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– Tony Soprano

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YOU DON'T WANT TO PAY TWICE:

Property Taxes in Common Interest Communities

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No property owner wants to pay more than their fair share of real estate taxes. While every property owner should understand how his or her municipal tax assessor is valuing their property, property owners in common interest communities should be especially vigilant of the potential for double or excessive taxation based upon the existence of common elements or common property in these types of communities. An understanding of the fundamental differences in real property taxation in condominium and fee simple communities, combined with an analysis of some court decisions, can hopefully bring potential areas for double or excessive property taxation to light so that property owners in common interest communities can avoid overpayment.

What Are The Basic Differences In Real Property Taxation For Common Elements In A Condominium And Common Property In A Fee Simple Community?

Property in condominium and fee simple communities is assessed for real property taxes differently. In condominiums, unit owners own their individual unit along with an undivided percentage interest in the common elements. Pursuant to the New Jersey Condominium Act, "all property taxes… imposed by any taxing authority shall be separately assessed against and collected on each unit as a single parcel, and not the condominium property as a whole."[1] Therefore, the common elements in a condominium are not separately taxed, but rather, "the value of the common element is allocated among its owners based on percentages set forth in the condominium's master deed."[2] Therefore, in a condominium community, the real estate taxes attributable to the common elements, which generally include the land in a condominium community and recreational improvements such as clubhouses and pools, are assessed to all unit owners in the condominium as part of the property taxes separately assessed against each unit.

In fee simple communities with homeowners associations, each lot is owned in fee simple by the homeowner and, typically, the association owns certain common property in fee simple on separate individual lots, with such lots containing recreational improvements or other improvements associated with the community. In the fee simple community, both the homeowner and the association are assessed and taxed separately for the lots that they own and the improvements thereon.

> *"Property in condominium and fee simple communities is assessed for real property taxes differently."*

New Jersey Tax Court Decisions Shed Light On Areas Where Common Interest Communities May Be Subject To Over Taxation.

A review of some New Jersey Tax Court decisions points out some of complexities and pitfalls in real property taxation for common interest communities that may result in over-taxation as follows:

- **Condominiums Located In More Than One Municipality:**

In *The Top Condominium v. Township of South Orange*,[3] the New Jersey Tax Court was presented with the juxtaposition of two competing interests: (1) the principle that

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the municipal tax assessor is mandated to impose an assessment on property located in the municipality unless it is specifically exempted; and (2) the provisions of *N.J.S.A.* 46:8B-19 that common elements, including land, as a matter of law are not to be "separately assessed from the condominium units."[4] The condominium community in *The Top Condominium* straddled the boundary of both the Township of South Orange Village ("South Orange") and Maplewood Township. The property comprising the condominium located in Maplewood Township contained all of the units, and each unit received its own separate tax bill from Maplewood Township and no separate tax bill was issued for common elements in Maplewood. The portion of condominium located in South Orange (the "South Orange Property") was only common element portions of the condominium, but had a block and lot designation and was issued a separate tax bill by the tax assessor in South Orange.

The condominium association filed a tax appeal challenging the separate assessment of the South Orange Property claiming it violated *N.J.S.A.* 46:8B-19, in that common elements are not to be separately assessed from the units. South Orange countered that it is required to impose an assessment on property located with its municipal boundaries.

While the Tax Court determined that the matter was not ripe for summary judgment, the Tax Court focused on the fact that the matter would ultimately be resolved based on a determination of whether any double taxation was occurring. In essence, if the association could show that the value of the South Orange Property was incorporated into the assessment of the individual condominium units as determined by Maplewood, it would not be fair for the unit owners through their assessments to have to pay taxes on the same property again to South Orange.

- **Use of Common Elements:**

In *Olde Orchard Village Condo Apartments, Inc. v. Pequannock Township,* the Tax Court determined that a common element utilized as an apartment for rent, where the rent was used to defray condominium expenses, was not to be separately assessed by the municipality.[5] In this instance, a common element originally used as a meeting room was converted to a rental apartment by the association. The tax assessor, upon the change of use of the meeting room to an

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apartment, began to issue a separate assessment and property tax bill for the apartment; however, the association never separately owned the apartment as it was a common element. In finding that the apartment was not subject to a separate assessment, the New Jersey Tax Court analyzed a number of cases and found that the common thread in cases where a condominium association was determined to have properly received a separate tax bill for property was based on whether the condominium association actually held title to the property.[6] The potential for over-taxation exists in this scenario if the value of the rental apartment is included in the assessment of the units and the association additionally receives a separate tax bill for the apartment.

- **Recreational Improvements on Common Property:**

In *Gatherings at Cape May Homeowners Association v. Middle Township,* the Tax Court addressed property taxation in the context of a fee simple community with a homeowners association and, in doing so, tangentially raised the issue of over taxation in the context of recreational improvements

on common property.[7] The court rejected the association's attempt to argue in its tax appeal that language in the public offering statement made the community akin to a condominium so that the common areas on separate lots containing recreation improvements should not receive separate tax bills, but rather, should be taxed as part of the "units". However, the court did not reject the tax appeal filed by the association completely, as a question of whether the lot owners were subject to double taxation still was unsettled. As stated in *Gatherings,* the potential exists for lots in fee simple communities with homeowners associations to be double-taxed as the value of recreational improvements could be included by the tax assessor in the value of each individual homeowner's lot, and the association may still be receiving a tax assessment for the full value of the common property, including any recreational improvements.[8] As the homeowner through their assessments would be paying the tax on the association's property, they in essence would be paying these taxes twice.

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How Can Property Owners And Associations Ensure That They Are Only Paying Their Fair Share Of Property Taxes?

As with all property owners, lot owners, unit owners, community associations should carefully review their property tax assessments, which are sent to each property owner by the municipality each year. Community associations should pay close attention to properties for which they are receiving assessments to ensure that they are not being over-assessed, or improperly assessed for properties for which they should not be assessed. With respect to recreational amenities in fee simple communities, lot owners and homeowners associations should analyze their tax assessments to avoid being assessed twice for the same improvements. It is said that one of the certainties in life is taxes, but it should not be a certainty that you overpay them.[9] ■

(Endnotes)

1. *N.J.S.A.* 46:8B-19.
2. *Olde Orchard Village Condo Apartments, Inc. v. Pequannock Township*, 21 *N.J. Tax* 275, 280-81 (Tax 2004) *(citing N.J.S.A.* 46:8B-3o; *N.J.S.A.* 46:8B-19).
3. *The Top Condominium v. Township of South Orange*, 2012 WL 4465573 (Tax 2012).
4. *Id.* at 3.
5. *Olde Orchard Village Condo Apartments, Inc. v. Pequannock Township*, 21 *N.J. Tax* 275 (Tax 2004).
6. *Id.* at 280-81.
7. *Gatherings at Cape May Homeowners Association v. Middle Township*, 2012 WL 4470900 (Tax 2012).
8. *Id.* at 6-7 *citing Llewellyn Park v. West Orange Tp.*, 224 *N.J.Super.* 342, 346-347 (App.Div. 1988) *(quoting* W. Smith, *New Jersey Condominium Law*, 5-7 (1985)).
9. Benjamin Franklin, Letter to M. Leroy [1789] ("Our Constitution is in actual operation; everything appears to promise that it will last; but in this world nothing is certain but death and taxes.").