BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203	Docket No.: 68603
Petitioner: **RIDGE CENTENNIAL 63 INC.,** v. Respondent: **PROPERTY TAX ADMINISTRATOR.**	

ORDER

THIS MATTER was heard by the Board of Assessment Appeals on August 19, 2016, James R. Meurer and MaryKay Kelley presiding. Petitioner was represented by William A. McLain, Esq. Respondent was represented by Robert H. Dodd, Esq. Petitioner is protesting Respondent's decision to deny an abatement and refund of property taxes for tax years 2013 and 2014.

The subject property is described as follows:

6638 South Nome Street
Centennial, CO
Arapahoe County Schedule No.: 2075-23-4-34-001

Procedural Background

On or about August 17, 2015, Petitioner filed for an abatement and refund of the subject's 2013 and 2014 property taxes with the Arapahoe County Board of County Commissioners. The Arapahoe County Board of County Commissioners partially approved the abatements for both tax years. The subject's original actual value was adjusted from $1,414.632 to $884,145 resulting in a refund of $18,661.72 for tax year 2013 and a refund in the amount of $18,431.73 for tax year 2014.

Pursuant to Sections 39-1-113 and 39-2-116, C.R.S., because the refunds were in excess of $10,000, they were submitted to Respondent for review. In a letter dated December 30, 2015, Respondent denied Petitioner's abatement request for both the 2013 and 2014 tax years on the basis that Petitioner did not own the subject property in those years and therefore lacked standing to

challenge the valuations for years prior to 2015, regardless of whether or not Petitioner paid the taxes for 2013 and 2014.

On January 26, 2016, Petitioner appealed Respondent's decision to the Board of Assessment Appeals. The Board of Assessment Appeals held a hearing in this matter on August 19, 2016.

Factual Background

On October 10, 2013, Petitioner entered into a Commercial Real Estate Purchase and Sale Agreement (hereinafter, the "Sale Agreement") to purchase the subject property from Gas Detection Services, Inc., MCG-HJT, Inc. d/b/a MCG Architecture, and HD Supply d/b/a White Cap Construction Supply (collectively, the "Seller").

The Sale Agreement contained the following provision pertaining to the subject's property taxes:

> Prorations. [. . .] Notwithstanding anything to the contrary herein, Purchaser shall be responsible for and assume the costs for all of the Property's real property taxes, past due and current, as final settlement and shall be entitled to any rebates, if any, that become available prior to or after Closing.

See Petitioner's Exhibit 4, at ¶ 12, *Commercial Real Estate Purchase and Sale Agreement.*

Closing of the sale took place on May 6, 2015, pursuant to the terms of the Sale Agreement (as amended and extended by mutual agreement of the parties). At the closing, Petitioner signed a closing statement (the "Closing Statement"). The Closing Statement contains a detailed break-down of the amount Petitioner paid at closing. Under the "Additional Charges" section, the Closing Statement indicates that Petitioner paid "2008-2013 taxes due through 5/31/15 to Arapahoe County Treasurer" in the amount of $387,191.94 and "2014 Taxes due to Arapahoe County Treasurer" in the amount of $52,274.56. In total, the amount Petitioner paid at closing for taxes was $439,466.50 ($387,191.94 + $52,274.56). *See* Petitioner's Exhibit 6. Petitioner's exhibits included a copy of the title company's cleared check in the amount of $439,466.50 paid to the order of the Arapahoe County Treasurer. *See* Petitioner's Exhibit 7.

Petitioner subsequently sold the subject property by a Special Warranty Deed to a third party.

Arguments

At the hearing, Petitioner argued that:

1. It has standing to challenge the assessments for tax years 2013 and 2014 because it paid the taxes for those years.

2. The Seller had the right to authorize Petitioner to seek abatement of previous property taxes incurred.

3. The language in Paragraph 12 in the Sale Agreement is unambiguous and was an assignment of the abatement and refund rights for tax years 2013 and 2014 to Petitioner. To the extent the Board finds that the language in Paragraph 12 is ambiguous, Petitioner presented an offer of proof and testimony indicating that the Seller and Petitioner intended for the abatement rights to be assigned to Petitioner.

4. No formal assignment language was required between Seller and Petitioner to authorize Petitioner to seek abatement and refund for tax years 2013 and 2014.

5. The Assessors' Reference Library notes that prior owners sometimes give new property owners abatement rights and that a written assignment of abatement rights allows the new owner to file for an abatement for prior years' taxes and keep the refund.

At the hearing, Respondent argued that:

1. While it was possible for Seller to assign the abatement rights for tax years 2013 and 2014, there was no assignment of the abatement rights in the Sale Agreement. Respondent acknowledged that had the abatement rights been properly assigned, Petitioner would have had the right to pursue the abatements for tax years 2013 and 2014, even though Petitioner did not own the property during those years.

2. The language in Paragraph 12 of the Sale Agreement is unambiguous, and it was not an assignment of the abatement rights for tax years 2013 and 2014 to Petitioner. Respondent acknowledges, however, that the language in Paragraph 12 was sufficient to allow Petitioner to challenge the subject property's valuation for tax year 2015.

3. Clear and definite language is needed for a valid assignment, and the language in Paragraph 12 was not a clear and definite assignment. In support of this argument, Respondent noted that Paragraph 12 is entitled "Prorations" and there is no language of assignment in Paragraph 12. Respondent argued that "prorations" involve current year adjustments – not adjustments for prior years. Respondent further noted that Paragraph 12 uses the term "rebate" rather than the terms "abatement" and "refund". Respondent acknowledged that this word choice isn't a fatal flaw but is an indication that in drafting Paragraph 12, the parties weren't thinking about the abatement and refund procedure under statute.

4. In order to have standing to pursue an abatement action, a party must bear the financial burden of the tax. Respondent argued that Petitioner did not bear the financial burden of the 2013 and 2014 taxes because it did not own the property during those years. Instead, Petitioner's payment of the 2013 and 2014 taxes was a voluntary payment.

5. Petitioner does not have standing to pursue an abatement action for tax years 2013 and 2014 because Petitioner did not own the property during those years. The only exceptions to the ownership requirement (where an owner must pay back taxes after acquiring title through foreclosure proceedings and where a lessee is required to pay taxes by the terms of a lease) are not applicable in this case.

Analysis and Findings

The Board finds that Petitioner had standing to pursue the abatement actions for tax years 2013 and 2014.

Generally, the one who bears the financial burden of a tax is a party aggrieved and thus has standing to challenge an assessment. And a previous owner of a property may authorize the new owner to seek abatement of previous property taxes incurred. See *Hughey v. Jefferson Cnty Bd. of Comm'rs*, 921 P.2d 76, 78 (Colo. App. 1996), citing *Washington Plaza Associates v. State Bd. of Assessment Appeals*, 620 P.2d 52 (Colo. App. 1980). The Assessors' Reference Library reiterates this premise by stating that "[p]rior owners sometimes give new property owners 'abatement rights.' The written 'assignment of abatement rights' allows the new owner to file for an abatement for prior years' taxes and keep the refund." ARL, Vol. 2, at page 5.17.

The Board was convinced by language in the Sale Agreement that Petitioner was obligated to pay the 2013 and 2014 taxes. The Sale Agreement required the Seller to deliver to Petitioner a quit claim deed conveying title to Petitioner subject only to the "Permitted Exceptions". The "Permitted Exceptions" included an exception for liens and/or encumbrances of past due and currently due taxes on the property.

Paragraph 12 of the Sale Agreement provides additional, convincing support that Petitioner bore the financial burden of the 2013 and 2014 taxes. The unambiguous language of Paragraph 12 indicates that Petitioner was responsible for and assumed the costs for all of the subject property's real estate taxes, past due and current.

Paragraph 12 of the Sale Agreement also convinced the Board that the Seller authorized Petitioner to seek abatement of the 2013 and 2014 taxes. Although Paragraph 12 was entitled "Prorations", the Board was convinced, by a plain reading of the paragraph, that it also authorized Petitioner to seek property tax abatements for the current year and prior years.

Paragraph 12 has only three sentences. The first two sentences deal specifically with the proration of utilities, operating expenses, other charges and items of income. The Board believes that the third sentence clearly reflects the parties' understanding with respect to real estate taxes, namely that there would be no proration of the current or past due real estate taxes. Instead, Petitioner would be 100 percent responsible for such taxes, but that Petitioner would also be entitled to any rebates with respect to such taxes. Even though there is no specific "assignment language", the Board believes that entitlement to the tax rebates included the right to seek those rebates. Clearly, the Seller would have no incentive to seek the rebates given that Petitioner would be entitled to the

rebates if obtained. The Board was convinced by the third sentence of Paragraph 12 that the Seller authorized Petitioner to seek abatement of the property taxes for 2013 and 2014.

The Board was unconvinced by Respondent's argument that "proration" paragraphs in real estate contracts involve only current year items. The Board was also unconvinced that the use of the term "rebate" rather than the terms "abatement" and "refund" undermined the Seller's authorization for Petitioner to seek abatements and refunds pursuant to statute. The Board notes that the term "rebate" was also used in one of the property tax cases cited by Respondent. See *Washington Plaza Associates v. State Bd. of Assessment Appeals*, 620 P.2d 52 (Colo. App. 1980). The Board believes that in the context of the Sale Agreement, the term "*rebate*" had the same general effect as the term "*abatement*": a reduction in the taxes paid.

The Board did not find Respondent's case law arguments compelling. Respondent cited *Hughey v. Jefferson Cnty Bd. of Comm'rs*, 921 P.2d 76, 78 (Colo. App 1996), *Utah Motel Assocs. v. Denver County Bd. of Comm'rs*, 844 P.2d 1290 (Colo. App. 1992) and *Washington Plaza Associates v. State Bd. of Assessment Appeals*, 620 P.2d 52 (Colo. App. 1980).

In the *Hughey* case, the Court of Appeals cited the general rule that one who bears the financial burden of a tax is a party aggrieved and thus has standing to challenge an assessment. The Court ruled that Hughey lacked standing to pursue the abatement where Hughey purchased a tax lien at auction and then paid the taxes prior to obtaining title to the property. The Court specifically noted that there was no evidence in the record to indicate that Hughey was legally obligated to pay the taxes under any kind of agreement with the previous owner of the property or that any assignment of the right to seek abatement was given. The facts in *Hughey* are very different from the facts in this appeal, where Petitioner and Seller agreed in the Sale Agreement that Petitioner would pay the taxes and Petitioner paid the taxes at the Closing. Unlike Hughey, Petitioner did not purchase a tax lien several years prior to obtaining title to the property and thereafter voluntarily pay the taxes prior to obtaining a treasurer's deed.

In the *Utah Motel* case, the Court of Appeals held that a property owner had standing to challenge an assessment even though it did not own the property at the time of the assessment, but thereafter purchased the property and owned it at the time the taxes were levied. The Court stated that denying standing to a purchaser who purchased the property after the assessment date would lead to an unjust and absurd result where the purchaser ultimately bears the economic burden of the overvalued taxes and where the former owner no longer had any economic interest in the property. The Court noted that the overvaluation of the property injures the purchaser's legally protected interest in the property. Even though Petitioner did not own the property at the time the taxes in this appeal were levied, Petitioner bore the economic burden of the taxes that were based on the overvalued assessment of the property, and the Seller no longer had any economic interest in the property. The Board believes that the reasoning of the Court of Appeals in the *Utah Motel* case supports Petitioner's standing in this appeal.

In the *Washington Plaza* case, the Court of Appeals held that the property owner did not bear the financial burden of the tax and therefore lacked standing to seek an abatement and refund where the property owner did not own the property at the time of assessment and collection of the taxes and

was only authorized by the seller to pursue the refund of taxes nine months after the property was sold. The facts in the *Washington Plaza* case are very different from the facts in this appeal, where the Sale Agreement specifically says that Petitioner is entitled to any rebates that become available prior to or after Closing.

The Board finds that Petitioner had standing to pursue the abatement of property taxes for tax years 2013 and 2014.

ORDER:

The petition is granted.

Respondent is ordered to approve the refund of taxes to Petitioner for the 2013 and 2014 tax years as previously approved by the Arapahoe County Board of County Commissioners in the amount of $18,661.72 for tax year 2013 and $18,431.73 for tax year 2014.

APPEAL:

If the decision of the Board is against Petitioner, Petitioner may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-nine days after the date of the service of the final order entered).

If the decision of the Board is against Respondent, Respondent, upon the recommendation of the Board that it either is a matter of statewide concern or has resulted in a significant decrease in the total valuation for assessment of the county wherein the property is located, may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provision of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-nine days after the date of the service of the final order entered).

In addition, if the decision of the Board is against Respondent. Respondent may petition the Court of Appeals for judicial review of alleged procedural errors or errors of law when Respondent alleges procedural errors or errors of law by the Board.

If the Board does not recommend its decision to be a matter of statewide concern or to have resulted in a significant decrease in the total valuation for assessment of the county in which the property is located, Respondent may petition the Court of Appeals for judicial review of such questions.

Section 39-10-114.5(2), C.R.S.

DATED and MAILED this 29th day of September, 2016.

BOARD OF ASSESSMENT APPEALS

James R. Meurer

MaryKay Kelley

I hereby certify that this is a true and correct copy of the decision of the Board of Assessment Appeals.

Milla Lishchuk

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