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

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In the Matter of the Application of

UNITED STATES POSTAL SERVICE,

Petitioner,

- against -

THE ASSESSOR, THE BOARD OF ASSESSORS AND THE BOARD OF ASSESSMENT REVIEW OF THE TOWN OF BEDFORD AND THE TOWN OF BEDFORD,

Respondents.

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

DECISION/ORDER

Index Nos:
14632/99
14066/00
16418/01
16945/02
15702/03
14394/04
16420/05

Motion Date:
1/23/08

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LaCAVA, J.

The following papers were considered in connection with this application by petitioner for an Order granting Re-argument of respondent's motion for an Order striking petitioner's Notes of Issue in each of the pending tax years, for failure to provide discovery in a timely manner, and upon said striking, to dismiss the petitions relating to tax years 1999 through and including 2002, for failure to timely file Notes of Issue for each of those tax years, and, upon re-argument, denial of said motion:

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIRMATION/EXHIBITS	1
AFFIRMATION IN OPPOSITION/EXHIBITS	2
MEMORANDUM OF LAW	3
AMICUS BRIEF	4
AFFIRMATION IN REPLY/MEMORANDUM OF LAW	5

In this tax certiorari matter, petitioner seeks re-argument of the Court's Decision and Order, dated October 2, 2007, which

granted the motion by respondent (Town) seeking an order striking the Notes of Issue in each of the pending tax years, for petitioner (Postal)'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 2003, for failure of petitioner to timely file Notes of Issue for each of those tax years.

Respondent asserts that Postal timely filed petitions challenging tax years 1999, 2000, 2001, and 2002. The petitioner then, in 2003, served upon respondents a document it described as a statement of income and expenses pursuant to 202.59 of the Uniform Rules for the Supreme Court. According to the Town, however, this document merely contained a copy of the lease for the premises to set forth the rental cost; a statement that the actual expenses for the tax years were unavailable; and a further statement that the petitioner would accept "the market expenses as found by the Court plus the reserve for replacements." Subsequently, respondent further asserts, Postal timely filed petitions challenging additional tax years 2003, 2004, and 2005; petitioner then, in 2005, served a similarly-described document, again pursuant to 202.59 of the Uniform Rules for the Supreme Court, which document similarly contained only a copy of the lease for the premises, the statement that the actual expenses for the tax years were unavailable; and the statement that the petitioner would accept "the market expenses as found by the Court plus the reserve for replacements."

Subsequently, in March 2007, respondent filed the instant motion to strike Postal's Notes of Issue, arguing that, the served statements notwithstanding, 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; and urging that, upon the striking of the Notes for said discovery failures, the petitions for each of the tax years 1999 through 2002 should be dismissed for failure of petitioner to timely file Notes of Issue for those tax years.

Upon service of the motion, Postal apparently prepared one purported statement pursuant to 202.59 with IRS Schedule "E" forms for the instant tax years except 2004, setting forth several expenses for those years, and a second purported statement pursuant to 202.59 with an IRS Schedule "E" form for the tax year 2004, again setting forth several expenses for that year, and served said documents upon counsel for the respondent. Petitioner argued both that the prior statements served were proper, or accepted without objection by respondent, and that the untimeliness of the recent

statements is a “mere technicality” upon which Notes of Issue should not be stricken and tax certiorari petitions dismissed, citing, *inter alia, Syms Corp v. Assessor of the Town of Clarence*, 5 A.D.3d 984 (4th Dept. 2004).

Respondent argued in support of its motion that it was not required to reject the earlier statements as insufficient; that compliance with 202.59 is the primary, if not sole, means of discovery in tax certiorari actions involving income-producing property, and thus the lack of said discovery is highly prejudicial; that both the original statements, and the later-proffered new statements (containing the IRS Schedule “E” forms) provided insufficient expense data for the property; and that 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 all held that the failure to timely comply with 202.59 requires the striking of a Note of Issue and, if any petition is in excess of four years old, the dismissal of said petition for untimely filing of the Note of Issue.

In a Decision and Order entered on October 2, 2007, the Court held that the failure to serve and file income and expense statements in compliance with Rule of Court 202.59 (b) requires the striking of subsequently- or simultaneously-filed Notes of Issue, and, if any of the matters are in excess of four years old, the dismissal of those matters as abandoned.

Petitioner now seeks re-argument, arguing that the Court misapprehended issues of law and fact in its October 2, 2007 Decision and Order. Respondent opposes the motion.

As an initial matter, the Court notes that the motion to reargue may indeed be untimely. CPLR 2221 provides

(d) A motion for leave to reargue:

1. shall be identified specifically as such;

> 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
>
> 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

Annexed to petitioner's moving papers, at Exhibit "G", is the Notice of Entry served upon him by counsel for respondent, said service taking place on October 5, 2007. While dated November 8, 2007, the motion was not filed with the Clerk of the Court until November 15, 2007. Even if accorded the five days for mailing pursuant to CPLR § 2103, in the absence of an affidavit of service upon respondent the Court can only conclude that the instant motion is untimely by several days.

In any event, in the exercise of discretion, the Court herewith considers the motion on its merits. Initially, though, as respondent properly sets forth, petitioner failed to include in his instant motion two exhibits–"G" and "H" which he included in his original Affirmation in Opposition to respondent's motion. In fact, petitioner has failed to include **any** of the papers upon which opposition to the motion was initially based except his affirmation, nor **any** of the papers offered by respondent in support of his motion, again except affirmations. Absent inclusion of said supporting and opposition papers, it is very difficult for the Court to intelligently rule on a motion seeking their re-argument. *(Cf. Sheedy v. Pataki*, 236 A.D.2d 92,97 [3d Dept. 1997], *lv. denied* 91 N.Y. 2d 805 [1998]--"a Supreme Court Justice does not retain the papers following his or her disposition of a motion and should not be compelled to retrieve the clerk's file in connection with its consideration of subsequent motions".)

Further, petitioner argues that respondent waived its right to challenge petitioner's income statements, by failing to seek an audit. Respondent properly notes that the Court found that petitioner wholly failed to fulfill its requirement to timely file such statements in compliance with Rule of Court 202.59 (b). As served, the first statements included only a lease as apparent evidence of income, and a statement that expense information was unavailable, which latter assertion was clearly untrue, since when later demanded again petitioner promptly supplied them. The defect

therein is, one would hope, evident--petitioner simply appended the lease as indicative of income for the premises, which it may be to some extent, but it nowhere is accompanied by any affirmative statement as to whether the lease amount reflected the full sum of income from the property. In addition, petitioner declined to provide **any** expense information whatsoever, asserting it was "unavailable".

The second statements were no more compliant, since they provided only an IRS Schedule "E" form for each of the tax years, which forms provided limited evidence of income, and essentially no expense information. Hence, in light of petitioner's default in compliance of its obligation to provide meaningful income and expense statements for the tax years at issue, and particularly in light of the fact that (as set forth in the Decision and Order, and noted below), none of the statements were properly verified, there was no waiver of its right to an audit by respondent's decling to audit.

In addition, the Court declines to find that *Ames Dep't Stores Inc. v. Assessor of Greenport*, 276 A.D.2d 890 (3rd Dept. 2000), or the other cases cited by movant and/or amicus counsel, support petitioner's assertion that a waiver of the right to audit was effected by simply failing to audit, particularly when in *Ames* the petitioner actually complied with the Rule of Court, rather than failing to comply as petitioner here did.

Nevertheless, it is clearly true, as petitioner and amicus point out, that respondent herein neither sought an audit pursuant to the Rule of Court, nor sought to compel disclosure pursuant to CPLR §§ 3124 and/or 3126. Rather, respondent chose to wait until as little as two, and as much as four years after the statements were filed and served, not to challenge the alleged failure to disclose by disputing the accuracy or completeness of the statements themselves, but rather to move to strike the Notes of Issue for such alleged failures.

Having waited so long, the Court is persuaded by the arguments presented by petitioner and amicus that respondent thereby waived its right to so challenge those statements. *Rose Mt. Vernon* (*Rose Mt. Vernon Corp. V Assessor of Mount Vernon*, 1 Misc.3d 906A [Supreme Court, Westchester County, Dickerson, J., 2003], aff'd 15 A.D.3d 585 [2nd Dept. 2005]), cited by respondents as controlling, is distinguishable from the case at bar, as in the former there were factual disputes as to whether or not the statements had **ever** been served on respondents, whereas here there is no doubt that in some form, albeit disputed, service had been made on respondents.

Under these facts, respondents should have either sought to conduct a timely audit, or availed itself of the appropriate provisions of the CPLR to compel disclosure of the income and expenses of the property, rather than waiting years to mount an ancillary challenge to their validity. Such waiting suggests gamesmanship, and effected a waiver of their right to either move to compel production of the income and expenses, or to challenge by way of audit, or to seek to strike the Notes of Issue for any alleged deficiencies in the statements, at least without granting petitioner a reasonable time to cure their alleged default. *Syms Corp. v. Assessor of Clarence*, 5 A.D.3d 984 [4th Dept. 2004; *Cf. CMI Clothesmakers, Inc. v. Knopf*, 91 A.D.2d 675 [2nd Dept 1992].)

The Court also concurs that service upon counsel in this case was not inappropriate.

Upon the foregoing papers, it is hereby

ORDERED, that the motion by respondent for an for an Order granting re-argument of respondent's motion for an Order striking petitioner's Notes of Issue in each of the pending tax years, for failure to provide discovery in a timely manner, and upon said striking, to dismiss the petitions relating to tax years 1999 through and including 2002, for failure to timely file Notes of Issue for each of those tax years, and, upon re-argument, denial of said motion, is hereby granted, and it is further

ORDERED, upon re-argument, that respondent's motion to strike the Notes of Issue, as set forth above, and dismissal of the petitions over four years old, is denied.

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

Dated: White Plains, New York
March 26, 2008

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

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