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THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY

Mala Sundar
JUDGE

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Re: Ritchie & Page Distrib. Co., Inc. v. City of Trenton
Block 11701, Lot 4
Docket No. 001240-2014

Dear Counsel:

This letter constitutes the court's decision in connection with a motion to apply the assessment for tax year 2014 ($940,900) to tax years 2015 and 2016 pursuant to the Freeze Act, N.J.S.A. 54:51A-8 ("Freeze Act") since the judgment setting the 2014 assessment is now final. Defendant ("City") opposed the relief sought because: (1) plaintiff sold the above-captioned property ("Subject") in 2014, thus, plaintiff had no standing to seek the Freeze Act relief; (2) there was a change in occupancy of the Subject due to the sale, thus, Freeze Act could not apply; and, (3) the successor owner failed to respond to the City's assessor's annual request for income and

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expense information under N.J.S.A. 54:4-34 ("Chapter 91") for tax years 2015 and 2016, which has prevented the City from proving a change in value.

The court is unpersuaded. Plaintiff's successor retained plaintiff's counsel to make the instant application. Relief under the Freeze Act is not automatically barred due to change in ownership or occupancy, rather, the City has the burden to make a preliminary showing of a substantial change in market value as of the assessment dates for 2015 and 2016. That burden is not obviated by a property owner's failure to respond to Chapter 91 requests since the purpose of Chapter 91 information is to set the property's assessment for a particular tax year, and failure to do so only bars the property owner from challenging the validity of the assessment.

FACTS

Plaintiff and defendant entered into a stipulation of settlement for multiple tax years (2011-2014) for multiple lots, which was filed with this court on May 20, 2016. At issue here is only the Subject, as to which the parties agreed to reduce the original assessment of $1,250,000 to $940,900. The stipulation was silent as to the application or otherwise of the Freeze Act.

Based on the stipulation, the court entered a judgment on June 17, 2016 setting the 2014 assessment for the Subject at $940,900. That judgment is now final.

Prior to the stipulation and judgment dates, the Subject (along with other Lots) was sold on October 21, 2014 for $1,360,000 to Mary and Thomas Realty, L.L.C. Mr. Mottackal is the principal of this entity. A prior sale agreement of February 18, 2014 between plaintiff and Mottackal Properties, L.L.C. was for conveyance of the Subject (along with other Lots) for $1,665,000. The portion of the Agreement provided to the court did not reference or address the control of the pending tax appeals. However, the seller (plaintiff) obligated itself to provide the buyer with a lease agreement, tax bills, assessment notices, "and any information relating to past

or current tax appeals." Paragraph 6, titled Apportionments, stated that the buyer would "receive the economic benefits and burdens of ownership for the Closing Date."

On August 23, 2016, plaintiff's counsel filed the instant application seeking Freeze Act relief for tax years 2015 and 2016 based on the 2014 judgment. For both those tax years, the assessment was $1,250,000, reflecting the carry-forward of the 2014 original assessment. Mr. Mottackal certified that he retained plaintiff's counsel on June 10, 2015 for purposes of filing the instant Freeze Act application.

ANALYSIS

Subject to certain exceptions, the Freeze Act protects a taxpayer by "freezing" an assessment for the two years following a final judgment of the Tax Court for a particular tax year (called the "base year"). N.J.S.A. 54:51A-8.[1] The judgment must reflect a value determination of the property for the base year, whether on merits at trial or by the parties' settlement in this regard. Rainhold Holding Co. v. Township of Freehold, 15 N.J. Tax 420 (Tax 1996); Borough of South Plainfield v. Kentile Floors, Inc., 4 N.J. Tax 1 (Tax 1981), aff'd, 92 N.J. 483, 489 (1983).

Relief under the Freeze Act is available "regardless of whether an appeal for the subsequent year has been filed." Borough of Northvale v. Director, Div. of Taxation, 17 N.J. Tax 204, 208 (Tax 1998), aff'd, 324 N.J. Super. 518 (App. Div. 1999). Unless the application of the Freeze Act is affirmatively waived, the provisions apply. Zisapel v. Borough of Paramus, 20 N.J. Tax 209, 212 & n.1 (Tax 2002) (taxpayer can waive the Freeze Act application or seek further reduction, and while a stipulation may be "silent" in this regard, the relief is nonetheless available as long as

[1] A similar but separate statute addresses the Freeze Act application to the judgments of a County Board of Taxation. See N.J.S.A. 54:3-26 ("where no request for review is taken to the Tax Court to review the . . . determination of the county board involving real property the judgment of the county board shall be conclusive and binding upon the . . . assessor and the taxing district for the assessment year, and for the two assessment years succeeding the assessment year, covered by the judgment").

the exceptions to the Freeze Act relief do not apply). See also Borough of South Plainfield, supra, 4 N.J. Tax at 10 ("parties' consent" to the "availability of the Freeze Act for the benefit of the taxpayer" is "not a prerequisite to the operation of the statute," therefore "[t]he absence of an agreement by the parties to apply the Freeze Act is not relevant").

In Zisapel, supra, the successor owner filed an appeal for the freeze year, and the taxing district sought dismissal of the same because the predecessor owner had agreed that the Freeze Act would apply. 20 N.J. Tax at 211-12. The court concluded that the "authority" to invoke the Freeze Act application was "an incident of ownership or other status as taxpayer . . . not of" which party had "control of base year litigation." Id. at 214. Such status "is easily demonstrated by deed, lease or other means." Id. at 216. Consequently, the standing to make the Freeze Act application is dependent on the status of the applicant, i.e., one who has interest in the property when the application is made.

Here, there is no question that the stipulation of settlement was silent as to the application or otherwise of the Freeze Act, therefore, the Freeze Act relief is available. The successor owner has applied for such relief in its status as an owner (thus, taxpayer) as of the assessment date for both 2015 and 2016. The City argues that because the caption of the application cites to plaintiff's name, this is plaintiff's application for Freeze Act. First, this argument entirely ignore the successor owner's certification in this regard. Second, as plaintiff correctly points out, use of the predecessor owner's name in the caption is a procedural requirement inasmuch as R. 8:7(d) states that an application should be made "under the caption of the Tax Court judgment for the base year to which the Freeze Act application is sought."

The City also argues that it has raised the "the exact distinction" here as in Zisapel, supra, in that here the successor owner never filed tax appeals for 2015 or 2016, thus "did not preserve

its right to further litigation," nor did it "preserve its right to claim the Freeze Act applicability for" those tax years. Since successor owners have not been permitted to continue a timely filed appeal where the preceding owner failed to respond to a Chapter 91 request (citing to ADP of New Jersey, Inc. v. Township of Parsippany-Troy Hills, 14 N.J. Tax 372 (Tax 1994)), and further since the Freeze Act applies only if the successor owner files a timely appeal for a freeze year, the only "conclusion," is that a failure of the plaintiff's successor to file appeals for the freeze years and failure to respond to Chapter 91 requests bars the successor owner from seeking relief under the Freeze Act.

The above arguments have simply no support in law or fact. First, unlike in Zisapel, supra, the stipulation of settlement between the predecessor owner and the City was silent as to the applicability or otherwise of the Freeze Act. Therefore, there is no issue of the binding nature of a predecessor's agreement upon a successor. Second, there is nothing in the Freeze Act that provides relief contingent or conditioned on the filing of a tax appeal for a freeze year since the statute's "application is mandatory and self-executing," and a taxpayer need only file an application for Freeze relief if the final judgment is issued after the October 1 assessment date of the freeze year. See Clearview Gardens v. Parsippany-Troy Hills, 196 N.J. Super. 323, 328-29 (App. Div.1984). Third, the consequence of Chapter 91 non-compliance is not denial of relief under the Freeze Act. Neither statute references the other, nor are their respective purposes complementary. The plain language of the Freeze Act denies relief under specific circumstances, none of which is failure to respond to a Chapter 91 request.

The City next contends that Freeze Act relief is unavailable because there was an implied change in value due to change in occupancy of the Subject from owner-occupied during plaintiff's ownership, to being tenanted post-sale. However, the City is being prevented from offering proof

of the value change because the successor owner failed to respond to the Chapter 91 requests, which in turn hampered the assessor in setting the 2015 and 2016 assessments. Therefore, the City maintains, it should be permitted to engage in discovery as to ownership details, "new uses and income producing opportunities," so that it can prove a prima facie change in value.

Freeze Act relief is not available if there has been a change in value in the freeze years. N.J.S.A. 54:51A-8. A municipality must first show that the property's value changed between "the assessment dates for the base year and freeze years" due to "an internal or external change," which "substantially and meaningfully increased the value of the property," after which it is entitled to a "plenary hearing" on the applicability of the Freeze Act. Coastal Eagle Point Oil Co. v. Township of West Deptford, 353 N.J. Super. 212, 218 (App. Div. 2002) (citations and quotations omitted). An "internal change" involves physical changes to the property such as additions. Id. at 219 n.3 (citation and quotation omitted). An "external change" is a market change such as "extreme economic" or "zoning" changes. Ibid.

Here, the City's bare allegation of a change in occupancy does not establish a prima facie showing of a substantial value change. Cf. AVR Realty Co. v. Township of Cranford, 316 N.J. Super. 401, 408 (App. Div. 1998) (a change from use as a hotel/motel to senior citizens assisted living apartments/facilities can be prima facie evidence of change in value), certif. denied, 160 N.J. 476 (1999); Entenmann's Inc. v. Borough of Totowa, 19 N.J. Tax 505, 514-15 (Tax 2001) (an allegation of change in the highest and best use of the property is not necessarily a sufficient showing of change in value), aff'd, 21 N.J. Tax 182 (App. Div. 2003); New Rock Inv. Partners v. City of Elizabeth, 18 N.J. Tax 207, 213 (Tax 1999) ("[a] change in value sufficient to warrant an added assessment may not be sufficient to avoid application of the Freeze Act . . . [since that statute's] avoidance requires a demonstration of a change in value measured against the base year

value," thus, an added assessment "does not automatically translate into a change in value from the base year value").

The City's request for discovery to prove change in use is also unavailing. As plaintiff correctly points out, discovery to provide an opinion of value change is permitted after a plenary hearing is permitted. Brae Assoc. v. Borough of Park Ridge, 21 N.J. Tax 115, 120 (App. Div. 2003). Engaging in discovery first in order to make a prima facie claim of value change, to thereafter engage in more discovery in furtherance of a plenary hearing, subverts the two-step process approved in AVR, supra, 294 N.J. Super. at 300. A taxing district must perform its "research . . . before" opposing a Freeze Act application, since "[d]iscovery is warranted only if a [plenary] hearing is necessary," and a plenary hearing is "warranted only if the municipality provides . . . a preliminary basis [to show], that a substantial and meaningful change in value has occurred." Entenmann's, supra, 19 N.J. Tax at 515 (rejecting the township's claim that it should first be provided a post-base year lease from the taxpayer after which it could prove a prima facie claim in value noting that this would "reverse[] the appropriate procedure"). The reason for this burden is because the "raison d'etre" for the Freeze Act "was the protection of the taxpayer, not the municipality." Borough of Hasbrouck Heights v. Division of Tax Appeals, 41 N.J. 492, 499 (1964).

In this regard, the City's heavy reliance on the failure to respond to the Chapter 91 requests is misplaced. The alleged inability of an assessor to impose the assessment is not the cornerstone of an opposition to a Freeze Act application.[2] This is because a hearing on the change in value for

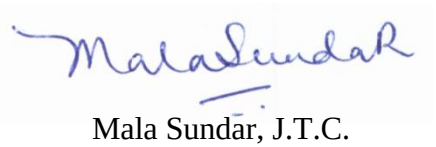
[2] An assessor is not prevented from imposing an assessment when an owner fails to respond to a Chapter 91 request. See N.J.S.A. 54:4-34 (if a property owner fails to respond, the assessor "shall value his property at such amount as he may, from any information in his possession or available to him, reasonably determine to be the full and fair value thereof").

Freeze Act purposes is something "other than a regular fair market valuation hearing." AVR Realty Co. v. Township of Cranford, 294 N.J. Super. 294, 300 (App. Div. 1996), certif. denied, 148 N.J. 460 (1997) (citation and quotation omitted). Since Chapter 91 information is used to set the assessment, its lack thereof does not necessarily foreclose the City from making a prima facie showing of a change in value.

CONCLUSION

For all of the foregoing reasons, the Freeze Act application is granted for the Subject for tax years 2015 and 2016 based on the final judgment for 2014 setting the assessment at $940,900.

Very truly yours,



Mala Sundar, J.T.C.