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INSIGHTS and Developments in the Law

This May Be the Year to File a Real Estate Tax Appeal

by Andrew T. Fede

The market value of your residential, commercial or investment real property has probably declined in the last few years, but you almost certainly have not seen a reduction in your local property tax assessment or in your property taxes. You should therefore review your 2010 assessment to determine if 2010 is a year in which you ought to file a real property tax appeal.

At the beginning of each year, municipal tax assessors are required to mail to each real property owner a notice of the property tax assessment charged against his or her property. The notice usually is printed on a postcard that you should receive in February.

When you file a tax appeal, you are not really challenging your property taxes; you are challenging the fairness of the assessment of your property, which is used to calculate your property taxes. To win most tax appeals, you need to prove that the actual fair market value of your property is less than its imputed fair market value.

You can calculate this imputed fair market value if you know your municipality's 2010 "average ratio" of assessed value to true value. For example, if your property is assessed at \$500,000 and your municipality has an average ratio of 80%, your property has an imputed fair market value of \$625,000. A qualified real estate appraiser's expert opinion of the current market conditions is essential in most cases to evaluate the fairness of your property's assessment in relation to the property's market value, its imputed market value and the assessment ratio.

If you successfully appeal your 2010 assessment, you are entitled to a refund or tax credit retroactive to January 1, 2010, and, in most cases, your reduction will be "frozen" for three years – 2010, 2011 and 2012. A statute called the Freeze Act in effect "locks in" assessments that are adjusted by a tax appeal judgment or settlement for the tax year under appeal and the next two years. This freeze may not apply:

- If, in future years, there is a change in circumstances (such as an addition or other improvement to the property);

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Estate Planning – 2010 And Beyond

by Andrew J. Cevasco

Much to the dismay of those of us trying to provide good advice to our clients, Congress has left estate planning in a state of extreme flux. By failing to extend the 2009 estate tax exemption (\$3.5 million for estate and GST tax) and by allowing the current law to remain in place, Congress has saddled taxpayers with the following issues:

- The federal estate tax and GST tax are repealed, but only for one year – 2010;
- The federal gift tax exemption limit remains at \$1 million;
- Capital assets inherited in 2010 will be subject to increased capital gains taxes because of the loss of the "step up" in basis on inheritance – except to the extent an executor allocates increased basis to those assets, which allocation is limited to \$1.3 million for non-spouses and \$3 million for spouses;
- Beginning in 2011, the estate tax and GST tax return with a vengeance. Exemption credits are reduced from \$3.5 million to \$1 million and the top tax rate increases from 45% to 55%.

Given this mess and the uncertainty of what future changes may be made by Congress, wills must be reviewed and revised to maximize flexibility. Funding of "credit shelter" trusts using formulas based on

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- If the municipality has completed a townwide reassessment or revaluation; or
- If you obtain certain types of land use approvals or permits for the property.

Tax appeals can be filed with the Tax Court of New Jersey and/or the appropriate county board of taxation, depending on the property's assessed value. The deadline for filing appeals challenging a 2010 tax assessment is Thursday, April 1, 2010. In municipalities that implemented a townwide reassessment or revaluation for 2010, the deadline is extended to May 1, 2010. The filing date deadline should be printed on the card that you receive from the tax assessor.

Although your appeal must be filed in April or May, you probably will not receive your actual 2010 tax bill until after July 1. So if you wait until you receive your tax bill before deciding whether or not to file an appeal, it will be too late for you to challenge your 2010 assessment. You can estimate your 2010 tax bill if you multiply the assessed value stated in the notice of assessment by your municipality's current tax rate that is shown on your last tax bill. Your actual 2010 tax bill is most likely going to be higher, however, and the actual 2010 rate probably will not be available until after July 1.

We recommend that all 2010 tax appeals be filed as early in the year as possible. The proof of a postmark confirming that you mailed an appeal to the Tax Court of New Jersey or the County Board of Taxation does not satisfy the filing deadline. The Court or the County Board must actually receive the appeal papers by the filing deadline.

If after an initial review we believe that there is a basis for an appeal, we may agree to pursue a tax appeal for you on a contingency fee basis or on an hourly fee basis. With a contingency fee, you pay us only an agreed-upon percentage of your tax savings, plus expenses, such as the filing fees and the cost of an appraisal of your property. ▲

If you want to discuss the possibility of filing a tax appeal, please contact Andrew Fede at 201-342-6000, extension 238, or afede@hertenburstein.com.

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the estate tax credit (the traditional approach) will have potentially devastating results for the estates of spouses dying in 2010 because the formulas don't work in 2010. For example, if a husband with such a will and an estate of \$2 million dies in 2010, no funds will be placed in the credit shelter trust because no estate tax exemption exists in 2010. Thus, the wife will inherit his entire estate. If she dies in 2011 with \$2 million in her own assets and the additional \$2 million inherited from her husband, the reduced estate tax credit will cause her estate to pay roughly \$1.5 million in taxes that would have been completely avoided under the 2009 estate tax law. The problem gets worse as the estate assets increase.

Another challenge resulting from the 2010 estate tax law is the limitation on stepped-up basis for inherited capital assets. Capital assets are taxed on the appreciation in value over and above the "basis" in the property. It is the taxpayer's burden to

prove basis in capital assets when they are sold. Thus, it is imperative that clients compile and maintain records to allow heirs to prove their basis in inherited capital assets.

In addition, one of the favored devices to provide the necessary flexibility in estate tax planning is the use in the Will of a disclaimer to trigger creation and funding of a credit shelter trust. This allows the surviving spouse the opportunity to tax plan within the first nine months after decedent's death. However, there are very specific requirements for a valid disclaimer. Thus, you must contact your estate planning attorney for instructions as soon as possible after the death of a loved one, and *before* any bank accounts or investment assets are transferred or any life insurance is collected. ▲

For more information on estate planning, please contact Andrew Cevasco at acevasco@hertenburstein.com.

News from Herten Burstein

Bankruptcy Member **Daniel Gielchinsky** obtained a successful result for firm client United Water New Jersey in a land use lawsuit. The case involved an appeal to the Superior Court of New Jersey from a denial by the Montvale Zoning Board of an application for a use variance and other relief needed to construct a water pumping station on a 1.8 acre site that has been home to a 1.5 million gallon water storage tank since it was constructed in 1960. With Gielchinsky as its counsel, United Water sought permission from the Montvale Zoning Board to construct the pump station in order to enhance its service to a residential area of Montvale that is currently serviced by United Water New York. After thirteen public hearings over the course of a year, the Zoning Board denied United Water's application, and this appeal followed. Superior Court Judge Joseph S. Conte determined that the proposed use is "inherently beneficial," and that the Zoning Board's denial was arbitrary and capricious.

The Real Estate Department closed on representing our client in connection with a \$41 million purchase of four apartment houses in Bergen County.

Real Estate Chair **Arnold Litt** continued to be a Trustee, as well as immediate past Chairperson, at Friendship House, whose mission is to assist people with mental, developmental and physical disabilities to improve the quality of their lives.

Terry Paul Bottinelli, a member of Herten Burstein's Litigation Department, received the Stivale D'Italia Award of Excellence, given annually by *The Italian Tribune* to a select group of Italian-Americans who have honored their heritage, culture and traditions.

Labor and Employment Associate **Dan Ritson** has been appointed as co-chair of the Meadowlands Regional Chamber of Commerce's Small Business Council for 2010. The Small Business Council is one of the Meadowlands Regional Chamber of Commerce's top strategic initiatives for 2010.

Litigation Associate **Christopher Karounos** served as the Master of Ceremonies for the 25th Anniversary Charity Ball for Pangregorian of America Charitable Foundation Inc. Dignitaries present included the Greek Archdiocese's Metropolitan for the State of New Jersey, Consul General for Greece, Consul General for Cyprus and various other state and local political figures. The Charitable Foundation has donated over \$1.6 million to programs helping the needy, especially children in need of medical care and social services. Chris remains active in the Hellenic American Bar Association and continues as treasurer this year.

Business Law Member **Gianfranco Pietrafesa** organized and moderated the annual seminar on Legal Ethics for Transactional Lawyers, sponsored by the New Jersey State Bar Association Business Law Section and the New Jersey Institute for Continuing Legal Education. At the seminar, Franco also gave a lecture on the topic of legal ethics for negotiators. Franco participated in a seminar for Lawline.com, a national on-line provider of continuing legal education for attorneys, where he lectured on the topic of legal ethics in attorney marketing and advertising. Franco was again selected by his peers as one of the New York Area's Best Lawyers® in Corporate Law, as reported in the year-end issue of *New York* magazine and on www.BestLawyers.com. Franco also handles business litigation, and had his updated chapter on preparing complaints in federal court lawsuits published in the 2010 edition of *New Jersey Federal Civil Procedure*, published by New Jersey Law Journal Books.

William Schmidt and **John Fazio**, members of the firm's Business Law group, made a presentation to the Hudson-Bergen Inn of Transactional Counsel on the topic of representations and warranties in joint venture agreements.

Litigation member **Jason Shafron** will continue to serve as co-chair of the Commerce & Professionals Division of the United Jewish Appeal of Northern New Jersey for 2009-2010, and was reappointed to the Board of Trustees. He has also been appointed to chair both the Personnel and Insurance Committees as a Commissioner of the Northwest Bergen County Utilities Authority.

Three attorneys recently published articles in the *New Jersey Law Journal*. Real Estate Department Chair **Arnold Litt** wrote "Right of First Refusal to Lease Additional Space Terminates upon the Expiration of the Lease Term." Litigation member **Jason Shafron** wrote "Commercial Real Estate Litigation Against Guarantors and Debtors is Complicated by Unsettled Case Law." **Daniel Ritson**, an associate in the Labor & Employment Department, wrote "New Incentive for Reasonableness in Settlement Negotiations."

Litigation member **Andrew Fede** was appointed to serve as special counsel to represent the Rochelle Park Planning Board in Superior Court litigation involving one of the Board's determinations. Andrew's biography on James Brooks Dill, the "prototype of the new corporate lawyer who acted as a business's 'constant consultant,'" appears in *The Yale Biographical Dictionary of American Law*. ▲

Buying or Selling a Business Series: Stock Purchase or Asset Purchase

By Gianfranco A. Pietrafesa

Clients come to us when buying or selling a business (for this article, we will assume that the business is a “C” corporation). Many times they have reached an agreement on purchase price and payment terms, but have had no discussions on whether the deal will involve the purchase of stock or assets. In general, a buyer can purchase either the shares of stock from the shareholders of the corporation or the assets of the business directly from the corporation. Part 1 of this article will explain the different legal consequences between the two different deal structures. Part 2, in the next issue of *Insights*, will focus on the different tax consequences between the deal structures.

Purchase of Stock or Assets

In an asset deal, the buyer purchases assets from the selling corporation. The buyer can purchase specific assets, with the other assets remaining with the corporation. Even when the buyer purchases “all” of the assets of a business, the selling corporation often excludes certain assets from the deal, such as cash and personal vehicles used by the shareholders of the corporation.

In a stock deal, the buyer acquires the corporation by purchasing the shares of stock from the shareholders. Typically, the corporation will distribute its cash and transfer certain assets, such as personal vehicles, to the selling shareholders immediately before the closing.

Responsibility for Seller’s Liabilities

In an asset deal, the buyer is usually responsible only for the liabilities that it agrees to assume. The remaining liabilities of the business remain with the selling corporation. In a stock deal, the buyer purchases the corporation, including all of its assets and liabilities. Although the buyer is not personally liable, the liabilities remain with, and will be paid by, the corporation. The buyer will often require the selling shareholders to indemnify the buyer for certain liabilities, including undisclosed liabilities.

Transfer of Assets

In an asset deal, the corporation will have to transfer title of its assets to the buyer. In a stock deal, there is no need to do so because the assets will continue to be owned by the corporation, which will have a new owner – the buyer.

Third Party Consents

The corporation may have important or favorable contracts, licenses or permits. In an asset deal, the buyer and seller will need the consent of third parties to transfer the contracts, etc. from the selling corporation to the buyer. For example, the landlord must consent to a transfer of a lease from the selling corporation to the buyer.

In a stock deal, there is no need to get the landlord’s consent because the tenant will remain the same – the corporation, which will be owned by the buyer. Sometimes, however, contracts, etc. contain change in control provisions requiring the consent of third parties, no matter how the deal is structured.

Conclusion

There are significant differences in the legal consequences between an asset deal and a stock deal, which may affect the purchase price. A prudent client will want to discuss the structure of a deal with legal counsel before engaging in discussions with the other party. ▲

For more information on stock purchases and asset purchases, please contact Gianfranco Pietrafesa at gpietrafesa@hertenburstein.com.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.