TAX

CAN TENANTS CHALLENGE PROPERTY TAX ASSESSMENTS?

by Mark D. Lansing

A recent New York case brought into question what had been accepted as a reality, can a tenant challenge the property tax assessment it must pay under the lease? As recognized by the Court, tenants are aggrieved persons under leases that require them to pay property taxes ("petitioner is an aggrieved party within the meaning of the RPTL because the assessments had a direct adverse effect on its pecuniary interests…", *Larchmont Pancake House v. Board of Assessors*, 153 A.D.3d 521, 61 N.Y.S.3d 45, 48 (2nd Dep't 2017)).

Real Property Tax Law ("RPTL") §524 specifies that a complaint to the board of assessment review must be made by "the person whose property is assessed, or by some person authorized in writing by the complainant or his officer or agent to make such statement who has knowledge of the facts stated therein." At one time, this language was thought to limit the complainant to the "owner" of the property or his agent. However, New York courts construed this language more broadly, permitting tenants to challenge property assessments under Article 7 of the RPTL. *See Matter of Waldbaum Inc. v. Finance Admin. City of New York*, 74 N.Y.2d 128 (1989). In McLean's Department Stores v. Commissioner of Assessment, 2 A.D.2d 98 (3d Dep't 1956), the court concluded that "[s]ince the right of judicial review is preserved for the benefit of persons claiming to be 'aggrieved,' it clearly follows that every complainant whose status is comprehended by that term is entitled to complain to the board [of assessment review] and obtain the preliminary review necessarily precedent to the judicial proceeding" (id., 153 N.Y.S.2d, at 345). The same court defined an "aggrieved person" as "one whose pecuniary interests are or may be adversely affected [by an assessment]" (*People ex rel. Bingham Operating Corp. v. Eyrich*, 265 App. Div. 562, 40 N.Y.S.2d 33, at 35 (3d Dept., 1943)).

The courts further held that a provision granting the right to contest property tax assessments in the landlord's name was sufficient; even if, the lease provision did not expressly state that the tenant's right extends to the landlord's "undivided interest." *Matter of K Mart Corp. v. Board of Assessors*, 176 A.D.2d 1034, 575 N.Y.S.2d 185 (3d Dep't 1991). More specifically, a lessee of property obligated to pay taxes during the term of the lease was held to be a "person aggrieved," and therefore, entitled to seek review of an assessment. *McLean's Department Stores, supra; Matter of Burke*, 62 N.Y. 224 (1875); *Arlen Realty and Development Corp. v. Board of Assessors*, 74 A.D.2d 904, 425 N.Y.S. 2d 855 (2d Dept., 1980). Thus, the language "in lessor's name" was sufficient to establish the right to assert the lessor's undivided interest. Recently, the Appellate Division, Second Department denied a tenant's right to challenge an assessment in its own name. *Larchmont Pancake House v. Board of Assessors,* 153 A.D.3d 521, 61 N.Y.S.3d 45 (2nd Dep't 2017). In Larchmont Pancake House, the Second Department found Petitioner was "aggrieved", but nonetheless, dismissed the petition on the basis it was not the owner.

Clearly, the point of *Larchmont* is that the tenant in New York must make sure that the lease provides clear authority to the tenant to challenge the assessment in its own name that it is otherwise bound to pay. Otherwise, *Larchmont* necessitates that the owner be named in the challenge. Notwithstanding New York's case law precluding dismissals based on mere irregularities and technicalities, it appears that tenants must make sure that the lease language is clear. The tenant must now meet the technicality of naming the owner as part of the challenge. Thus, a Payment in Lieu of Taxes Agreement that is based on an assessment and allows the "tenant" to challenge the assessment, the "tenant" may now have to name the Industrial Development Agency in the complaint and petition to avoid the *Larchmont* outcome.

However, this decision should not apply to the situation where an exempt municipal corporation, commission or public authority enters into a ground lease with a developer, by which the developer "owns" the building(s) and improvements, but not the underlying land. In that situation, there should be a separate tax map parcel for the building(s) and improvements that names the developer as the owner and taxpayer.

Other states have addressed the issue by a broader definition of an "aggrieved person". Thus, for example, in Michigan, MCL §205.735a(6) provides:

> (6) The jurisdiction of the tribunal in an assessment dispute as to property classified under section 34c of the general property tax act, 1893 PA 206, MCL 211.34c, as commercial real property, industrial real property, developmental real property, commercial personal property, industrial personal property, or utility personal property is invoked by a party in interest, as petitioner, filing a written petition on or before May 31 of the tax year involved. The jurisdiction of the tribunal in an assessment dispute as to property classified under section 34c of the general property tax act, 1893 PA 206, MCL 211.34c, as agricultural real property, residential real property, timber-cutover real property, or agricultural personal property is invoked by a party in interest, as petitioner, filing a written petition on or before July 31 of the tax year involved. In all other matters, the jurisdiction of the tribunal is invoked by a party in interest, as petitioner, filing a written petition within 35 days after the final decision, ruling, or determination.

In *Spartan Stores, Inc v City of Grand Rapids*, 307 Mich App 565, 571 n 5, 573-574 (2014), the Court held that parties in interest under MCL 205.735a(6) are persons or entities with a property interest in the property being assessed. *Id.* at 575. A property interest is defined as "[a] legal share in something; all or part of a legal or equitable claim to or right in property." Id. at 575 n 9, quoting Black's Law Dictionary (10th ed), p 934. The Court held that the lessee is a "party in interest" because its leasehold is a property interest "i.e., 'a legal share in something; all or part of a legal or equitable claim to or right in property.'" *Id.* quoting Black's Law Dictionary (10th ed). The Court also held that the same cannot be said for the lessee's corporate parent. While a corporate

parent "certainly has a financial interest in the tax assessment of the [subject property], it does not have a property interest in the assessment of the [subject property]." *Id.* (Emphasis in original.)

Many, if not most, states permit tenants to challenge property assessments; however, the tenant must review the particularities of each state's requirement and incorporate them into the lease to best preserve its rights.

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FOR MORE INFORMATION CONTACT:

Mark D. Lansing is a Member in Dickinson Wright's Washington, D.C. office. He can be reached at 202.466.5964 or mlansing@dickinsonwright.com.