Commercial net tenants finally get a win with their property tax burden - by Douglas Atkins

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Net tenants can breathe a sigh of relief with regard to having a fair property tax bill thanks to a recent New York court decision.

In New York, as in most states, commercial properties are entitled to a fair tax assessment, which includes accurate valuation, classification and exemptions. An error or unfair assessment would mean that a taxpayer is being over-charged. The only remedy to the taxpayer is to challenge the assessment by filing a tax grievance.

State law says that an “aggrieved party” has the right to challenge a property tax assessment. The most obvious aggrieved party is a property owner, but case law and custom reasonably expanded to include others whose pecuniary interest were affected, namely: net tenants, contract vendees, mortgagees and others.

A net tenant’s right to challenge the property tax was a logical and fair application of the law. A typical net lease puts nearly all expense obligations onto the tenant: property tax, insurance, utilities, security, landscaping, snow removal, etc. Along with these obligations comes rights. Obviously, the right of property possession is first on the list. Additionally, net tenants typically have rights to manage the property to their liking and control their costs. Any net tenant would want to exercise the right to challenge their most significant real estate expense - the property tax. Further, since the tax challenge period can be as short as three weeks, it is an in-possession tenant who is in the best position to meet the deadline and file a tax challenge.

For decades, this legal interpretation and custom were unquestioned; net tenants regularly filed tax challenges.

Starting in 2012, there were a string of illogical state appellate court decisions which construed statutes to mean that only a property owner could challenge a tax assessment. This was manifestly unfair to net tenants and other parties whose financial interests could be harmed.

Tax assessing municipalities began using these misguided appellate court decisions against those who had a direct financial interest in the property tax. The most common example was the preclusion of a net tenant’s right, but there were other casualties. Contract vendees could normally file a tax assessment challenge simply as a matter of due diligence, but now they needed the seller (still the legal owner until closing) to meet the deadline and file their own challenge. Even wholly owned subsidiaries and related entities (e.g. Acme Realty Co. who owns the real estate versus Acme Operating Co. who pays the taxes) were on shaky ground if the tax assessment challenge was not filed in the “proper owner name.”

In short, unless you were the clear, titled owner of the real property, you should prepare to be told you had no right to challenge an unfair tax assessment. At best, you would need to chase down an uninterested owner’s cooperation. At worst, your case would be dismissed and you would be over-charged on your property tax.

Thankfully, New York’s highest court, the Court of Appeals, recently clarified the law and restored common sense fairness to these net tenants’ tax burdens.

The case, DCH Auto v. Mamaroneck, concerned a car dealership (DCH) who occupied its property as a net tenant with an obligation to pay the property tax. Since DCH was responsible for the taxes, it filed a tax grievance against the Town of Mamaroneck. The town sought dismissal of the matter under the misguided theory discussed above: only the owner of a property could pursue a tax grievance, not a tenant.

Forchelli Deegan Terrana LLP took special interest in this matter as we filed an amicus curiae brief with the court on behalf of the International Council of Shopping Centers (ICSC), a global trade organization consisting of 70,000+ members in over 100 countries, which serves the retail real estate industry. ICSC membership includes thousands of commercial net lessees facing potential harm if the town's argument prevailed.

Fortunately, the Court of Appeals unanimously rejected the town's argument and ruled that a tenant such as DCH had the authority to challenge its tax assessment, even without the owner filing himself. This legally solidified the previously accepted custom: the taxpayer is the one who has the right to challenge its tax assessment, whether it is the owner, the tenant, or possibly a third party.

In the wake of the DCH Auto decision, new best practices emerge. First, it is as true as ever that all commercial taxpayers should be reviewing their tax assessment annually. As stated above, filing periods are very brief and you need to be aware whether you have a legitimate claim for a reduction. Second, landlords and tenants should decide who has the responsibility to review and challenge the tax assessment, and that should be memorialized in the lease. Third, contract vendees should be given the affirmative, contracted right to challenge the property tax assessment and they should do so, especially if the seller will not do so on their own.

In sum, if you are a commercial real estate taxpayer, make sure you are reviewing your tax bill annually. If you have any questions about it, discuss it with your attorney.

Douglas Atkins is a tax certiorari partner at Forchelli Deegan Terrana LLP, Uniondale, N.Y.