

Current Property Tax Issues

February 24, 2011

By Jeff Cowan

Pre-1998

- Owners assessed realty taxes
- Tenants assessed separately for business taxes (value of property apportioned on basis of FMR) including shared parking business assessment

Current Value Assessment 1998

- Business assessment abolished
- One assessment to owner, now based on full occupancy, and FMR of tenants capitalized after allowances for vacancy and unrecoverable expenses
- For unleased, vacant units > 90 days, 30-35% vacancy rebate, upon application to municipality
- Property taxes capped. Reductions "clawed" back. Loss of capping.
- Tenant taxes capped. Shortfall recovery
- Historic cost values replaced by income valuations
- FMR "curve" means inverse relationship between GLA and FMR, resulting in larger tenants having smaller % of assessed value despite larger % of GLA
- MPAC provides valuation summaries (GRAD) that provide total assessment, valuation parameters and assessed value attributable to individual tenants. Tenants entitled to their attributed assessed value but not others.
- Assessment cycles 2009-2012 tax years based on January 1, 2008 valuation
- Phase-in increase from 2008 tax year assessment (January 1, 2005 valuation) to 2012 tax year "destination" assessment phased in 25% per year
- 2008 assessment is "notional" i.e., will be adjusted in 2009-2012 to reflect new buildings or additions, demolitions for purposes of calculating phase-in

Lease Allocation of Taxes

- Proportionate share (GLA) vs. assessed value (separate assessment, as defined)
- Combination – pro share net of anchor
 - pro share of components
- Base year taxes increased

Case Law

Sherwood Park Mall Ltd. v. Zellers Inc., [2001] A.J. 885

- Landlord to use best efforts to obtain assessment for tenant building “separate and distinct” from assessment of other buildings in shopping centre. If cannot obtain separate assessment, then taxes assessed against buildings shall be apportioned by landlord so that only those taxes fairly attributable to tenant’s building shall be charged to tenant
- Tenant shall pay its proportionate share of all taxes assessed against the land and interior mall areas
- Prior years assessed on cost approach with breakdown for each. New assessment on income approach, with no separate assessment for Zellers
- Landlord billed on pro share
- Court determines “separate” in lease ? separate formal assessment, Landlord could have applied for allocation pursuant to regulation enacted for such purpose; therefore failed “best efforts” obligation
- Income approach was best guide for determining taxes “fairly attributable”

Orlando Corp. v. Zellers Inc. (2003), 66 O.R. (3d) 535 (C.A.)

- Lease: Tenant to reimburse taxes “in respect of and referable solely to Tenant’s building + pro share of land and parking lot”
- Billed on basis of business assessment value until 1998
- In the event shopping centre assessed “en bloc”, or Tenant’s building not assessed and taxed as a separate tax lot, Tenant may apply for apportionment or make application for separate tax lot. If this fails, then pro share of taxes
- 1998 amendments abolishing separate business assessments resulted in no separate assessment for Tenant, so that pro share was triggered
- MPAC’s Shopping Centre Valuation and Apportionment Record (separate value for Zellers) was not a separate assessment

Sophisticated Investments Ltd. v. Trouncy Inc. (2003) 13 R.P.R. (4th) 291 (S.C.J.)

- Tenant occupied 1/3 of former K-Mart space
- Tenant pays increase in realty taxes from 1998 base year, based on separate tax bill; if none, at option of Landlord, calculated on the basis of assessed value. If no separate tax bill and Landlord not able to charge on basis of assessed value, then pro share.
- Base year was not 1/3 of K-Mart’s capped taxes, new tenant was not capped, and no assessed value for new premises.
- MPAC valuation record (working papers) ? assessed value, because Orlando determined they ? separate assessment, because

1. can apply for separate assessment;
2. MPAC’s position that “this separate tenant assessment . . . was not established for allocating taxes under leases;
3. individual assessed values are to total the gross assessment and not intended to be reliable on an individual basis;
4. Tenant’s portion can be altered on appeal without alteration in owners assessment; even if landlord appealed, and “high” value for one Tenant, others may be too low

- Settled on appeal

658425 Ontario Inc. v. Loeb Inc., [2007] O.J. No. 4723 (S.C.J.)

- Lease provided for pro share; provided that if premises are assessed or valued separately by the municipality for tax purposes, then share of taxes = assessed value x applicable mill rate.
- Tenant paid separate assessment 1998 to December 2003, then unilaterally reverted to pro share and deducted overpayment periodically
- Landlord relies on assessors’ calculation of individual assessed value as “valued separately”
- Court applies *Sophisticated Investments Ltd.* Assessors’ working papers not reliable

- Tax allocation “on the basis of a separate assessment. However in event Landlord unable to obtain . . . any separate allocation . . . , or separate assessment or other information” deemed sufficient by the Landlord to make the calculations . . . then proportionate share
- Tenant argues assessor’s assessed value for premises satisfied clause
- Landlord charged pro share, conceded its discretion to do so must be exercised reasonably
- However, “deemed” construed as imposing a subjective standard
- Working papers not reliable on individual basis (*Sophisticated Investment Ltd.*; Loeb). There is a systemic uncertainty as to the reliability of the working papers that could apply in any individual circumstance. They are informal and discretionary, with no regulatory or legislative direction that they be prepared
- Landlord tax expert testified calculations were incorrect (unrealistically low)
- On limitation period, Tenant able to claim for 2004 tax year because Landlord failed to provide statement certifying amounts that are part of calculation of Additional Rent, which triggered 90 day period for Tenant to provide Notice of Dispute. Certification was not limited to Operating Costs
- ONCA confirmed, reiterating unreliability of working papers
- For another case on Landlord discretion to recover shortfall from eligible tenants, see *Omers Realty Corp. v. Sears Canada* (2006), 80 O.R. (3d) 561 (C.A.)

OGT Holdings Ltd. v. Startek Canada Services Ltd. (S.C.J. December 9, 2009), affirmed 2010 ONCA 438

- Lease provided for pro share of taxes, but in event a separate assessment or apportionment, then Landlord, at its option may use separate assessment or apportionment as basis for taxes
- Tenant’s call centre premises separate from rest of complex (Loeb as anchor tenant)
- Landlord billed 2001-2005 based on separate assessed value, including Loeb (who was successful in 2007 in reversing 1998-2003 taxes to pro share)
- Dispute over whether Landlord informed Tenant in 2001 and subsequently thereafter that Loeb’s concern may result in revision to pro share basis
- Upon receipt of Loeb decision in 2007 rebilled 2001-2005 based on pro share
- Tenant relied on election of Landlord to bill on basis of separate assessment (in error, based on case law above), and Landlord couldn’t unilaterally to obtain same advantage
- Court distinguishes Loeb, in that lease permitted use of separate “apportionment”, but accepts defence of estoppel and dismissed Landlord claim for \$350,000 (under appeal)

Other Issues

- No “phased in” tenant assessed values 2009 to 2012 just total assessment, based on 2008 total “notional” assessment base
- Total property’s assessment change may not be same for each tenant, as relative value between tenants may have changed
- Excess land valuation and allocation
- Change in policy on partial assessments. No longer vacant land until supplementary assessments adding new building value upon subsequent occupancy. Now estimated value of construction effective January 1 of tax year
- Increased valuations based on HBU of under utilized plazas
- Demolition rebates based on assessed value of building demolished, or is remaining land still worth amount the amount of the assessment cost vs. income
- “Fee simple, if unencumbered” value vs. sale price
- Tax refunds payable only to current owner

For more information or inquiries:



Jeff Cowan

Toronto
416.947.5007

Email:
jcowan@weirfoulds.com

Jeff Cowan is recognized as one of Canada's leading public law litigators.

WeirFouldsLLP

www.weirfoulds.com

Toronto Office

4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035