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Surviving the Silent Killer

Failure to respond to a tax assessor's Chapter 91 request may not bar an appeal

By Timothy Duggan

The changing real estate market has caused property owners to take a closer look at their real estate tax assessments and investigate the merits of filing a tax appeal. As the April 1 appeal deadline approaches, property owners are assembling the pertinent property information necessary for an appraiser or attorney to evaluate whether to appeal. For income-producing properties, the year-end profit and loss statement, rent roll and lease agreements are among the more important information necessary to determine the value of the subject real estate. Despite what this information may tell you about the value of your client's income-producing property, you may never see the inside of the courthouse if your client failed to comply with the requirements of N.J.S.A. 54:4-34, commonly referred to as Chapter 91. In tax appeal

circles, Chapter 91 is known as the "silent killer" because failure to respond to a Chapter 91 request can end the case before it even starts.

Generally, in late January or early February of each year, all property owners in New Jersey receive a notice of their annual real estate tax assessment. Appeals from the tax assessment must be filed by April 1 of the tax year in question. N.J.S.A. 54:4-21. Some tax assessors use Chapter 91 requests to gather fiscal information that can aid in valuing income-producing properties. Chapter 91, codified at N.J.S.A 54:4-34, provides:

Every owner of real property of the taxing district shall, on written request of the assessor, made by certified mail, render a full and true account of his name and real property and the income therefrom, in the case of income-producing property, and produce his title papers, and he may be examined on oath by the assessor, and if he shall fail or refuse to respond to the written request of the assessor within 45 days of

such request, or to testify on oath when required, or shall render a false or fraudulent account, the assessor shall value his property at such amount as he may, from any information in his possession or available to him, reasonably determine to be the full and fair value thereof. *No appeal shall be heard from the assessor's valuation and assessment with respect to income-producing property where the owner has failed or refused to respond to such written request for information within 45 days of such request or to testify on oath when required, or shall have rendered false or fraudulent account.* The county board of taxation may impose such terms and conditions for furnishing the requested information where it appears that the owner, for good cause shown, could not furnish the information within the required period of time. In making such written request for information pursuant to this section the assessor shall enclose therewith a copy of this section. (*emphasis added*).

The nickname "silent killer" comes from the italicized portion of the statute which prohibits the County Tax Board

Duggan is a shareholder with Stark & Stark in Lawrenceville and regularly counsels both commercial and individual property owners on real estate tax appeals.

or New Jersey Tax Court from hearing a tax appeal if a property owner refuses or fails to respond to a Chapter 91 request. Chapter 91 requests are often sent to property owners in the summer or fall of the pretax year, and sometimes inadvertently get filed away for another day. The New Jersey Courts have strictly applied the Draconian remedy of dismissing an appeal when a Chapter 91 request is ignored, irrespective of the merits of the appeal. Owners of income-producing property must be aware of their obligation to respond to a Chapter 91 request since the consequences are dire.

However, if a property owner does not reply to a Chapter 91 request or buys property from an owner who did not reply to the request, all hope is not lost. Proper diligence with the right professionals can sometimes save the day.

All Chapter 91 requests must be prepared and served in strict compliance with N.J.S.A. 54:4-32. When defending against a motion to dismiss a complaint for failure to respond to a Chapter 91 request, ask the following questions. First, was the Chapter 91 request made in writing and sent by certified mail as required by N.J.S.A. 54:4-34? Second, was the request clear, and was a copy of the statute included with the request? See *Green v. East Orange*, 21 N.J. Tax 324 (Tax Ct. 2004). Third, who sent the Chapter 91 request? If your town is performing a revaluation and the revaluation company mails out the Chapter 91 request, it may be invalid. See *Tri-Martin Associates II, LLC, v. City of Newark*, 21 N.J. Tax 253, 258 (Tax Ct. 2004). Finally, was the request sent in a timely manner so the assessor would be able to use the information? See *Franklin-Medcare, Inc. and Tri-Cap v. Lakewood*, New Jersey Superior Court, Appellate Division, docket no. A-1085-04 (May 23, 2005); *Cassini v. City of Orange*, 16 N.J. Tax 438 (Tax Ct. 1997); but see *John Hancock Mutual Life v. Township of Wayne*, 13 N.J. Tax 417 (Tax Ct. 1993).

Before conceding an appeal, make certain the tax assessor strictly complied with Chapter 91 when requesting the

property information from the owner.

As a general rule, a property owner must respond to a Chapter 91 request even if the property is not income-producing. The cases in this area have not been consistent, however, and under some limited circumstances, the lack of income may be a defense to a motion to dismiss an appeal for failing to respond to a Chapter 91 request.

Over 20 years ago, the New Jersey Tax Court refused to dismiss a complaint on property that was an owner-occupied manufacturing plant. *Monsanto Co., v. Town of Kearny*, 8 N.J. Tax 109 (Tax Ct. 1986). The Tax Court found that the property owner did not have to respond to the Chapter 91 request because the property was not an income-producing property. However, since this decision, several cases have clouded the issue.

In *ML Plainsboro Limited Partnership v. Plainsboro Tp.*, 16 N.J. Tax 250 (App. Div.), cert. denied, 149 N.J. 408 (1997), the property owner responded to the Chapter 91 request, but did not produce any information, taking the position that the property was not income-producing. The Tax Court dismissed the appeal, but the Appellate Division reversed. The Appellate Division framed the issue as "whether the assessor's request would be understood by the average owner of an income-producing property to require disclosure of the information which the taxpayer has allegedly withheld." Although the property owner allowed certain organizations to use its conference center for a fee on a limited basis, the Appellate Division found that assessor's request was not "sufficiently clear and unequivocal to justify the harsh sanction of an order barring appeals from the assessments." In reading this decision, it is important to note that the property did reply to the request (without supplying any information), and that the result may have been different if the property owner totally ignored the request and did not reply.

For example, in *Southland Corp. v. Dover Tp.*, 21 N.J. Tax 573 (Tax Ct. 2004), the property owner experienced a

different result in a case where no response was sent to the assessor. The property in question was being operated by a franchisee who, according to the property owner, did not pay rent. The Tax Court performed a thorough review of the controlling case law and held that "if the subject property is in fact owner-occupied, and not income producing, a taxpayer must so inform the assessor at the time of the initial request for income and expense information. Only if such a timely response is made will the court inquire into whether, in fact, the property is owner-occupied." The property owner was not permitted to proceed with its appeal but was allowed a reasonableness hearing (discussed below).

To make matters a bit more confusing, one New Jersey Tax Court judge noted in a footnote that "Owners that occupy their properties which are not otherwise income-producing and who fail to respond to assessor's demands for income statements regarding their properties will not be precluded from appealing assessors' valuations and assessments in court." *City of Trenton v. Trenton District Energy Co.*, 21 N.J. Tax 244, 252, n. 2 (Tax Ct. 2004) (citing *Monsanto*, 8 N.J. Tax at 109).

The lesson for properties owners: always respond, even if the property is owner-occupied and there is no income. However, if the property is not income-producing, the door is left open (or slightly ajar) to argue that *Monsanto* does not require a property owner to file a response if the property is not income-producing.

A purchaser of property stands in the shoes of the prior owner when it comes to Chapter 91 requests. *ADP of New Jersey, Inc. v. Parsippany-Troy Hills Tp.*, 14 N.J. Tax 372 (Tax Ct. 1994). If the prior owner failed to respond to a Chapter 91 request, a tax appeal by the purchaser may be dismissed under Chapter 91.

If the tax assessor alleges he did not receive a response to a Chapter 91 request, but the property owner contends he mailed it, a careful reading of *J&J Realty v. Wayne Tp.*, 22 N.J. Tax 157

(Tax Ct. 2005), is in order. In *J&J Realty*, the property owner alleged he mailed a timely response to the assessor, which the assessor alleged he did not receive. In support of his allegation, the property owner submitted a certification from both his property manager and accountant stating the Chapter 91 request was completed, placed in an envelope addressed to the township assessor, and mailed with proper postage. The Tax Court conducted an evidentiary hearing and ultimately found that the taxpayer did reply to the Chapter 91 request, but the assessor did not receive it. However, after balancing the interests of the parties in the context of the statutory scheme under Chapter 91, the Tax Court held that “when a taxpayer, in good faith, responds by regular mail to a Chapter 91 request, and, through no fault or negligence of the taxpayer, the assessor does not receive the response, the severe limitation on appeal

rights contained in Chapter 91 should not be imposed.”

A property owner who failed to respond to a properly served Chapter 91 request has several unattractive options. First, the New Jersey Supreme Court has held that even if a property owner fails to comply with a Chapter 91 request, the property owner is still entitled to a reasonableness hearing. *Ocean Pines Ltd. v. Point Pleasant Bor.*, 112 N.J. 1 (1988). The hearing is very limited as described by the Court: “The inquiry will focus solely on whether the valuation could reasonably have been arrived at in light of the data available to the assessor at the time of the valuation. Encompassed within this inquiry are (1) the reasonableness of the underlying data used by the assessor, and (2) the reasonableness of the methodology used by the assessor in arriving at the valuation.” Also, information that was withheld by the property cannot be used at the hearing.

Second, a property owner can hope that the municipality either fails to file a motion to dismiss the complaint or files the motion after the court-imposed deadline. Under R. 8:7(e), a motion to dismiss an appeal for failure to comply with Chapter 91 must be filed no later than the earlier of 180 days after the filing of the complaint or 30 days before the trial date. It has happened, but a lot of time and money may be wasted if the motion gets filed five months into an appeal.

When a commercial property owner contacts his lawyer to inquire about appealing a real property tax assessment, the lawyer should not forget to ask about Chapter 91. No matter how strong of a valuation case you may have, you may have to sit out a tax year if the Chapter 91 request was ignored. However, before conceding victory to the silent killer, analyze the various defenses and weigh the risks and rewards of proceeding. ■