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Tax abatements for problematic properties: Time requirements and common grounds for entitlement

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In my experience in representing taxpayers, the valuation that boards of assessors place on certain categories of real estate is often too high. In this article, I will set out the strict time requirements for tax abatements as well as the most common grounds for being entitled to an abatement. Then, I will cover some of the situations I have encountered in my tax abatement practice.

Municipalities are having budgetary problems. The assessors and the appraisal firms hired by the assessors do not necessarily have the expertise or the will to determine the actual fair cash value of property. It is up to owners, therefore, to file for abatements in order to pay no more real estate taxes than the law requires.

Time Requirements for Filing. We are in fiscal year 2015 which began on July 1, 2014, and ends on June 30, 2015. Now is the time to review the assessments on commercial and industrial real estate. In the event the assessment exceeds the fair cash value as of the "relevant date," which was January 1, 2014, owners should consider filing an application for abatement with the local board of assessors. We spend a significant amount of our time each January filing applications for abatement. Most municipalities in Mass. send out quarterly tax bills. The first two are merely preliminary bills. The third bill, which is usually sent after the tax rate has been set, is an actual bill. The application for abatement must be filed with the board of assessors not later than the date for paying the actual bill. Assuming that the bills are mailed by December 31, 2014, the due date both for payment of the tax and for filing the application for abatement will be February 2, 2015. Applications for abatement must be filed each year. The fact that an owner filed for fiscal 2014 does not excuse the owner from filing for fiscal 2015 if in fact he wants an abatement for fiscal 2015. The next step in the process is an Appeal to the Appellate Tax Board, in the event the board of assessors fails to grant a satisfactory abatement.

Fair Cash Value: The most common reason to file and obtain a tax abatement is that the local board of assessors has put an assessed value on the property which exceeds the fair cash value of the property. The issue is: What is the fair cash value of the property? In a case before the Appellate Tax Board (ATB), the ATB stated that:

"Fair cash value means fair market value, which is defined as the price at which a willing seller and buyer will agree if both of them are fully informed and under no compulsion." *Boston Gas Co. v. Assessors of Boston*, 334 Mass. 549, 566 (1956).

The ATB and our courts interpret compulsion very narrowly. Compulsion has been defined as "duress, fraud or imperative need for immediate cash at a cost that would preclude a free market." *Epstein v. Boston Housing Authority*, 317 Mass. 297, 300 (1944).

Because it is so difficult to arrive at "fair cash value," it is important for every owner of real estate to

carefully examine his tax bill and to file an application for abatement in the event he determines the assessors have not accurately determined "fair cash value."

The remainder of this article covers some of the situations I have encountered in my tax abatement practice.

Eminent Domain: When a special purpose parcel is partially taken by eminent domain, the assessors try to value the remaining parcel by the percent of land remaining after the taking. This often does not make any economic sense. For example, if the property was used before the taking as a truck terminal and after the taking can no longer be used as a truck terminal, the remaining value is minimal. This assessor should accept this and value the property accordingly. Also, at a minimum, the assessors should be willing to subtract the dollar amount received as a result of the taking from the value of the property. However, assessors will not do this unless they are forced to do so by an appeal to the Appellate Tax Board.

Contaminated Property: Neither capitalization of income nor sales-comparison methods lead to accurate valuation for properties contaminated by hazardous materials. The stigma of a contaminated property is difficult to quantify. It is certainly more than just the cost to remediate or the cost to monitor. The difficulty of obtaining financing, the need to indemnify purchasers, and the liability to third parties must be considered. Because it is difficult to quantify the affect of contamination on a given property, assessors often ignore the negative impact of contamination. This obviously leads to an inaccurate assessment. The affect of contamination on smaller commercial properties such as a building with four (4) stores can be very difficult to determine. A buyer of such a property is normally not sophisticated and will be reluctant to buy a property with a history of contamination.

Affordable Housing: The case law is clear that in calculating the estimated gross annual income of a housing project financed by and operating under a governmental program to promote housing for low and moderate income people, the restrictions placed by Federal regulations on the actual income of the project must be considered (*Community Development Company of Gardner v. Board of Assessors of Gardner*, 377 Mass. 351 (1979)). Therefore, the assessors may not base their valuation on the higher "fair market" rental rates.

Special Purpose Buildings: Assessors have trouble with special purpose buildings such as amusement centers, health clubs, nursing homes, and medical office buildings. There are often not enough sales of comparable special purpose properties. The sale of a medical office building does not occur every day in a town such as Norwell, for example. Therefore, it becomes impossible to use the sales-comparison approach. The sales that have occurred may not be truly comparable. For example, a medical office building in Norwell does not have the value of a medical office building in Wellesley.

In lieu of the sales-comparison approach, appraisers use income capitalization or cost reproduction for special purpose properties. This can lead to inaccurate appraisals. For example, an appraiser is not qualified to testify on cost reproduction. This should be done by an engineer, but often the only expert involved in the case is an appraiser. The result can be less than satisfactory.

Special purpose properties tend to be high risk properties that are affected greatly by a recession. Assessors would have difficulty with buildings used for bowling alleys, go-cart race tracks, or health clubs. If the facility is vacant or nearly vacant, it is difficult to use the income capitalization approach. Cost reproduction also does not work as it is unlikely that a buyer would pay cost reproduction for an empty building which has only one use. For example, a buyer would not pay replacement cost for a

health club which includes an indoor swimming pool and other amenities, if the buyer did not want to use the building as a health club. The cost to retrofit a special purpose building clearly is a negative in putting a value on the building.

Business Enterprise Value: A hotel, restaurant and other real estate designed for a specific purpose is often assessed for more than the fair cash value of the real estate. This is because the assessors fail to subtract the business value. However, the law is clear in Mass. that the value of the business can not be assessed. Real and personal property can be assessed. Intangible property such as business value can not be assessed.

Exempt Property: Property that is owned by a non-profit entity and occupied by low income tenants should be fully exempt from taxation. Even though the case in Mass. law now supports this conclusion, municipalities are reluctant to concede this. The Appeals Court in 2009 in *Mary Ann Morse Healthcare Corp. v. Board of Assessors of Framingham* should have resolved this matter. The ATB has confirmed this in a recent 2011 case involving the City of Holyoke (*The Congregation of Sisters of St. Joseph v. Board of Assessors of the City of Holyoke*). Other municipalities, however, have been slow to concede that a low income project that is prohibited by statute from showing a profit for many decades must be exempt from real estate taxes until the prohibition lapses.

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