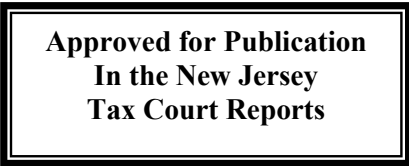


**NOT FOR PUBLICATION WITHOUT THE APPROVAL  
OF THE TAX COURT COMMITTEE ON OPINIONS**

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30 JOURNAL SQUARE PARTNERS, LLC,	:	TAX COURT OF NEW JERSEY
	:	DOCKET NO.: 009666-2020
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
CITY OF JERSEY CITY,	:	
	:	
	:	
Defendant.	:	
-----X		



Decided: December 30, 2020

David B. Wolfe for plaintiff (Skoloff & Wolfe, P.C., attorneys).

David J. Yanotchko for defendant (Florio Kenny Raval, LLP, attorneys).

Robert D. Blau for defendant (Blau & Blau, attorneys).

BRENNAN, J.T.C.

This constitutes the court’s opinion on Plaintiff’s motion requesting that this court issue an order to the effect that: (1) the Tax Court has exclusive jurisdiction over the tax appeals at issue, pursuant to N.J.S.A. 54:3-21(a)(1); and (2) ordering Defendant to withdraw its pending county board tax appeals. For the reasons explained more fully below, and as stated by the court’s October 21, 2020 bench opinion<sup>1</sup> the court determines that, as of the filing date of Plaintiff’s direct appeal to the Tax Court, exclusive jurisdiction of all related 2020 pending appeals rests solely with the Tax Court pursuant to N.J.S.A. 54:3-21(a)(1). The court also directs Defendant (petitioner before

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<sup>1</sup> The court issued its bench opinion and entered an order on the same date due to the emergent nature of the motion which was made on short notice.

the county board) to request the county board to relinquish its authority to hear the eleven tax appeal petitions filed by Defendant municipality due to the change in statutory jurisdiction. Procedurally, Defendant/petitioner should obtain dismissal without prejudice judgments from the Board, which are not adjudications based upon the merits of the appeals, and thereafter file timely appeals from those judgments to this court.

**I. Procedural History and Factual Findings**

Pursuant to R. 1:7-4, the court makes the following findings of fact and conclusions of law.

On June 3, 8, and 9, 2020 defendant City of Jersey City (“Jersey City”) filed timely petitions with the Hudson County Board of Taxation (“Board”) challenging the 2020 assessments for eleven properties<sup>2</sup> owned by 30 Journal Square Partners, LLC (“Plaintiff”).

Subsequently on July 1, Plaintiff filed a timely direct complaint with the Tax Court challenging the assessments of the same eleven properties.<sup>3</sup>

By letter dated August 6, 2020, Plaintiff’s counsel wrote to the Board and advised it of the direct appeal to the Tax Court. Plaintiff’s counsel also requested that the Board issue judgment dismissing the appeals for lack of jurisdiction pursuant to N.J.S.A. 54:3-21 and interpretive case law.

In response to this letter, Jersey City’s counsel<sup>4</sup> responded in an August 7, 2020 letter to the Board that it had no objection to the dismissal if it was without prejudice so that Jersey City

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<sup>2</sup> The eleven properties are identified on the Jersey City Tax Map as Block 10702, Lots 4, 6,7,8,9,10, 11,12,13,14, and 15.

<sup>3</sup> N.J.S.A. 54:3-21 permits the filing of a direct appeal to the Tax Court when a subject property has a value in excess of \$1,000,000. In the present case, two of the eleven properties satisfied the \$1,000,000 minimum requirement, and Plaintiff’s counsel certified that all eleven parcels are contiguous and in common ownership thereby qualifying the appeals to be filed as one complaint.

<sup>4</sup> Jersey City retained separate counsel for the filing of its affirmative Board petitions and its defense of Plaintiff’s direct appeal.

could file appeals to the Tax Court. Specifically, Jersey City requested that the Board affirm the assessments and mark the memorandum of judgments with Judgment Code 6B, hearing waived. Jersey City would then file appeals de novo to the Tax Court.

On August 17, 2020, Plaintiff's counsel again wrote to the Board. An objection was raised to the dismissal suggested by Jersey City on the basis that there were no hearings to be waived because the Board did not have jurisdiction. Plaintiff's counsel advised the Board that the appropriate resolution would be the entry of a judgment of dismissal with prejudice with Code 5F-Lack of Jurisdiction.

On September 11, 2020, Jersey City's counsel wrote to Plaintiff's counsel stating the following:

The City of Jersey City has filed a petition with the Hudson County Board of Taxation to increase the assessment on the above captioned property. You represent the taxpayer. Most of our adversaries want the county board of taxation to affirm these petitions without prejudice. Unless we hear from you otherwise, we will assume that we have your consent to affirm without prejudice to take this matter to the Tax Court of New Jersey. If you do not want the matter to be affirmed without prejudice, please let me know within seven days.

Plaintiff's counsel responded by letter dated September 17, 2020 as follows:

This firm represents Respondent, 30 Journal Square Partners, LLC. In response to your letter dated September 11, 2020, please be advised that Respondent does not consent to your request to affirm Jersey City's petitions without prejudice. As previously indicated in our correspondence to the Hudson County Tax Board dated August 6, 2020 and August 17, 2020, a complaint challenging the assessments of the above-referenced properties was timely filed to the Tax Court of New Jersey (Docket No. 009666-2020), and as such, the Tax Court possess general jurisdiction in this matter as provided by R. 8:2(c). Copies of our correspondence to the Hudson County Tax Board are enclosed for your reference.

This office maintains its position that the pending County Board petitions filed by Jersey City should be dismissed with prejudice for lack of jurisdiction and judgment entered with code 5F.

By letter dated September 23, 2020, the Board scheduled Jersey City's petitions for a hearing on September 29, 2020.

On September 25, 2020, Plaintiff filed a motion on short notice seeking an order declaring the exclusive jurisdiction of the Tax Court and ordering Jersey City to withdraw its complaints from the Board. Jersey City replied on September 27, 2020 objecting to the relief requested. Due to the emergent nature of the motion, the court held a telephone conference call with all counsel on October 5, 2020. As a result of the call, it was determined that the Board had legal authority to hold hearings until October 30, 2020. In order to resolve the matter prior to the October 30, 2020 deadline, the court established a briefing schedule, and a virtual hearing was held on October 21, 2020.

At oral argument, counsel for Jersey City did not dispute this court's exclusive jurisdiction over all pending appeals. However, it argued that the proper procedure is for the Board to either dismiss or affirm Jersey City's pending petitions without prejudice, thereby allowing Jersey City to file a timely appeal therefrom to the Tax Court. Plaintiff countered that the proper procedure was for Jersey City to have filed a timely counterclaim to the direct appeal, and its failure to do so bars any attempt to assert or file its independent claims before this court. Consequently, Plaintiff argued, Jersey City should be ordered to withdraw its Board appeals without the right to file an independent appeal to the Tax Court.

Due to the limited amount of time for the court to render an in-depth written decision, the court rendered its decision from the bench at the conclusion of oral argument. The court found that the Tax Court has exclusive jurisdiction over the tax appeals and ordered Jersey City's counsel

to contact the Board and advise them that the pending county board petitions should be dismissed without prejudice.<sup>5</sup>

Court records indicate that on November 5, 2020, the Board issued Memorandums of Judgment on all eleven petitions with Judgment Code 6B – Hearing Waived. Thereafter on November 23, 2020, Jersey City filed a direct appeal of the eleven judgments entered by the Board.

## **II. Conclusions of Law**

N.J.S.A. 54:3-21(a)(1) provides a choice of forum for a taxpayer or municipality to challenge the assessed valuation of the taxpayer’s property when the value of the property in dispute exceeds \$1,000,000. Either party may file a complaint with a county board of taxation or directly with the Tax Court. When there is a filing in the Tax Court and with a county board, however, “[a]n appeal to the Tax Court by one party in a case in which the Tax Court has jurisdiction shall establish jurisdiction over the entire matter in the Tax Court.” *Ibid.* Both parties agree that the Tax Court has jurisdiction over the entire matter once Plaintiff filed its direct appeal in July of 2020. The issue before the court is the proper procedural resolution of a dual filing. Specifically, when one party files with the county board, while the other party files with the Tax Court, how should the matter be disposed of at the county board level?

### *History of Dual Filings*

Dual filing by the same party was addressed in Union City Associates v. Union City, 115 N.J. 17 (1989) wherein the Supreme Court held that for the purposes of N.J.S.A. 54:3-21, once a party has chosen a forum, it cannot later switch forums; the party may choose to file with either

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<sup>5</sup> The Order issued by the court that same day inadvertently ordered the Board to dismiss the appeals without prejudice. For clarity of the record, an Amended Order is being issued with this opinion ordering Jersey City to request dismissal of the petitions without prejudice in conformance with the court’s ruling on the record.

the Tax Court or a county board, assuming the statutory minimum is met, but must adhere to that choice thereafter. Id. at 28.

Dual filing by opposing parties was addressed in Shav Associates v. Township of Middletown, 11 N.J. Tax 569 (Tax 1991), where the parties filed petitions in different forums on the same day. Judge Rimm held that when one party files with the Tax Court and the opposing party files with a county board, the Tax Court retains exclusive jurisdiction. He did not, however, address the proper method to dispose of the case filed with the county board as it had already rendered a judgment. Id. at 576.

A similar dual filing was at issue in Atlantic City v. Greate Bay Hotel and Casino, Inc., 16 N.J. Tax 486 (Tax) aff'd, 304 N.J. Super. 457 (App. Div. 1997). There, the taxpayer filed a petition with the Atlantic County Board of Taxation on March 31, 1997; Atlantic City filed complaints challenging the same property assessments the next day with the Tax Court. Id. at 488. Taxpayer then moved to have Atlantic City's complaints transferred to the county board. Ibid. Atlantic City filed a cross motion seeking a determination of exclusive jurisdiction in the Tax Court over the matter. Judge Rimm ordered the taxpayer to withdraw its complaints at the county board as the Tax Court had exclusive jurisdiction over the entire matter pursuant to N.J.S.A. 54:3-21. Id. at 503.<sup>6</sup>

Two factors were key to Judge Rimm's decision. First, the court found that the taxpayer was engaging in gamesmanship motivated by an attempt to manipulate the burden of proof and presumption of correctness related to county board judgments. Second, the property at issue had

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<sup>6</sup> The issue before the Tax Court and the appellate court was whether the Tax Court had exclusive jurisdiction over the appeals. As an apparent consequence of Judge Rimm's ruling directing the taxpayer to withdraw its county board petition, the taxpayer proceeded as though it had lost its right to an independent appeal since the time for filing of a counterclaim had passed .

an aggregate assessment of over \$260 million. Id. at 496-97. Judge Rimm determined that, while the taxpayer may have had a right to file with the county board, the county board was ill equipped to handle such a large assessment as such cases become quite complex. Judge Rimm further noted that county boards lack certain resources available to the Tax Court, and that county board adjudication would waste municipal funds and time since there was a strong likelihood that any county board decision would be appealed to the Tax Court. Id. at 497.<sup>7</sup>

At oral argument, both Plaintiff and Jersey City accused each other of gamesmanship, which the court finds irrelevant to the procedural issues at hand. The issue is strictly a determination of what the appropriate resolution of a pending county board appeal is when the county board no longer has jurisdiction due to another party's filing of a direct appeal with the Tax Court. Specifically, if there is no opportunity to file a timely direct appeal, is the party that filed a petition with county board limited to a timely counterclaim to the other party's direct appeal?

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<sup>7</sup> Six years later in Greate Bay Hotel & Casino v. City of Atlantic City, 21 N.J. Tax 122 (App. Div. 2003), the taxpayer chose to file a petition challenging assessments on the same property with the county board, although it could have filed a direct appeal, and despite the fact that appeals from prior years were still pending with the Tax Court. Unlike the 1997 tax appeal, there was no dual filing by the municipality. The county board, in its discretion, dismissed the taxpayer's appeal without prejudice, "so that the petitioner can file said appeals with the Tax Court."<sup>7</sup> Id. at 125. The Tax Court reversed the county board's decision, which Atlantic City then appealed. The Appellate Division reversed the Tax Court, holding that:

[a] county board has the authority to dismiss without prejudice if prior year appeals are pending in the Tax Court in particularly complex cases after the parties have been heard on whether it should do so. The county board's decision to do so here, in view of its recognition of its limitations as an appropriate forum and considering the interests of administrative and judicial efficiency and avoidance of wasteful, costly and duplicative litigation, was eminently sensible.

[Id. at 130.]

Plaintiff argues that the language of N.J.S.A. 54:3-21, “[a]n appeal to the Tax Court by one party in a case in which the Tax Court has jurisdiction shall establish jurisdiction over the entire matter in the Tax Court,” immediately divests a county board of jurisdiction once a complaint has been filed with the tax court. Further, Plaintiff contends that the party that filed with a county board is limited to a withdrawal of its petition. Essentially Plaintiff argues, that when a county board loses statutory jurisdiction, it cannot issue a judgment (such as a dismissal without prejudice) as it has no power to adjudicate.

It is undisputed that a county board’s jurisdiction is extinguished because of a legitimate and timely direct appeal to the Tax Court. The court however rejects Plaintiff’s position that the party with a county board petition is limited to the filing of a timely counterclaim to protect its independent right of appeal. In other words, the court does not agree that the failure to file a timely counterclaim results in the county board petitioner losing all rights and remedies associated with its original timely filing with the county board.

Instead, the court adopts the approach thoughtfully described by my colleague Judge Sundar in Township of South Brunswick v. Princeton Orchards Associates L.L.C., 2013 N.J. Tax Unpub. LEXIS 23 (Tax 2013), which this court now incorporates herein and adopts as its own:

The proviso in the first sentence of N.J.S.A. 54:3-21 dealing with direct appeal acts to remove a timely filed county board petition to the Tax Court so that duplicative and wasteful proceedings, conflicting judgments, and confusing standards of review of presumptive correctness, is avoided. Whereas the first sentence of N.J.S.A. 54:3-21 permits either a taxpayer or a “taxing district” to challenge the validity of an assessment, thus, “clearly and unequivocally accords both the taxpayer and the taxing district an independent right to appeal from a property tax assessment.” F.M.C. Stores v. Borough of Morris Plains, 195 N.J. Super. 373, 380, 479 A.2d 435 (App. Div.), aff’d, 100 N.J. 418, 425, 495 A.2d 1313 (1985). “The right of appeal of the taxpayer and the right of appeal of the taxing district are separate and independent causes of action, even though they involve the same subject matter,”



consequently, “the right of each party to pursue an appeal within the statutory time period is wholly independent of and unaffected by the course of action decided upon by the other.” F.M.C. Stores, supra, 195 N.J. Super. at 382. Indeed, “the choice of forum as between the county board of taxation and the Tax Court should not affect the substantial rights of the parties.” Id. at 383.

A harmonious interpretation of the two sentences in the same statute means that the initial county board petition (or the initial cause of action in the county board), when filed within the statutory time limits is not nullified or negated after the county board loses jurisdiction pursuant to a later filed Tax Court complaint such that it cannot be thereafter prosecuted in the Tax Court. While a direct appeal deprives the county board from continuing to retain subject matter jurisdiction and thereafter deciding the case on its merits, it does not retroactively nullify a timely filed cause of action in the county board to preclude its litigation in another forum.

[. . .]

Further, the term “nullity” used in the precedent involving dual filing of a local property tax appeal, addresses a county board judgment which is entered after a hearing of the merits of the case. The reason such a county board judgment is deemed a nullity is to avoid conflicting judgments pertaining to one (challenged) assessment and conflicting presumptions of correctness (assessment versus county board judgment). See also Greate Bay Hotel & Casino v. City of Atlantic City, 21 N.J. Tax 122, 126 (App. Div. 2003) (stating that the holding in Atlantic City supra, was “that the Tax Court filing by the municipality effectively mooted the county board’s jurisdiction”).

In this connection, a county board judgment dismissing a county board petition without prejudice, or, affirming an assessment without prejudice, is generally deemed as one entered without an adjudication of the merits of the case. Id. at 124-25, n.1 (an affirmance of an assessment without prejudice by a county board is the same as a dismissal of a petition without prejudice by a county board, both such judgments being “tantamount to a transfer of the appeal to the Tax Court”). Indeed, the common practice for the county boards to exercise discretion and enter such judgments where local property tax appeals for the same property are pending for prior tax year/s in the Tax Court is appropriate. Id. at 128 (the county board can “dismiss without prejudice as a technique for deferring the evidentiary evaluation hearing to the Tax Court”). See also Handbook for County Boards of Taxation, § 1105.15, p.331-32

(July 2005) (a county board can issue “[a] dismissal without prejudice” if “[t]he property under appeal has an appeal pending before the tax court, or a higher court, for one or more prior years,” and the “effect of” such dismissal, “sometimes referred to as “affirmed without prejudice” i[s] that the matter proceeds to the tax court without the presumption of correctness, which usually attaches to judgments of the county board”). Cf. Woodward-Clyde Consultants v. Chem. & Pollution Scis., Inc., 105 N.J. 464, 472, 523 A.2d 131 (1987) (“[a] dismissal without prejudice is not an adjudication on the merits and does not bar reinstatement of the same claim in a later action”); Feinsod v. Noon, 261 N.J. Super. 82, 84, 617 A.2d 1234 (App. Div. 1992) (“[a] dismissal with prejudice constitutes “an adjudication on the merits as fully and completely as if the order had been entered after a trial”); R. 4:37-2(d) (“any dismissal not specifically provided for by R. 4:37, *other than a dismissal for lack of jurisdiction*, operates as an adjudication on the merits”) (emphasis added).

[. . .]

In sum, where one party timely files a petition in the county board and the other timely files a direct appeal to the Tax Court, each challenging the same local property tax assessment of over \$1 million, only the Tax Court can decide the merits of the matter. The procedural mechanism to achieve the harmony between the right to file an appeal in either forum and the mandate that only the Tax Court decide the merits of the matter if a direct appeal is filed, both provisions being set forth in N.J.S.A. 54:3-21, is to have the county board issue a judgment under N.J.S.A. 54:3-26 dismissing the petition without prejudice due to the existence of the direct appeal, and to allow a timely appeal from that judgment to the Tax Court. Under these circumstances, the county board judgment cannot be considered a judgment based on the merits of the case because it recognizes the county board’s inability to continue to retain jurisdiction. This harmonious interpretation, (a) protects each party’s right to file an independent cause of action, (b) recognizes the county board’s inability to retain continuing jurisdiction over, and thus, decide the merits of the case, (c) avoids dual standards of review, and (d) prevents inconsistent conclusions of the property’s fair market value or assessment by two forums

[Id. at \*24-28, \*33-34.]<sup>8</sup>

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<sup>8</sup> Although an unpublished opinion, and therefore not authoritative, this court agrees with and fully adopts the reasoning of Judge Sundar. See James Const. Co., Inc. v. Director, Div. of Taxation,

Jersey City has the right to an independent cause of action. F.M.C. Stores, 195 N.J. Super.at 180. It timely filed with the Board and that right should not be extinguished by Plaintiff filing its own action with the Tax Court. Plaintiff’s argument that Jersey City could and should have filed a counterclaim to preserve its cause of action is incompatible with Jersey City’s adherence to the statutory provisions governing timely appeals. Were Plaintiff’s counterclaim theory adopted, a party that correctly and timely files a petition with a county board faces an immediate second filing deadline to preserve its independent right to an appeal. A deadline which could be as short as twenty days would terminate the county board filer’s ability to file in totality notwithstanding its adherence to the statute of limitations. See N.J.S.A. 54:3-21(a)(1). Such a result would be patently unfair to any party caught in this situation.

Plaintiff additionally argues that the language found at the end of N.J.S.A. 54:3-21(a)(1), which states in part: “a taxpayer or a taxing district shall have 20 days from the date of service of the petition or complaint to file . . . a counterclaim with the Tax Court,” was added to limit the available options when there has been a dual filing. In other words, the legislature intended that when one party files a direct appeal with the Tax Court, and the opposing party files with a petition with the county board, the county board filer is limited to filing a counterclaim to continue to challenge the assessment.

This argument is unavailing as well. The language was clearly added as a legislative response to the holding in F.M.C. Stores which disallowed a counterclaim to be filed after the then

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18 N.J. Tax 224, 229, n.1 (Tax 1999) (“R. 1:36-3 forbids the citation of an unreported opinion. But if a case is mentioned and quoted at length and not cited as authority, the rule is not violated. Falcon v. American Cyanamid, 221 N.J. Super. 252, n. 2 at 261 and 262-64 (App.Div.1987)”); see also Sauter v. Colts Neck Volunteer Fire Co. No. 2, 451 N.J. Super. 581, 600 (App. Div. 2017) (“Rule 1:36-3 does not prevent a party from properly calling an unpublished opinion to the attention of the court . . . nor prevent the court from acknowledging the persuasiveness of a reasoned decision on analogous facts”) (citations omitted).

August 15 deadline, even when a party filed a complaint on or near the deadline. S. Cty & Mun. Gov't Comm. Statement to S. 2217 (L. 1987, c. 185); see Mase Land Co. v. Twp. of Jefferson, 20 N.J. Tax 439, 443 (Tax 2002). The added language is expansive, not contractive.

The court notes that while N.J.S.A. 54:3-21(a) explicitly vests exclusive jurisdiction of all pending county board petitions with the Tax Court upon the filing of a direct appeal, it does not provide guidance on how this should be accomplished. Unfortunately, there are no statutory procedural guidelines or edicts as to how this is to occur. Should a pending petition be transferred? Alternatively, as per current practice, should the Board issue a judgment dismissing the petition without prejudice? If the pending petition should be transferred, would such "transfer" have an effective filing as of the original filing date? The court opines that the Legislature should clarify that the filing of a direct appeal in the Tax Court does not vitiate the county board's jurisdiction to dismiss the pending petitions without prejudice, and provide the procedural mechanisms to be followed by the parties and the county boards of taxation. This would then preserve the petitioner's ability to continue the litigation in the Tax Court.

In the absence of a clear and concise procedural mechanism to effectuate the transfer of a Board petition to the Tax Court pursuant to N.J.S.A. 54:3-21(a), the court accepts the Board's current practice, namely the issuance of a Memorandum of Judgment with Code #6B – Dismissal Without Prejudice – Hearing Waived. This provides the Tax Court with jurisdiction over the entire matter as required by N.J.S.A. 54:3-21(a). It also provides Jersey City the opportunity to continue to challenge the assessments at issue by the filing of a timely appeal to the Tax Court in compliance with the referenced statute. The dismissal-without-prejudice judgment by the Board is not an adjudication on the merits and will not be considered a nullity. The court rejects Plaintiff's remaining argument that Jersey City was required to file a counterclaim per N.J.S.A. 54:3-21(a)(1).

### **III. Conclusion**

For these reasons, the court finds that pursuant to N.J.S.A. 54:3-21(a) it has exclusive jurisdiction over the above-captioned complaint, and as of July 1, 2020, exclusive jurisdiction of Jersey City's pending 2020 petitions before the Board. This statutory jurisdictional mandate, however, does not negate the Board's ability to issue judgments dismissing the pending petitions without prejudice. The court amends its prior Order to conform to its ruling on the bench, directing counsel for Jersey City to request a dismissal of its petitions from the Board.