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APPELLATE TAX BOARD UPDATE

A periodic report for property owners, appraisers, assessors and attorneys

February 2011

THE YEAR 2010 IN REVIEW

2010 was a particularly busy year at the Appellate Tax Board which issued 59 Findings of Fact and Reports of which 50 involved real estate valuation (the others involved appeals from Commissioner of Revenue decisions). There were some noteworthy decisions on topics such as valuation of a golf course, charitable exemptions and taxation of state-owned historic property. [Complete copies of all decisions are available from the ATB's website: www.mass.gov/atb.]

EYESORES

It's not unusual for a property owner to bemoan the adverse impact of unsightly or unseemly activities in the neighborhood. Only rarely does the property owner prove the case. The owner was successful, however, in Pistorio v. Boston Assessors (March 10, 2010). The case involved a four-unit apartment building valued at about $590,500 in Fiscal Year 2007 and $597,500 in 2009. The owner cited two neighborhood factors which detracted from the value of the property. First, there was an "eyesore" across the street consisting of a brick building painted black with partially boarded-up windows and a dilapidated fire escape. Of further concern was the opening, in May 2007, of an enterprise across the street known as The Dogfather which provided dog daycare, grooming, walking and other related services. This business, according to the apartment owners, generated a considerable amount of noise and foot traffic to the extent that the apartment owners needed to decrease rent for one newly-renovated unit from $1,700 to $1,375 per month and that two other units were vacated because of the noise and traffic. The ATB upheld the assessed value for Fiscal Year 2007 but did acknowledge the deleterious effect from the arrival of The Dogfather as well as the "unattractive" building across the street. These conditions warranted a 2009 reduction in value from $597,500 to $537,500 (there was no 2008 appeal).

Not so fortunate were the owners in Sophia and Susan Gordon v. Newton Assessors (December 8, 2010) who argued that The Teddy Bear Club, a daycare center next door, negatively impacted the fair cash value. Contrasting the evidence in Pistorio, the ATB concluded that the Gordons "failed to provide sufficient detail or information" to support their claim of negative impact.

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HISTORIC MANSE

The rarely-seen application of General Laws Chapter 59, Section 2B arose in Willowdale, LLC v. Topsfield Assessors (March 15, 2010). This law gives authority to the Commonwealth (through its Department of Environmental Management) to lease for commercial use any of 23 designated historic properties. The law seeks to insure that the properties are adequately preserved and maintained and to allow the public access to the historic qualities of these facilities. The property in question was the so-called Palmer Mansion, located in Bradley Palmer State Park, which was leased to Willowdale for use as an inn/bed and breakfast, conference center and banquet facility. Willowdale undertook the cost of restoring the property and was required to make lease payments to DEM. For Fiscal Years 2007 and 2008 the assessors valued the property at about $1.4 Million and $1.3 Million.

Under Chapter 59, Section 2B the real estate is taxed to the tenant, even though it is owned by the Commonwealth, if the property is "used in connection with a business conducted for profit or leased or occupied for other than public purposes." There was no dispute that use of the Palmer Mansion was for profit but Willowdale argued that the mansion was subject to occupancy which was "reasonably necessary to the public purpose of a…park…available to the use of the general public." The ATB concluded that, although the Palmer Mansion was located within Palmer State Park, the facility was not itself a "park" nor was it necessary to use the facility in order to gain access to the park. In addition, the functions (such as wedding receptions) carried on within the Palmer Mansion, in the eyes of the ATB, were not recreational activities for enjoyment by the general public. Willowdale was therefore obligated to pay the real estate taxes. The ATB's decision was upheld in a full decision of the Appeals Court issued on February 16, 2011.

IMPACT OF PRIOR YEAR ATB DECISIONS

Three cases decided in 2010 dealt with the application of General Laws Chapter 58A, Section 12A which essentially provides that a decision of the ATB establishing value for Year 1 shifts the burden to the assessors to justify any increase in assessment for Years 2 and 3. Ordinarily the taxpayer has the burden of proving overassessment. In Hart v. Plainville Assessors (July 28, 2010), for example, a Fiscal Year 2009 case, there had been a previous decision for Fiscal Year 2007 in which the ATB determined that the value of the property should be $382,600. The owner did not appeal the 2008 valuation of $445,600 but did appeal the 2009 valuation of $488,000. At the hearing on the 2009 valuation the Assessors addressed all the issues which had prompted the ATB to order a reduction in value to $382,600 for 2007. This evidence justified an increase for 2009 to the $445,600 value for 2008, but not above that amount, since there had been no evidence that property values had increased from 2008 to 2009.

The assessors were not so fortunate in Ellis v. Norwell Assessors (July 23, 2010) where the ATB's previous valuation for 2007 was $400,000 which the assessors increased for 2009 to $418,800. The ATB found that the assessors had not justified the increase. In fact, the ATB took notice of evidence that properties had decreased in value since the Fiscal Year 2007 appeal. Accordingly, the ATB concluded that the 2009 value should be $383,000. (Apparently there was no contest for Fiscal Year 2008).

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Yet another variation on the application of Section 12A arose in W. A. Wilde Company, Inc. v. Holliston Assessors (May 13, 2010). In this Fiscal Year 2007 case the assessed values for two industrial/office buildings were $3.2 Million and $5 Million. The properties had been subject to previous appeals for Fiscal Years 2005 and 2006 where the ATB found that the property owners had failed to meet their burden of proving that the two properties were overvalued and let stand the assessed values (which were slightly below the 2007 amounts). The owners claimed that the previous decisions for 2005 and 2006 should require that the values for those two years carry forward to 2007. The ATB disagreed since, in the prior cases, it had not made any determination of value; rather the ATB had held that the assessed value was appropriate. This was not the same as an actual determination of fair cash value contemplated by Section 12A.

GOLF COURSE VALUATION

Thanks to a thorough 2010 decision, Black Rock Golf Club, LLC. v. Hingham Assessors (March 1, 2010), we now have the benefit of the ATB's wisdom in valuing a golf course as a going concern.

Black Rock consisted of about of 357 acres of land with a championship 18-hole private golf course, four-level clubhouse, recreational center, an outdoor pool and five outdoor tennis courts. The assessed valuations were $20 Million and $18.6 Million for Fiscal Years 2006 and 2007.

Membership required payment of an initiation fee as well as annual dues and minimum spending requirements in the dining facilities. The club had a cap of 325 full-golf memberships which initially required payment of a $125,000 initiation fee although in more recent years the initiation fee was reduced to $65,000. A large part of the initiation fee ($90,000 of $125,000) could be refunded in certain circumstances if sufficient new members joined the club after a member's resignation.

Dueling Experts

The ATB hearing featured a battle of experts with both sides using the income-capitalization approach. The club's expert analyzed the operation from the standpoint of four income-producing departments: golf, pro shop merchandise, food and beverage and "other" (pool and tennis fees, camps and clinics, etc.) The club's expert's goal was to establish total net operating income for the club and treat this as if it were rent payable to the owner of the property. The expert concluded that "market rents" were about 22% of golf revenue, 6% of merchandise sales, 10% of food and beverage receipts and 5% of "other" revenues.

Using this methodology, the expert concluded that there was about $1.3 Million of total "rent payable" for calendar years 2005 and 2006. He used a capitalization rate of 10%, plus a tax factor, to arrive at a total value of $11.5 Million for 2006 and $12.2 Million for 2007, substantially less than the assessed values noted above. The club's expert supported his income approach with a comparative-sales approach based on five recent golf course transactions.

The assessors' expert also used the income approach but without using the department-specific income/expense analysis. This expert used the income stream from membership initiation fees in two ways. First, this expert calculated the "stabilized annual income" which was attributable to the non-refundable component of these fees. After accounting for annual membership turnover, the expert concluded that the non-refundable deposits yielded stabilized annual income of about $500,000.

The assessors' expert also included in gross revenue the "imputed interest" on both the non-refundable and refundable portions of the membership deposits. He then applied a "safe rate of interest" of about 4.23% for 2006 and 4.37% for 2007 to the deposits. The result was the addition to gross revenues of "imputed interest" income of $1.7 Million and $1.3 Million.

The assessors' expert's use of the imputed income from the deposits was based on an extension of the ATB's decision in the 2003 case of The Willows at Westborough v. Westborough Assessors which involved an assisted living facility. In that case the ATB held that the income stream should include imputed interest on the 90% refundable portion of the residents' entrance fees which were held by the facility prior to being refunded.

The ATB's Solution

The ATB rejected The Willows approach in the Black Rock case. The ATB noted that there was "overwhelming evidence" in The Willows to show that the entrance fees had a downward impact on the charges for living at the facility. In other words, as the entrance fees accumulated, the monthly service fees decreased. As for the Black Rock case, the ATB concluded that "the record is devoid of any evidence correlating the initiation deposit to lower annual dues." Therefore there was no basis to include imputed interest from initiation fees in gross revenues for the club.

Using a slightly lower capitalization rate (9.5%) than the club's expert and slightly higher NOI, the ATB arrived at fair cash value of about $13.4 Million for 2006 and $14 Million for 2007, a bit more than the club's conclusion but still significantly less than the assessed values. Clearly this was not the outcome the assessors were looking for but at least now they have the benefit of the ATB's thinking on valuation of a private golf club. The case is now at the Appeals Court which will hear oral argument on March 10.

GOLF COURSE CLASSIFICATION

In 2009, as reported in last year's Update, the ATB decided that a private golf course, located partially in Harwich and partially in Brewster, was not entitled to have its land classified for "recreational use" under Chapter 61B. The case was Cape Cod Five Cents Savings Bank and Cape Cod National Golf Foundation, Inc. v. Harwich Assessors. The Chapter 61B classification would entitle the course to pay real estate taxes based on 25% of the land value. The beneficial classification is available to "members of a non-profit organization" and in fact the club was leased by a non-profit foundation. The ATB

concluded that the entity was a non-profit in name only, therefore defeating any claim to favorable tax classification.

In 2010, the Appeals Court (77 Mass. App. 1122) upheld the ATB's decision that the recreational land classification was not appropriate. It was clear from the Appeals Court decision that for a number of reasons the relationship between the non-profit foundation which leased and operated the golf club and the trust which owned the land didn't pass the "smell test." As did the ATB, the Appeals Court questioned the alleged charitable status of the foundation, taking note of only $1,500 in charitable contributions on almost $3 Million of income. The Appeals Court also took note of the "swirl of inter-corporate/trust and lease restructuring transactions" which, together with the exclusivity of membership, supported the conclusion that the point of the exercise was "evading properly assessed real estate taxes." The Appeals Court decision was not a full-blown discussion of the merits. Rather, the decision was issued pursuant to the Court's Rule 1.28 which means the opinion has less significance as precedent.

The Appeals Court left open the matter of the Chapter 61B classification for conventional private clubs operated as non-profit corporations with exclusivity of membership but without the sort of suspicious hyjinx that troubled the ATB and the Appeals Court in the Cape Cod case. These private clubs are typically non-profit, members-only entities. In addition, the golf course land is valuable and developable and therefore tempting for local assessors to bring onto the tax rolls. The Chapter 61B classification of these traditional clubs will have to be tested in another case.

CHARITABLE EXEMPTION CASES

It was big news in 2003 when the Roman Catholic Archdiocese of Boston decided to sell prime land in Brighton which included the Archbishop's residence. Fast forward to 2010 and the sale made news again, this time in the form of an important decision from the Appellate Tax Board in Trustees of Boston College v. Boston Assessors (Feb. 4, 2010).

In June 2004, Boston College acquired about 43 acres, including the former residence, for $99.4 Million. All the land had been exempt while owned by the Archdiocese but the City of Boston began taxing Boston College in Fiscal Year 2005.

The details of the timing and prices for the various parcels aren't as important as the uses of the properties which the College claimed (and which the ATB agreed) qualified for the charitable exemption.

A Variety of Uses

As for the actual use during the three fiscal years at issue (as contrasted with the College's future plans), the ATB concluded that a parcel on Foster Street was used to meet the parking needs of the College's administrative staff working in the building known as St. Clement's Hall, although the remainder of this parcel was undeveloped.

As for parcels on Commonwealth Avenue, the ATB credited testimony from the College that some of this land was used to dump excess snow in the winter and that

paved areas were used for overflow parking. The meadow and open areas were used for sunbathing, informal recreational activities (frisbee, whiffle ball, walking and jogging) and for training by the track and rugby teams. The area was "actively maintained" by the College through steps such as pruning trees and mowing the grass.

The ATB agreed with the College that the Foster Street parcel should be exempt for 2005 (the only year in which it was taxed) since the use of the land for parking "facilitated the overall operation of the College." As for the Commonwealth Avenue parcels, the "passive recreational opportunities" promoted the "physical training, and the social [and] moral" advancement of the students. These activities "constituted the occupation of the property in furtherance of [the College's] charitable purpose." The same was true of the use of this parcel for "extraordinary parking needs." Finally, the ATB found that all of the land acquired from the Archdiocese helped maintain open space to provide an "adequate buffer from the surrounding residential neighborhood", a purpose which was consistent with minimizing so-called "town-gown" conflict. The ATB recited that the Archbishop's former residence had been used for at least one fundraising event and for several meetings of College trustees.

Not surprisingly, the Assessors argued that uses such as sunbathing and frisbee-playing were "trivial and incidental" to the charitable purpose of the College and hardly rose to the level of exemption qualification. The ATB rejected this claim as well as the Assessors' argument that, as a matter of public policy, the exemption application ought to be denied since the revenue losses from the ongoing exemption of privately owned land "serves to handicap the city" without an accompanying public benefit. The ATB simply noted that "public policy arguments are for the Legislature's consideration."

The ATB therefore concluded that all of the property should have been exempt, for all years at issue, resulting in abatements totaling about $1 Million. The case shows – to the obvious regret of the Boston Assessors – that an exemption is available for uses other than typical classroom and dormitory buildings.

Elsewhere on Campus

A different slant on the charitable exemption for a college arose in Bridgewater State College Foundation v. Bridgewater Assessors (February 4, 2010). This case involved four properties owned by the Bridgewater State College Foundation which claimed that the properties should be exempt pursuant to General Laws Chapter 59, Section 5, Clause Third.

The Foundation was a charitable foundation "organized and operated exclusively for the benefit of [Bridgewater State College]." The College, in turn, is a "public institution of higher learning." The operating agreement between the College and the Foundation stated that the Foundation was "organized and operated exclusively for the benefit of the College." The specific activities in which the Foundation engaged included the oversight of the College's annual fund, creation of an endowment and administration of scholarship programs.

There was no dispute that the properties in question were owned by the Foundation. Rather, the assessors argued that the properties should not be exempt because they were not "occupied" by a charitable organization but were actually occupied by the College which was a governmental entity which could not be a charitable organization.

As the Foundation demonstrated, certain undeveloped parcels on Plymouth Street, for example, were used for recreational purposes by college students and student clubs and these activities, the ATB found, were "consistent with the charitable purpose of [the Foundation], which was the support of [the College's] educational mission." Another parcel housed the Foundation's office and the College alumni office; another building housed the College political science department; another building, the former College president's residence, was used by the College as well as the Foundation for fundraising events and receptions. The ATB found that "each of these uses advanced the charitable educational mission of [the College] which was the sole purpose of [the Foundation's] organization and operations." The ATB concluded that all of the parcels should be exempt from real estate taxes. The ATB decision has been appealed to the Appeals Court.

Vocational Training

A non-profit was also successful in retaining an exemption in Center for Human Development v. Springfield Assessors (May 20, 2010). CHD used furniture-making as a means to assist individuals with histories of mental illness, substance abuse and trauma. That goal was carried out through Riverbend Furniture whose 75 employees turned out 7,000 pieces of furniture and achieved gross sales of $956,000 (but an operating loss of $121,000) for 2007. The ATB rejected the Assessors' claim that this was a commercial enterprise and concluded that the vocational rehabilitation program was in furtherance of CHD's charitable purpose.

FURTHER EROSION

It's no secret that ATB and court decisions have significantly lowered the bar for qualifying as a "manufacturing" corporation. This trend continued with Onex Communications v. Commissioner of Revenue, 457 Mass. 419 (2010), where the Supreme Judicial Court upheld previous ATB and Appeals Court decisions in favor of the company. Onex was a start-up corporation that developed a new computer chip for the telecommunications industry. Onex, claiming it was a manufacturing corporation, challenged its obligation to pay about $300,000 in use taxes on its purchases of computer hardware and software, lab equipment and fixtures. The Commissioner argued that Onex had only produced prototypes and not a single finished product. The Supreme Judicial Court said a finished product was not necessary as long as Onex was engaged in an "essential and integral" step in the manufacturing process.

"Manufacturing" status has important tax and revenue impacts for a corporation as well as municipalities and the Commonwealth. The corporation is exempt from state use tax and only its machinery is subject to local personal property tax.

APPELLATE TAX BOARD UPDATE

TELCOM
Chapter 59, Section 39 Can Hear You Now

In 2010, the Supreme Judicial Court clarified procedural issues surrounding telephone and telegraph companies. The SJC, through In re Valuation of Bell Atlantic Mobile, 456 Mass. 728 (2010), clarified the scope of the ATB's jurisdiction when a challenge to valuation is brought under the central valuation statutory scheme, i.e., Chapter 59, Section 39. As previously reported in the Update, there was a hard-fought battle led by Newton to establish that wireless companies were not "telephone or telegraph companies" entitled to central valuation by the Commissioner of Revenue. The point was made both at the ATB and the SJC and the cases were then sent back to the ATB for further resolution. The ATB then found itself in the awkward position of dismissing the cases. The ATB reasoned that if the companies were not entitled to central valuation under Chapter 59, Section 39, then challenges to the valuations should not have been brought under Section 39, but rather under Section 65, the standard section used for valuation appeals. The SJC reversed. Looking at the central valuation statutory scheme as a whole, the SJC reasoned that if the Commissioner classified a company as a telephone and telegraph company subject to central valuation under Section 39 at the outset, then both municipalities and taxpayers had the right to challenge both that classification and the valuation, all under Section 39. Thus, even if the Commissioner is in error when she classifies a company as a telephone company, neither the municipality nor the taxpayer must bring parallel actions under both Sections 39 and 65 to bring a challenge. The ATB will have jurisdiction over both classification and valuation under Section 39. With this knowledge in hand, the ATB and the parties have been able to break a logjam of wireless cases and reduce the docket.

An RCN Side-Step Turns into a Taxation Misstep

In MASSPCSCO v. COR and Springfield and Woburn, (May 7, 2010), a wireless phone network's attempt to side-step the RCN-BecoCOM, LLC v. COR, 443 Mass. 198 (2005) decision met with failure before the ATB. RCN-Beco held, among other things, that limited liability companies classified as telephone companies were not exempt from taxation of their personal property under Chapter 59, Section 5, Clause 16, because Clause 16 only applied to corporations, not limited liability companies. Following the RCN-Beco decision, equipment used in the Sprint wireless network became subject to local tax because Sprint Spectrum was an LLC. To avoid this taxation, MASSPCSCO was set up essentially as a corporation to lease the previously locally taxable property to Sprint. The idea was that MASSPCSCO could enjoy the "stock-in-trade" exemptions under Clause 16(2). Following the analysis from the 1983 case, Brown, Rudnick, Freed & Gesmer v. Assessors of Boston, 389 Mass. 289, the ATB rejected the exemption attempt by finding that the new corporation's activities were not undertaken for profit or for a predominantly business purpose, but were instead carried on for the predominant purpose of avoiding taxation. The ATB concluded that MASSPCSCO was properly assessed the personal property taxes which had been appealed. The ATB decision is now before the Appeals Court.

2010 CAPITALIZATION RATE SURVEY			
CASE	TYPE OF PROPERTY	YEAR	ATB % RATE
Black Rock Golf Club v. Hingham Assessors	Golf Club	2006/2007	9.5

(This was only 2010 case where the ATB determined the appropriate capitalization rate.)