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APPELLATE TAX BOARD UPDATE

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

February 2010

THE YEAR 2009 IN REVIEW

It was a busy year at the Appellate Tax Board which issued 50 full decisions on real estate tax valuation cases. As usual, there were plenty of decisions which involved nothing-fancy single family home valuation appeals. At the same time the ATB confronted a wide range of more complex disputes including charitable exemptions; recreational and residential/commercial land classifications; two high end research and development buildings; and valuation of the Boston Gas distribution system.

LESSONS IN CHARITY

The blockbuster case of the year didn't come from the Appellate Tax Board but from the Massachusetts Appeals Court in the form of Mary Ann Morse Healthcare Corp. v. Framingham Assessors (74 Mass. App. Ct. 701). This was the first appellate court decision to apply the new standard for charitable exemption cases which was articulated by the Supreme Judicial Court in New Habitat, Inc. v. Tax Collector of Cambridge (451 Mass. 729) which we reviewed in last year's Update. In New Habitat, the SJC introduced the concept of "traditionally charitable purposes." To the extent that an organization engaged in such purposes, the fees which it charged were less significant in deciding real estate tax-exempt status. The facility in New Habitat was a residence for brain injured persons who paid at least $17,000 per month to stay there.

Mary Ann Morse involved a facility, run by a non-profit entity, with 48 conventional assisted living apartments and common areas in one building. In another building were 40 apartments for residents suffering from Alzheimer's disease and it was this building which was the subject of the decision. The 2008 Update discussed the Mary Ann Morse decision from the ATB which concluded that the facility was not entitled to a real estate tax exemption. That conclusion was overruled by the Appeals Court.

Monthly fees for the Alzheimer's section ranged from $4,100 to $5,920 -- about the same as the fees charged by the facility in Jewish Geriatric Services v. Longmeadow Assessors (61 Mass. App. Ct. 73). In that case, the Appeals Court upheld the denial of the exemption purely on the basis of the level of the fees which, the court concluded, were sufficient to preclude a substantial segment of the population from residing at the facility.

Applying the New Habitat standard, the Appeals Court concluded that the role of the facility in Morse was indeed the "indisputable performance of a traditional public charitable function." The level of the fees was therefore less important.

As with most assisted living facilities, the occupancy agreement at Morse did create some privacy rights in the apartments but the Appeals Court concluded that the residents did not have exclusive occupancy rights. Therefore, this tenancy arrangement did not deprive Morse of a tax exemption. This conclusion was contrary to many previous ATB and appellate court decisions where a tenant-like arrangement was found to be inconsistent with the occupancy by the charity as a whole. Previously, this consideration had been a vital ingredient for an exemption.

Admittedly, Mary Ann Morse dealt only with an assisted living facility for Alzheimer's patients. Looking forward, it doesn't seem like a huge leap for a court to conclude that a facility which deals with non-Alzheimer's residents also performs a "traditionally charitable function" and therefore should be exempt. The rest of the story will therefore need to be told in future appellate court or ATB decisions.

The Year 2009 saw the first ATB case which applied the new "traditionally charitable" concept handed down by the SJC in New Habitat. The case was Straight Ahead Ministries, Inc. v. Hubbardston Assessors (January 5).

The subject was Straight Ahead Academy, a temporary group home for young men, consisting of several buildings on 6.5 acres of land. The Academy was "faith-based" although the ATB found "no religious test for admission." Rather, the Academy was open to young men between ages 16 and 20 "who were planning on independent living and were interested in spiritual growth and leadership." Fewer than a dozen students attended the Academy at any one time but all had been recently discharged from juvenile detention facilities. The Massachusetts Department of Youth Services paid tuition for each of the young men although the majority of the Academy's financial support came from tax-deductible gifts.

Despite the small number of students, male-only limitations and the "spiritual growth" component, the ATB concluded that the Academy fit the "traditionally charitable" mold. Furthermore, the ATB concluded that the Academy eased a burden of government, another exemption factor, by attending to care and education of young men placed by DYS which paid only part of the rehabilitation costs. The assessors have appealed the ATB decision to the Appeals Court.

MATTERS OF CONTIGUITY

Two cases, featuring totally different fact patterns, involved the valuation of adjacent parcels of real estate. First we had Joseph and Anna P. Haley taking on the assessors in Beverly (decided November 24) involving a 4.9 acre parcel with about 470 feet of "sandy frontage on the Atlantic ocean" and improved with two bathhouses. Next door was a 1.2 acre parcel which contained the owners' three-bedroom 4,861-square foot home. The fight was over the essentially unimproved 4.9 acre parcel which the assessors valued at about $2.9 Million for fiscal year 2008. There was no appeal from the $549,700 valuation of the lot with the house.

The owners had acquired both parcels in the same deed and argued that the highest and best use of the undeveloped lot was as an unbuildable vacant parcel which should not be valued in conjunction with the contiguous improved parcel. The owners' expert argued that the lot was only worth $550,000. The ATB concluded that the package approach for valuing the two lots was appropriate. Very simply, the undeveloped parcel would most likely be marketed with the house-parcel to "preserve the unobstructed waterfront views and access" and thereby achieve the highest price for the two parcels. In other words, it was simply not logical to consider splitting off the undeveloped parcel and marketing it separately. The assessors' valuation was therefore upheld.

Centre Avenue Real Estate Trust v. Plymouth Assessors (December 30) also involved contiguous parcels but in this case one parcel was improved with a one-story cottage and the other parcel with two cottages. For Fiscal Year 2008 the assessors valued the properties separately (one for $177,300 and the other for $201,300). The owner argued that the two parcels should be combined for valuation purposes and, using the assessors' usual valuation schedule, the value of the single large parcel would be less than the total of the individually valued separate parcels. Importantly, one parcel was acquired in 1998 and the other in 2005. Early on, the assessors had told the owner that the parcels could not be combined because the owner acquired the parcels in two separate deeds. The owner then transferred both parcels into a new realty trust and once again asked for a single tax bill. The assessors then turned down this request because there were cottages on each parcel. The ATB found no legal basis for requiring the parcels to be combined and agreed that the assessors appropriately assessed the separate lots.

TROUBLE NEXT DOOR

Two cases involved property owners' unsuccessful attempts to prove overvaluation due to allegedly value-depressing activities on nearby properties. In O'Connell v. Danvers Assessors (February 10), the owner claimed her property was adversely impacted by a tree cutting business next door. In O'Shea v. Sharon Assessors (February 13), the owners claimed that a Salvation Army conference center across the street increased traffic and commercial deliveries and the emptying of garbage dumpsters. The ATB denied relief in both instances because the owners failed to come forward with hard evidence to prove whether and to what extent the neighboring activities negatively impacted fair cash value.

NOT BY LAND ALONE

A number of cases decided during the year involved taxpayers' laments that the assessors had overvalued the land component of improved real estate as shown on their tax bills. Merely attacking the land value, the ATB has pointed out, does not get the job done because improved real estate is valued as a single entity. As the ATB has repeatedly stated, "a tax on a parcel of land and a building thereon is one tax....although for statistical purposes they may be valued separately." This principle was at least partly responsible for the unsuccessful appeals in Chater v. Dighton Assessors and Kazakaitis v. Sharon Assessors (both April 13).

On the other hand, the owners in Foley and Lee v. Eastham Assessors (March 11) did it the right way in securing an abatement while focusing on the land value. This case involved a 7,405 square foot waterfront parcel, assessed for $990,200, and improved with a small seasonal cottage, valued at $49,500. Predictably, the owners attacked the land value, claiming that it was over-assessed in comparison to assessments of nearby properties. The ATB took note of the owners' effective use of comparable sales and assessments and was less impressed by the assessors' efforts. While the ATB noted once again that the land and the building are subject to "one tax," nevertheless the component parts "are each open to inquiry and revision" by the ATB in deciding whether the total assessment is excessive. This is particularly true where the total assessment is so heavily weighted on land value. The upshot of it all was a reduction in value of about $200,000.

CLASS ACT

The ATB is rarely called on to resolve disputes over the proper classification of real estate for assessment purposes. Such an occasion arose, however, in Union Street Realty Trust v. Holbrook Assessors (November 3) which involved a 78.6 acre parcel of real estate valued at about $3.5 Million for Fiscal Year 2006 and about $7 Million for 2007. Despite that quantum leap in value, the sole issue in the appeal was the proper classification of the property: the owner claimed it should have been classified as residential while the assessors maintained that commercial classification was appropriate.

When the owner purchased the property it was all zoned business/commercial, although the owner then prepared a master plan which proposed to develop about nine acres with a mix of retail and office space and the remaining 70 acres as a 211-unit residential condominium complex and a four-lot residential subdivision. The Town approved zone changes which were consistent with the owner's project. The planning board also approved a definitive subdivision plan for the entire parcel.

The ATB concluded that the owner had just not gone far enough to qualify for the residential classification, notwithstanding the master plan and the zone changes. Chapter 59, Section 2A(b) sets out several requirements for the classification. First, the classification includes "property used or held for human habitation containing one or more dwelling units...." This step had not been accomplished as of the assessment date, the ATB concluded. Section 2A(b) also allows the classification if the property is located in a residential zone and is subdivided into residential lots. In this case, the definitive subdivision plan was not approved until August 2006, well after the January 1, 2005 and January 1, 2006 valuation dates.

OIL SPILL

It's a really bad day when the home oil delivery man overfills the tank to the tune of about 650 gallons. The unfortunate tale for Fiscal Year 2008 is told in Abdella v. Oxford Assessors (December 4). The oil spill was on January 15, 2004. For Fiscal Year 2007, the owners claimed the severity of the contamination meant the property had no value and the ATB did reduce the assessment from $322,400 to $153,500. For Fiscal Year 2008 the assessors kept the value at that same amount which the owners also challenged.

Mr. Abdella testified that the impact of the spill was so severe that in April 2008 the home had to be demolished except for the foundation. A new home was constructed on the foundation a few months later. The land component of the 2008 value was $128,200. The ATB noted that even if the house had been gone on January 1, 2007, the property still included structural elements such as a one car garage and other features, including a driveway and utility connections. The ATB found that the foundation and the other improvements were worth at least $25,300, bringing the total value (even without a house) to $153,500. So even if the house had been torn down as of the valuation date the assessed value for the land and other improvements was on target.

IS IT REAL OR IS IT PERSONAL

The status of a cell tower was just one of the lessons to be learned from the I. Fred Dicenso Trust v. Wilmington Assessors (April 8) which involved Fiscal Years 2004-06. This was a significant case, involving 65 Industrial Way (4.7 acres with 90,000 square feet of industrial/office/manufacturing space assessed for $1.9 - $3.4 Million) and 80 Industrial Way (about 21 acres with 212,000 square feet of industrial space valued at $4.4 - $7.9 Million). Both parcels had environmental contamination without final closure. The owner claimed the contamination at No. 65 made leasing difficult and attracted a lesser quality of tenant and that the contamination at No. 80 meant the owner needed to "reposition" the property from office to warehouse space at a cost of $6 Million. The owner's expert testified that No. 65 had no value in 2004, a value of $180,000 for 2005 and a value of $260,000 for 2006. He also concluded that No. 80 had no value in 2004, $2.1 Million for 2005 and $1.7 Million for 2006. The owner's expert valued a cell tower on the property at $1.3 Million, although he viewed it as personal, not real, property.

The ATB acknowledged the environmental contamination at both properties but concluded that the owner had failed to adequately describe the real-world impact of those conditions on income, tenant selection and related issues. As for the cell tower, the ATB acknowledged that it was fixed to the ground and could be removed but that the tower, 190 feet tall, bolted with 22 tons of steel to a concrete foundation, 39 feet square and 5 feet deep, was substantial enough to be considered real estate. It was therefore appropriate to include the cell tower in the total assessed value of the real estate at 65 Industrial Way. The ATB decision is now before the Appeals Court.

PRIVATE MATTERS

Private golf clubs which benefit from a Chapter 61B "recreational use" classification might want to keep an eye on local assessors in light of the ATB's decision in Cape Cod National Golf Foundation, Inc. v. Harwich and Brewster Assessors (July 17). The case involved the Cape Cod National Golf Course, located partly in Brewster and partly in Harwich. The facts were a bit tricky: the golf course land was owned by a trust which leased it to a limited liability company which assigned its leasehold interest to Cape Cod National Golf Course Foundation, Inc., a Florida non-profit corporation. The assessors in both towns denied the Foundation's request for "recreational use" classification which bases real estate taxes on just 25% of the land value.

One route to recreational land classification is having the land be "available to the general public or to members of a non-profit organization...." The assessors claimed the golf course was only available to members of a private club and the guests at a nearby hotel. The Foundation's articles of organization did state that it was formed for a number of charitable purposes but, in the real world, it had made only $1,500 in charitable contributions out of the $70,000 "profit" from operating the club. In the eyes of the ATB, the Foundation was simply not a non-profit organization within the meaning of Chapter 61B, Section 1.

While there were some bad-taste facts which apparently made the Foundation look like a smooth operator, there is language in the decision which should give pause to private, member-only clubs which enjoy the benefits of Chapter 61B classification. The case is currently on appeal to the Appeals Court.

In yet another golf course case, the ATB valued a hotel and its Par 3 golf course in SLT Realty Limited Partnership v. Barnstable Assessors (July 27). At issue was the Sheraton Hyannis Hotel which stands on 54 acres, including 30 acres of golf course. The ATB took a different tack than the experts on both sides and valued the land in its entirety, applying the same average value per acre to all 54 acres, including the golf course. In other words the ATB did not call for valuation of the golf course as a separate entity. However, at the end of the day, the entire assessed value of the hotel and land was lowered by $2M one year and $4M in another based primarily on an adjustment to the hotel's occupancy rate.

BIG TICKETS

High valuations were at stake in Vertex Pharmaceuticals v. Cambridge Assessors (November 17). The case involved two buildings, used as laboratory and office space, valued at a total of about $100 Million for Fiscal Years 2005 through 2007. The buildings were leased to Vertex which was obligated to pay more than half the taxes and therefore was eligible to seek tax relief.

As is often the case in a battle of expert witnesses, the contest focused on just a few key elements in the appraisals. One such item was the vacancy rate where the tenant's expert used 15%, which the ATB found to be "reasonable and well-supported by the market data," as contrasted with the 7.5% suggested by the assessors' expert.

On the matter of expenses, the tenant's expert suggested $6/6.25 per square foot over the three years for one of the two buildings and $5/5.25 for the other building. The ATB found these rates to be "more appropriate" than the flat $10 per square foot rate suggested by the assessors' expert for both buildings in all three years.

There was also a good deal of daylight between the two experts' opinions on rent. The tenant's expert suggested a declining range from $33 per square foot (2005) to $31.50 (2006 and 2007) for one building and $36 to $34.25 for the other. The assessors argued for $37.50 to $40 and $45 to $50. The ATB settled on $34.50 to $32.75 on one building and $37.50 to $35.75 on the other.

Interestingly, there was little difference between the experts in the suggested capitalization rate and the ATB ultimately arrived at a range of 9.0% to 8.4% for years 2004 through 2007. At the end of the day the ATB granted abatements of about $163,000 for Fiscal Year 2005, $172,000 for 2006 and $96,000 for 2007. The case is now before the Appeals Court.

PLENTY OF GAS

For 2009 "the big one" in terms of length (106 pages) and value ($223 Million assessed value in personal property and $28 Million in real estate) was Boston Gas v. Boston Assessors (December 16). The real estate was the 34-acre Commercial Point facility owed by the utility (now Keyspan), most of which is used for liquefied natural gas storage and distribution. The personal property was the 6,200-mile network of pipe, storage facilities and related equipment used to operate the massive storage and distribution system.

The scholarly and technical testimony of experts (introduced during 22 days of hearings) need not be repeated here. Essentially, the owner argued that "enterprise sales" of public utilities inflate the actual value of tangible assets (real estate and personal property) by including intangible assets such as intellectual property and brand name. The price directly attributable to the real estate and personal property would not exceed net book value, the owner argued.

The assessors, on the other hand, argued that actual marketplace transactions supported values which substantially exceeded net book value. The ATB was particularly persuaded by the assessors' expert who valued the personal property using a "reproduction cost new less depreciation" approach. The ATB concluded that the fair cash value of the personal property was $248 Million which exceeded the assessed value of $223.2 Million.

As for the real estate, the ATB found that the appraisals of the experts for both the owner and the assessors were "substantially flawed." Very simply, the ATB found itself having to conclude that "valuation of the real property as whole was not possible." Given the presumption in favor of the assessed value, the ATB decided in favor of the assessors.

By agreement with the ATB, the parties went to hearing on only the Fiscal Year 2004 case as a "test year," leaving the 2005-2009 cases for another day. As the ATB stated in a footnote, the 2004 decision should "provide substantial guidance for disposition of the remaining appeals." Notwithstanding that encouragement, the owner has taken the case to the Appeals Court.

TELCOM UPDATE

The year 2009 saw yet another telcom decision, In Re Valuation of MCI Worldcom Network Services, 454 Mass. 635. In this case the Supreme Judicial Court buttoned down basic legal principles and advanced the ongoing litigation squarely into the realm of valuation. The Court confirmed, for the first time on the merits, that a limited liability company could not qualify for the corporate utility exemption (affecting principally its machinery). The exemption eligibility determination date was ruled to be January 1 and not July 1 as argued by the taxpayer. The court rejected the contention that a good result for one community in a central valuation case is a good result for all communities regardless of whether an individual community filed its own petition. Finally, and perhaps most importantly, the Court articulated the standard of review for central valuations determined by the Commissioner of Revenue. As the court put it, "the appellant has the burden of proving that the value of the property is substantially higher or substantially lower than the valuation certified by the Commissioner. If the appellant fails to meet that burden, the Board is not empowered to substitute its own valuation."

ON HIGHER AUTHORITY

The Appellate Tax Board batted .500 in the Supreme Judicial Court's review of Middlesex Retirement System LLC v. Billerica Assessors (453 Mass 495) (covered in the 2007 Update). The SJC concluded that the ATB was correct in holding

that the offices of the retirement system were not exempt from tax under Chapter 59, Section 5, Clause Second. The exemption denial was appropriate since the real estate was not owned by the regional retirement system but by a private limited liability company. As for the personal property, this should have been exempt (contrary to the ATB's conclusion) since it was in fact owned by the retirement system and not the LLC.

The SJC upheld the ATB's conclusion that a limited liability company, since it was not "incorporated", did not qualify for a charitable exemption under Chapter 59, Section 5, Clause Third. CFM Buckley/North, LLC v. Greenfield Assessors, 453 Mass. 404 (covered in the 2007 Update).

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2009 CAPITALIZATION RATE SURVEY			
CASE	TYPE OF PROPERTY	YEAR	ATB % RATE
Vertex v. Cambridge	laboratory/office	2005	9
		2006	8.7
		2007	8.4
SLT Realty v. Barnstable	Hotel	2004	11.3%
		2005	11.1%