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THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY
DOCKET NO. 013403-2019

BUCKEYE PERTH AMBOY TERMINAL, LLC, Plaintiff, v. CITY OF PERTH AMBOY, Defendant.	Approved for Publication In the New Jersey Tax Court Reports

Decided: March 27, 2020

John S. Wisniewski for plaintiff
(Wisniewski & Associates, LLC, attorneys).

William T. Rogers for defendant
(Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys).

SUNDAR, J.T.C.

This is opinion decides plaintiff's summary judgment motion seeking to invalidate defendant's added assessment of $10,092,300 for all twelve months of tax year 2019, and defendant's cross-motion for summary judgment seeking to uphold the said assessment either as added or as omitted. The court finds that the assessment is valid as an omitted assessment, and therefore, grants defendant's cross-motion and denies plaintiff's motion.

FACTS

Plaintiff owns real property located in defendant taxing district ("City"), identified as Block PipeLine, Lot 6 ("Subject"). The Subject is a 3.5-mile long, 16-inch wide, bi-directional petroleum pipeline (the "pipeline") connecting the Buckeye Raritan Bay Terminal and the Buckeye Perth

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Amboy Terminal. Plaintiff commenced construction of the pipeline in 2016, and the pipeline was placed into service on or about May 1, 2018. On September 24, 2019, the City levied an added assessment of $10,092,300 on the Subject for tax year 2019, applicable for all twelve months of the year.

On October 10, 2019, Plaintiff filed a direct appeal to this court challenging the added assessment, alleging that it is in excess of the Subject's true or assessable value and that it was untimely filed. Plaintiff then filed a motion for summary judgment to void the 2019 added assessment. The City filed its own motion for summary judgment to have the assessment declared valid as an added or omitted assessment.

There is a dispute as to when the City's current assessor (the "Assessor") became aware of the construction of the pipeline. The Assessor, who took office on April 17, 2017, certified that he first became aware of the pipeline on June 11, 2019, during an inspection of the Subject, and that until a meeting on August 29, 2019, he had never received any form of communication indicating that the construction of the pipeline had begun, was underway, or had been completed. He further certified that he established the twelve-month added assessment for tax year 2019 as soon as he was able to do so.

In response, Plaintiff submitted the certification of its senior tax manager, in which she stated that on July 31, 2018, she attended a meeting at the Assessor's office. She further stated that in attendance were counsel for Plaintiff, counsel for the City, the Assessor, and another employee of Plaintiff. Among the issues discussed were the completion of the construction of the pipeline and the anticipation of an added assessment.

Plaintiff submitted additional evidence to support the proposition that the City was on notice of the construction of the pipeline much before 2019. In a letter dated June 22, 2018,

addressed to the City's corporation counsel, Plaintiff's counsel discussed the completion of the pipeline's construction and the City's release of an easement for the pipeline. Plaintiff's counsel also certified that on June 25, 2018, he attended a meeting at City Hall attended by the City's mayor, its corporation counsel, and others. Issues discussed were the completion of the pipeline's construction; the release of the easement document for the Subject; and the release of all escrows, performance guaranties and cash bonds related to the construction of the pipeline.

ANALYSIS

A. Appropriateness of Summary Judgment

Summary judgment will be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). Here, the sole issue raised by Plaintiff is that the City's twelve-month added assessment for tax year 2019 is improper as a matter of law because the pipeline was completed and existed as of the assessment date for tax year 2019, i.e., as of October 1, 2018. Although the Assessor claims that he was ignorant of the pipeline's existence until 2019, the undisputed documents show that it was built and existed as of October 1, 2018.[1] It is also undisputed that the first and only assessment on the pipeline for tax year 2019 is the added

[1] Plaintiff's response included the following documents but without a certification: a November 3, 2016, correspondence sent to the City's corporation counsel; a February 17, 2017, email to, among others, the Mayor and Council President; a July 12, 2017, City ordinance granting an easement to Plaintiff for the pipeline; and a permit issued by the Department of Environmental Protection for construction of the pipeline which was copied to the City's Municipal Clerk and Construction Official. The court will not consider these documents in deciding the instant motions. See R. 1:6-6; Celino v. General Accident Ins., 211 N.J. Super. 538 (App. Div. 1986). Nonetheless, they do not impact the outcome herein. Note that the City did not respond to Plaintiff's properly certified to Statement of Material Facts not in Genuine Dispute, and during oral argument, stated that it would not dispute the same.

assessment challenged herein.[2] The court must therefore decide whether the existence of the pipeline as of the October 1, 2018 assessment date bars the City from imposing an added assessment for tax year 2019. It also must determine whether the challenged assessment is valid as an omitted assessment, and if so, whether an improperly categorized added assessment may be converted to an omitted assessment. These are questions of law that can be appropriately decided by summary judgment.

B. Regular Assessments

By law, the assessor must assess all real property within a taxing district annually. N.J.S.A. 54:4-23. The assessed valuation is to be determined as of October 1 of the pre-tax year. Ibid. An assessor is required to submit a tax list by January 10 of the tax year, listing the assessment for each parcel of real property. N.J.S.A. 54:4-35. See also N.J.A.C. 18:12-2.8 (assessor to identify taxable property on a regular tax list).

Nonetheless, there are two other statutory assessment methods or procedures that allow for the assessment of real property outside of the ordinary, annual assessment process – added assessments and omitted assessments. Pursuant to the seminal ruling in Appeal of N.Y. State Realty & Terminal Co., 21 N.J. 90 (1956), the omitted assessment statutes can also be used to capture an assessment that was omitted to be placed within the time frames of the added assessment statute. Such an assessment is termed as an "omitted added assessment."

C. Added Assessments

Under N.J.S.A. 54:4-63.2, if a structure was erected, added to, or improved after the October 1 valuation date and before January 1 of the tax year, an added assessment is imposed for

[2] The City also imposed an added assessment for tax year 2018, which Plaintiff appealed separately as to the valuation aspect, but did not challenge its validity.

the entire tax year, and for a portion of the pre-tax year of completion from the first day of the month following completion through December 31. If, however, a structure was erected, added to, or improved after the October 1 assessment date, and completed between January 1 and October 1 of the tax year, the assessor must first determine the taxable value of the improvements as of the first of the month following the completion, then assess the amount in excess of the assessment made as of the preceding October 1 date, and thereafter prorate such amount for the remaining months in the tax year. N.J.S.A. 54:4-63.3.[3]

"The purpose of the added assessment law is to permit the taxation of real property which becomes taxable during the year following the assessment date of October 1, in order to avoid having properties escape taxation until the next assessment date arrives." Snyder v. Borough of South Plainfield, 1 N.J. Tax 3, 7 (Tax 1980). The procedure "is a refinement which sweeps into the system properties and improvements not assessable on October 1 of the pre-tax year. Its scope is precisely defined." Am. Hydro Power Partners, L.P. v. City of Clifton, 239 N.J. Super. 130, 138 (App. Div. 1989).

Here, the pipeline was constructed and completed during tax year 2018. Thus, under the statutory scheme, it would merit a pro-rated, added assessment for the remainder of that tax year. Since it was not constructed at any time between January 1 and October 1 of 2019, the added assessment statute simply does not apply for the 2019 tax year. Thus, a twelve-

[3] Procedurally, the assessor must file an added assessment list by October 1 "following" the completion of the improvements. N.J.S.A. 54:4-63.5. The county board should send a copy of the same (as revised or corrected) to the tax collector on or before October 10. Ibid. The tax collector then prepares, completes, and delivers tax bills to the property owner "at least one week before November first." N.J.S.A. 54:4-63.7. The tax due as a result of the added assessment is payable on November 1 of the tax year. N.J.S.A. 54:4-63.8. A property owner has the right to an appeal by December 1. N.J.S.A. 54:4-63.11.

month *added* assessment for tax year 2019 cannot be statutorily sustained.[4] However, and as further explained below, this conclusion is not a statutory, legislative, or precedential basis for the pipeline entirely escaping tax for tax year 2019.

D. Omitted Assessments

Our Legislature has specifically provided the authority for imposing an omitted assessment on any taxable property, i.e., on property that was "omitted from the tax list." Van Orden v. Township of Wyckoff, 22 N.J. Tax 31, 35 (Tax 2005). See N.J.S.A. 54:4-63.12; N.J.S.A. 54:4-63.31.[5] Under either statute, an omitted assessment can be imposed either in the tax year for which the property was omitted or "in the next succeeding year." Ibid.

The "theory of the . . . Omitted Assessments Law is to provide means whereby . . . property omitted from the tax rolls through design or inadvertence can be added and included and taxed . . . [for the] year in which it was omitted from the tax rolls." Appeal of N.Y. State Realty & Terminal Co., 21 N.J. at 97. These statutes "aid in accomplishing a proper and equitable distribution of the tax burden." Ibid. "Taxes are the life blood of government and no taxpayer should be permitted to escape . . . contributing" to the same. Id. at 96. "Any procedure which would permit avoidance of such taxes when a substantial basis therefor exists is inequitable." Ibid.

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[4] The Assessor's September 24, 2019 notice stated that the "date of completion" of the pipeline was "12/1," and that no inspection, permits or certificates of occupancy were needed to "determine completeness" for purposes of imposing the added assessment (relying on and quoting N.J.S.A. 54:4-63.1, which defines the word "completed" to mean "substantially ready for the use for which it is intended").

[5] N.J.S.A. 54:4-63.12 permits a county board to "assess any taxable property omitted from the assessment for the particular year." The procedure is by the filing of a complaint "specify[ing] the property alleged to have been omitted," and the "particular year of the assessment." N.J.S.A 54:4-63.13. Under N.J.S.A. 54:4-63.31, the "newer or alternative procedure," an omitted assessment is placed in a manner similar to "the procedure for added assessments in that the omitted assessment is initiated by the assessor's filing of an omitted assessment list with county board." Van Orden, 22 N.J. Tax at 35.

Note that there need not be a complete omission of the property from the tax list for the omitted assessment statutes to apply. Thus, in Boardwalk Properties v. City of Atlantic City, 5 N.J. Tax 192, 198 (Tax 1983), the court found that the omitted assessment procedure was properly used to include an inadvertently overlooked improvement (a partially constructed building) although the assessor had valued the property as vacant land when imposing a regular assessment. Any parcel or improvement not assessed, whether with the intent to benefit a taxpayer or merely through inadvertence, may be placed by an assessor on the tax rolls through an omitted assessment.

(1) Omitted Added Assessments

Our Supreme Court interpreted the added assessment and the omitted assessment statutes together to hold that if an assessor, for whatever reason, failed to impose an added assessment, then the assessor could use the omitted assessment statutes as a remedy. The Court held:

> An added improvement by not being included in the tax assessment rolls pursuant to the procedure and during the time prescribed by the added assessment statutes thus becomes an omitted assessment and is governed by the provision of these latter sections; and what was not accomplished under one statute is accomplished under the other -- the taxation of all property within the jurisdiction of this state annually at its true value.
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> [Appeal of N.Y. State Realty & Terminal Co., 21 N.J. at 99.]

E. Limitations on Imposing Omitted Assessments

As noted above, omitted assessments are limited to being placed either in the tax year for which the property was omitted or "in the next succeeding year." Here, for instance, an omitted assessment for tax year 2019 could be imposed in 2019 or 2020.

Additionally, precedent subsequent to the Supreme Court's decision has disapproved the use of an omitted assessment procedure where an assessor has placed a value on improvements that existed as of October 1 of the pre-tax year and subsequently attempts to increase the

assessment via an omitted or added assessment for the following tax year. These courts ruled that having made a subjective determination of value as of the assessment date, whether that amount is $0 or something else, the correct procedure to increase the assessment is to file an appeal. See e.g. Glen Pointe Assocs. v. Township of Teaneck, 10 N.J. Tax 598 (Tax 1989), aff'd, 12 N.J. Tax 127 (App. Div. 1991); 200 43rd St. LLC v. City of Union City, 16 N.J. Tax 138, 142 (Tax 1996); Borough of Freehold v. Nestle USA, 21 N.J. Tax 138 (Tax 2003); City of South Amboy v. Karpowicz, 28 N.J. Tax 324 (Tax 2015). See also Coastal Eagle Point Oil Co. v. Township of West Deptford, 19 N.J. Tax 123, 129 (Tax 1999) (rejecting the imposition of an omitted assessment on personal property that had already been assessed as real property, but was later treated as personal property), aff'd, 19 N.J. Tax 301 (App. Div. 2001); Parikh v. Township of Livingston, 30 N.J. Tax 326 (Tax 2018) (rejecting an attempt to place a twelve-month "added" assessment for tax year 2016 on property which was renovated and improved prior to the assessing date of October 1, 2015).

Plaintiff argues that under Parikh, if the newly added improvement is in place as of the pre-tax year October 1 assessment date, then there cannot be any assessment other than a regular assessment for the tax year. Parikh, Plaintiff claims, being a published opinion, must control over unpublished Tax Court opinions that have permitted assessing newly constructed or added improvements which existed as of the assessment date, under the omitted assessment procedure. Additionally, Plaintiff claims, the Supreme Court's decision in Appeal of N.Y. State Realty & Terminal Co. is limited to added assessments that were omitted. It cannot be expanded for policy reasons or otherwise. Just as a taxpayer loses a right to a reduction in taxes if it fails to timely appeal, Plaintiff argues, so too does a taxing district lose its right to receive taxes if it fails to

include property or an improvement that existed and was substantially complete as of the assessment date, in the regular assessment tax list.

The court is unpersuaded. First, the plain language of the omitted assessment statutes imposes no such limitation or restriction. An omitted assessment is one that was omitted from the tax rolls. The statutes thus presuppose the existence of real property or improvements as of a particular assessment date. Indeed, our Supreme Court, in interpreting the omitted assessment statutes, stated: "we view the . . . Omitted Assessments Law . . . as permitting assessment of property which may have properly been included in the general assessment but for one reason or another was not included either originally on the general assessment date or subsequently as required by the added assessment statutes." Appeal of N.Y. State Realty & Terminal Co., 21 N.J. at 98 (emphasis added). This court does not read this sentence as a limitation of the application of the omitted assessment statute to *only* an added assessment that was omitted.

Also militating against a limited application of the omitted assessment statutes is their analysis by the Supreme Court. In explaining the genesis of these statutes, the Court stated, "the inequity of omitted assessments has long been recognized," and that "[i]t would be a novel and dangerous doctrine to hold, that if the assessors happened to omit some property really taxable, the assessment is thereby necessarily void, so that no taxes can be collected. There is, perhaps, scarcely a district in the state where this does not happen, to a greater or lesser extent, almost every year." Id. at 97 (citations omitted).

Thus, the Appellate Division held, "[t]he omitted assessment procedure is broadly applicable to 'assess any taxable property omitted from the assessment for the particular year.'" Am. Hydro Power Partners, 239 N.J. Super. at 138 (quoting N.J.S.A. 54:4-63.12; -63.31). The procedure "applies to any omission, regardless of cause" including an omission of an added

assessment. Ibid. (emphasis added). "Through its objective time periods and its fresh right of appeal, the omitted assessment procedure gives structure to the correction of an assessment failure." Id. at 138-39.

The above controlling precedent makes it clear that contrary to Plaintiff's contention, am omitted assessment *can* be validly imposed upon property existing as of an assessment date. Its argument that such property can be subject *only* to regular assessment contravenes the plain language of the omitted assessment statutes that an assessor can "assess any taxable property omitted from the assessment for the particular year," and renders those statutes redundant.

Second, precedent, including Parikh that have disapproved of using the omitted assessment or even the added assessment procedure, were all based on a single principle: such procedures cannot be used as a backdoor to changing an already placed assessment, i.e., "to reflect a change in opinion as to the value of property on the regular assessment date." Nestle, 21 N.J. Tax at 148. Thus, in Parikh, the court rejected an attempt to place a twelve-month "added" assessment for tax year 2016 on property that was renovated and improved prior to the assessing date of October 1, 2015. Following precedent, the court held that a full year added assessment is improper to capture the assessment of a newly constructed improvement that existed as of the assessment date for tax year 2016. 30 N.J. Tax at 334-38. Thus, and because the assessor had already placed a regular assessment, the court did not apply the omitted assessment statute; rather, it held that the property "was not properly subject to an added assessment for tax year 2016" and that the "assessor arrived at an erroneous determination of the subject property's value" as of the assessment date "in accordance with the sound rationale of the court in Glen Pointe." Id. at 337.

Third, the line of cases disapproving the use of the omitted assessment procedure uniformly recognized that where the assessor has not determined the property's value in a regular assessment,

use of the omitted assessment procedure *is proper*. Thus, in Glen Pointe Associates, the court held that "[a]n omitted assessment can be imposed when real property subject to taxation has been erroneously omitted from the assessment rolls" or "where there is new construction, improvements to existing structures or to rectify a prior error such as erroneous farmland classification." 10 N.J. Tax at 601 (citations omitted). In Boardwalk Properties, the court held that the omitted assessment procedure is permissible where "the assessor did not determine that the improvements had no value" as of the valuation date, "but rather . . . omitted altogether to assess the improvements." 5 N.J. Tax at 198. In Parikh, the court held that the omitted assessment "statute permits an assessor to place an assessment on a property or an improvement to a property, omitted entirely from the assessment rolls." 30 N.J. Tax at 331-32. See also Coastal Eagle Point Oil Co., 19 N.J. Tax at 129 ("[o]mitted assessments may be imposed when a property or physical portions of a property have been entirely omitted from the original assessment").

Here, there was no assessment at all on the pipeline for tax year 2019. Whether or not the Assessor had actual or constructive knowledge of the pipeline's construction and completion, it does not per se bar him from assessing the same as omitted property. Nor does it render such assessment as per se invalid. The fact is that, the Assessor, for whatever reason, did not include the pipeline in the regular assessment rolls as of 2018, and thus, on the tax list for tax year 2019. This action is fully authorized by the plain language of the omitted assessment statutes. He placed an assessment for tax year 2019 in 2019. This is also fully within the timeframe under the omitted assessment statutes. There is nothing to show that the Assessor was attempting to change the Subject's regular assessment (the value already placed) for tax year 2019.

Finally, that the Assessor's notice incorrectly labeled the assessment as an "added" assessment does not inure to the benefit of Plaintiff.[6] Such an argument would elevate form over substance, and in the absence of factors such as lack of notice, or frustration of the Plaintiff's right to a timely appeal, cannot control the determination of the legal validity of the assessment. None of these factors were alleged. Indeed, the deadlines for filing an omitted assessment list to, and its certification by, the county board of taxation, for sending tax bills, and for filing appeals, are the same as for added assessments, namely, October 1, October 10, November 1, and December 1. See N.J.S.A. 54:4-63.32; -63.35; -63.26; -63.39. Plaintiff also timely and promptly appealed the assessment via a direct appeal. Therefore, the Assessor's notice that he was imposing a twelve-month added assessment for tax year 2019, which other than the label, is effectively placing an omitted assessment for the entire tax year 2019, does not mandate the court to grant summary judgment in favor of Plaintiff. Any error in this regard, under the facts here, is not egregious. Such an error is outweighed by the public interest in having all property owners bear their fair share of the cost of government as explicated by the our Supreme Court in N.Y. State Realty & Terminal Co., that an improvement cannot escape tax entirely (at least for the tax years set forth in the omitted assessment statutes).

CONCLUSION

Simply because the improvement was completed as of the valuation date of a tax year and was not captured in the regular assessment for that tax year, does not automatically, as a matter of law, and without more, foreclose its assessment under the omitted assessment statutes. The Assessor here omitted to assess the pipeline for tax year 2019 entirely. Thus, and although the

[6] During oral argument, the court queried if Plaintiff would have challenged the assessment had it had been labeled as "omitted." Plaintiff responded in the affirmative.

pipeline existed as of October 1, 2018, its assessment in 2019 for tax year 2019 is valid as an omitted assessment. Therefore, the court denies Plaintiff's summary judgment motion to void this assessment and grants the City's cross-motion to declare the assessment valid. Trial will be held on the valuation aspect of Plaintiff's complaint.