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## REAL ESTATE LAW

• FOCUS ON PROPERTY TAXES •

### The Perils of Chapter 91

When the Assessor Asks Questions, the Taxpayer Must Answer

By Thomas Olson

Many attorneys have clients who own income-producing property. That property may be substantially over-assessed and the owner entitled to a reduction in its assessment and a significant savings in its real estate taxes. However, the issue may never even reach adjudication due to the owner's unwitting failure to comply with the requirements of N.J.S.A. 54:4-34, commonly known as Chapter 91. A property owner, and that owner's attorney, should be aware of the requirements of this statute, as it represents a potential pitfall with severe consequences for tax appeals.

All property in New Jersey is assessed at its fair market value as of Oct. 1 of the pre-tax year. N.J.S.A. 54:4-23. Appeals from assessments must be filed

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*The author is a partner in Morristown's McKirdy and Riskin. The firm's practice is concentrated in the field of real estate valuation, especially real property tax appeals and eminent domain. Olson has lectured frequently on real property tax appeals and eminent domain issues.*

on or before April 1 of the tax year in question. N.J.S.A. 54:3-21, R. 8:4-2(4). A section of the statutes, N.J.S.A. 54:4-34, or Chapter 91, allows an assessor to request additional information about income-producing properties located within that assessor's municipality. The statute 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 to testify under oath when required, 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 asses-

*sor's valuation and assessment with respect to income producing property where the owner has failed or refuse to respond to such written request for information within forty (45) days of such request or to testify on oath when required or shall have rendered a false or fraudulent account. The county board of taxation may impose such terms and conditions for furnishing the requested information where it appears that the owners, for good cause shown could not furnish the information within the required period of time. In making such written request for information pursuant to this section the assessor shall enclose therewith a copy of this section. (Emphasis added.)*

It is important that owners of income producing properties be aware of the requests and the requirements for response since they are usually mailed long before the owner receives notification of the assessment placed on the property and long before the April 1 dead-

for appeals. The requests for information typically are mailed out to the owners by the assessors sufficiently in advance of the Oct. 1 valuation date to enable the assessor to use the information in formulating the assessments. As set forth above, the penalty for failure to respond to this request is severe, as the statute provides that no appeal shall be heard from the assessor's valuation if the owner has failed or refused to respond to the assessor's written request for information within 45 days of such request.

The statute has been strictly construed by the courts, which have dismissed appeals where the taxpayer has failed to properly respond. In *Terrace View Gardens v. Twp. of Dover*, 5 N.J. Tax 469 (Tax Ct. 1992), *aff'd o.b.* 5 N.J. Tax 475 (App. Div. 1992) *cert. denied* 94 N.J. 559 (1993), a taxpayer failed to respond to the assessor's request for information. The court dismissed the taxpayer's appeal on the basis that refusals on the part of taxpayers to cooperate with local property assessors will not be tolerated and a general request for information by assessors, utilized to assist in the preparation of assessments, are actions which should be encouraged by the court. The taxpayer's failure, without explanation, to supply the assessor information which would be pertinent and helpful in placing an assessment on the subject property required dismissal of its complaint.

In *SAIJ Realty Inc. v. Kearny*, 8 N.J. Tax 191 (Tax Ct. 1986) the court, while observing that Chapter 91 imposes obligations on an owner to comply with its provisions, also found that the statute imposes obligations on the assessor and held that Chapter 91 requires an assessor to include a copy of the statute in the written request to the owner. A municipality must comply with its statutory obligations imposed under the statute, which requires that the request be sent to the owner via certified mail and a copy of the statute must be included with the request. Failure to do so will result in the denial of the municipality's dismissal motion.

#### 'Income-Producing' Property

Chapter 91 requires that the owners of "income-producing" property respond to an assessor's request. The income information which must be supplied to an assessor typically will consist of rental

income generated by tenants and expenses incurred by the landlord. *Monsanto Co. v. Kearny*, 8 N.J. Tax 109 (Tax Ct. 1986); *Great Adventure Inc. v. Jackson*, 10 N.J. Tax 230 (App. Div. 1988).

A recent decision has expanded the scope of the statute to include other types of income. In *Rolling Hills of Hunterdon v. Clifton*, 15 N.J. Tax 364 (Tax Ct. 1995), the court found that Chapter 91 required the owners/operators of a nursing home to provide the assessor with income received from payments made by nursing home patients. The court determined that nurs-

(Tax Ct. 1990). See also *Prudential Ins. v. Parsippany* 16 N.J. Tax 58 (Tax Ct. 1995), *aff'd* 16 N.J. Tax 148 (App. Div. 1996). Payments made by nursing home patients were thus relevant information that would be helpful to an assessor in formulating an assessment on the subject property.

The courts have been fairly strict in finding that a taxpayer must supply all income information as it relates to the subject property. For example, in *SKG Realty Corp. v. Wall*, 8 N.J. Tax 209 (App. Div. 1985), the property was leased by a subsidiary of the owner. The owner did not respond to the Chapter 91 request and the municipality moved to dismiss the taxpayer's appeal. The owner responded that it had not denied the assessor any meaningful information, since the lease was not an arm's length transaction and could not have provided the assessor with any relevant information in formulating the assessment. The Appellate Division disagreed, holding that the purpose of the statute is to afford the assessor access to information that can aid in valuing the property. The owner of the property was under an obligation to respond to a valid Chapter 91 request as it was up to the assessor and not the taxpayer to decide whether the information furnished would be useful, even where the property was leased by a subsidiary of the owner.

In *Monsanto Co. v. Town of Kearny*, 8 N.J. Tax 109 (Tax Ct. 1996), however, the property that was the subject of the Chapter 91 request was an owner-occupied factory. The court found that the property was not "income-producing" property within the meaning of Chapter 91, since no rent was being paid. The owner's failure to respond to the Chapter 91 request did not mandate dismissal of its complaint, since there was no rental income information the owner could have provided to the assessor.

In *Alfred Conhagen v. So. Plainfield* 16 N.J. Tax 470 (App. Div. 1996), the assessor mailed a proper Chapter 91 request for income information to the owner in July 1994 for the 1995 tax year. The owner was the sole occupant of the industrial building located on the property, but had leased a portion of the land area to another company for the storage of vehicles for three years before May 1994 when the tenant vacated the property.

The owner failed to respond to the assessor's request and argued in respon-

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ing homes were income-producing properties within the meaning of N.J.S.A. 54:4-34 since payments by nursing home patients were, at least in part, attributable to the use of the real estate and to that extent were tantamount to rental payments.

The court analogized this situation to that of hotel properties, which have been found to be income-producing properties, and payments made by hotel patrons have been used in an income approach. *Glenpointe Assocs. v. Teaneck*, 10 N.J. Tax 380 (Tax Ct. 1989), *aff'd* 12 N.J. Tax 118 (App. Div. 1990); *Westmount Plaza v. Parsippany Twp. Hills*, 11 N.J. Tax 127

to the municipality's motion to dismiss its complaint that it did not have to respond, since at the time the Chapter 91 request was mailed the property was not producing any income. The court disagreed. The property's prior use as a rental property for the storage of vehicles rendered the property "income-producing." The assessor was aware of this prior use and it was incumbent on the taxpayer to respond to the assessor. Even where an income-producing property has not produced income, the taxpayer is obliged to report that fact to the tax assessor. The failure to produce income may be explained by the temporary loss of a tenant, the presence of a tenant who has failed to pay rent, or, as in this case, the termination of the tenancy and a withdrawal of the property from the rental market.

#### Reasonableness Hearing

In *Ocean Pines Ltd. v. Point Pleasant*, 112 N.J. 1 (1988), the state Supreme Court considered the appropriate remedy upon failure by the taxpayer to comply with an assessor's Chapter 91 request. The taxpayer had purchased a 20-unit garden apartment complex for \$795,000. On March 26, 1984 the assessor mailed to the taxpayer a Chapter 91 request, seeking information necessary to assess the property for the 1985 tax year. The taxpayer did not respond within the 45-day period, contending that its status as a recent purchaser and the unavailability of income information for the period before its purchase of the property exempted it from compliance. Based on the information otherwise available to him, the assessor placed an assessment on the property of \$692,700.

Plaintiff appealed the assessment to the Ocean County Board of Taxation and at the hearing before the board attempted to introduce income and expense projections for the property, together with financial statements for the property from the date of purchase to the date of the hearing. The municipality moved to dismiss the petition pursuant to the provisions of Chapter 91. The board dismissed the appeal. The plaintiff thereafter appealed to the Tax Court, which also dismissed the complaint.

The Appellate Division reversed the Tax Court's dismissal of the appeal and remanded the matter to the Tax Court. The

appeals panel indicated that, although it agreed that plaintiff's failure to provide the requested information within 45 days barred its subsequent appeal based on the requested data, and despite the fact that it agreed that plaintiff had not satisfied the "good cause" provision of the statute, the taxpayer was nevertheless not precluded from seeking all relief from the assessment. The Appellate Division found that the plaintiff was entitled on both statutory and constitutional grounds to challenge the "reasonableness" of the assessor's valuation of the property.

The state Supreme Court affirmed. In so ruling, the Court reaffirmed the policy that barring a taxpayer from presenting data in a subsequent appeal which it did not supply to an assessor pursuant to a Chapter 91 request "encourages compliance" with a proper request for that information. 112 N.J. at 8.

The Supreme Court also affirmed the Appellate Division's conclusion that a taxpayer is entitled to a "reasonableness hearing" even when it has not complied with an assessor's request for information pursuant to Chapter 91. N.J.S.A. 54:4-34 provides that where a taxpayer fails to comply with the assessor's request for economic data "the assessor shall value the property in such a manner as he may, from any information in his possession or available to him, *reasonably determine* to be the full and fair value thereof." 112 N.J. 11 (emphasis by the Court). Therefore, the statute itself suggests that the taxpayer must have an available remedy in those cases in which the assessor has unreasonably valued the property.

These "reasonableness" hearings, however, are to be sharply limited, both substantively and procedurally. The taxpayer's failure to provide the requested financial information in a timely fashion will preclude the use of that data on appeal. The inquiry at the reasonableness hearing will focus solely on whether the valuation could reasonably have been arrived at in light of the data available to the assessor at the time of the valuation. Included within the inquiry will be (i) the reasonableness of the underlying data used by the assessor; and (ii) the reasonableness of the methodology used by the assessor in arriving at the valuation.

The Supreme Court also held that in light of the limited scope of inquiry, there is no requirement for a plenary hearing. In

most cases such an appeal may be disposed of by the county board of taxation or the Tax Court in a summary fashion without taking testimony. The taxpayer is entitled to discovery of any information relied on by the assessor in arriving at the subject valuation. If either the taxpayer or the municipality is to rely on an expert's opinion, then the other party shall be entitled to discovery concerning that opinion. The original assessment is entitled to a presumption of validity. To overcome that presumption, the taxpayer must produce evidence that is "definite, positive and certain in quality and quantity" sufficient to overcome the presumption of correctness of the assessment. 112 N.J. at 11-12. If the reasonableness hearing is conducted before the county board, either party is permitted to seek additional review of the board's determination with the Tax Court in accordance with N.J.S.A. 54:51A-1, although the proceeding before the Tax Court will also ordinarily be disposed of in a summary fashion.

An owner who has failed to respond to a Chapter 91 request and whose appeal has been dismissed may thus have an opportunity to challenge the "reasonableness" of the assessment. However, in light of the very stringent standard of review established by the *Ocean Pines* court, it will be extremely difficult for an owner to prevail with respect to any such challenges. The actual effect of an owner's failure to comply with Chapter 91 will in most instances result in no reduction of the assessment.

#### Timing of Request

Several decisions have considered the time within which an assessor's Chapter 91 request for information must be made. In *Westmark Partners v. West Deptford*, 11 N.J. Tax 591 (Tax Ct. 1993), the taxpayer had filed complaints for the 1991 and 1992 tax years. The municipality moved to dismiss these complaints due to the taxpayer's alleged failure to respond to the assessor's Chapter 91 request for income and expense data.

The assessor mailed two requests. The first, mailed on June 17, 1991, was received by the taxpayer on June 1, 1991. The second request was mailed on Feb. 1, 1992 and was received by the taxpayer on Feb. 3, 1992. The June 1991 request sought information which t

request stated would be helpful in establishing the 1991 assessment on the subject property. The request mailed in Feb. 1992 sought income information for the tax year ending Dec. 31, 1991, which would be relevant for the 1992 assessment.

The taxpayer argued that the motion must be denied since the assessing date had passed for each of the tax years in question. (Oct. 1, 1990, and Oct. 1, 1991) before each notice was mailed. The court agreed. The court found that the information requested for the 1991 tax year was not mailed to the taxpayer until June 17, 1991, after the Oct. 1, 1990 assessing date. Likewise, the information requested by the assessor on Feb. 1, 1992 for the 1991 tax year was also after the Oct. 1, 1991 valuation date. Thus, even if the taxpayer had responded, it would have been too late for the assessor to utilize any of the information in establishing the assessments.

The court found that an assessor's Chapter 91 demand should be made within sufficient time for the taxpayer to use the full 45-day response period allotted to it under the statute and failure to do so precludes application of the statute's severe sanction of the denial of administrative or judicial review of the tax assessment. See also *Delran Holding Corp. v. Delran*, 8 N.J. Tax 80 (Tax Ct. 1985), where the court refused to dismiss the complaint where the assessor had not mailed the request until after the complaint was filed, which was well after the assessing date.

The 45-day period, however, need not expire before the Oct. 1, assessing date. In *John Hancock Mutual Life Ins. v. Wayne*, 13 N.J. Tax 417 (Tax Ct. 1993) the municipal assessor mailed the Chapter 91 notice to the taxpayer on Oct. 6, 1992 for the 1993 tax year. The 45-day compliance period expired November 20, 1992. The taxpayer did not respond and the municipality made a motion to dismiss the taxpayer's complaint for failure to comply with Chapter 91. The taxpayer objected, noting that the request was mailed after the Oct. 1, 1992 assessing date and therefore could not have been utilized by the assessor in establishing an assessment for the 1993 tax year. The court disagreed, noting that an assessor does not actually have to certify the assessment as final until Jan. 10 of the tax year and may make changes to the assessments up to that date.

See N.J.S.A. 54:35-1. Therefore, the assessor could have utilized the information supplied by the taxpayer if it had been provided in accordance with the statute. The court dismissed the complaint.

In *Cassini v. City of Orange*, 16 N.J. Tax 438 (Tax Ct. 1997), the court refused to dismiss the taxpayer's complaint for failure to respond to the assessor's Chapter 91 request when that request, mailed in September 1995, requested income and expense information for the tax year ending Dec. 31, 1995. The court noted that it was impossible for the taxpayer to respond to the assessor in time for the assessor to establish the assessment for the 1996 tax year since the requested information could not have been compiled and made available to the taxpayer before the Jan. 10, 1996 deadline for finalizing assessments for the tax year 1996. The court stated: "In dealing with the public, government must turn square corners". (citing *FMC Stores Co. v. Morris Plains*, 100 N.J. 418, 426 (1985)). A municipality cannot seek to close the door of tax appeals until it has given property owners fair notice of their obligations in the Chapter 91 requests. The request was not a proper request and the taxpayer's complaint would not be dismissed.

#### Subsequent Purchasers

Purchasers of property also must be wary of any Chapter 91 requests which may have been sent to the seller before closing.

In *ADP of N.J. v. Parsippany-Troy Hills*, 14 N.J. Tax 372 (Tax Ct. 1994), the court held that a taxpayer who purchased the property three months after the assessor mailed his Chapter 91 request was precluded from filing an appeal when the prior owner had failed to respond within the 45-day period. The court found that the subsequent purchaser had an obligation to inquire into the assessment status of the property if it intended to protect its right to contest the assessment on the subject property.

In *Carriage Four Associates. v. Teaneck*, 13 N.J. Tax 172 (Tax Court 1993) the taxpayer directed the municipality to send its tax bills to its agent located on the subject property, rather than direct it to the owner's office. The municipality communicated with the tax-

payer's agent with regard to all taxation matters, and mailed the Chapter 91 notice to the taxpayer's agent. No response was made by the agent. A receiver subsequently came into possession of the property, who argued that mailing a notice to the owner's agent was not effective service in accordance with Chapter 91.

The tax court disagreed, observing that a receiver takes property subject to any pre-existing conditions and the owner of the property had specifically directed the municipality to communicate with its agent regarding tax matters. As such, the Chapter 91 notice was appropriately mailed to the taxpayer's agent and its failure to respond mandated dismissal of its complaint, subject to the right of the taxpayer to a reasonableness hearing in accordance with *Ocean Pines*.

#### Challenges and 'Good Cause'

Chapter 91 allows the county board of taxation (and the Tax Court) to "impose such terms and conditions for furnishing the requested information where it appears that the owners for good cause shown, could not furnish the requested information within the requested period of time." Several decisions have considered challenges to Chapter 91 requests and the "good cause" provision of the statute.

In *Pisani v. Wayne*, 13 N.J. Tax 412 (Tax Ct. 1993), the taxpayers received the Chapter 91 notice from the municipality and failed to respond within the 45-day period. The taxpayer challenged the municipality's motion to dismiss its complaint pursuant to the statute, arguing that the assessor's statement in the letter sent to the taxpayer indicated that the taxpayer "may be precluded from filing an appeal if it failed to respond. The taxpayer argued that the municipality had not give adequate notice that lack of compliance with the request must result in the dismissal of the appeal and further argue that by using the word "may," taxpayer did not receive adequate notice that compliance is mandatory.

The court agreed with the municipality's position that use of the phrase "may be precluded from an appeal" was an accurate and proper term under Chapter 91. The court also found that the taxpayers had received a copy of the current version of N.J.S.A. 54:4-34 with the requ-



and the inclusion of a copy of the statute with the request alerted the taxpayer of the consequences of non-compliance. By stating in the main text of its notice that the taxpayer's non-compliance "may" be fatal to an appeal, the municipality merely gave additional notice to the taxpayer of the potential consequences of non-compliance. This notice went beyond the requirements of N.J.S.A. 54:4-34, which merely require inclusion of a copy of the statute and was indicative of the municipality's efforts to deal fairly with the taxpayer. The complaint was dismissed subject to a reasonableness hearing.

In *Tower Center Associates v. East Brunswick*, 15 N.J. Tax 692 (App. Div. 1986), the taxpayer made a similar argument with respect to the language used in the notice, and also challenged the scope of the information sought by the assessor. It argued that the illegality of the scope of the request constituted "good cause" for failing to respond within 45 days of the request.

The Appellate Division affirmed the dismissal of taxpayer's complaint, noting that the taxpayer had not responded at all to the assessor's request within the 45-day period, but rather first raised its objection when the municipality's motion to dismiss was filed. The Appellate Division affirmed the dismissal of the complaint and held that if a taxpayer wishes to challenge the adequacy of a municipality's notice, it must take some action within the 45-day period to put the municipality on notice of its contention. The taxpayer "cannot just sit by and do nothing until the assessment is finalized" and thereafter seek to appeal the assessment by plenary review. 15 N.J. Tax at 697.

In *Ocean Pines v. Point Pleasant*, supra, the taxpayer had argued that it had "good cause" for failing to reply, since the assessor had requested income information which it, as a new purchaser, did not

have in its possession. The Supreme Court rejected this argument. It found that the owner had made no attempt within the 45-day period to explain to the assessor why it could not comply with the request and this failure to respond in any fashion precluded the owner from asserting a "good cause" claim.

In *TMC Properties v. Wharton*, 15 N.J. Tax 455 (Tax Ct. 1996), the court considered the prerequisites necessary for a taxpayer to succeed on a claim of "good cause" for non-compliance under the statute. The court found that the *Ocean Pines* and *Tower Center* decisions established a two-step analytical framework for deciding motions to dismiss. The first step is a determination of whether the taxpayer has made a sufficient "response" to the assessor's request within the statutory 45-day period. The second step is a determination of whether the taxpayer's failure to furnish, or delay in furnishing, the requested information resulted from "good cause."

The court found that in order for a response (other than one furnishing the requested information) to be sufficient, it must be made within the 45-day time period and must communicate to the assessor, in reasonable detail, a plausible basis for the taxpayer's inability to furnish the requested information. In order for "good cause" to be shown, a taxpayer must demonstrate that it "could not" answer the assessor's request within the statutory time limit. The owner in *TMC Properties* had tried several times to reach the assessor by telephone within the 45-day period, but did not receive a response. The court found that the failure of the owner to respond to the assessor in writing within 45 days, when it easily could have done so, did not constitute "good cause" for failing to comply with the requirements of Chapter 91.

In *ML Plainsboro Ltd. v. Plainsboro*, 16 N.J. Tax 250 (App. Div. 1997), cert.

*denied* 149 N.J. 408 (1997), the subject property was an essentially owner-occupied office building and conference training center. The training center was used for the owner's own purposes, although outside organizations occasionally used the facility by paying a fee to the owner. The assessor's Chapter 91 request asked for rental income information. The owner responded by stating that the properties were not income-producing and had no leases. The Tax Court dismissed the complaint, finding that the owner should reasonably have read the request as requiring the inclusion of the income received from fees paid for use of the training center.

The Appellate Division reversed, finding that since the assessor's request for information only sought rental income, the owner could not reasonably conclude that the request also encompassed non-rental income. The Appellate Division noted that tax assessors are experts in the field of real estate valuation, while the owners of income-producing properties include not only substantial business enterprises but also small businesses persons who may have difficulty reading complex and confusing forms and may lack ready access to legal advice. The assessor's request to the taxpayer must be clear cut and if there is room for reasonable doubt as to whether an average owner of income-producing property would understand an assessor's request to include a particular kind of information, the benefit of the doubt should be given to the taxpayer. In light of the severity of the penalty for non-compliance (dismissal of the complaint a strict construction of the statute required. 10 N.J. Tax at 257. See also *Summerton Plaza v. Manalapan*, 15 N.J. Tax 173 (App. Div. 1995), which states that an assessor's request to a taxpayer pursuant to Chapter 91 must be "clear cut." ■