

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 WESTCHESTER

-----X
In the Matter of the Application of

ARDSLEY COUNTRY CLUB,

Petitioner,

- against -

THE ASSESSOR OF THE TOWN OF GREENBURGH
AND THE TOWN OF GREENBURGH,

Respondents,

- and -

DECISION/ORDER

Index Nos:

14726/99

14409/00

14260/01

15992/02

16534/03

14394/04

19633/07

22460/08

DOBBS FERRY UNION FREE SCHOOL DISTRICT

Intevenor-Respondent.

For Review of a Tax Assessment under
Article 7 of the Real Property Tax
Law.

Motion Date:

4/10/09

-----X
In the Matter of the Application of

ARDSLEY COUNTRY CLUB,

Petitioner,

- against -

THE VILLAGE OF IRVINGTON, its
ASSESSOR and BOARD OF ASSESSMENT
REVIEW,

Respondents,

For Review of a Tax Assessment under

Index Nos:

6334/00

5753/01

6010/02

6232/03

Article 7 of the Real Property Tax
Law.

-----X

In the Matter of the Application of

ARDSLEY COUNTRY CLUB,

Petitioner,

- against -

THE ASSESSOR(S) OF THE VILLAGE OF DOBBS
FERRY AND THE VILLAGE OF DOBBS FERRY,

Respondents,

For Review of a Tax Assessment under
Article 7 of the Real Property Tax
Law.

-----X

LaCAVA, J.

The following papers were considered in connection with this application by respondents/intevenor-respondent for an Order striking petitioner's Notes of Issue in several of the pending tax years, for failure to provide discovery in a timely manner, and upon said striking, to dismiss the petitions relating to those tax years, for failure to timely file Notes of Issue for each of those tax years:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION/AFFIDAVIT/EXHIBITS	1
MEMORANDUM OF LAW	2
AFFIRMATION IN OPPOSITION/EXHIBITS	3
MEMORANDUM OF LAW IN OPPOSITION	4
AFFIRMATION IN SUPPORT/EXHIBIT	5
MEMORANDUM OF LAW	6
AFFIRMATION IN SUPPORT/EXHIBIT	7
REPLY AFFIRMATION	8
NOTICE OF MOTION/AFFIRMATION/EXHIBITS	9
MEMORANDUM OF LAW	10
NOTICE OF MOTION/AFFIRMATION/EXHIBITS	11
MEMORANDUM OF LAW	12
AFFIRMATION IN REPLY/EXHIBITS	13
REPLY AFFIRMATION	14

In this tax certiorari matter, respondent Town of Greenburgh (Town) seeks an order striking the Notes of Issue in each of the pending tax years commencing with 1999 and running through and including 2004, for petitioner (Club)'s alleged failure to comply with its discovery obligations in a timely manner pursuant to the Rules of Court (22 NYCRR 202.59 [b], [d] 1) and, upon the striking of those Notes for said alleged discovery violation, to dismiss the petitions for each of the tax years 1999 through and including 2004, for failure of petitioner to timely file Notes of Issue for each of those tax years. Respondents Village of Dobbs Ferry (Dobbs) and Village of Irvington (Irvington) have likewise moved for the same relief relating to the tax years 1999 through and including 2003.

Respondent asserts that the Club timely filed petitions challenging tax years 1999 through 2004. The petitioner then, in 2002, filed and served a Note of Issue relating to the 1999 petition upon respondents, which failed to state whether the subject was income-producing or not, and which was not accompanied by a statement of income and expenses pursuant to 202.59 of the Uniform Rules for the Supreme Court. Subsequently, respondent further asserts, the Club timely filed and served Notes of Issue relating to tax years 2000, 2001, 2002, 2003, and 2004; on each occasion, petitioner stated, pursuant to 202.59 of the Uniform Rules for the Supreme Court, that the subject was not an income producing property, and also failed to accompany the filing and service with statements of income and expenses. Finally, upon filing and serving the Notes of Issue for 2007 and 2008, petitioner described the property as income-producing.

Subsequently, in November 2008, respondent Town filed the instant motion to strike the Club's Notes of Issue for the tax years 1999 through and including 2004, arguing that petitioner had failed to comply with the mandates of the Uniform Rules of Court (22 NYCRR 202.59 [b], and [d] 1), by failing to timely provide proper income and expense statements for the subject, an income-producing property; and urging that, upon the striking of the Notes for said discovery failures, the petitions for each of the tax years 1999 through 2004 should be dismissed for failure of petitioner to timely file Notes of Issue for those tax years. Respondents Dobbs and Irvington have since moved for similar relief with respect to all of the petitions filed against them, namely tax years 2000 through and including 2003, based on the same alleged failure by petitioner.

Respondents all essentially assert that the recent Second

Department decision in *Matter of Eastgate Corporate Park, LLC v. Assessor, Bd. of Assessment Review of the Town of Goshen*, 54 A.D.3d 1036 (2nd Dept. 2008) controls here. In *Eastgate*, this Court (see *Matter of Eastgate Corporate Park, LLC v. Assessor, Bd. of Assessment Review of the Town of Goshen*, Supreme Court, Orange County, Dickerson, J., November 28, 2006) held that the failure to file income and expense statements as required of income-producing properties pursuant to Rule of Court 202.59 (b), and failure to subsequently serve them, prior to filing a Note of Issue, requires striking of the improperly-filed Note of Issue, and, where more than four years have elapsed since the inception of the case, the matter must be dismissed. The Second Department affirmed that holding, and noted that, while such a failure by a petitioner may be excused for good cause shown, such showing must take place within the four-year limitations period of RPTL 718 (2) d.

Eastgate is in fact only the last in a line of cases dealing with petitioners' failures to file income and expense statements. As several respondents point out, compliance by petitioners with 202.59 is the primary, if not sole, means of respondents' gathering discovery in tax certiorari actions involving income-producing properties, and that therefore the lack of said discovery is highly prejudicial to them. Further, this Court, in *Rose Mount Vernon* (*Rose Mount Vernon Corp. v. Assessor of the City of Mount Vernon*, 1 Misc.3d 906(A), 781 N.Y.S.2d 628 [Supreme Court, Westchester County, Dickerson, J., December 29, 2003]) and *Midway* (*Midway Shopping Center v. Town of Greenburgh*, 11 Misc.3d 1071(A), 816 N.Y.S.2d 697 [Supreme Court, Westchester County, Dickerson, J., March 29, 2006]); the Second Department in affirming *Rose Mt. Vernon* (15 A.D.3d 585 [2nd Dept. 2005]); and the Third Department in *Pyramid Crossgates* (*Pyramid Crossgates Co. v. Board of Assessors of the Town of Guilderland*, 302 A.D.2d 826 [3rd Dept. 2003]), have consistently held that the failure to timely comply with 202.59 requires the striking of a Note of Issue and, where any petition is in excess of four years old, the dismissal pursuant to RPTL 718 (2) d of said petition for untimely filing of the Note of Issue.

RPTL 718 (2)

RPTL 718 (2) provides

Where a proceeding is commenced pursuant to this article to review the assessment of a parcel of real property which solely contains property which is not subject to the provisions of subdivision one of this section, a note of issue shall be filed in accordance with this subdivision.

(d) Should the respondent fail to demand that the petitioner file a note of issue pursuant to paragraph (c) of this subdivision within four years from the date of the commencement of the proceeding, and a note of issue has not otherwise been filed, the proceeding shall be deemed to have been abandoned and an order dismissing the petition shall be entered without notice and such order shall constitute a final adjudication of all issues raised in the proceeding, except where the parties otherwise stipulate or a court or judge otherwise orders on good cause shown within such four-year period.

Rule of Court (22 NYCRR) 202.59 [b], [d] 1

22 NYCRR 202.59 [b], [c], and [d] 1 provide

§ 202.59 Tax assessment review proceedings in counties outside the City of New York; special rules

(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.

What is Income-Producing Property?

Of course, it is axiomatic that income and expense statements need not be filed and served prior to filing a Note of Issue where a property is not "income-producing." No definition of the phrase appears in 202.59 (or, indeed, its analogous provision, applicable within the City of New York, 202.60.) Indeed, the only statutory or code definition the Court has located appears in NYC Administrative Code §11-208.1 (e), which requires "income-producing" property owners within the City of New York to submit income and expense statements annually to facilitate the assessment of those properties. The phrase is defined there as follows "As used in this section, the term 'income-producing property' means property owned for the purpose of securing an income from the property itself...."

Petitioner asserts that the subject property is "owner-occupied", which is to say that petitioner itself is present on the premises and personally operates the business resident thereon, a golf club. However, does that status assist petitioner at all, since Rule 202.59 further provides, as set forth above, that "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." Petitioner cites in particular to *In the Matter of White Plains Properties Corp., Respondent, v. Tax Assessor of the City of White Plains et al*, 58 A.D.2d 653 (2nd Dept. 1977) as supporting its argument that it is not an "income producing property" within the reach of the Rule. There, a challenge by Macy's to the tax assessment on its then-White Plains store location, this Court had declined to strike Notes of Issue filed without income and expense statements as directed by the predecessor to 202.59, 22 NYCRR 678.3. This latter Rule, like 202.59, required the filing of a Note of Issue along with a statement addressing whether the property was income producing or not, and, if so, a statement of income and expenses. The Second Department affirmed the denial of the motion to strike, holding that the Rule was intended to expedite tax review proceedings, but did not alter the existing law on what was an income-producing property, and stating that "'income producing' applies only to income produced directly by the real estate, and not to income generated by a commercial business conducted thereon." (58 A.D.2d, 654.)

White Plains has since been cited, including by the Second Department, in similar cases to deny motions by respondents seeking income and expense statements, where the property is owner-occupied. In *Avis Rent A Car System, Inc. v. Rye*, 131 A.D.2d 568 (2nd Dept. 1987), this Court had denied a motion by respondents therein to compel petitioner Avis, the owner/occupier of several airport rental car concession facilities, to supply a certified statement of income and expenses. The Court, citing to *White Plains*, noted that Avis' business income and expenses is "irrelevant to the valuation" of the rental facilities. The Avis Court also cited to *Barnum v. Srogi*, 54 N.Y.2d 896 (1981), *Federated Department Stores, Inc. v. Podeyn*, 32 A.D.2d 823 (2nd Dept. 1969), and *Farone & Son, Inc. v. Srogi*, 96 A.D.2d 711 (4th Dept 1983), all of which explicitly make the same point--that income and expenses from the rental of a property may generally be relevant for an appraisal, but that income and expenses attributable to a business located on a premises owned by the operator of the business generally are not relevant to valuation. It is also notable that *Avis* was decided just one year after 22 NYCRR 678.3 was renumbered and re-enacted as the current 202.59, with the explicit requirement that owner-occupied premises be considered income-producing "as determined by the amount reasonably allocable for rent," although the petitioner "is not required to make an estimate of rental income." Rule of Court 202.59 (b).

White Plains was also cited more recently by the Third Department in *Matter of Norton Company v. Assessor of the City of*

Watervliet, 292 A.D.2d 672 (3rd Dept. 2002.) The premises there, a manufacturing plant, was owner-occupied, and the petitioner sought to comply with Rule 202.59 by verifying that the property was "not income-producing." At trial, respondent objected to the admission of petitioner's appraisal, reasoning that the appraiser could not use the Income Capitalization Method to value the property if the property was not income producing, as previously asserted. The trial court agreed and denied admission of petitioner's appraisal, but the Third Department reversed, holding that income-producing is "a phrase synonymous with rental activity" and that "the property was owner-occupied and not income-producing in the sense that no rental activity was present."

Consequently, while respondents are generally correct that the failure to provide income and expense statements for income-producing property can be fatal to a Note of Issue and, where the case is over four years old, to a Petition as well, it has no such effect where the property is **not** income-producing, which phrase, the Rule's reference to owner-occupiers notwithstanding, per *White Plains, Avis, Federated, and Norton*, includes *inter alia* the property of an owner-occupier of a business. Thus, petitioner Club was not required by 202.59 to verify its business income and expenses prior to filing and service of a Note of Issue.

Income and Expenses Nevertheless Discoverable

Matter of Mill Riv. Club v. Board of Assessors, 48 A.D.3d 169 (2nd Dept 2007), cited by respondents, is not to the contrary. The main issue in *Mill River* was the proper valuation of a golf course property, in particular the proper capitalization rate and the derivation of a proper market rent for the premises. *Mill River* did not hold that not-for-profit golf courses such as the subject are income-producing properties; to the contrary, it only held that such properties are properly valued as income-producing properties, by use of the Income Capitalization Method.

However, *Mill River* is also significant for affirming the traditional method of appraising golf courses, first set forth in the unreported decision *New Country Club of Garden City v. Assessor, County of Nassau* (Supreme Court, Nassau County, Rossetti, J., June 4, 1991.) In *New Country Club*, the Court found that the net income to be computed for the premises under the Income Capitalization Method relates to the rent which might be attributable to the property, which in turn is derived from the revenue generated by the course. Since operation of a not-for-profit course would inevitable show less revenue and, potentially, greater expenses (since operation is for the benefit of the members rather than with an eye to profit), the proper calculation of revenue would be under the assumption that the private, not-for-

profit golf course would instead be operated as a public or semi-private for-profit course. This revenue would be used to generate a market rent, from which market expenses would be deducted, and the resulting Net Operating Income would then be capitalized to show present market value.

The essence of this calculation, as argued by petitioners, is, of course, a hypothetical construction of revenue and expenses based on optimal operating conditions, rather than reliance on the actual income, expenses, and condition of the premises. Nevertheless, as the Court in *New Country Club* noted, and as respondents properly argue, "...the actual income of subject certainly provides valuable and usable data from which to derive market value...." Consequently, while production of an income and expense statement was not compelled here prior to filing of a Note of Issue under 202.59, an income and expense statement is undeniably relevant and material to the appraisal problem for the subject golf course, and therefore, discoverable.

Discovery in Tax Certiorari Proceedings

CPLR 3101 (a) provides in part:

a) **Generally.** There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:

(1) a party, or the officer, director, member, agent or employee of a party;

(2) a person who possessed a cause of action or defense asserted in the action;

However, it is well-established that proceedings commenced pursuant to RPTL Article 7 are Special Proceedings as provided-for in CPLR Article 4, and thus are governed by the discovery rules set forth in CPLR §408. (See *Xerox Corp. V. Duminuco*, 216 A.D.2d 950 [4th Dept. 1995]--"Because this proceeding was commenced pursuant to RPTL Article 7, disclosure is governed by CPLR 408, which requires leave of court."

CPLR § 408 provides

§ 408. Disclosure. Leave of court shall be required for disclosure except for a notice under section 3123.

While the Court is loath to permit discovery at this late date, not only is the income and expense data possibly of

importance to respondents' appraisers' work, but the trial in this matter has already been delayed by the instant motion practice, which is partly due to respondents' waiting until **after** the scheduled trial date to move for dismissal, despite their knowing well in advance of that date of possible dismissal grounds. Further, they likely were well aware that, beyond the possibility of moving to dismiss for petitioner's alleged failure to comply with Rule 202.59, the income and expense information sought was subject to compulsory disclosure under CPLR § 408 and Article 31. Consequently, so long as application is promptly made for the sought information, the Court will treat the instant motion to strike the Notes of Issue for failure to serve income and expense statements, and thereupon to dismiss the Petitions for untimely filing of Notes of Issue, as a motion by respondents seeking leave of Court to compel disclosure of the subject's income and expenses.

Upon the foregoing papers, it is hereby

ORDERED, that the motions by respondents for Orders striking petitioner's Notes of Issue for the tax years 1999 through and including 2004, for failure to provide discovery, income and expense statements for each of the tax years at issue, in a timely manner, is hereby denied; and it is further

ORDERED, that the respondents, individually or collectively, are granted leave of Court pursuant to CPLR §408 and Article 31, to seek to compel production by petitioner, by way of a Demand for Discovery and Inspection or otherwise, of an Income and Expense Statement for the subject property, solely insofar as such action by respondents or any one of them to compel said disclosure is taken within 30 days of the instant Order.

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

Dated: White Plains, New York
May 18, 2009

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