughout the property on a regular basis. Accordingly, petitioner has satisfied the legal requirements in order to receive a real property tax exemption…" On April 1, 2014, the Court of Appeals granted the town leave to appeal. A decision on the appeal is expected in the next several months.

PROPERTY IS NOT OWNER-OCCUPIED FOR PURPOSES OF SMALL CLAIMS TAX ASSESSMENT WHERE PETITIONER'S MOTHER IS PERMANENTLY LIVING AT THE PROPERTY RENT-FREE

Matter of Manouel v. Board of Assessors, 111 A.D.3d 735 (2nd Dept. 2013), *leave to appeal granted*, 2014 N.Y. Lexis 222 (February 20, 2014)

Petitioner applied for small claims assessment review pursuant to Real Property Tax Law Article 7. Petitioner's mother occupied the property but did not pay rent. To qualify for small claims assessment review, the property at issue must be, among other things, owner-occupied. Respondent raised a jurisdictional objection at the hearing which was sustained and the application was denied. On appeal, the Appellate Division, Second Department upheld the determination. In so doing, it distinguished *Matter of Masters v. Board of Assessors*, 188 A.D.2d 471 in which the court held that a property was eligible for small claims assessment review where is was for sale and petitioner's father-in-law was living at the property until its sale. Since the father-in-law's occupancy was clearly temporary, the property did not lose its owner-occupied character. Here, there was no evidence that the mother's occupancy was temporary and as such, the court concluded the property was not owner-occupied. On February 20, 2014, the Court of Appeals granted the Petitioner leave to appeal. A decision on the appeal is expected in the next several months.

COURT OF APPEALS REJECTS APPRAISAL SUBMITTED IN AN RPTL ARTICLE 7 PROCEEDING WITHOUT ALL FACTUAL AND STATISTICAL INFORMATION UPON WHICH IT IS BASED PURSUANT TO 22 N.Y.C.R.R. §202.59

Matter of Board of Mgrs. Of French Oak Condominium v. Town of Amherst, 2014 N.Y. Lexis 901 (May 1, 2014)

In a case of first impression for the Court of Appeals, it has reaffirmed the long-standing principle articulated by the state's appellate courts: an appraisal will be disregarded when a party violates 22 N.Y.C.R.R. §202.59(g)(2) by failing to adequately set forth the facts, figures and calculations supporting the appraiser's conclusions.

Petitioner is the board of managers of the French Oaks Condominiums, a residential complex located in the Town of Amherst, New York. The town assessed the complex's real property at $5,176,000 for the 2009-2010 tax year. Petitioner commenced an RPTL Article 7 proceeding challenging the assessment as excessive. In support of its petition, Petitioner submitted an appraisal report setting the valuation of the property at $4,265,000. Petitioner's appraiser applied an income capitalization method to establish the market value of the complex. In determining the appropriate capitalization rate, the appraiser relied on information from four purportedly comparable apartment complexes in the area. Based on this information he arrived at "forecast financials." However, his report did not explain how he arrived at these financials and did not otherwise identify the sources for this component.

The trial court as well as the Appellate Division both held that the Petitioner had adequately satisfied the requirements of 22 N.Y.C.R.R. §202.59 as well as demonstrated by a preponderance of the evidence that its property was over-assessed. The town appealed to the Court of Appeals. The Court found that the appraiser failure to provide the sources of the income or expense figures related to each of his comparables. His testimony revealed that in fact, he had very little information concerning the four comparable properties. As such there was "no basis to check or test whether the net operating incomes for these four

properties – and the capitalization rates adduced from them – were valid, or even in the ballpark." The Court rejected the Petitioner's appraisal and denied its petition.

CLAIMING INFORMATION IS "CONFIDENTIAL" DOES NOT OVERCOME 22 N.Y.C.R.R. §202.59(g)(2) REQUIREMENT THAT ALL SUPPORTING DATA AND INFORMATION MUST BE INCLUDED IN APPRAISAL

Matter of Bove v. Town of Schodack, 2014 N.Y. App. Div. Lexis 2301 (3rd Dept. 2014)

Less than thirty days before the Court of Appeals issued its decision in *Matter of Board of Mgrs. Of French Oak Condominium*, the Appellate Division, Third Department was faced with a very similar question in *Matter of Bove*.

Petitioner in this case was the Evergreen Country Club, owner of two 18-hole golf courses and associated amenities located on two contiguous parcels in the Town of Schodack. During the years 2009-2011, the town assessed the properties as having a total value of $5,240,000. The Petitioner applied to the Board of Assessment Review seeking a reduction in the assessment which application was denied. Thereafter, RPTL Article 7 proceedings were commenced. At trial, Petitioner submitted an appraisal setting forth the total value of the properties as $2,300,000. The Supreme Court denied the petition finding, among other things, that the appraisal did not include important data upon which its conclusions had been premised in violation of 22 N.Y.C.R.R. §202.596(g)(2). Petitioner appealed.

The Appellate Division, Third Department upheld the trial court's decision. In its appraisal, the Petitioner's appraiser employed the income capitalization method to value the subject properties. His conclusions were based on income and expenses from two other golf courses. However, the identity of the two other golf courses was not provided and instead was listed as "confidential" since the appraiser obtained the information when working for such courses. The Appellate Division concluded that the information was critical and failing to disclose it ran afoul of 22 N.Y.C.R.R. §202.59. In so holding, the court stated: "If, as petitioner contends, his appraiser was precluded by ethical considerations from disclosing this information, then he should have either obtained permission to use the information from his former clients or used other sources that could be properly included in the appraisal report. There is no showing that the confidential information pertained to properties that so unique and vital that value of the subject golf course could not otherwise have been determined without resorting to such information."

USE OF THE GROSS LEASE ASSUMPTION IS APPROPRIATE AND DOES NOT CONSTITUTE "DOUBLE COUNTING"

Matter of Hempstead Country Club v. Board of Assessors, 112 A.D.3d 123 (2nd Dept. 2013)

Petitioner owns 123 acres of property in Nassau County on which it operates a private, not-for-profit, golf course. Petitioner challenged its assessment for the 2006/2007, 2007/2008 and 2008/2009 tax years. The Petitioner and Respondents agreed that for purposes of assessment, the property should be assessed as a private, for-profit golf course. They also agreed that the income capitalization method of valuation was the proper approach for the purposes of the subject assessments. Finally, they agreed that the amount of real estate taxes imposed on the property should be taken into account when computing the property's fair market value however they differed on how to do so.

In conducting its income capitalization valuation, Petitioner's appraiser converted the leases for the comparable properties into gross leases, under which the owner, rather than the lessee, is obligated to pay the real estate taxes and utilized the "assessor's formula," pursuant to which a factor is added to the capitalization rate to account for real estate taxes. He based his decision, in part, on the fact that some of the leases he considered were municipal leases in which the underlying real property was tax exempt. In contrast, Respondents' appraiser adopted an approach assuming a triple net lease, under which the lessee, not the owner, is obligated to pay real estate taxes. According to Respondents, the expense of real estate taxes is accounted for in the fair market rent for the property and need not be accounted for in the capitalization rate. Additionally, the Respondents'

appraiser downwardly adjusted the rent-to-revenue ratio, used in the determining the fair market rent for the property to account for high real estate taxes in the subject location. The trial court accepted the Petitioner's method of valuation.

On appeal, the Respondents argued, among other things, that the Petitioner's approach of using the "assessor's formula" was inappropriate to value a golf course. Further, Respondents argued that the Petitioner's methodology "double counts" real estate taxes as an expense, and as a result, fails to yield a fair market value. In rendering its decision, the Appellate Division acknowledged that in separate cases it had previously accepted the approach Petitioner used as well as the one Respondents utilized. It resolved the conflicting case law by reminding that the determination of which is the appropriate method of valuation is within the trial court's discretion to decide under the circumstances presented as "valuation remains largely a question of fact, and the courts have considerable discretion in reviewing the relevant evidence as the specific property before them." Further, the Appellate Division concluded that trial court did not engage in "double counting" by accepting Petitioner's approach of utilizing the gross lease assumption because real property taxes were not part of the equation until factored into the capitalization rate. The court held that it was reasonable to accept Petitioner's appraiser's methodology based, among other things, on his determination to treat the municipal leases as gross leases because the tenants there under were not required to pay real estate taxes since the property was tax exempt. Moreover, in treating the municipal leases as gross leases, Petitioner's appraiser properly made adjustments to the rent-to-revenue ratio in order to account for any restrictions which might be placed on greens fees. At the same time, it was proper to add a tax load factor to the capitalization rate in order to account for the cost of real estate taxes. The approach, taken as a whole, does not constitute "double counting."

THIRD DEPARTMENT REMINDS THAT RECENT ARM'S LENGTH SALE IS BEST INDICATOR OF VALUE BUT IN ITS ABSENCE, COMPARABLE SALES IS THE GENERALLY PREFERRED METHOD

Matter of Lowe's Home Ctrs., Inc. v. Board of Assessment Review and/or Dept. of Assessment Review of Tompkins County,
106 A.D.3d 1306 (3rd Dept. 2013)

Petitioner operates a Lowe's Home Center on 14.85 acres in the City of Ithaca, Tompkins County. The property includes a 134,574 square-foot building constructed in2004, as well as an attached 27, 200 square-foot garden center. Petitioner challenged its assessment. Its appraiser used comparable sales, income capitalization and reproduction cost methods to value the property. Respondent's appraiser used only income capitalization and reproduction cost methods of valuation.

While the Petitioner's comparable sales method was ultimately rejected by the court, the Appellate Division, Third Department took the opportunity to remind that a recent arm's length sale of the subject property is the best evidence of value. However, absent that, the traditional methods of valuation: comparable sales, income capitalization and reproduction cost methods can be used. Of the three, "evidence of comparable sales is generally the preferred measure of a property's value for assessment…" The remaining methods may be used where there is insufficient data for a comparable sales approach.