NYC Finance

December 29, 2014

RE: Request for a Ruling
Anonymous
Real Property Tax Law
FLR-13-4948

Dear Ms. XXXX:

This is in response to your request for a ruling regarding the application of the Real Property Tax Law ("RPTL") to hypothetical facts concerning whether an air rights parcel is an assessable tax lot.

FACTS:

You have presented the following hypothetical facts:

The Taxpayer owns two tax lots. One lot is improved with a building containing less floor area than is permitted by the applicable zoning district. The owner of the tax lot proposes to sell the building to another party, but retain the right to develop the unused floor area by housing these rights in an air parcel above the tax lot. The air rights parcel will not contain any improvements and is considered the second lot at issue, which for purposes of this inquiry, has been assigned a separate 9000 lot.

ISSUE:

Whether an undeveloped air rights parcel is assessable for purposes of the RPTL?

CONCLUSION:

An undeveloped air rights parcel has no separate assessable value for purposes of the RPTL.

DISCUSSION:

"Air rights" are " 'one of the bundle of rights associated with ownership of the land . . .' " Warren's Weed, New York Real Property, "Defining 'Air Rights' or 'Airspace Rights': Defining Air Rights As Ownership of Above-Surface Property" §6.01(1) (quoting Macmillan, Inc. v. CF Lex Assocs., 56 N.Y.2d 386, 392 (1982)). A property owner has the right "to occupy the space over a designated tract of land" and therefore the " 'air' above the surface level can be conceptually subdivided" to create a horizontal subdivision on a piece of real estate. Id. Generally, a landowner "owns at least as much of the space above the ground as [the landowner] can occupy or use in connection with the land" and the fact that the landowner does not occupy the space above the ground "in a physical sense--by erection of buildings and the like--is not material." United States v. Causby, 328 U.S. 256, 264 (1946).

The United States Supreme Court has further determined, in a condemnation case that, air rights are not real property that can be "taken" and therefore subject to protection under the Fifth Amendment (as applied to the states by the Fourteenth Amendment), nor are they an independent and separate parcel of real property. The court then noted, however, that air rights themselves, separate and distinct from the underlying real property may nevertheless represent an extremely valuable asset. See Penn Central Transportation v. City of New York, 438 U.S. 104 (1978). See also Fred F. French Investing Company Inc. v. City of New York, 39 N.Y. 2d 587, 597 (1976), where the New York Court of Appeals noted that air rights "are an essential component of the value of the underlying property" because it constitutes "some of the economic uses to which the property may be put." Contrast with Mitsui Fudosan (USA), Inc. v. County of Los Angeles, 219 Cal. App. 3d 525, 528 (Ct. App. 1990) where the Court of Appeal of California, Second Appellate District found that when transferrable development rights ("TDRs") are transferred as part of a transaction for furthering new construction with "all the hallmarks of a transfer of real property", then TDRs are a taxable property interest.

Consistent with the above, New York courts have held that in the condemnation context, unless otherwise provided by statue, undeveloped air rights have no independent value, and thus may only be valued as an inseparable portion of the underlying real property. See 3775 Genesee Street, Inc. v. State of New York, 415 N.Y.S. 2d 575 (Ct. Cl. 1979). In the assessment context, cases have held that real property " 'is assessed for tax purposes according to its condition on the taxable status date, without regard to future potentialities or possibilities and may not be assessed on the basis of some use contemplated in the future.' " In the Matter of Stillwell Equipment Corp. v. Assessors for the Town of Greenburgh, 251 A.D.2d 672, 672 (2d Dep't 1998)(quoting In the Matter of Addis Co. v. Srogi, 79 A.D.2d 856, 857 (4th Dep't 1980). See also In the Matter of BCA-White Plains Lanes, Inc. v. Glaser, 91 A.D.2d 633 (2d Dep't 1982). The New York State Board of Equalization and Assessment, the predecessor to Office of Real Property Tax Services and the New York State Department of Taxation and Finance, also issued an opinion stating that unless "specifically provided by statute . . . air rights may not be separately assessed." 8 Op. Counsel SBEA 110 (1986). It should be noted that for administrative purposes only, the Department of Finance has created a 9000 tax lot that is separate and distinct from the parent lot, so as to represent the intangible interest of a property owner in air rights.

In resolving the question pertaining to the taxation of undeveloped airspace, the starting point is the RPTL. That statute provides that all real property within the state is subject to taxation. See RPTL §300. Real property is defined in RPTL §102(12). It includes:

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(b) Buildings and other articles and structures, substructures and superstructures erected upon, under or above the land, or affixed thereto… (emphasis added)

Hence, when air space is improved, the improvements may be assessed since they constitute real property. However, for purposes of this ruling, we have been advised that there are no improvements in the retained development rights. Accordingly, this ruling is limited to unimproved airspace floating over the surface of the land and the existing improvement.

It should be noted that air rights are not discussed in the statute. In fact, there are only two subsections of section 102(12) that even make a vague reference to an intangible right such as air rights, constituting real property.

Section 102(12)(b) of the RPTL provides in pertinent part for real property to mean and include the following:

… the value of the right to collect wharfage, cranage or dockage thereon …

Section 102(12)(h) provides in pertinent part for real property to mean and include special franchises as set forth in subdivision seventeen below:

17. "Special franchises" means the franchise, right, authority or permission to construct, maintain or operate in, under, above, upon or through any public street, highway, water or other public place mains, pipes, tanks, conduits, wires or transformers, with their appurtenances, for conducting water, steam, light, power, electricity, gas or other substance…

In contrast RPTL §564(2) specifically references air rights when providing that leased interests situate on State lands shall be separately assessed and taxed in the name of the lessees.

There are also several other statutes, separate and apart from the RPTL, which define "real property" while at the same time specifically referencing air rights. In these contexts -limited though they may be - the legislature has given its recognition to the theory that air rights may be separately defined from the underlying land, as these statutes provide that air rights are to be considered real property (See Transportation Law §40; Public Authorities Law, §§1972(8); and Education Law, §§452(17) and 476(16)).

Thus, if the legislature had intended that air rights be deemed to be separately assessable real property for purpose of taxation, it would have made a clear provision to that effect in the definition of real property in RPTL §102(12). Accordingly, while for administrative purposes an undeveloped air rights parcel may be a tax lot, the air rights lot will not have a separate assessable value under the RPTL.

The Department of Finance nevertheless reserves the right to review any further information submitted in connection with this inquiry.

Very truly yours,

Diana Beinart
General Counsel
Legal Affairs Division
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