

## Local Government & *Public Finance Law*

### Chapter 91: Assessment Tool Turned Litigation Sword

Municipalities are using this statute to dismiss tax appeals from owners of income-producing properties

**By Thomas Olson and Cory K. Kestner**

The downturn of the real estate market in late 2007 has had a profound impact on municipalities in two ways. First, less state and federal aid was distributed, so municipal budgets were forced to rely more heavily on what could be generated at the local level. Second, plunging real estate prices and successful property tax appeals impacted the real estate assessments municipalities relied upon to collect taxes for their yearly

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budgets. With property owners having a greater chance of success in their tax appeals as a result of plunging market values, municipalities must look for other ways to reduce a property owner's chance of success in a tax appeal.

N.J.S.A. 54:4-34, commonly referred to as Chapter 91, was intended to provide a means by which assessors may obtain current income and expense information for income-producing properties in order to assist them in formulating their assessments correctly, thereby avoiding unnecessary expense, time and effort in litigation. *Ocean Pines Ltd. v. Bor. of Point Pleasant*, 112 N.J. 1 (1988).

The plain language of the statute requires that a Chapter 91 request identifying the property be sent by the assessor to the property owner by certified mail together with a copy of the statute. The statute provides that a subsequent

tax appeal may be dismissed for failing to respond to the request. The statute also provides the taxpayer with 45 days to send the requested information back, or to contact the assessor and explain why the information cannot be provided as requested. A provision is made for a County Board of Taxation to impose terms or conditions on the property owner if the property owner can show good cause why the information was not provided to the assessor. No similar provision exists for the Tax Court, and the only options available to a Tax Court judge are to deny a municipality's Chapter 91 motion or dismiss the taxpayer's appeal subject to an *Ocean Pines* "reasonableness hearing" at which it is nearly impossible for a taxpayer to prevail.

A taxpayer can defend against a Chapter 91 motion in one of two ways. First, the taxpayer can show that the tax assessor failed to comply with the law. Tax assessors have historically failed to comply with the law by sending incorrect or confusing requests, untimely requests, or have relied on a third party to send the request. Second, the taxpayer can establish that it satisfied its obligation to respond and sent back the requested information within the prescribed time even though the tax assessor may have failed to receive it. Generally, in cases where the taxpayer has made some response to the Chapter 91 request, the courts have denied the municipality's motion to dismiss. When

taxpayers have failed to respond at all, courts have granted dismissal in virtually all of the cases. Recent cases highlight how the Tax Court is approaching the issues raised by Chapter 91 motions.

In *United Parcel Service v. Secaucus Town*, Docket No.: 006750-2010 (Tax Ct. 2010), the Tax Court denied a municipality's motion finding that the town's assessor sent a form that: (1) did not properly identify the property; (2) failed to include a cover letter or clear instructions regarding what information was requested and why; and (3) did not supply the taxpayer with a copy of the statute as required under the law. The tax assessor argued that it was his standard procedure to include a copy of the statute, and provided a sample mailing in a supplemental filing. However, the sample mailing contained different documents than those provided to and returned by the taxpayer. The Tax Court found the documents submitted by the municipality in the assessor's certification undermined the tax assessor's assertions, and instead provided credibility to the taxpayer's claims. The municipality's motion was therefore denied.

In *Town of Phillipsburg v. ME Realty*, 26 N.J. Tax 57 (Tax Ct. 2011), a taxpayer argued that a municipality's Chapter 91 request: (1) was vague and failed to clearly specify the information sought; (2) failed to set forth the consequences for not responding; (3) failed to provide a copy of N.J.S.A. 54:4-34; and (4) failed to adequately identify the subject property, since the only identifier was the small and "nearly illegible" address typed at the top of the municipality's cover letter. The court agreed and denied the Chapter 91 motion to dismiss after finding that the Chapter 91 request was "deficient since it does not clearly and unequivocally indicate what information is sought." The court also held that the municipality's motion was untimely under Court Rule 8:7(e), which requires that a motion to dismiss for failure to comply with a Chapter 91 request "shall be filed no later than the earlier of (1) 180 days after the filing of the complaint, or (2) 30 days before the trial date." In this matter, the municipality's motion was filed 195 days after the filing of its complaint. Although the municipality argued that the 180-day time period commenced upon the filing of the taxpayer's counterclaim, the Tax Court disagreed by holding that the

trigger date for the 180-day time period is the date the complaint is filed.

With municipalities using Chapter 91 as a sword, taxpayers must make sure to respond in order to avoid being dismissed for failing to respond. Cases have also highlighted mistakes made by taxpayers that left the Tax Court with no option but to dismiss the current year under appeal.

For example, if a taxpayer has a related entity such as a tenant with the same principals as the ownership entity, then the property is income-producing for Chapter 91 purposes even if the rent generated by the lease between the related entities is not market-oriented or arm's-length. *SKG Realty Corp. v. Wall Twp.*, 8 N.J. Tax 209 (App. Div. 1985). This means that income and expense information must be provided even if it would not be considered "market rent" for valuation purposes.

Taxpayers must also provide information related to "vendors" who may occupy space inside what could otherwise be considered an owner occupied property. A recent decision in *Community Sports Partners II v. Twp. of Mount Laurel*, Docket No. 009012-2011 (Tax Ct. 2011), held that a property owner's failure to include information concerning a small concession lease for a 3,000 sq. ft. area within a 75,000 sq. ft. skating rink was a "false or fraudulent account" under Chapter 91. The property owner answered the tax assessor's Chapter 91 request for the 2010 and 2011 tax years by stating that the property was owner-occupied. The lease was subsequently disclosed in pretrial discovery during the appeal filed in the following year. The municipality's motion to dismiss for providing a false response was granted. The Tax Court noted that the language of the Chapter 91 statute plainly requires a property owner to report all income realized from the subject property, and no de minimis exception exists in the statute which would permit a taxpayer to only provide the information when the entire property generates rental income.

The opinion in *Noam v. Borough of Paramus*, 26 N.J. Tax 335 (Tax Ct. 2012), highlighted the importance of a buyer requesting that a seller of income-producing property provide the buyer with any Chapter 91 requests that it may have recently received. Paramus moved to dismiss the taxpayer's 2011 tax appeal for

failure to respond to the tax assessor's Oct. 1, 2010, request for income and expense information that covered the period Oct. 1, 2009, through Sept. 30, 2010. The property was listed in the assessor's records as income-producing during that time. The taxpayer was the new owner of the property who acquired title to the property on Oct. 7, 2010. No response to the request was provided, and the record revealed that the tax assessor's request was sent to the prior owner, and not the new owner. The taxpayer argued that after acquiring the property, it ceased to be income-producing and therefore there was no obligation to submit the income and expense information from the prior owner's use. The Tax Court, however, concluded that the failure of the prior owner to respond to a valid Chapter 91 request for property that produced income during the requested reporting period is a defect that "runs with the land," and therefore acts to bar to the new owner's 2011 tax appeal. The taxpayer suggested that it never received the tax assessor's request, and argued that the court should impose on the assessor the additional duty to track property transfers and resend the Chapter 91 request to each new owner. This argument was also rejected by the Tax Court.

Taxpayers have overcome Chapter 91 motions by establishing that they responded to and returned the request. In *Cam Gar v. Verona Twp.*, Docket No.: 004838-2011 (Tax Ct. 2011), the taxpayer filed a complaint challenging the assessment on real property for the 2011 tax year. In opposing the township's motion to dismiss, the taxpayer argued that it had mailed back to the assessor a timely response despite the municipality's claims that it never received it. The court scheduled a plenary hearing during which the plaintiff provided testimony of a bookkeeper for its parent company who testified how she handled and returned to the assessor Chapter 91 requests, not only for the year in question, but for prior years as well. The court found this testimony credible and was satisfied that in 2010, as in prior years, the bookkeeper followed the established and routine procedure for responding to Chapter 91 requests. The municipality argued that ruling in favor of the plaintiff would be tantamount to allowing "the check is in the mail" argument to be a satisfactory reply whenever the tax assessor does not

receive a Chapter 91 response. In response, the court noted that this very concern was addressed in *J & J Realty v. Twp. of Wayne*, 22 N.J. Tax 157, 162 (Tax 2005), and that while a plaintiff can falsely claim to have sent the response, a tax assessor can likewise falsely claim that he never received the response.

The use of Chapter 91 requests by municipalities as a “sword” to dismiss

appeals means the owners of income-producing properties must be vigilant in identifying and responding to Chapter 91 requests. Because the notices are sent out to the address listed in the tax records, and not to the client’s attorney, attorneys must also educate their clients about the requests and the consequences of failing to provide a response. Additionally, although not required by the statute, it might be

best for the taxpayer to send a Chapter 91 response back to the assessor by certified mail to avoid any confusion as to whether the returned response was received by the assessor. In this new era of tax appeal litigation, a taxpayer’s failure to establish that it responded to an assessor’s Chapter 91 request could well sound the death knell for a taxpayer’s appeal under the Chapter 91 “sword.” ■