

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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In the Matter of the Application of
AVALON PROPERTIES, INC. and/or
AVALON COMMUNITIES, INC.,

Petitioner,

DECISION/ORDER

-against -

Index No:
5343/03
4921/04
5371/05
6038/06
6675/07
8804/08

THE ASSESSOR OF THE TOWN OF CLARKSTOWN,
THE BOARD OF ASSESSMENT REVIEW OF THE
TOWN OF CLARKSTOWN, AND THE TOWN OF
CLARKSTOWN,

Motion Date:
12/15/08

Respondents.

For a Review of Tax Assessments under
Article 7 of the Real Property Tax Law,

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LaCAVA, J.

The following papers numbered 1 to 5 were considered in connection with the motion by respondent Town of Clarkstown (Town or respondent) for an order granting consolidation of the 2008 matter with the matter involving tax years 2003 through and including 2007:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION/EXHIBITS	1
ANSWER TO MOTION/EXHIBITS	2
REPLY AFFIRMATION	3
SUR-REPLY	4
REPLY AFFIRMATION TO SUR-REPLY	5

In this Article 7 Tax Certiorari action, respondent seeks consolidation for trial of the newly-filed 2008 matter with the impending trial concerning tax years 2003 through 2007, arguing that judicial economy will be furthered by inclusion of the last filed year in the trial of this matter. The Town notes that it has already included tax year 2008 in its trial appraisal, and asserts that petitioner, while it has not done likewise, can swiftly and easily do so.

Petitioner opposes the motion, arguing, *inter alia*, the expense of amending its appraisal.

RPTL § 710 provides

A justice before whom separate petitions to review assessments of real property are pending may on his own motion consolidate or order to be tried together two or more proceedings where the same grounds of review are asserted and a common question of law or fact is presented

(*Cf* CPLR § 602, which provides

§ 602. Consolidation

[a] Generally. When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.)

Indisputably, all of the tax years (2003 through 2008) have the same grounds of review, and common questions of law or fact. While it would seem that the trial of the 2003 through 2007 matters would invariably be lengthened by addition of the 2008 matter, a separate trial of the 2008 matter, after the trial of the 2003 through 2007 matters, would, given these common grounds of review and issues of law and fact, be a waste of scarce judicial resources.

Rule of Court 202.59 (22 NYCRR 202.59) further provides

§ 202.59. Tax assessment review proceedings in

counties outside the City of New York; special rules

(a) Applicability. This section shall apply to every tax assessment review proceeding brought pursuant to title 1 of article 7 of the Real Property Tax Law in counties outside the City of New York.

(f) Consolidation or joint trial. Consolidation or joint trial of real property tax assessment review proceedings in the discretion of the court shall be conditioned upon service having been made of the verified or certified income and expense statement, or a statement that the property is not income-producing, for each of the tax years under review.

Thus, while consolidation may be ordered by the Court where appropriate, attention must be paid to the obligation of petitioner to provide, where required, income and expense information, which issues are also dealt with in § 202.59:

(b) Statement of income and expenses. Before the note of issue and certificate of readiness may be filed, the petitioner shall have served on the respondent, in triplicate, a statement that the property is not income-producing or a copy of a verified or certified statement of the income and expenses on the property for each tax year under review. For the purposes of this section, a cooperative or condominium apartment building shall be considered income-producing property; an owner-occupied business property shall be considered income-producing as determined by the amount reasonably allocable for rent, but the petitioner is not required to make an estimate of rental income.

(c) Audit. Within 60 days after the service of the statement of income and expenses, the respondent, for the purpose of substantiating petitioner's statement of income and expenses, may request in writing an audit of the

petitioner's books and records for the tax years under review. If requested, the audit must be completed within 120 days after the request has been made unless the court, upon good cause shown, extends the time for the audit. Failure of the respondent to request or complete the audit within the time limits shall be deemed a waiver of such privilege. If an audit is requested and the petitioner fails to furnish its books and records within a reasonable time after receipt of the request, or otherwise unreasonably impedes or delays the audit, the court, on motion of the respondent, may dismiss the petition or petitions or make such other order as the interest of justice requires.

(d) Filing note of issue and certificate of readiness; additional requirements.

(1) A note of issue and certificate of readiness shall not be filed unless all disclosure proceedings have been completed and the statement of income and expenses has been served and filed.

(2) A separate note of issue shall be filed for each property for each tax year.

Thus, as set forth above, consolidation may be ordered by the Court where appropriate, with due attention to petitioner's obligation to provide income and expense information, said duty arising, however, contemporaneous with the filing of a Note of Issue in the matter. Neither of the latter have yet occurred with respect to the 2008 tax year.

On the question of Notes of Issue, Rule of Court § 202.21 (22 NYCRR 202.21) provides

§ 202.21. Note of Issue and Certificate of Readiness

(a) General. No action or special proceeding shall be deemed ready for trial or inquest unless there is first filed a note of issue accompanied by a certificate of readiness, with proof of service on all parties entitled to notice, in the form prescribed by this section.

CPLR §3402 further provides:

Rule 3402. Note of Issue

(a) Placing case on calendar. At any time after issue is first joined, or at least forty days after service of a summons has been completed irrespective of joinder of issue, any party may place a case upon the calendar by filing, within ten days after service, with proof of such service two copies of a note of issue with the clerk and such other data as may be required by the applicable rules of the court in which the note is filed. The clerk shall enter the case upon the calendar as of the date of the filing of the note of issue.

Thus, while the CPLR permits filing by any party of a Note of Issue, the Note, regardless of who files it, must be filed with a certificate of readiness which affirms that all disclosure has been completed. No matter may be placed on the trial calendar prior to such a filing. Therefore, while the Court may, and herein does, direct the consolidation of the 2008 matter for trial, said matter may not appear on the trial calendar until the service and filing, by petitioner, of appropriate income and expense statements, and the filing, by either party, of a Note of Issue for that tax year¹.

Based upon the foregoing motion, it is hereby

ORDERED, that the motion is granted, solely to the extent that the Petition bearing Index # 8804/08 is directed to be consolidated for trial with Index #s 5343/03, 4921/04, 5371/05, 6038/06, and 6675/07, upon condition that petitioner timely serve and file

¹The Court agrees, as suggested by respondent, that a petitioner may not delay a trial-ready case by declining to file a Note of Issue where discovery is complete. It is for that reason that the CPLR provides that any party may file the Note. However, it is equally true that a respondent may not foreclose a petitioner's duty to serve and file income and expense statements where the former, rather than the latter, files the Note of Issue. Consequently, where a respondent, rather than a petitioner, files a Note of Issue in a matter where income and expense statements are required, petitioner shall still have a reasonable period of time from the filing of the Note to serve and file any income and expense statements required.

income and expense statements within 15 days of the instant ORDER and that a Note of Issue be filed at that time or immediately thereafter; and it is further

ORDERED, that all parties are directed to appear before the Court on January 19, 2009, at 10:30 a.m., for a status conference.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
January , 2009

HON. JOHN R. LA CAVA, J.S.C.

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