NOT FOR PUBLICATION WITHOUT APPROVAL OF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

TAX COURT OF NEW JERSEY

Patrick DeAlmeida
Presiding Judge

R.J. Hughes Justice Complex
P.O. Box 975
25 Market Street
Trenton, New Jersey 08625-0975
(609) 292-8108 Fax: (609) 984-0805

February 16, 2016

John Isaac Frederick, Esq.
FrederickBaillie, LLP
491 Baltimore Pike #311
Springfield, Pennsylvania 19064-3810

Martin Allen, Esq.
DiFrancesco, Bateman, Kunzman, Davis,
Lehrer & Flaum, P.C.
15 Mountain Boulevard
Warren, New Jersey 07059-6327

Re: 279 Homestead Road, LLC v. Township of Hillsborough
Docket No. 006308-2014

Dear Counsel:

This letter constitutes the court's opinion with respect to defendant's motion to dismiss the Complaint because of plaintiff's false response to the tax assessor's request for income and expense information pursuant to N.J.S.A. 54:4-34, commonly known as Chapter 91 (L. 1979, c. 91). For the reasons explained more fully below, defendant's motion is granted, subject to plaintiff's right to a reasonableness hearing pursuant to Ocean Pines, Ltd., v. Borough of Point Pleasant, 112 N.J. 1, 11 (1988).

*

I. Findings of Fact and Procedural History

This letter opinion sets forth the court's findings of fact and conclusions of law on defendant's motion. The findings of fact are based on the certifications and exhibits submitted by the parties on the motion.

Plaintiff 279 Homestead Road, LLC is the owner of real property located in defendant Hillsborough Township. The property is designated in the records of the municipality as Block 200.02, Lot 12 and is commonly known as 279 Homestead Road.

On or about July 15, 2013, the municipal tax assessor sent plaintiff a written request for income and expense information associated with the subject property. The request, issued pursuant to N.J.S.A. 54:4-34, was intended to assist the assessor in determining the assessment to place on the property for tax year 2014. Enclosed with the request was a form, Part II of which requested factual information about the property's characteristics, Part III of which requested information regarding rental income from the property, and Part IV of which requested information regarding expenses associated with operation of the property. Also enclosed with the request was a Rental Information Sheet, which requests information regarding leases in place at the property.

The assessor's request provided as follows:

> For property that is Owner Occupied, please indicate that no rent is collected on the income side of the form and complete Part II to the best of your ability. If you have unusual circumstances pertaining to the subject property, please write them down and include such information with the attached forms.
>
> If you have any questions with regard to this request or require any clarification relating to the information, please contact our office at (908) 369-4313, ext. 146. Our office hours are, 8:00 a.m. to 4:30 p.m., Monday through Friday.

On September 4, 2013, a principal of plaintiff responded to the request. On Part II of the form, he completed the following inquiry thusly:

"Is this property OWNER OCCUPIED: 100% ✓"

On Part III of the form, which concerns rental income, plaintiff's principal drew a long diagonal line across the page and wrote "100% Owner Occupied No Profit/Loss."

In the absence of income and expense information from the property owner, the assessor set the tax year 2014 assessment for the subject property as follows:

Land	$ 1,441,400
Improvement	$ 1,575,400
Total	$ 3,016,800

On April 1, 2014, plaintiff filed a Complaint in this court challenging the tax year 2014 assessment on the subject property.

On December 9, 2015, based on information produced during discovery, defendant moved to dismiss the Complaint pursuant to N.J.S.A. 54:4-34, based on its contention that plaintiff provided a false response to the assessor's Chapter 91 information request.

Plaintiff thereafter opposed the motion.

The parties waived oral argument. As a result, the court decides the motion on the papers. R. 1:6-2(d).

The motion record establishes that on January 1, 2012, the owner of the property executed a 10-year lease with Stracq, Inc. d/b/a Stryka Botanics, a New Jersey corporation. The lease expressly identifies plaintiff as the landlord and Stracq Inc. as the tenant and provides that the lease applies to Block 200.02, Lot 12, otherwise known as 279 Homestead Road in Hillsborough Township, the property that is the subject of this appeal. The 17-page leases provides that Stracq, Inc. will pay to plaintiff an annual rent equal to 120% of the annual mortgage payments payable

by plaintiff on the mortgage of the subject property. Stracq, Inc.'s rental obligations are payable in equal monthly installments. The lease also requires Stracq, Inc. to pay additional rent, including taxes on the subject property and utilities. The lease is signed on behalf plaintiff by Brian McNally, who is identified as a "member" of 279 Homestead Road, LLC. Mr. McNally also signs the lease on behalf of Stracq, Inc. and is identified as President of that corporation. Plaintiff's financial records produced during discovery include profit and loss statements establishing that Stracq, Inc. paid to plaintiff $36,116.64 in rent during 2012 and $181,104 in rent during 2013. Those records also detail expenses incurred in the operation of the property and an annual loss for each year.[1]

II. Conclusions of Law

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 if he shall fail or refuse to respond to the written request of the assessor within 45 days of such request . . . 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 shall have rendered a false or fraudulent account.

Plaintiff does not dispute that the assessor's request for income and expense information comports with Chapter 91. Nor is there any question that the property owner received the request and responded with a statement that the subject property was owner occupied and its operation

[1] Additionally, in response to an Interrogatory asking if any portion of the property is owner occupied, plaintiff's representative answered, "No."

resulted in no loss or profit. The question before the court is whether plaintiff's response to the request was a false or fraudulent account of the income and expenses associated with the property.

The "term 'income producing properties' . . . is commonly understood to refer solely to property which generates rental income." ML Plainsboro, Ltd v. Township of Plainsboro, 16 N.J. Tax 250, 259 (App. Div.)(citation omitted), certif. denied, 149 N.J. 408 (1997). For purposes of Chapter 91, a property is income producing if a "fee paid to the owner of land by tenants or patrons is for the continuous and exclusive use of a specific portion of the land and buildings, in the traditional sense of a tenancy . . . . " Southland Corp. v. Township of Dover, 21 N.J. Tax 573, 589 (Tax 2004)(emphasis removed). See also Great Adventure, Inc. v. Township of Jackson, 10 N.J. Tax 230 (App. Div. 1988).

The court finds that a tenancy existed at the subject property during 2012 and 2013 for purposes of N.J.S.A. 54:4-34. It is undisputed that a fully executed lease was in place at the subject property beginning January 1, 2012. Stracq, Inc. made monthly rental payments to plaintiff in exchange for Stracq, Inc.'s right to occupy the subject property. This arrangement is the very essence of a landlord/tenant relationship. Plaintiff's financial records indicate that it received tens of thousands of dollars in rent from its tenant in 2012 and 2013. In addition, those records show expenses incurred in the operation of the subject property and a loss for both years. The property was, therefore, income producing within the meaning of Chapter 91.

Plaintiff's statement in its response to the assessor's Chapter 91 request that the property is 100% owner occupied was false. During the periods in question, the property was occupied by Stracq, Inc., an entity that is not the owner of the subject property. In addition, plaintiff's statement that there was "no profit/loss" associated with the rental of the property also was false. Plaintiff's financial records show that expenses exceeded rental income for both 2012 and 2013. With respect

to this aspect of plaintiff's response, the court notes that the assessor's instructions were that for owner-occupied property, "please indicate that no rent is collected" on the enclosed form. Plaintiff's principal did not follow this instruction, instead stating that there was "no profit/loss," not that there was no rent collected. This is a telling indication that plaintiff's principal was aware that rent was collected at the subject property, given his election not to follow a simple instruction applicable to owner-occupied property.

The fact that plaintiff and Stracq, Inc. may have common ownership is not material to the court's analysis. The holding in SKG Realty Corp. v. Township of Wall, 8 N.J. Tax 209 (App. Div. 1985), is instructive on this point. In that case, the property owner was the wholly-owned subsidiary of a parent corporation. A division of another subsidiary of the parent corporation was the sole tenant at the subject property. Id. at 211. The sole purpose of the ownership of the property was to house the related corporation's division. The parties made no effort to set economic rents, and the payment of expenses was established in such a way as to accommodate the inter-subsidiary accounting needs of the various entities in the corporate structure. Ibid.

The property owner did not respond to a Chapter 91 request on the theory that the property was effectively owner occupied and did not produce income. Ibid. This court granted the municipality's motion to dismiss pursuant to Chapter 91. The Appellate Division affirmed. The appellate court held that the taxpayer's opinion that the property was effectively owner occupied did not erase the statutory obligation to provide a full account of the income produced by the subject property. As the court explained:

> Where real property is owned by one entity and occupied by a related entity, the manner in which they order their fiscal relationship may reduce the usefulness of the income accounting required by the statute. But, some or all of it may have utility, and

> it is up to the assessor and not the taxypayer to decide whether to consider the information furnished.
>
> [Ibid.]

The court went on to state that

> [t]ransactions among related corporations are not privileged. There is nothing about them or the language or purpose of N.J.S.A. 54:4-34 that exempts a real estate taxpayer who owns property rented and occupied by a sister corporation.
>
> [Ibid.]

The holding in ML Plainsboro, supra, on which plaintiff relies, does not support its position. In that case, a limited partnership owned property on which two buildings were located. Merrill Lynch & Co., Inc. ("Merrill Lynch"), a member of the limited partnership, and its subsidiaries occupied one of the buildings under an arrangement that did not involve a lease. 16 N.J. Tax at 253. The other building, a conference center, was used by Merrill Lynch, and generated fees from third parties who used the building for training sessions and meetings. Ibid.

In response to the assessor's information request, the property owner stated that "these are not income producing properties," and that "Merrill Lynch is the sole tenant and has no lease arrangement with outside parties." Id. at 254. The assessor subsequently set the assessment on the property, which was challenged by the property owner in this court. Ibid. After discovery, the municipality moved to dismiss the appeal pursuant to N.J.S.A. 54:4-34, on the ground that the taxpayer had failed or refused to respond to the assessor's information request. Ibid.

This court granted the motion, holding that the property was income-producing under N.J.S.A. 54:4-34, a fact not reported by the property owner in response to the assessor's request. The Appellate Division reversed. The court held that only property "which generates rental income" constitutes income-producing property within the meaning of N.J.S.A. 54:4-34. Id. at

259. The court reasoned that because, as the property owner explained, "there was then and still are no leases on the Properties [and] since there was no rental income derived from the Properties," the appeal-preclusion provision of N.J.S.A. 54:4-34 did not apply. Id. at 255. In addition, the fact that the property owner "received payments from third parties for the use of the Conference Training Center . . . did not constitute rental income from leased properties." Id. at 260.

Here, plaintiff executed a long-term lease for the subject property. The lease generated monthly payments of rent. Pursuant to the terms of the lease, the tenant was also responsible to pay other expenses associated with the property. The property owner's financial records reflect tens of thousands of dollars in rental income over the two-year period preceding the valuation date. These facts do not in any way resemble those before the court in ML Plainsboro.

Nor is the court convinced that the appeal-preclusion provision of N.J.S.A. 54:4-34 does not apply because there is some element of common ownership between plaintiff and its tenant. As a threshold matter, the court notes that plaintiff proffered no evidence detailing the extent to which the landlord and tenant are in common ownership. While such information would be useful for the sake of completeness, it is not necessary for the court to determine precisely the extent to which ownership of the two entities overlap. It is the existence of the lease, and the resulting landlord-tenant relationship, that controls the outcome here, regardless of the degree to which plaintiff and its tenant have common owners.

The principals of plaintiff elected to form a limited liability company to own the subject property. The limited liability company rented its property to a separate and legally distinct corporation. Presumably, these steps were taken for reasons that benefit plaintiff and its principals. While a taxpayer is free to order its financial affairs in any manner it chooses, it must also accept the tax consequences of its decisions, whether those consequences were or were not anticipated.

General Trading Co. v. Director, 83 N.J. 122, 136-137 (1980). "'It is for the taxpayer to make its business decisions in light of tax statutes, rather than the other way around.'" Id. at 135 (quoting Household Finance Corp. v. Director, 36 N.J. 353, 362, cert. denied, 371 U.S. 13, 83 S. Ct. 41, 9 L. Ed. 2d 49 (1962)). Plaintiff's arrangement with its tenant renders the subject property income producing for purposes of N.J.S.A. 54:4-34, whatever the principals of the two entities may have had in mind when executing the lease.

In Ocean Pines, supra, our Supreme Court held that a taxpayer who fails to comply with N.J.S.A. 54:4-34 may nevertheless seek a "sharply limited," and likely summary, review of the reasonableness of the assessor's valuation based upon the data available to the assessor when the valuation was made. Such an inquiry would be limited to "(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." 112 N.J. at 11.

The court, therefore, will issue an Order setting a date for a reasonableness hearing and affording the parties sufficient time to conduct discovery related thereto.

Very truly yours,

/s/Hon. Patrick DeAlmeida, P.J.T.C.