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Trials & TRIBULATIONS

Litigation of tax 'certiorari' proceedings

Springtime brings warmer weather and, of course, the deadline to file real property tax grievances.

Now is an opportune time to review a few of the basics of litigating tax *certiorari* proceedings as well as new developments in the law.

In my column on the topic last year (June 4, 2009 edition of *The Daily Record*), I addressed some of the procedures necessary to challenge a tax assessment before a municipality and to institute an Article 7 proceeding.

It bears repeating that the first step in challenging any property tax assessment (apart from residential small claims assessment review) is the filing of a grievance before the Board of Assessment Review in the municipality where the property is located. For most municipalities in Monroe County, the deadline for filing such grievances is fast approaching — the fourth Tuesday in May. The City of Rochester's deadline — the fourth Tuesday in March — already has passed.

If a property owner is unsuccessful before the assessment review board, the assessment may be challenged by filing a verified petition pursuant to RPTL Article 7. The proceeding must be commenced within 30 days of the last day set by law for the filing of the final assessment role. See RPTL §702(2).

Application of the CPLR to Article 7 proceedings

The application of the CPLR to Article 7 proceedings can create hurdles for the imprecise litigant. For example, RPTL §708 lays out the requirements for service of the petition. In addition to service on the municipality, the petition and notice must be mailed to the county treasurer and, with certain exceptions, to the superintendent of schools in the district in which the property is located. See RPTL §708[3].

The failure to provide such notice can result in dismissal. The onus is on the municipality to raise the failure to serve the school district, and the failure to raise the issue either in its answer or in a motion to dismiss amounts to a waiver. See *Brookview Apartments v. Stuhlman*, 278 AD2d 825 (Fourth Dept. 2000). Significantly, if a school district is never served, it will not be required to pay its portion of any refund of back taxes. *Id.* When the school district is served properly, but does not intervene in the proceeding, it waives any right to object to payment of such a refund. *Id.*

The application of CPLR 205 to tax *certiorari* proceedings creates both procedural relief and uncertainty. CPLR 205(a) generally allows for the re-commencement of an action otherwise filed timely, within six months after its involuntary termination.

In a decision issued just last week, the Fourth Department for the first time addressed the dismissal of a tax *certiorari* petition for the failure to serve a school district with leave to recommence pursuant to CPLR 205(a). See *MM 1 LLC v. Lavancher*, 2010 N.Y. Slip Op. 03541 (April 30). The Fourth Department determined the failure to serve the district was not jurisdictional, therefore the lower court properly granted leave to recommence the action.

Again, the failure to serve the school district must be raised either in the respondent's answer or in a motion to dismiss. Yet the RPTL does not require an answer to a tax *certiorari* petition. See RPTL §712(1) ("if the respondent fails to serve such answer within the required time, all allegations of the petition shall be deemed denied").

Assuming no answer is filed, when must the procedural issue be raised in a motion to dismiss? CPLR 3212, which addresses the timing and waiver of defenses with respect to a motion to dismiss, offers little guidance. The Third Department has held that CPLR 3212 does not impose a time limit in which a taxing authority must move to dismiss a tax *certiorari* proceeding. See *Landesman v. Whitton*, 46 AD3d 827 (Second Dept. 2007); *Village Square of Penna Inc. v. Semon*, 290 AD2d 184 (Third Dept. 2002). It is, then, theoretically possible that a tax *certiorari* proceeding may be pending for years, only to suffer dismissal and re-genesis following a motion to dismiss, filed either by the taxing authority or the school district. See, e.g. *Bloomington's Inc. v. City of Assessor of City of White Plains*, 294 AD2d 570 (Second Dept. 2002) (reversing on other grounds the lower court's decision granting leave to recommence petitions for the four previous tax years pursuant to CPLR 205[a]).

Practically speaking, it behooves the petitioner to properly serve the school district. A judgment ordering the return of tax

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money will not be enforceable against a district when it is entered before such notice is served. *Macy's Primary Real Estate Inc. v. Assessor of City of White Plains*, 291 AD2d 73 (Second Dept. 2002).

Although the interplay between the RPTL and the CPLR may provide some relief if the petitioner fails to properly serve the school district, the petitioner is better served by strict procedural adherence to the RPTL. The interplay between the CPLR and the RPTL often creates more questions than answers, and ambiguities often lead to increased litigation costs.

Litigating the proceeding

Litigation of an Article 7 proceeding is somewhat unique. The proceeding is limited in scope and function, essentially "a trial *de novo* to decide whether the total assessment of the property is correct and if it is not to correct it." *Katz Buffalo Realty Inc. v. Anderson*, 25 AD2d 809 (Fourth Dept. 1966).

Discovery in Article 7 proceedings is governed by CPLR §408, which requires leave of court for disclosure in special proceedings. Ultimately, trial courts have substantial discretion to direct the disclosure of materials and necessary information. See *Niagara Mohawk Power Corp. v. City of Saratoga Springs*, 2 AD3d 953, 954 (Third Dept. 2003).

For example, although a petitioner "is not entitled to disclosure of the thought processes underlying the appraiser's valuation of any particular parcel," a petitioner may be entitled to discover "the underlying facts forming the basis for the assessment." *Id.*

The Uniform Civil Rules contain special requirements applicable to Article 7 proceedings. See 22 NYCRR §202.59. The petitioner must serve a statement that the property is not income producing, or a "verified or certified statement of the income and expenses on the property for each tax year under review." *Id.* at 202.59(b). Within 60 days after service of that statement, the respondent may request an audit of the petitioner's books or records. *Id.* at 202.59(c).

Section 202.59(g) governs in detail the exchange of appraisal reports. The report must contain "a statement of the method of appraisal relied on and the conclusions as to value reached by the expert, together with the facts, figures and calculations by which the conclusions were reached." *Id.* at 202.59(g)(2). A thorough appraisal report is a necessity, because the trial testi-

mony of an expert witness is limited to the details set forth in the report. *Id.*

At trial, the petitioner must first survive the "minimal threshold" of demonstrating "the existence of a valid and credible dispute regarding valuation." *Fifty-Sixty Saginaw Realty LLC v. Assessor of Town of Henrietta*, 2007 WL 5232913, at *1 (Monroe Co. May 10, 2007) (J. Fisher) (quoting *FMC Corp. v. Unmack*, 92 NY2d 179, 188 [1998]). In other words, the petitioner must present substantial evidence to rebut the presumptive validity of the assessment. *Id.* At this stage, the court's role simply is to "determine whether [the] documentary and testimonial evidence ... is based on sound theory and objective data." *Id.*

Once the threshold is met, the petitioner must establish, by a preponderance of the evidence, that the challenged assessment was excessive. *Id.*; *Markham v. Comstock*, 38 AD3d 1262 (Fourth Dept. 2007).

Litigants must be cautious, as the rules set forth in 22 NYCRR §202.59 can significantly impact the court's determination. The appraisal submitted by the taxing authority in *United Parcel Service v. Assessor of Town of Colonie*, 42 AD3d 835 (Third Dept. 2007), for example, failed to fully identify lessors of purportedly comparable properties, which were essential to a meaningful comparison with the subject property. Section 202.59(g)(2) requires that "[i]f sales, leases or other transactions involving comparable properties are to be relied on, they shall be set forth with sufficient particularity as to permit the transaction to be readily identified."

Given those deficiencies, the Third Department upheld the lower court's decision striking the respondents' appraisal. The court also observed in a footnote that, even if the respondents' appraisal had been considered, other deficiencies in the report would have justified affording greater weight to the report prepared by the petitioner's appraiser. For those and other reasons, the importance of a thorough appraisal report cannot be understated.

In the end, keen attention to procedural rules and well-reasoned appraisals are keys to any litigant's success, regardless whether you are commencing or responding to a tax *certiorari* petition.

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