

## Beware the Imposition of Retroactive Real Estate Taxes

By Paul J. Korngold and Grace Betancourt

A recent New York Supreme Court decision affirmed the right of the City of New York to collect retroactively real estate taxes in cases where the City of New York forgot to bill the owners. Although this decision dealt with a retroactive imposition of taxes on a non-residential building, clearly the law applies to residential owners and, particularly, those owners who are receiving tax benefits such as J-51, 421-a, Senior Citizen Rent Increase Exemption ("SCRIE") and other similar real estate tax abatements and tax exemptions.

In *Milea Associates v. New York City Dept. of Finance*, Index 5615/11, NYLJ 1202522237141, at \*1 (Sup. Ct. Kings County decided Oct. 12, 2011) at issue was a property tax exemption given in 1981 to Milea Associates, a Brooklyn company, through the City's Industrial Development Agency ("IDA"). The company agreed to make payments in lieu of taxes ("PILOT") to the IDA that were lower than the normal property taxes the company would have paid on their property if there had been no PILOT in place. The PILOT was scheduled to end when Milea Associates agreed to buy the property from the agency on February 3, 2000. A Tax Directive Letter, dated February 3, 2000, was sent to the Department of Finance to advise them that Milea Associates' PILOT benefits should cease; however, through inadvertent error, the letter was not processed and Milea Associates did not receive tax bills for the period of February 3, 2000 to January 2, 2011. Upon finding the error, the Department of Finance revoked the incorrect exemption and generated a real property tax bill for the period of July 1, 1999 to January 1, 2011 in the amount of \$480,299.03. Milea Associates paid the bill and brought an Article 78 proceeding against the Department of Finance alleging among other things that this imposition of taxes was arbitrary, capricious, unreasonable, unsupported by the facts and contrary to law.

Justice Michael L. Pesce ruled in favor of the Department of Finance, finding that "it is the burden of the taxpayer to make sure that its taxes have been paid" and that the "Department of Finance acted appropriately when it billed petitioner for the taxes that had not been paid since the property's tax exempt status had expired." Justice Pesce also wrote that "the fact that the petitioner therein was not sent tax bills for the subject years, or that the tax rolls were in error so that the petitioner was not taxed in prior years, did not bar the City from levying these taxes for the full period that the property was taxable."

Although the imposition of taxes was scheduled to occur in this case as a result of a sale, owners should not believe that title insurance will cover them against retroactive impositions of real estate taxes. A retroactive real estate tax lien can be imposed after a closing and title insurance will not protect the purchaser unless it was of record on the date of closing. The title company is liable only where the tax lien could have

been discovered by the title company and the title company failed to do so.

A recent audit by City Comptroller John Liu discovered that the city had paid out \$11.8 million through SCRIE benefits to about 4,000 dead beneficiaries. The audit discovered that owners of 3,801 tenants who were dead, some for as long as a decade, continued to receive the benefits because the deceased tenants' households did not inform the owners or the City. City officials say that they have recovered \$3.3 million of the posthumous profits, but say they will continue to collect the rest and implement safeguards to avoid this problem.

Existing owners of multi-family properties, as well as purchasers of multi-family properties, may wish to take the following steps to avoid the retroactive imposition of these charges under each of these programs:

### SCRIE

1. Is the named tenant actually 62 years of age or older and still living in the apartment?
2. Is the apartment still subject to rent control or rent stabilization?
3. Does the beneficiary have an annual household income of \$29,000 or less?
4. Does the beneficiary pay more than one-third of the household's aggregate disposable income for rent?

### J-51

1. Is the property still receiving abatements or exemptions even though the benefits were scheduled to expire?
2. Is the amount of the abatement or exemption accurate?

### 421-a

1. Is the amount of the exemption accurate?
2. Does the scheduled expiration date correspond with the certificate of eligibility and certificate of occupancy?

For both J-51 and 421-a, owners are urged to be sure their rent registrations with the DHCR are timely filed. Our office is presently involved in an Article 78 proceeding where the Department of Finance retroactively imposed a \$750,000 tax lien on a five-family building receiving 421-a benefits for failing to properly register the units with the DHCR.

Owners and prospective purchasers are urged to take similar precautionary steps on properties with DRIE or coop/condo abatements. By properly checking the records of the city agencies as well as the owner's own internal records, the imposition of retroactive real estate taxes can be avoided. ■

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