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POTENTIAL OF THE PROPERTY TAX FOR LOCAL REVENUE MOBILIZATION

SÃO PAULO, BRAZIL

TAXPAYERS' RIGHTS, EXPECTATIONS, AND CONCERNS

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TAXPAYERS' RIGHTS, EXPECTATIONS AND CONCERNS[*]

What are taxpayers' rights? Expectations? Concerns? What are the concerns prompted by "Local Revenue Mobilization"? Are there lessons to be learned from those of us who live with these entrenched systems today?

At a global conference such as this it is extraordinarily difficult to summarize, but it is perhaps possible to generalize. Coming from the United States, the author has some perspective on the effects of tens of thousands of property–taxing municipalities, school districts, counties, business improvement districts and the like, which generate perhaps as much diversity as does the fascinating world outside our borders. Moreover, while the multi-faceted U.S. approach to property taxation means that laws can vary markedly from one place to another, there are consistent broad themes to explore.

This outline addresses five general areas, and subsets, thereof, which experience and case law teach reflect fundamental issues of taxpayers' rights, expectations and concerns in the environment of local property taxes. Overarching these, naturally, are taxpayers' inconsistent and competing desires for (1) Equity, and (2) A Better Deal Than My Competition Has.

Americans have a saying that "all politics is local." Perhaps nothing is more local than the need to fund local government, and the schools, police, firemen, sanitation, roads, transportation infrastructure, etc. that inform the daily lives of individuals and the environment in which business is conducted. At the same time, because local politics is a fishbowl, property taxation is particularly susceptible to thumb-on-the-scale syndrome, in which some taxpayers are "stuck" and therefore good targets (e.g., utilities), while others are mobile and therefore shopping for the best deal. It is in many respects a strange way to fund basic governmental services, but it is the system we have.

The five areas addressed herein as significant from a taxpayer's perspective (from the author's point of view) are:

1. Valuation
2. Classification
3. Exemptions
4. Procedures
5. Transparency

1. Valuation

Obviously every taxpayer's concern is "how much?" In the world of ad valorem property tax, that basic analysis hinges on the valuation of the property in question.

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[*] The views expressed herein are those of the author, and not those of Jones Day nor any other organization with which the author is associated

It is generally accepted that the principal methods for valuing real estate are comparable sales and income capitalization, with "specialty properties" perhaps requiring some version of replacement cost as reduced by actual and functional depreciation or obsolescence. It also is generally accepted, if differently articulated, that valuations must be consistent and competent (see Bell Atlantic). In other words, we hope for equity and fairness in establishing each taxpayer's obligation to contribute to their community's functioning.

That's easy to say!

In practice, however, it is not nearly so simple. There are of course the usual valuation problems - - identifying comparables, quantifying the relevant adjustments, determining the income to be capitalized, the cap rate, the assumptions for end-stage disposition, the hoped-for development possibilities, and so on. Fortunately, property tax (unlike other valuation problems) tends to require more of a snapshot of each year, rather than a 15-year projection that would inform a purchase price or a transfer tax liability.

Apart from these more generic valuation issues, however, property taxes frequently generate valuation problems unique to this tax.

a. Timing of Revaluations

One could say this is, the "Proposition 13 Issue." The model currently (by popular demand) governing California's property tax system precludes reassessment in the absence of a sale (as variously defined). Put in place as a reaction to the creeping increases in property tax valuations that made it increasingly difficult for seniors and other fixed-income taxpayers to keep their homes, Prop. 13 reflects a certain humanitarian sensibility in figuring out how to fund local governments.

But at the same time, it has a number of perhaps inappropriate side effects. It is not needs-based, just a blanket rule. Is that the most equitable means to allocate the cost of government? A response to a fire presumably costs the same whether 110 Maple or 140 Elm is on fire. Is it appropriate that 110 Maple pay only a fraction of the support to the Fire Department that 140 Elm pays? Is it a good thing for a property tax to become a deterrent to market transactions such as home sales, because "downsizing" to a home more commensurate with the owner's current lifestyle would invoke substantial changes in the tax paid by that same family property, before and after the sale, thus affecting the sales value?

And does this concept of no reassessment absent a sale make any sense in the context of commercial properties? In part, California hinges its reassessment on the occurrence (or not) of a "termination" of a partnership under Internal Revenue Code § 708, a concept that has little if anything to do with the ability-to-pay concerns that, in the author's view, were the genesis of the various laws that now restrict reassessment to transactional events.

b. Special Valuation Problems

One of the recurring themes in U.S. valuation disputes is the treatment of properties that do not fit neatly into the comparables/income cap mode. This tends to break down into two

problems: First, is this property truly so special that we cannot value it under the more standard methodologies; and second, if so, now what?

The valuation of "special" property is often a significant issue, especially for utilities, and particularly since, in the U.S., utility deregulation changed fundamentally the structure of the utility business, and the income-generating potential of their assets, freed of regulatory rate setting requirements. Where a special property requires a different approach, the valuation problems that follow can be complex.

A special property has been described by a New York court as one that is unique and specially built; has a special use for which it was designed and is so used; is a property for which there is no market or sales; and is an appropriate improvement to the property and one intended to be replaced. Niagara Mohawk. Where this definition, or whatever definition obtains in the relevant jurisdiction, is met, and where other valuation methods fail to yield realistic values, nontraditional valuation methods may be resorted to to derive a fair assessed value. Replacement (or reproduction) cost new less depreciation ("RCNLD"), for example, is a method commonly found, at least outside of deregulated assets, for valuing special properties.

Yet the application of RCNLD is itself fraught with uncertainties. Taxpayers and tax assessors argue about what it might cost to replace or reconstruct the property at issue; how much depreciation or obsolescence to assign to the property (which in many cases has been in use for some time); and how to account for intangibles in valuing the taxable property. As illustrated by just one of dozens of cases in this area, Con Ed argued for the inclusion of excess construction costs in the calculation of obsolescence. The New York Court of Appeals agreed, but even in doing so noted that this was not necessarily the rule, just the right approach in this particular case.

c. Due Process Concerns

The U.S. Constitution and many State Constitutions prohibit the taking of property without due process of law. This "Due Process" clause is generally read to require that a taxpayer be given fair notice of the government's claim, and an opportunity to be heard, to make its case.

As discussed below, the Due Process clause figures in a number of the procedural issues arising under the property tax. Two recent cases out of Wyoming, however, provide an interesting analysis of Due Process flaws in a county's valuation process. In Goldie-Morrison the assessment of the taxpayers' home increased 139% in one year, notwithstanding a falling market. The property was also reclassified from one-story-with-basement to two-story, and its construction quality was upgraded four grades, although no work had been done to the property. The taxpayer protested.

The Wyoming court examined the County Board's review process and found that it violated Due Process. Specifically, the Court concluded that hearing sixteen appeals over the course of forty-four minutes gave the taxpayer no reasonable opportunity to challenge the determination. (See also Baltensperger).

Speed hearings of property tax appeals are not confined to Wyoming. They are pervasive, and in many cases may limit taxpayers' ability to get a fair hearing of its appeal. In New York City alone, for example, 184,000 properties appealed their assessments last year. The sheet weight of processing that many cases puts a significant burden on even the largest cities.

This, then, represents another taxpayer concern with local property taxation. While valuations are supposed to be consistent and competent, where resource strapped localities are tasked with handling large numbers of appeals, some involving complex valuation issues, getting that fair hearing may be difficult, short of litigation.

d. Environmental Issues

A particular valuation problem for properties encumbered, or thought to be encumbered, by environmental contamination is the effect of such contamination on the valuation process. Plainly, a polluted property is worth less on the open market, and may not even be marketable if a potential buyer, or its lender, does not want to open itself up to exposure for unknown clean-up costs as a result of coming into title.

Commerce Holding Corp. offers interesting insights into this often difficult valuation problem. The mission was to achieve a "fair and realistic" value for a former industrial property heavily contaminated by various metals. The assessing authority first argued that to allow the owner some reduction in value reflecting the contamination would be to shift the costs of pollution onto all taxpayers, such that everyone would have to chip in to cover the shortfall in town coffers that would attend a downward adjustment in the assessed value of the polluted property. The NY Court of Appeals rejected that argument, reasoning that property tax assessments are to be based on a constitutional mandate to assess at "full value," and environmental policy could not trump the mandate to assess at a value that reflected the costs to remediate which a buyer would clearly consider in pricing the property.

The Court then considered the manner in which a deduction in respect of the contamination should be calculated. Because each situation is unique, no broad rule was announced. However, the taxpayer's approach of valuing the property under the income capitalization method, then deducting the present value of the costs to remediate, as reduced by amounts actually expended, was acceptable.

e. Concerns About Legitimacy

It is difficult to articulate this, but necessary. Early in the first term of NYC Mayor Michael Bloomberg over a dozen New York City property tax assessors were arrested for what appeared to be charges of receiving payments for favorable valuations. The implications were far-reaching, involving significant commercial properties. And the number of City assessors charged in the scheme was nothing short of stunning.

That such a ring existed and had influenced the valuations of commercial properties in Manhattan for years was very surprising to some, less so to others. That the individuals involved reportedly repaired to Florida each year to divide the spoils gave the whole operation a mob-like flavor.

Yet this is a real risk that must be confronted when a small group of people are charged with assessing the same properties, dealing with the same counter-parties, year after year. In a venue such as Manhattan there were considerable amounts of money involved, but in any local taxing jurisdiction the relative smallness of the government and of the assessment pool creates the risk of illegitimate valuations. Local property tax can only work if the participants trust it.

2. Classification Issues

Property taxes frequently have different layers of tax, with some types of property paying at a higher rate than others. These classification systems often reflect local sensibilities, and thus are far from uniform. Moreover, classification of a particular property frequently gives rise to controversy, as the following examples show.

Utility property is in some cases taxed more heavily than commercial property, and in other cases may be entitled to favorable valuation provisions, Thus, in Massachusetts, we find Bell Atlantic Mobile arguing that it is a "telephone company" and thus entitled to Massachusetts' favorable "central valuation" provision. The court held it was not.

On the other side of the coin, in New York, where utility property is subject to a more burdensome tax regime than commercial property, we have Astoria Gas arguing that certain of its deregulated assets were no longer "utility" property but instead had become "commercial" property. The court agreed.

Astoria brings to the fore an interesting subtopic. What is the impact of agencies other than the taxing authority on the property tax treatment of a particular property? In Astoria, the "lightened regulation" applied to the assets in question by the Public Service Commission following deregulation helped to convince the court that the assets were no longer utility property.

Similarly, in Gordon the issue was whether certain land was "vacant land," and thus to be valued based on "highest and best use," or whether it was instead "forest land" entitled to a considerably more favorable property tax regime. Here, the court was influenced by the longstanding certifications of the property as forest land by the state's Department of Environmental Conservation.

Another kind of classification issue can arise when there is a change in the tax law, and the question is whether the new regime applies, or the property is grandfathered. As evident in Srour, the answer to such questions may depend on analyses that are not strictly tax questions. Srour involved a new impact tax on development, designed to raise funds to offset increased congestion through improvements to the transportation infrastructure. Development projects that obtained permits from the relevant buildings department before the effective date would be grandfathered and exempt from the new tax. The court concluded that, while permits had been issued for the retaining walls, an essential part of the development, the buildings themselves were not permitted until after the effective date. Thus, they were subject to the new impact tax.

As a final note in this general area, while not technically a question of tax classification, the Tishman-Speyer case illustrates a situation in which a property's tax classification affected the amount of rent it could charge its tenants. The case involved a $5 billion residential complex

in Manhattan. The property had long been subject to New York's rent stabilization laws, but more recently had attained a J-51 tax abatement based on capital improvements made to the buildings.

Some years later the New York legislature enacted legislation to ease rent stabilization restrictions by permitting "luxury decontrol" in certain cases. Luxury decontrol was not to apply to buildings with property tax abatements, however. At issue in the case was whether this restriction applied to properties that were stabilized before earning the tax abatement. The court said it did.

In so holding, (in addition to bankrupting the property owner) the court opined that a ruling by the Department of Housing which reached the opposite conclusion need not be deferred to. Making its own analysis of the statutory language, the court held luxury decontrol to be unavailable, based on the property tax abatement.

To summarize, questions of classification are, logically, driven by local considerations. Taxpayers may seek to gain one classification in one jurisdiction while avoiding it in another, based on the varying local statues. In addition, property tax classification questions may or may not get bound up with non-tax related classifications made by other governmental agencies, depending on the text of the relevant statute, and the mood of the courts.

3. Exemptions

As with classification, the provision of exemptions is an important feature of the property tax system, and again one for which there may be considerable variations from one locality to another. Taxpayers obviously care about exemptions when they are claiming or trying to hold on to them. Non-exempt taxpayers likewise care about whether a competitor may benefit from an exemption they cannot claim.

A few cases in this area serve to show how varied exemptions can be, and how political they may become. Again, with our highly fractured U.S. property tax system generalizations are difficult. Perhaps that is the relevant point here. Local taxes have local flavor.

a. Religious Exemptions

Virtually every U.S. local property tax affords tax-exempt status to properties used for religious purposes. Churches do not pay tax.

The harder questions come when a tax-exempt type of owner owns a property with mixed or ambiguous use. Overlying these analyses also are issues of the burden of proof; generally a taxpayer claiming exemption has the burden to prove entitlement, whereas a taxing authority seeking to revoke an exemption bears the burden of proof in that circumstance.

As is the theme throughout, these exemption issues can boil down to highly localized concerns, with the result that the concept of an exempt use, religious for example, may vary from one taxing authority to the next. A few examples of the kinds of issues exemption claims and revocations raise follow.

In Tartikov a religious organization owned a summer camp facility but contracted with a third party to manage it. The owner retained, however, general supervision and control, control over hiring, firing, and food providers, and control over the curriculum. Based on those factors the court rejected the revocation of exempt status sought by the locality, concluding that economic profit does not, by itself, extinguish the exemption.

Similarly, (and harking back to the previous discussion of the role of other agencies in determining property tax liability), Eternal Flame concluded that a zoning violation was insufficient to terminate the exemption previously afforded to a religious organization.

In Florida a claim to a religious exemption provoked a battle of virtually epic proportions. Near Orlando there is a facility much like a theme park centered on the theme of "The Holy Land Experience." The property owner claimed exemption; the County Assessor protested vigorously, and five years of litigation ensued.

Ultimately the taxpayer got the Florida Legislature to intervene, and former Governor Jeb Bush signed legislation granting a property tax exemption, worth a reported $300,000 per year, on condition that the park provides free public access one day each year. The arguments continue, however, the latest being the taxpayer's attempt to have two large residences nearby declared exempt as parsonages.

Again, all politics is local.

b. Disregarded Entities

The 1990's saw the advent of a new business vehicle in the U.S., the limited liability Company, or "LLC." As states increasingly authorized the use of these entities in their business laws, the U.S. Treasury Department also weighed in with regulations introducing the concept of a disregarded entity, or "DRE." Briefly, an unincorporated entity such as an LLC could, if it had only one owner, be treated for U.S. federal income tax purposes as a branch or division of its owner, rather than as a separate entity. As a DRE, the entity basically did not exist for income tax purposes – it was invisible, and its owner was deemed to own the assets of, earn the income of, and incur the expenses of, the DRE. This enabled taxpayers to isolate businesses, etc., for liability purposes while not needing to deal with a separate tax entity.

Many states followed suit under their income tax laws. For property tax purposes, however, the picture is considerably murkier, especially in the area of exemptions. In some cases unfavorable case law may have been supplanted by local legislation, so before surrendering it is, as always, very important to examine the current state of play in each relevant jurisdiction. That said, a few cases will illustrate the basic problem that arises for property tax owners when a local property tax adheres to principles fundamentally different from the federal or state income tax.

Middlesex is one such case. That involved a regional retirement system, which sought exemption as an instrumentality of the Commonwealth of Massachusetts. Middlesex used a DRE to purchase a building which housed its own operations, those of another not-for-profit, and some commercial tenants. Middlesex sought exemption for the real estate as well as the personal property used in Middlesex's operations.

The problem, said the court, was that title to the real property was in Middlesex's DRE, not Middlesex itself. And the DRE was not an instrumentality of Massachusetts, but a conventional business owning real estate leased to third parties. As a result, while the personal property, which was owned by Middlesex directly, qualified for exemption, the real estate, owned by the DRE, did not.

Similar outcomes can be found in other cases. MCI sought the Massachusetts corporate utility exemption for property owned by its DRE. That was denied because the DRE was not technically a corporation, and thus not subject to tax under the corporate tax provisions referenced in the exemption.

In CFM Buckley an LLC failed to qualify as a charitable organization because it was not incorporated, and also could not be considered to hold its real estate in trust for its exempt parent.

The conclusion to which these kinds of cases lead is the importance of knowing, in each relevant jurisdiction, whether the property tax does or does not conform to other relevant tax regimes, and if it does not whether an ownership structure that may look attractive for business or other tax reasons could vitiate the application of an otherwise available exemption.

4. Procedure

Taxpayers are of course concerned with property tax procedures, most importantly the appeals process, the foreclosure process, and the refund process. While every taxing jurisdiction in the U.S. is subject to the Due Process clause, interpretations of its scope and requirements may vary. Moreover, the nuances of local procedural rules will most certainly vary from one jurisdiction to the next, putting a premium on a solid understanding of what the locality requires. A few examples of foreclosure and refund cases serve to illustrate the significance of following local rules in preserving taxpayers' rights.

Sidun was a foreclosure case in which the court held that the locality failed Due Process standards when it mailed notices to both co-owners at the address given in the deed for only one of the two, disregarding the address, also in the deed, of the second owner. When the notices were returned as undeliverable the County had, in the court's view, an obligation to provide notice by such means as someone would employ if actually trying to locate the taxpayer. Given that the deed gave notice of two addresses, the use of only one was inadequate.

By contrast, in Helseth the taxpayers tried to register a change of address with the county, but for some reason it was not registered properly. Foreclosure notices were sent to the old address, as well as being published and posted in county offices.

The mailed notices were returned, as was the subsequently mailed (but not otherwise publicized) redemption notice. The foreclosure notices were held to satisfy Due Process, apparently based on the multiple types of notice provided. The redemption notice, by contrast, was held not to be subject to Due Process standards, because at that point the taxpayers no longer had an interest in the property of the status protected by Due Process.

Refund claim procedures offer a particularly rich source of learning in the realm of the importance of knowing the specificities of local laws. In RECAP a lawsuit brought by the taxpayer under New York's action for monies had and received failed because the taxpayer sued after the expiration of the statute of limitations. Normally that action can be brought within six years. However where the defendant is a school district, which the taxing authority was, a special provision in the Education Law cut the statute of limitations back to one year. It takes some rather sophisticated local knowledge to know to look in the Education Law for the statute of limitations on a property tax claim; here the failure to do so was fatal.

Chevron litigated a couple of cases addressing the timeliness of refund claims. In one (Chevron, March 2007) Chevron claimed that a private postal meter was not a "postmark" sufficient to start the statute of limitations. The court did not agree. In another (Chevron, April 2007) the court held that discretionary relief from the statute of limitations for "excusable neglect" applied where outside circumstances (death, illness) prevented a taxpayer from filing on a timely basis. Internal office failure caused by the mistake of a paralegal was not excused, however.

So again, the same theme. Where taxes are local the locals are in charge. It can indeed be very burdensome for a multi-jurisdictional business to keep track of and follow all of the relevant local property tax procedures and rules, but a failure to do so may cost the taxpayer the opportunity to make its claim.

New York Telephone is a particularly unusual refund claim case, which while not technically a case involving procedure is nevertheless an interesting window into local property taxes. The case involved assessments by Nassau County, New York, against a telephone company. The assessments were held to be erroneous, but the county claimed it should not have to pay a refund because of the impact the refunds would have on the county's fiscal health. The county's position was actually upheld by the Appellate Division, the State's second-highest court. The Court of Appeals reversed, however, concluding that in the absence of proof quantifying the county's hardship, it was erroneous to deny the refund claim. Noting cases in which retroactive relief had been denied to taxpayers, cases of general rather than taxpayer-specific application, the Court of Appeals nevertheless held that simply accepting the County's assertion was inadequate – it was necessary to hear proof of the asserted hardship.

Obviously it is of great concern to taxpayers that, having paid their taxes on time as required, and before being able to seek a refund, the taxing authority might wrongfully keep those tax dollars by spending the money and then pleading poverty. But since localities cannot simply print money to pay their bills (unlike the federal government) the possibility of an erroneous assessment of a major taxpayer, or major group of taxpayers, or of a tax law that is legally or constitutionally flawed, raises real practical problems for both taxpayers and taxing jurisdictions. Budgets should not be built on shaky assumptions, nor should taxpayers be deprived of their rights by profligate governments.

5. Transparency (or Not), and Incentives

As a final topic it is worthwhile to consider the rights, expectations and concerns taxpayers have, enjoy, or experience, in an environment in which the property tax is used as a

tool for economic development. <u>Cuno</u>, decided by the U.S. Supreme Court, offers an interesting window into this practice. In that case a manufacturer was granted property tax abatements and income tax credits for agreeing to increase its Ohio facilities. The Sixth Circuit had no problem concluding that the property tax abatements were constitutionally permitted, but they held against the income tax credits. The Supreme Court avoided any analysis of the incentives themselves, holding instead that the taxpayers who brought suit had no standing to challenge the incentives Ohio awarded to the manufacturer.

This case is but the tip of a very large iceberg. As states and localities compete against one another for development, enhanced economic activity, and jobs, they have increasingly used tax breaks as incentives to lure, or keep, businesses in their sandbox. Sometimes these incentives are specifically legislated (although perhaps not quantified); sometimes they are granted under vague legislation affording considerable discretion to specified agencies (and thus even less likely to be quantified); sometimes they are the product of a creative use of existing law. However effected, the result is that some taxpayers may enjoy an advantage over their peers by virtue of some exemption or abatement of property tax.

For taxpayers receiving these benefits the usual reactions is the less said the better. They generally have no interest in the public understanding the value of the incentives they have been given.

For taxpayers not blessed by similar tax deals, however, the lack of transparency in knowing how public funds are, in essence, being deployed to favor certain commercial enterprises can create considerable concern, as evidenced by <u>Cuno</u>.

This is, perhaps, the most difficult current problem with local property taxes, throughout the U.S. States and localities may make deals that do indeed make the jurisdiction economically stronger, and this may even be necessary given the incentives offered by competing jurisdictions. But the inability of other taxpayers to know what has been paid (in an economic sense), and why, can create real competitiveness concerns for those not blessed with similar incentives.

<u>Summary</u>

Taxation of real property by the local government is an ancient form of funding government. Throughout the U.S. it is relied upon by virtually every locality as a significant source of the funds needed to provide local services. It is a tax deeply ingrained in our system, and those of numerous other countries.

Yet it is not a perfect system. One of its major drawbacks in an economy in which multi-jurisdictional businesses are commonplace is the complexity created when different localities have different rules. This may be inevitable, and certainly need not be fatal, but if starting from scratch it is worth considering whether at least some of these complexities can be mitigated or avoided.

TABLE OF CASES

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In the Matter of Astoria Gas Turbine Power, LLC v. Tax Commission of the City of New York, et al., 7 NY3d 451, 857 NE 2d 510 (N.Y. 2006) ("Astoria").

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