

TAX COURT OF NEW JERSEY

Joshua D. Novin
Judge



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NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE TAX COURT COMMITTEE ON OPINIONS

September 22, 2015

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Re: 34 Russo Place, LLC v. Township of Berkeley Heights
Docket No. 002960-2015

Dear Counsel:

This letter constitutes the court's opinion on defendant's motion to dismiss plaintiff's Complaint due to plaintiff's failure to respond to a request for income and expense information from the municipal tax assessor pursuant to N.J.S.A. 54:4-34, commonly known as Chapter 91 (L. 1979, c. 91). For the reasons explained more fully below, defendant's motion is denied.

I. Findings of Fact and Procedural History

In accordance with R. 1:7-4(a), the court makes the following findings of fact based on the submissions of the parties.

Plaintiff, 34 Russo Place, LLC ("plaintiff"), is the owner of real property and improvements located at 22 Russo Place, in the Township of Berkeley Heights, County of Union,

and State of New Jersey (the “subject property”). The subject property is designated Block 1901, Lot 41 on the municipal tax map of the Township of Berkeley Heights (“defendant”).

On June 1, 2014, defendant’s municipal tax assessor mailed, by certified mail return receipt requested, to “the property owner of record, 34 Russo Place, LLC at their address of 1221 Valley Road, Stirling, NJ 07980, a Chapter 91 request for income and expenses” (the “Chapter 91 Request”). Certification of Robert J. Edgar, June 8, 2015, para. 3. Annexed to defendant’s tax assessor’s Certification in support of the motion is a copy of what purports to be the Chapter 91 Request on township letterhead, bearing a date of June 1, 2014, containing the tax assessor’s name, address, telephone and fax numbers and signed by the tax assessor. However, conspicuously absent from the letter is the name and address of the taxpayer addressee and the commonly known address or block and lot designation of the property for which such income and expense information is sought. The letter contains a reference line stating “RE: Block_____, Lot_____”. The Chapter 91 Request annexed to defendant’s motion states in pertinent part:

Dear Property Owner:

You are respectfully requested to submit to this office income and expense data on the enclosed forms. You may submit a copy of the actual leases, rent rolls, and expense ledger; or use the enclosed forms in order to provide the requested information.

Accompanying the Chapter 91 Request was a copy of N.J.S.A. 54:4-34, a form captioned “Annual Statement of Business Income and Expenses Commercial Properties”, a form captioned “Instructions for Completion of Schedule A” and a rental schedule form captioned “Schedule A”. Annexed to defendant’s tax assessor’s Certification is a signed, undated, certified mail return receipt bearing a label addressed to:

Block: 1901 Lot: 41 4B
Property Location: 22 Russo Place
 Berkeley Heights, NJ
34 Russo Place LLC
1221 Valley Road
Stirling, NJ 07980

It is undisputed that the Chapter 91 Request was received by plaintiff. It is further undisputed that plaintiff did not respond to defendant's Chapter 91 Request.

On March 16, 2015, plaintiff filed a Complaint with the Tax Court challenging the 2015 tax year assessment.

On June 8, 2015, defendant timely filed the instant motion seeking to dismiss plaintiff's Complaint under N.J.S.A. 54:4-34, as a result of plaintiff's failure to respond to defendant's Chapter 91 Request. R. 8:7(e). Plaintiff opposed the motion arguing that: (i) the Chapter 91 Request was unclear and ambiguous; (ii) the Chapter 91 Request contains conflicting statements regarding the taxpayer's obligation to submit copies of the leases; (iii) the block, lot, qualifier and street address of the property for which information is sought is not identified on the Chapter 91 Request; and (iv) the reproduced copy of N.J.S.A. 54:4-34 failed to comport with the statutory requirements.

Plaintiff asserts that the Chapter 91 Request did not "identify anywhere, whether on the cover letter or on the enclosed forms, the year for which Taxpayer is required to furnish financial information." Plaintiff further contends that the Chapter 91 Request is both conflicting and contradictory, because the cover letter advises plaintiff that it "may submit a copy of the actual leases...", however the attached Instructions for Completion of Schedule A state, "DO NOT FORGET TO ATTACH A COPY OF EACH LEASE." Finally, plaintiff claims that defendant's assessor failed to enclose an accurate and true copy of N.J.S.A. 54:4-34, due to the following omissions and errors, which plaintiff argues alter the substance of the statute to its prejudice:

Line	Tax Assessor's Enclosure	<u>N.J.S.A. 54:4-34</u>	Deviation from Statute
2	Assessor	Assessor	Improper Capitalization
3	there from	therefrom	Different Phrase
4	Assessor	Assessor	Improper Capitalization
5	Assessor	Assessor	Improper Capitalization
7	Assessor	Assessor	Improper Capitalization
8	Determined	Determine	Past Tense of Determine
9	Assessor	Assessor	Improper Capitalization
12	false and fraudulent	false or fraudulent	"and" instead of "or"
12-13	County Board of Taxation	county board of taxation	Improper Capitalization
16	Assessor	Assessor	Improper Capitalization

Defendant argues in its reply brief that plaintiff failed to communicate to defendant's tax assessor within forty-five days of receipt of the Chapter 91 Request the alleged confusion or the difficulties it faced in responding to defendant's Chapter 91 Request. Thus, defendant asserts that plaintiff should be precluded from raising issues regarding the clarity and precision of the Chapter 91 Request at this time. Defendant maintains that a "cursory look at the Chapter 91 request" reveals the "information sought by the Assessor" and that "there is no room for reasonable doubt as to whether an average owner of an income producing property would have understood the request." Finally, defendant contends that because plaintiff failed to provide the court with a "certification from the Taxpayer showing" that there was any confusion with the Chapter 91 Request, defendant's motion must be granted otherwise it would "render the Chapter 91 statute meaningless" (citing two unpublished Tax Court opinions Raymour Furniture Co. v. Town of Secaucus, Docket No. 000445-2011 and Star Partner Enterprises Two L.L.C. v. Township of North Brunswick, Docket No. 006513-2015) (concluding that plaintiffs failed to provide any proof, by way of affidavit, certification or otherwise, that they found the Chapter 91 requests confusing or ambiguous).¹

¹ Copies of the unpublished opinions were attached to defendant's reply brief in accordance with R. 1:36-3.

Additionally, in a footnote to the reply brief, defendant's counsel states that:

The Town's computerized system prints two identical labels for the Cover Letter and the Certified Return Receipt both of which were used in the Chapter 91 request sent to the Taxpayer. The latter was appended the original certification of Robert Edgar. For this particular property, the labels identified the Block and Lot as 'Block 1901, Lot: 41.' The labels had the appropriate '4B' property classification. The labels further identified the property location as '22 Russo Place Berkeley Heights, N.J.'...The assessor affixed one of the labels at the top of the Cover Letter. Similarly, the assessor affixed the second identical label to the Certified Return Receipt.

Although defendant states that a "certification to this effect can be provided...upon request", no certification from the tax assessor was annexed to defendant's reply brief. Moreover, the statements contained in the footnote to defendant's counsel brief are not evidentiary and does not amount to a certification regarding the procedures employed by the municipality in preparing and mailing out the Chapter 91 requests for income and expense information.

II. Conclusions of Law

N.J.S.A. 54:4-34 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 produce his title papers, and he may be examined on oath by the assessor, 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 on 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 assessor's valuation and assessment with respect to income-producing property where the owner has failed or refused to respond to such written request for information within 45 days...or shall have rendered a false or fraudulent account...In making such written request for information pursuant to this section the assessor shall enclose therewith a copy of this section.

The legislative purpose behind Chapter 91 "is to assist the municipal tax assessors...by affording them access to fiscal information that can aid the valuation" of income-producing

property.” Lucent Technologies, Inc. v. Township of Berkeley Heights, 405 N.J. Super. 257, 263 (App. Div. 2009), rev’d in part, aff’d in part, 201 N.J. 237 (2010); SKG Realty Corp. v. Wall Township, 8 N.J. Tax 209, 2011 (App. Div. 1985); ML Plainsboro Ltd. v. Plainsboro Township, 16 N.J. Tax 250, 256 (App. Div. 1997). Chapter 91 is an elective system for assessors to obtain necessary financial data from taxpayers for income-producing property to fix the full and fair market value of property for purposes of tax assessments. Tower Center Associates v. Township of East Brunswick, 286 N.J. Super. 433 (App. Div. 1996); Westmark Partners v. Township of Deptford, 12 N.J. Tax 591 (Tax 1992). In effect, Chapter 91 provides a mechanism for tax assessors to evaluate a property’s economic records and to reasonably arrive at a fair assessment, thereby potentially “avoid[ing] unnecessary expense, time and effort” which may result in any ensuing tax appeal litigation. Ocean Pines, Ltd. v. Point Pleasant Borough, 112 N.J. 1, 7 (1988) (quoting Terrace View Gardens v. Township of Dover, 5 N.J. Tax 469, 474-75 (Tax 1982), aff’d o.b., 5 N.J. Tax 475 (App. Div.), certif. denied, 94 N.J. 559 (1983).

However, in light of the harsh appeal-preclusion penalties imposed under N.J.S.A. 54:4-34 for failing to timely and adequately respond to a Chapter 91 request, our courts have mandated tax assessors exacting compliance with the statute. Tri-Martin Assoc. II LLC v. City of Newark, 21 N.J. Tax 253, 260-61 (Tax 2004). The statute requires that requests for financial information, including supporting documentation, be served by certified mail, and that the request include a copy of the statute so that a taxpayer will clearly and unequivocally understand the response required and the consequences of a failure to respond. SAIJ Realty, Inc. v. Town of Kearny, 8 N.J. Tax 191 (Tax 1986) (concluding that the failure to include a correct copy of the statute invalidated the Chapter 91 request). Thus, if a tax assessor seeks information from a taxpayer for income-producing property, the assessor “must utilize ‘clear and unequivocal language’ to provide taxpayers with fair notice of their Chapter 91 obligations.” Town of

Phillipsburg v. ME Realty, LLC, 26 N.J. Tax 57, 64 (Tax 2011) (quoting Cassini v. City of Orange, 16 N.J. Tax 438, 453 (Tax 1997)). 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 business persons who may have difficulty reading complex and confusing forms and may lack ready access to legal advice.” Cassini, supra, 16 N.J. Tax at 447. The court cannot close the courthouse doors on a taxpayer seeking relief from a tax assessment unless the taxing district has afforded the taxpayer “fair notice of their obligations in the Chapter 91 requests.” Id. at 450. Thus, the appeal-preclusion provision under N.J.S.A. 54:4-34 is prompted only where “the assessor’s request would be understood by the average owner of an income producing property...” ML Plainsboro Ltd., supra, 16 N.J. Tax at 257. A request for income and expense information that fails to clearly and explicitly identify the financial data and information sought may not form the basis for dismissal of a Complaint. A “property owner that received a Chapter 91 request for which a response is impossible, or for which it is unclear what response is being sought, may not have its appeal dismissed for failure to timely respond to such a request”. Cassini, supra, 16 N.J. Tax at 453. That is not to say, that a Chapter 91 request must be impeccably or faultlessly written, however when there exists “room for reasonable doubt as to whether an average owner of an income producing property would understand an assessor’s request to include a particular kind of information, the benefit of that doubt should be given to the taxpayer.” ML Plainsboro Ltd., supra, 16 N.J. Tax 257 (citing to Great Adventure, Inc. v. Township of Jackson, 10 N.J. Tax 230, 233 (App. Div. 1988)).

Here, the Chapter 91 Request was vague and ambiguous. The first sentence of the assessor’s June 1, 2014 requests the taxpayer “submit to this office income and expense data on the enclosed forms.” The attached forms however fail to identify the period for which plaintiff was required to furnish such income and expense data. The average owner of income-producing

property could reasonably interpret defendant's assessor's request to include information for the calendar year ending December 31, 2014 or information for any of the prior calendar years. If plaintiff reasonably interpreted defendant's assessor's June 1, 2014 Chapter 91 Request to include the calendar year ending December 31, 2014, then it would have been impossible for plaintiff to submit income and expense data within the requisite 45 day period, given the fact that six months remained in the 2014 calendar year. Moreover, there is no indication in the Chapter 91 Request with respect to what tax year this income and expense data will be utilized for purposes of fixing the tax assessment on the subject property.

Defendant argues that the court should grant its motion when there is absent a certification from the plaintiff identifying the source of confusion or uncertainty that existed in forming a response to defendant's Chapter 91 Request. This argument is unavailing. Defendant attempts to improperly shift the burden of clarity from municipality to taxpayer. A duty is imposed on municipal tax assessors to employ "clear and unequivocal language" in providing taxpayers with notice of their statutory obligations under Chapter 91. Cassini, *supra*, 16 N.J. Tax at 453. This responsibility arises from the view that the "government has an overriding obligation to deal forthrightly and fairly with property owners. It may not conduct itself so as to achieve or preserve any kind of bargaining or litigational advantage over the property owner. Its primary obligation is to comport itself with compunction and integrity..." F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426-427 (1985) (citations omitted). Thus, in reviewing a request for information under Chapter 91, the applicable standard employed by the court is whether an "average owner of an income producing property would understand an assessor's request" and not the level of understanding of a particular taxpayer or its representative. ML Plainsboro Ltd., *supra*, 16 N.J. Tax at 257. Tax assessors are skilled experts in the field of real property valuation and their level of knowledge, experience and understanding cannot be

imputed to the taxpayer owner of income-producing property. A “taxpayer should not bear the burden of divining the assessor’s intent or purpose in sending a Chapter 91 request”. Cassini, supra, 16 N.J. Tax at 453. “When there is ‘room for reasonable doubt as to whether an average owner of an income producing property would understand an assessor’s request...the benefit of that doubt should be given to the taxpayer.” Town of Phillipsburg v. ME Realty, LLC, 26 N.J. Tax 57, 68 (Tax 2011) (quoting ML Plainsboro Ltd., supra, 16 N.J. Tax at 257)).

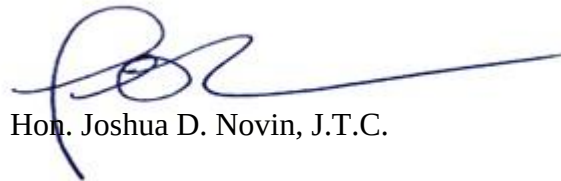
Given the lack of precision and clarity in defendant’s Chapter 91 Request, and the harshness of the remedy imposed on a taxpayer for not providing a response under N.J.S.A. 54:4-34, this court shall resolve such doubts in favor of the plaintiff.

In view of the court’s ruling on the indistinctness and ambiguity of defendant’s Chapter 91 Request, the court need not address plaintiff’s asserted property identification deficiencies in defendant’s Chapter 91 Request or plaintiff’s alleged misstatements in defendant’s copy of N.J.S.A. 54:4-34.

III. Conclusion

For the above-stated reasons, the defendant’s motion is denied. An Order reflecting this opinion will be simultaneously entered herewith.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'J. Novin', with a long horizontal line extending to the right.

Hon. Joshua D. Novin, J.T.C.