SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

BROADVAL, L.L.C.,

Plaintiff,

INDEX No. 019296/07

MOTION DATE: May 28, 2009
Motion Sequence # 001, 002

-against-

THE COUNTY OF NASSAU, THE BOARD OF ASSESSORS and/or THE ASSESSOR OF NASSAU COUNTY, THE ASSESSMENT REVIEW COMMISSION OF NASSAU COUNTY, THE NASSAU COUNTY TREASURER, THE RECEIVER OF TAXES OF THE TOWN OF HEMPSTEAD,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X
Affirmation in Opposition..... XX
Affirmation in Support..... X
Reply Affirmation XX

This motion, pursuant to CPLR 3212 by the plaintiff Broadval, LLC, for summary judgment: (1) declaring, ***inter alia***, that certain restored school and general taxes were belatedly imposed without legal authority and in violation of the plaintiff's constitutional, due process rights; (2) expunging those allegedly improper assessments; and (3) directing the

defendants County of Nassau, *et., al.*, [collectively the "County"], to issue corrected tax statements and to refund the allegedly illegal taxes collected, together with statutory interest thereon; and a cross-motion, pursuant to CPLR 3211[a][7] by the County defendants for an order dismissing the amended complaint, are **both** determined as hereinafter set forth.

In August of 2005 – and for the purchase price of $21,250,000.00 – the plaintiff Broadval, LLC ["Broadval"] acquired from the Salvation Army, certain previously tax-exempt real property located at 1641 Dutch Broadway, Valley Stream, New York (*see generally*, Real Property Tax Law ["RPTL"] § 420-a; Cmplt.,¶¶ 7-9; Leistman Aff., ¶¶ 8-11).

It is undisputed that prior to October of 2007, Broadval had not received school or general tax statements for the subject property. In October of 2007, however, Broadval received a "Statement of school taxes, 2007-08 levy" (Leistman Aff., Exh., "5"). Significantly, the foregoing 2007-08 statement contained not only the then current, 2007-08 school tax assessment ($421,763.83), but also included newly "restored" school tax assessments for the preceding two years totaling $1,637,037.39, *i.e.*, the statement included *pro rata* school tax assessments for the 2005-06 and 2006-2007 tax years in the amounts of $598,494.39 and $616,779.18, respectively.

Shortly thereafter, in January, 2008, the plaintiff received a "2008 Statement of Taxes 2008 General Levy" in the sum of $358,429.18. That bill similarly included taxes for the current, 2008 year as well as *pro rata*, restored tax assessments attributable to the 2005, 2006 and 2007 tax years, in the respective amounts of $180,199.35, $457,073.07, and $473,954.23.

According to the plaintiff, the foregoing bills represented the first official notice it received that it was to be held liable for restored school/general tax amounts attributable to the prior tax years referenced above. Broadval does not dispute, however, that it possessed notice of the school and general tax assessments amounts for 2006 general and 2006-07 school tax years, since it apparently filed administrative protests and petitions in connection with those assessments pursuant to Real Property Tax Law ["RPTL"] Article 7.

Shortly after it received the 2007-08 school tax bills with restored tax assessments, the plaintiff commenced the within action for stated declaratory relief, and thereafter amended its complaint upon receipt of the 2008 general tax statement.

Notably, the plaintiff advises that it has since paid the balance of the protested school and general tax amounts – $3,106, 693.37.

Issue has been joined and the parties now move and cross move for determinative relief with respect to their opposing claims.

The plaintiff Broadval moves for summary judgment setting aside the restored tax amounts as *ultra vires,* illegal and imposed absent the statutorily mandated notice. The County cross moves to dismiss the complaint pursuant to CPLR 3211[a][7].

Broadval claims, in substance, that stated provisions of RPTL Article 3 govern the taxation and assessment of previously exempted real property and limit the extent to which an assessor may restore so-called "omitted" assessments attributable to prior fiscal years when the property was exempt (*see,* RPTL §§ 520, 551, 553 *see also* RPTL § 550[4-a]; Cmplt., ¶ 42).

In particular, where as here, a restoration is attempted after publication of the tentative roll, the plaintiff contends that the RPTL statutory scheme permits the assessor to restore to only those assessments which have been omitted from: (1) the current tax year; and/or (2) the immediately preceding tax year – and then only if those restorations have been properly authorized in accord with specifically applicable procedures and statutory notice requirements, as imposed by, ***inter alia***, RPTL §§ 520, 553. The Court agrees.

Pursuant to RPTL §§ 302[3], 520[1], formerly exempt property "shall be immediately subject to taxation" in *pro rata* amounts "for the unexpired portion of any fiscal year during which * * * [the] transfer" occurs – and thereafter, in full, for "taxes in any fiscal year commencing subsequent to the date of the transfer * * *" (RPTL § 520[1])(Leistman Aff., ¶ 22). Notably, the RPTL defines formerly exempt properties as "omitted" properties (*e.g.*, RPTL §§ 551[1] *see also*, RPTL § 520[2],[3], [4]).

Despite the inclusive scope of the foregoing statutory language, an "assessor has no power of his own to change the tentative assessment roll after the date for completion," since the only authority "the assessor has to change the roll is that expressly conferred by statute" (***Niagara Mohawk Power Corp. v. Town of Onondaga***, 96 AD2d 1138, 1139 [Boomer, J., dissenting], *rev'd, on dissenting opn*, 63 NY2d 786, 1984).

While the "Legislature has enacted comprehensive provisions for the correction of errors in the roll" (*see*, Real Property Tax Law Article 3, §§ 550-555 (***Niagara Mohawk Power Corp. v. Town of Onondaga***, ***supra***, at 1139 *see also,* ***Tennessee Gas Pipeline Co. v. Town of Chatham Bd. of Assessors***, 213 AD2d 103, 105-106), an assessor does not

possess unfettered authority to unilaterally restore so-called "omitted" assessments at will and without temporal limit (***Niagara Mohawk Power Corp. v. Town of Onondaga***, ***supra***, *see also,* ***Spring Rock Golf Center v. The Board of Assessors of the County of Nassau, et., al***, ___Misc2d___ [Supreme Court, Nassau County 1995]; ***Henkind-Engel Meadowbrook Limited Partnership v The Board of Assessors, et., al.***, ___Misc2d___ [Supreme Court, Nassau County 1996] *accord*, 6 Opn. Counsel, State Board of Equalization and Assessment ["SEBA"] No. 40 [1979] *see also*, 10 Opn. Counsel, State Board of Real Property Services "[SBRPS"] No. 84 [1999] *cf.*, ***Niagara Mohawk Power Corp. v. Town of Clay Bd. of Assessors***, 208 AD2d 170, 172; *Westchester Park Associates v. Unmack*, 123 AD2d 494).

Both this Court and opinions issued by the Office of Real Property Services, have determined that "omitted" assessments attributable to formerly exempt property are generally restorable in accord with the corrective methodologies set forth in RPTL §§ 551, 553 (***Spring Rock Golf Center v. The Board of Assessors of the County of Nassau***, ***supra***; ***Henkind-Engel Meadowbrook Limited Partnership v The Board of Assessors***, ***supra*** 10 Opn. of Counsel, SBRPS No. 84, ***supra***, 6 Op. Counsel SBEA No. 40, ***supra*** [If assessor learns of transfer after completion of tentative roll, "the assessed value may be added to the final assessment roll as an omitted assessment in accordance with the provisions of [RPTL] section 553 * * *"]).

More significantly, and with respect to virtually identical taxpayer claims, this Court has already twice held that corrective restorations involving formerly exempt property may include only those assessments omitted from the current tax year; and/or those omitted from the immediately preceding tax year (*see*, RPTL §§ 520[3], [4], 553[1][c][d]; ***Spring Rock Golf Center v. The Board of Assessors of the County of Nassau***, ***supra***; ***Henkind-Engel Meadowbrook Limited Partnership v The Board of Assessors***, ***supra***; 10 Opn. Counsel SBRPS No. 84, *supra*, at 2; 6 Opn. Counsel, SBEA No. 40, *supra see also*, Opn. of State Controller, 81-223 [1981]["Taxes on omitted parcels may be added to the current year's assessment roll only for the preceding year not for earlier years"]).

Lastly, an assessor must still comply with applicable procedural and notice requirements in order to lawfully accomplish a corrective restoration pursuant to RPTL § 553 (*see*, ***Niagara Mohawk Power Corp. v. Town of Onondaga***, ***supra***; ***Spring Rock Golf Center v. The Board of Assessors of the County of Nassau***, ***supra*** *see also*, 6 Opn. of Counsel, State Board of Equalization and Assessment ["SEBA"] No. 40; 98 NYJur2d, Taxation & Assessment, §§ 382, 392).

Specifically, upon the facts presented at bar, an assessor must, ***inter alia***: (1) petition the Nassau County Assessment Review Commissions for permission to add allowable, omitted assessments to the final assessment roll for the then current tax year; and (2) thereafter, he or she must provide to the property owner, a written notice via certified mail, return receipt requested, which includes a "copy of the Assessor's omission petition and a statement of the time and place of the meeting of the appropriate board of assessment review" (*see*, ***Tennessee Gas Pipeline Co. v. Town of Chatham Bd. of Assessors***, ***supra***, 213 AD2d at 105-106; RPTL § 553[2][b] *see* also, RPTL § 523-b[1],[2][a]; 98 NYJur2d, Taxation & Assessment, § 392).

Here, the plaintiff has demonstrated that the assessor unilaterally, and without jurisdictional authority, added the disputed 2005-06 school and partial 2005, and 2006 general assessments to, respectively, the 2007-08 school/general tax statements and final assessment rolls, *i.e.*, the assessor reached back beyond the immediately preceding year and impermissibly restored assessments which were by then, two and three years old (*see*, ***Spring Rock Golf Center v. The Board of Assessors of the County of Nassau***, ***supra***; ***Henkind-Engel Meadowbrook Limited Partnership v The Board of Assessors***, ***supra***; 10 Opn. Counsel, SBRPS No. 84, *supra*, at 2; 6 Opn. Counsel, SBEA No. 40, *supra cf.*, RPTL § 550[7][c]; ***Niagara Mohawk Power Corp. v. Town of Onondaga***, ***supra***). It bears noting, in this respect, that the RPTL refers to the "fiscal" year as the governing time frame with respect to the restoration of exempted properties (*see*, RPTL § 520[3][4]; Leistman Reply Aff., ¶¶ 21-25 *see also,* LoCurto Opp. Aff., ¶ 11).

Although the assessor would ostensibly possess authority to restore the immediately preceding, 2006-07 school and 2007 general tax assessments to the then current 2007-2008 final assessment roll – assuming proper authorization pursuant to RPTL § 553 – the requisite authorization was never here acquired (***Spring Rock Golf Center v The Board of Assessors of the County of Nassau***, ***supra***, see also, RPTL§§ 520[2],[4], 553[2][b][3]). Specifically, the assessor did not petition the Assessment Review Commission by verified statement of change for authority to enter the foregoing, omitted assessments, which were instead, unilaterally added to the disputed tax statements (***Niagara Mohawk Power Corp. v Town of Onondaga***, ***supra*** cf., ***Tennessee Gas Pipeline Co. v. Town of Chatham Bd. of Assessors***, ***supra***) (Leistman Aff., ¶¶ 43-45). It follows that the assessor also failed to provide notice to the plaintiff in the specific form and fashion expressly required by RPTL § 553 (*see generally*, ***Tennessee Gas Pipeline Co. v. Town of Chatham Bd. of Assessors***, ***supra*** ,*see also*, RPTL § 520).

This Court has previously held that the failure to comply with the foregoing notice requirements constitutes a violation of the statute, precluding recovery of restored taxes (***Henkind-Engel Meadowbrook Limited Partnership v The Board of Assessors***, ***supra***; ***Spring Rock Golf Center v. The Board of Assessors of the County of Nassau***, ***supra***, at 2-4 *see also,* ***Tennessee Gas Pipeline Co. v. Town of Chatham Bd. of Assessors***, ***supra***).

Further, despite the plaintiff's alleged status as a sophisticated commercial entity – and its prior knowledge that the challenged assessments existed – the defendants neither complied with the procedures for authorizing the subject restorations nor provided the mandated notice in the form required by the applicable statutory requirements (***Tennessee Gas Pipeline Co. v. Town of Chatham Bd. of Assessors***, ***supra***, 213 AD2d at 105-106 [since 10-day notice requirement prescribed by RPTL§ 553[2][b] is "mandatory", "[l]ack of prejudice and substantial compliance" is immaterial] *cf.*, ***Feinstein v. Bergner***, 48 NY2d 234, 241 [1979]; ***Arbor Secured Funding, Inc. v. Just Assets NY 1***, 10 Misc.3d 1077(A), 2006 WL 236335 at 6 [Supreme Court, Nassau County 2006]).

Notably, it is settled that "when the particular statute is one which levies a tax," it must be "narrowly construed" in favor of the taxpayer (*e.g.*, ***Debevoise & Plimpton v. New York State Dept. of Taxation and Finance***, 80 NY2d 657, 661 [1993]; ***Yonkers Racing Corp. v. State***, 131 AD2d 565, 566; ***Tennessee Gas Pipeline Co. v. Town of Chatham Bd. of Assessors***, ***supra***, 213 AD2d at 105-106).

Lastly, the Court disagrees with the County's additional assertions that: (1) the claims raised herein are maintainable solely in an RPTL Article 7 proceeding; and (2) the plaintiff failed to exhaust its administrative remedies since it could have raised the claims now advanced in prior-commenced, RPTL Article 7 proceedings.

Preliminarily, both of the foregoing arguments have been made without citation to any supporting case law authorities. It also bears noting that the defendants' exhaustion theory was not expressly raised as a separate affirmative defense or discussed in the County's contemporaneously filed "Affirmation in Support of Answer".

In any event, it is settled that, "[w]hen the taxing authority exceeds its power * * * the taxpayer may challenge its levy collaterally in a plenary action" and that upon doing so, "need not meet statutory conditions precedent or follow the procedures set forth in the Real Property Tax Law because the assessment is void" (***Niagara Mohawk Power Corp. v. City***

School Dist. of City of Troy, 59 NY2d 262, 270-271[1983] *see generally,* ***Kahal Bnei Emunim and Talmud Torah Bnei Simon Israel v. Town of Fallsburg***, 78 NY2d 194, 204-205 [1991]; ***Otrada, Inc. v. Assessor, Town of Ramapo***, 41 AD3d 678, 680).

Further, "[i]t has long been recognized that where the assessor's jurisdiction to tax at all – or the legality of the tax itself – is challenged, one is not required to pursue the [Article 7] remedy, but may use either a CPLR article 78 proceeding or a declaratory judgment action" (***22 Park Place Co-op., Inc. v. Board of Assessors of Nassau County***, 102 AD2d 893 *see,* ***Averbach v. Board of Assessors of Town of Delhi***, 176 AD2d 1151, 1153; ***Krugman v. Board of Assessors of Village of Atlantic Beach***, 141 AD2d 175, 179 *see also,* ***Spring Rock Golf Center v. The Board of Assessors of the County of Nassau***, ***supra***).

The Court has considered the County's remaining contentions and concludes that they are lacking in merit and/otherwise insufficient to defeat the plaintiff's motion for summary judgment.

Accordingly, it is,

ORDERED and that the motion by the plaintiff Broadval, LLC, for summary judgment is **granted** to the extent indicated herein, and it is further,

ORDERED and, DECLARED: (1) that the restored school taxes for the years 2005-06 and 2006-07, as set forth on the plaintiff's statement of "School Taxes 2007-2008 levy;" and the restored general taxes for the years 2005, 2006 and 2007, as set forth in the plaintiff's "Statement of Taxes 2008 General Levy, are hereby expunged from the foregoing tax statements as due and owing; and it is further,

ORDERED that the defendants County of Nassau, *et., al.,* shall issue corrected tax statements and refund the improperly restored tax amounts collected, together with statutory interest thereon, and it is further,

ORDERED that the cross motion to dismiss the complaint pursuant to CPLR 3211[a][7] by the defendants County of Nassau, *et., al.*, is **denied**.

The foregoing constitutes the decision and order of the Court.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated NOV 16 2009

ENTERED
NOV 18 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Stephen A. Bucaria
J.S.C.