APPELLATE DIVISION HOLDS OPT-OUT FROM RENEWABLE ENERGY TAX EXEMPTION NOT EFFECTIVE UNLESS PROPERLY FILED

Hodgson Russ Renewable Energy Alert
April 20, 2020

In an important decision for both renewable energy developers and taxing jurisdictions issued on April 16, 2020, the Appellate Division, Third Department held in *Matter of Laertes Solar, LLC, et al. v. Assessor of the Town of Harford, et al.* that because the Dryden Central School District (the "School District") filed its resolution opting out of the Real Property Tax Law ("RPTL") § 487 exemption with the New York Department of Taxation and Finance ("DOTF"), but did not file with the New York State Energy Research and Development Authority ("NYSERDA"), and since both filings are required, the opt-out was ineffective. Thus the subject solar project was exempt from real property tax.

Background

The School District passed a resolution on May 28, 2014 opting out of the exemption for solar and other renewable energy systems provided for by RPTL § 487. RPTL § 487(2) exempts from real property taxation "any increase in the value [of real property] by reason of the inclusion of [a solar energy system] for a period of fifteen years." Any such local law or resolution opting out of the exemption must be filed with the New York State Department of Taxation and Finance ("DOTF"), and NYSERDA. RPTL § 487(8)(a). Here, the School District filed the opt-out with DOTF on or around July 1, 2014, but failed to do so with NYSERDA.

In December of 2016 Laertes Solar, LLC ("Laertes") completed construction of a solar energy system on property owned by Cornell University within the School District. The Town Assessor determined that Laertes, a for-profit company, owned the solar energy system, created a new tax parcel for it, and assigned it a taxable value for school taxes.

Laertes applied for the RPTL § 487 exemption and after it was denied, paid the school tax bill under protest. The School District, in February of 2017, passed another opt-out resolution, which it this time properly filed. Laertes sued seeking to overturn the denial of the RPTL § 487 exemption, contending that the School District's first opt-out was ineffective having not been timely filed.

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Litigation Ensues Over Whether School District's Opt-Out Was Effective

The Supreme Court sided with Laertes, granting the exemption because the School District's first opt-out, having not been filed with NYSERDA, was ineffective. On appeal, the Appellate Division, Third Department affirmed, strictly interpreting the language of RPTL § 487(8)(a) and its mandatory language that the opt-out "shall be filed" with DOTF and NYSERDA. The Court stated that while statutes providing tax exemptions are construed strictly against the one claiming the exemption, the statute will not be read in a manner to defeat its purpose. Construing the statute in a manner contrary to the Legislature's intent would not only conflict with canons of statutory construction, but would also disregard New York's public policy to spur renewable energy development. Therefore, based on the plain language of RPTL § 487(8)(a), the School District's failure to file the opt-out was fatal.

The School District Could Not Demand a PILOT Agreement

Apparently expecting the opt-out would be ruled defective, the School District argued that Laertes was required to seek a payment in lieu of taxes ("PILOT") agreement and, having not done so, could not claim the benefit of the exemption. But a taxing jurisdiction that does not opt out can only require a PILOT agreement when it demands one within sixty (60) days of receiving written notice of the intent to construct the project. RPTL § 487(9)(a). Here, the Court held that the School District had notice of Laertes' project because it was assessed with a taxable value. Additionally, the School District was provided written notice no later than September 28, 2017 when Laertes paid its school taxes and submitted its objection, reserving its right to protest the tax. Despite such notice, the School District did not notify Laertes of its intent to require a PILOT agreement until December 19, 2017, over 60 days later. Thus, the School District could not mandate a PILOT agreement. Furthermore, the subsequent 2017 opt-out resolution that the School District correctly filed had no bearing on Laertes' project since it occurred after construction was completed.

Hodgson Russ Insights

Laertes provides a few key lessons:

- For all the attention paid to it, *Laertes* represents a technical blunder rather than a true course forward for resolving the issue of affordable payments to taxing jurisdictions permitting the advance of the State's climate leadership goals. The Legislature needs to comprehensively address PILOTs and tax assessments for renewable energy projects for the benefit of both developers and taxing jurisdictions; the New York Solar Energy Industries Association and the Alliance for Clean Energy New York continue to lead the efforts to accomplish this goal.
- Second, for jurisdictions opting out of RPTL § 487 the filings with DOTF and NYSERDA are jurisdictional in nature and required for the opt-out to be effective. While the RPTL provides no deadline for filing, any delay renders the opt-out meaningless. In that instance, developers can still file an RPTL § 487 exemption application and obtain the exemption. Opt-outs are not retroactively effective; they operate only prospectively. Thus, if an opt-out is passed and filed after the notice of start of construction of a particular renewable energy project, it will be effective only as to future projects.
- *Laertes* is also the first appellate case delving into the question of what constitutes implied notice under RPTL § 487(9)(a) starting the 60-day clock for a taxing jurisdiction to demand a PILOT. The Court found the School District received the required written when the property was given a taxable assessed valuation, and certainly no later than when they

received the company's tax payment with a written reservation of rights. We are aware of other jurisdictions that have claimed lack of notice, that were resolved short of litigation, raising the issue of what constitutes constructive notice. The takeaway is do not let your situation be the test, document notice by use of certified mail or other delivery method requiring a signature.

If you have any questions about the application of tax exemptions to renewable energy projects, or the requirements under RPTL § 487 or other provisions, please contact Daniel Spitzer (Buffalo: 716.848.1420), Noah Shaw (Albany: 518.736.2924), or a member of our Renewable Energy Practice.

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