

NOT FOR PUBLICATION WITHOUT APPROVAL OF  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

TAX COURT OF NEW JERSEY

Kathi F. Fiamingo  
Judge



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COMMITTEE ON OPINIONS

March 27, 2017

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RE: 129 Newark. L.L.C. v. Director, Division of Taxation  
Docket No. 007651-2016

Dear Counsel:

This letter constitutes the court's opinion with respect to the Director, Division of Taxation's motion to dismiss plaintiff's complaint with prejudice for lack of subject-matter jurisdiction pursuant to R. 4:6-2(a). The issue presented by the Director's motion is the timeliness of the plaintiff's claim for refund of the realty transfer fee paid. Based on the undisputed evidence before the court, plaintiff's claim for refund was made beyond the statutory period of time to claim a refund of the realty transfer fee. Thus, the court has no jurisdiction over plaintiff's claim and the complaint is dismissed. As a result, plaintiff's motion to compel discovery is also denied.

## I. Procedural History and Findings of Fact

The court makes the following findings of fact based on the pleadings, moving papers and certifications submitted herein. The facts of this matter are not in dispute.

Plaintiff, 129 Newark, LLC (“plaintiff”) purchased a parcel of real property located in the City of Newark. The deeds<sup>1</sup> conveying title were dated September 22, 2015, and were recorded with the Essex County Register of Deeds on or about October 30, 2015. The realty transfer fee was paid at that time. The funds constituting the realty transfer fees were actually “transferred” to the State Treasurer on November 10, 2015. The consideration paid by plaintiff for the parcel was a total of \$2,900,000. At the time of purchase, plaintiff, as grantee, paid a realty transfer fee of \$29,000 as the so-called “Mansion Tax.”

At the time of purchase, the parcel was classified as “Class 4A-commercial property.” Thereafter, plaintiff determined that the property should have been classified as “Class 4B-industrial property.” Plaintiff contacted the assessor of the City of Newark in or about early December 2015. The classification of the property was subsequently changed to Class 4B-industrial property. At least as of January 29, 2016, the assessor’s records reflect the property as Class 4B.

Under date of March 1, 2016, plaintiff filed a claim for refund of the mansion tax portion of the realty transfer fee. The Director denied plaintiff’s claim for refund on March 15, 2016, as being untimely. Thereafter, plaintiff timely filed a complaint in Tax Court contesting the Director’s denial. The Director filed the subject motion to dismiss for lack of subject matter jurisdiction under R. 4:6-2(a), which is opposed by plaintiff. Simultaneously, plaintiff filed a motion to compel discovery, which the Director opposes.

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<sup>1</sup> Title was conveyed to plaintiff by way of two deeds wherein each Grantor transferred a 50% interest as a tenant in common so that plaintiff became the owner of 100% of the transferred property.

## II. Conclusions of Law

### A. Plaintiff's Motion to Dismiss for Lack of Subject Matter Jurisdiction

The Director's maintains that the plaintiff's claim for refund, having been made beyond the 90-day statute of limitations for claims for refund of the realty transfer fee, was out of time.<sup>2</sup> Thus, the Director posits that this court has no jurisdiction to hear plaintiff's complaint and it must be dismissed.

The defense of lack of subject matter jurisdiction is non-waivable and may be raised at any time. Macysyn v. Hensler, 329 N.J. Super. 476, 481 (App. Div. 2000). A motion to dismiss for lack of subject matter jurisdiction under R. 4:6-2(a) "shall be heard and determined before trial on application of any party, unless the court for good cause orders that the hearing and determination thereof be deferred until the trial." R. 4:6-3. The Director has brought this motion on the facts as alleged by the plaintiff in its complaint contending that the facts clearly demonstrate that the claim for refund is untimely and that the court lacks subject matter jurisdiction as a result. There is no dispute between the parties on the facts which inform the court's decision hereunder.

In addition to ordinary recording fees, N.J.S.A. 46:15-7 et seq. imposes a fee on all non-exempt transfers of realty, commonly referred to as the "realty transfer fee." The fee is calculated with reference to the total consideration paid for the transfer of real property. In general, the fee is imposed upon the grantor. N.J.S.A. 46:15-7.1(a). An additional fee is imposed on the grantee for the transfer of certain real property with consideration exceeding \$1,000,000. N.J.S.A. 46:15-7.2(a). Specifically, as relates to the subject matter, a fee of 1% of the total consideration paid is

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<sup>2</sup> Plaintiff contends that the statute of limitations should commence on November 10, 2015, the date the funds were "transferred" to the State Treasury. The Director maintains the statute commences to run on October 30, 2015 when the check was delivered to the County Clerk. In either case, the 90-day period would end prior to March 1, 2015 when the claim for refund was made. Plaintiff concedes that there are no facts in this matter under which plaintiff's claim for refund was made within the 90-day statute of limitations.

imposed on the transfer of property classified “pursuant to the requirements of N.J.A.C.18:12-2.2 as Class 4A ‘commercial properties.’” Ibid.

While designated as a “fee” under the statute, the payment is subject to N.J.S.A.54:48-1, the State Uniform Tax Procedure Law. Importantly, N.J.S.A. 54:49-14 of the Uniform Tax Procedure Law providing for a four-year statute of limitations does not apply, and instead a claim for refund must be made “within 90 days after the payment of any original fee.” N.J.S.A. 46:15-7.2(c). Plaintiff maintains that despite the clear and unequivocal language of the referenced statute of limitations, plaintiff’s claim, while admittedly filed more than 90 days after the payment of the fee, was timely because it did not have “standing” to file the claim until after the reclassification of the subject property as Class 4B industrial.

Plaintiff’s claim of lack of standing is conceptually and factually incorrect. Standing, in connection with the right to sue, generally means that a plaintiff must demonstrate “(1) that the challenged conduct has caused the plaintiff actual injury, and (2) that the interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guaranty in question.” Black’s Law Dictionary (10th ed. 2014).

“Standing ‘refers to the plaintiff’s ability or entitlement to maintain an action before the court.’” In re Baby T., 160 N.J. 332, 340, 734 A.2d 304 (1999). Standing cannot be waived. New Jersey Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402, 412, 686 A.2d 1265, (App.Div.1997). New Jersey courts have taken a liberal approach to standing. Dome Realty, Inc. v. City of Paterson, 150 N.J. Super. 448, 452, 375 A.2d 1240 (App.Div.1977). “[The] courts have considered the threshold for standing to be fairly low. In other words, so long as the litigant evidences a sufficient stake with real adverseness, standing will be found.” Reaves v. Egg Harbor Tp., 277 N.J. Super. 360, 366, 649 A.2d 904 (Ch.Div.1994). More specifically, there must be a substantial likelihood that the plaintiff will experience some harm in the event of an unfavorable decision. Loigman v. Township

Committee of the Twp. of Middletown, 297 N.J. Super. 287, 295, 687 A.2d 1091 (App.Div.1997).

Siegfried O. v. Holmdel Tp., 20 N.J. Tax 8, 11-12 (2002).

Plaintiff, at all times after acquiring title to the property and making payment of the mansion tax portion of the realty transfer fee had standing to file a claim for refund. Plaintiff was not required to obtain the reclassification of the property prior to filing the claim for refund. The Director is required to review the Assessor's classification of the subject property when deciding whether to grant or deny an application for refund of the mansion tax. Bordentown Real Estate Associates, LLC v. Director, Div. of Taxation, 24 N.J. Tax 561 (Tax 2009). A denial is subject to review in this court. Ibid. The jurisdiction of the Tax Court extends to decisions of "any county or municipal official with respect to a tax matter" including the realty transfer fee. R. 8:2(a).

Here, plaintiff chose to protest the classification of the property directly with the assessor of the municipality and successfully obtained a reclassification. Thereafter, the plaintiff filed a claim for refund, which was made outside the statute of limitations set forth in N.J.S.A. 46:15-7.2(c). Plaintiff argues that the filing deadline should be extended because it was unable to file the refund claim until after the reclassification of the property. There is no distinction in the statute for filing a claim for refund based on an alleged misclassification of the property or for any other reason. The statute merely provides that "a taxpayer may file a claim under oath for refund at any time within 90 days after the payment of any original fee." Id. As noted above, this would include a claim based on an alleged misclassification of the property as 4A commercial.

Plaintiff's argument that the municipality did not comport itself "scrupulously, correctly, efficiently and honestly" and did not turn square corners in its dealings with plaintiff is not persuasive. See F.M.C. Stores co. v. Borough of Morris Plains, 100 N.J. 418 (1985). Plaintiff purchased property which it knew or should have known at the time of closing was properly

classified as industrial. Plaintiff's representative signed an Affidavit of Consideration on which it was clearly indicated that the property was classified as "Class 4A – commercial property," as a result of which plaintiff paid \$29,000 as the mansion tax portion of the realty transfer fee. If the municipality was mistaken in its classification of the property, plaintiff knew or should have known of the misclassification at or prior to the date of closing. There was no duplicity on the part of the Director or the municipality. There was, at best, a mistake.

Plaintiff simply did not act promptly in accordance with the statute to obtain redress. Plaintiff's reference to F.M.C. Stores, supra 100 N.J. 418 is inapposite. In that case, the court approved the strict application of filing deadlines in the context of municipal tax appeals to attempted appeals by the municipality. In holding that the municipalities were barred from filing late appeals, the court recognized that "[f]ailure to file a timely appeal is a fatal jurisdictional defect." Id. at 425. While plaintiff correctly indicates that the court in F.M.C. Stores found against the municipalities, it did so in recognition that the statute of limitations for filing property tax appeals was as applicable to municipalities as it was to property owners.

Statutory filing deadlines pertaining to tax matters are jurisdictional and if not complied with, an otherwise eligible taxpayer waives his entitlement to any refund. Riteway Rentals v. Motor Vehicles Div. Director, 2 N.J. Tax 117, 119 (Tax Ct.1981); Commercial Refrigeration, Etc. v. Taxation Div. Director, 2 N.J. Tax 415, 419, 184 N.J. Super. 387, 446 A.2d 210 (Tax Ct. 1981). After the two-year limitation period for the filing of a refund application has passed, the State is entitled to assume that its tax revenues need not be refunded under any circumstances. Commercial Refrigeration, supra, at 419, 387 A.2d 210 . As stated by the court in McCullough Transp. Co. v. Div. of Motor Vehicles, 113 N.J. Super. 353, 360, 273 A.2d 786 (App.Div.1971): "Limitation periods for claims for refunds are common administrative provisions found in tax legislation and justified by the need for predictability of revenues by public agencies.

[Pantasote, Inc. v. Dir., Div. of Taxation, 8 N.J. Tax 160, 164 (Tax 1985)]

Moreover, "[p]ublic policy discourages suits for the refund of taxes erroneously paid or illegally collected. It is a 'well-established principle that statutes of limitation applicable to suits

against the government are conditions attached to the sovereign's consent to be sued and must be strictly construed.” (citations omitted) H.B. Acquisitions, Inc. v. Director, Div. of Taxation, 12 N.J. Tax 60, 65 (Tax 1991).

Plaintiff cites to Toys R Us, Inc. v. Director, Div. of Taxation, 300 N.J. Super. 163 (App. Div. 1997) in support of its position that the statute of limitations should be tolled in this matter. In Toys R Us the taxpayer was audited and assessed additional sales and use taxes. During the audit and before the payment of the additional tax, the Director changed its position regarding the assessment of tax in situations identical to that of the taxpayer. The taxpayer did not learn of the change in position until three months later. The taxpayer immediately filed a claim for refund. After the taxpayer’s complaint was dismissed by the Tax Court as a late filed claim, the appellate division remanded the matter to the Tax court to consider whether, on those facts, the taxpayer had equitable grounds for tolling the statute of limitations. Id. at 173.

Unlike the taxpayer in Toys R Us, plaintiff did not rely on any policy or position of the Director which was later changed to taxpayer’s disadvantage. Instead, taxpayer contested the classification of the property by the Municipal Assessor as a result of which the classification was changed.

“[E]ven though courts may have indicated that under certain circumstances, statutes of limitation can and should be relaxed, those rulings to not apply to tax matters where such relaxation is unavailable except in the most extraordinary circumstances.” Trump Plaza Associates v. Director, Div. of Taxation, 25 N.J. Tax 555 (App. Div. 2010) (citing M.J. Ocean, Inc. v. Director, Div. of Taxation, 23 N.J. Tax 646, 652 (Tax 2008).) Those circumstances do not exist here. Plaintiff’s situation is similar to that of the plaintiff in Trump, supra. As noted by the Court:

The Trump Entities willingly, absentmindedly, or carelessly paid (not as the result of an audit by the Division of Taxation) those overcharges.” As a result, “[t]he

Director cannot be said to be equitably estopped from asserting protection under a statute of limitations when so many others responsible for and to the Trump Entities failed to perform basic bill checking so that the Trump Entities could timely assert their rights." Indeed, "[e]quity demands more than good faith; it demands diligence in the protection of one's own interests." H.B. Acquisitions, supra, 12 N.J. Tax at 69.

Trump Plaza Associates, supra 25 N.J. Tax at 566.

Similarly, here, plaintiff failed to discover the undisguised misclassification of its property resulting in the payment of a fee for which it was not responsible. Plaintiff had all of the information regarding the proper classification of the property available to it when it purchased the property. Plaintiff could very well have applied for a refund immediately after closing based on the incorrect classification. Plaintiff would have been timely had it applied on January 29, 2016, when the classification was corrected. Plaintiff did not do so. It is a well-settled principle that "[e]ven where equitable considerations can toll a statute of limitations '[e]quity demands more than good faith; it demands diligence in the protection of one's own interest.'" Estate of Ehringer v. Director, Div. of Taxation, 24 N.J. Tax 599, 617 (NJ Tax 2009) (quoting H.B. Acquisitions, Inc. v. Director, Div. of Taxation, 12 N.J. Tax 60, 69 (Tax 1991)).

A taxpayer's failure to comply with the applicable limitations period is "of particular concern in tax matters, given 'the exigencies of taxation and the administration of . . . government.'" Millwork Installation, Inc. v. State Department of the Treasury, Division of Taxation, 25 N.J. Tax 452, 459 (Tax 2010) (quoting F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 424, 495 A.2d 1313 (1985)). The court's strict adherence to "limitation period[s] is mandatory and is justified by the need for predictability of revenues by the State." McCullough Transportation Co. v. Motor Vehicles Division, 113 N.J. Super. 353 (App. Div. 1971). In the area of taxation "statutes of limitation and limitation periods play a vital role. Legislative policy has consistently followed the salutary principle that proceedings concerning tax assessments and governmental fiscal matters



be brought expeditiously within established time periods." L.S. Village, Inc. v. Lawrence Township, 8 N.J. Tax 287 (Law Div. 1985), aff'd, 8 N.J. Tax 327 (App. Div. 1986). After expiration of the applicable limitations period, the Director is entitled to assume that an assessment is final, and is not subject to further scrutiny by the court. Commercial Refrigeration & Fixture Co., Inc. v. Director, Div. of Taxation, 2 N.J. Tax 415, 419, (Tax 1981).

A "failure to file a timely appeal is a fatal jurisdictional defect" and if a plaintiff fails to file within the prescribed time frame, that plaintiff is proscribed from an appeal in the Tax Court and any consideration of its case on the merits. F.M.C. Stores v. Borough of Morris Plains, supra 100 N.J. at 425. The burden of timely filing falls squarely and solely upon the taxpayer. Slater v. Director, Div. of Taxation, 26 N.J. Tax 332, 334 (Tax 2012) citing Dougan v. Director, Div. of Taxation, 17 N.J. Tax 110 (App. Div. 1997).

The Tax Court lacks jurisdiction to hear the complaint of a taxpayer which was not filed within the applicable 90 day period. See Clairol, Inc. v. Kingsley, 109 N.J. Super. 22, 25, aff'd 57 N.J. 199, 270 (1970); FMC Stores v. Morris Plains, supra 100 N.J. at 423-25; Slater v. Dir., Div. of Taxation, 26 N.J. Tax 322, 333 (2012); Off v. Dir., Div. of Taxation, 16 N.J. Tax 157, 164-66 (Tax 1996); Peoples Express v. Director, Div. of Taxation, 10 N.J. Tax 417, 424 (Tax 1989). Once this statute of limitation has expired, the Director is entitled to assume that his determination is final and is not reviewable. Slater v. Director, Div. of Taxation, supra 26 N.J. Tax 333.

#### B. Plaintiff's Motion to Compel Discovery

Plaintiff suggests that the Director's application for dismissal in this matter is premature because discovery has not been completed, yet plaintiff has provided this court with no proffer as to what circumstances could be uncovered that would change the result of the court's decision. Plaintiff has identified no action or official position of the Director upon which the plaintiff relied

in delaying a claim for refund. To the extent the Director may (or may not) have treated other taxpayers in similar situations differently has no effect on how the plaintiff acted in this matter. Plaintiff has not alleged that it relied on any policy or procedure upon which it relied in awaiting a decision of the Assessor before filing its refund claim. Plaintiff simply failed to timely apply for a refund through no fault of the Director. No further discovery can lead to any different result.

During oral argument counsel for plaintiff suggested that discovery may lead to the identification of some communication between the assessor and the Director informing the Director of a change in the classification that should have spurred some action by the Director with respect to the realty transfer fee. The court rejects plaintiff's suggestion that the Director had some obligation to act without need of a claim for refund by the plaintiff. To the contrary, the burden of filing a timely refund claim rests "squarely and solely upon the taxpayer." Dougan v. Director, supra 26 N.J. Tax at 334.

Plaintiff insists that it could not discover the error of the municipal assessor's misclassification of the property and yet that is exactly what occurred. Plaintiff contends that it did not know that the property it was purchasing was industrial until several weeks after the closing. All of the information necessary to make a determination of the actual use of the property and its misclassification as 4A commercial was within the plaintiff's knowledge and control at least as early as the closing date. Yet, plaintiff contends that it could not have known that the property it was purchasing was industrial and not commercial until some time after the closing. No amount of additional discovery will cure the plaintiff's failure to act in this matter. Plaintiff's motion to compel discovery from the Director is denied.

### III. Conclusion

The Director's motion to dismiss the complaint is granted. Judgment will be entered accordingly.

Very truly yours,

/s/Kathi F. Fiamingo, J.T.C.