



TAX TRENDS

The newsletter of the Illinois State Bar Association's Section on State & Local Taxation

A note from the co-editors

By Mary Ann Connelly and Stanley R. Kaminski

This edition of *Tax Trends* features an interesting article by Kevin Fanning about the **new tax incentive** for qualifying commercial properties located in Cook County **under the Class 7(c)**. The article provides an overview of the qualifications, process, and the requirements that the taxpayer must fulfill in order to be eligible for the incentive.

This edition of *Tax Trends* also addresses the case of *Alabama Department of Revenue et al. v. CSX Transportation, Inc.*, Case No. 13-553 (March

4, 2015). In that case, the Supreme Court held that for purposes of whether Alabama was involved in tax discrimination against rail carriers under the Railroad Revitalization and Regulation Reform Act of 1976, 49 U.S.C. Section 11501(b)(4), a comparison class of competitors consisting of motor carriers and water carriers is appropriate. The article authored by David J. Kupiec, Natalie M. Martin and Evan Schanerberger discusses the reasoning of the decision. ■

New Class 7c tax incentive provides opportunities for newly constructed or vacant commercial properties

By Kevin Fanning

On July 17, 2014 the Cook County Board of Commissioners adopted an ordinance that established a new property tax incentive classification benefiting commercial properties. The Class 7c Commercial Urban Relief Eligibility ("CURE") incentive is designed to stimulate commercial real estate development and further spur economic growth.¹ Properties that qualify will receive a reduced assessment level of 10% of fair market value for the first three years, 15% for the fourth year, and 20% for the fifth year.² Without the incentive commercial property would ordinarily be assessed at 25% of its fair market value.

The Class 7c designation is available to real estate used primarily for commercial purposes. The ordinance defines these properties as "any real estate used primarily for buying and selling of goods and services, or for otherwise provid-

ing goods and services, including any real estate used for hotel and motel purposes."³ The 7c incentive joins the list of established Cook County incentive classifications including the 6b for industrial properties, 7b for commercial properties, and newly created Class 8 for severely blighted commercial and industrial properties.

Projects qualify for the incentive only if they involve new construction or reoccupied abandoned property. The incentive applies to the property in its entirety, including the land on which the property is located. For projects that involve substantial rehabilitation of existing structures, the incentive applies to the added value which is "attributable to the rehabilitation and to the land, if vertical or horizontal square footage has been added, in such proportion as

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the square footage added by the rehabilitation bears to the total square footage of the improvements on the parcel.⁴

Eligibility Requirements

The four necessary eligibility factors of the Ordinance include:

1. Real Estate Tax Analysis

The property or particular portion's, Assessed Value, Equalized Assessed Value, or Real Estate taxes for three of the last six years must have declined or remained stagnant due to the depressed condition.

2. Viability and Timeliness

There must be a reasonable expectation that the development, re-development, or rehabilitation of the commercial development project is viable and will result in the economic enhancement of the property.⁵

Therefore, submitted evidence of economic viability and timely completion of the project should include: 1) construction documentation that provides a development schedule, 2) financial documentation including income tax statements, recent appraisals, and any profit sharing agreements between taxing districts, and 3) sufficiently detailed information about the developers, owners, prime tenants, and any other interested parties.

If the project qualifies for the Vacancy Incentive then the application should also include:

- 1) evidence of vacancy for 12 months or more,
- 2) evidence that the property was marketed for six months or more, and
- 3) income tax statements for the last three years, including recent appraisals.

3. Assistance and Necessity

Certification for Class 7c designation requires: "But For" certification, meaning that the incentive must "materially assist development, redevelopment, or rehabilitation of the property; and the commercial development property would not go forward without the full incentive offered under Class 7c certification."⁶ Additionally, certification requires "Condition Subsequent" certification, meaning that the project must be economically feasible for the duration of the incentive.

4. Increased Tax Revenue and Employment

The applicant must supply a statistical analysis projecting the added real estate tax revenue and employment resulting from the development. This should include analysis with and without the incentive.⁷ Employment figures should be categorized to show projections for new full and part-time employment, as well as temporary employment resulting from the construction.⁸

Application Procedure

A Class 7c application must be submitted along with supporting documentation to the Assessor and the Bureau of Economic Development prior to the commencement of construction, rehabilitation, or reoccupation of the property. A filing fee of \$500 must also be paid. The application must include a resolution or ordinance of support from the municipality where the parcel is located. If the parcel is located in unincorporated Cook County then the resolution must come from the Board of Commissioners. After submission of the application the Cook County Assessor and the Bureau of Economic Development will then review it for certification.

Renewal

During the term of the incentive the recipient must file an annual affidavit attesting to the use of the property and the number of workers employed at the property. The affidavit must be verified and returned to the Assessor within 21 days. Failure to file the triennial report within will result in a loss of the incentive.

Class 7c classification may be renewed during the last year in which a property is entitled to a ten percent (10%) assessment level or when the incentive is still applied at the fifteen percent (15%) or twenty percent (20%) assessment level. A renewal application must be filed in conjunction with a certified copy of the resolution or ordinance. Owners are limited to one renewal period.⁹

Future Uses

The newly minted 7c classification has not been utilized much yet. The designation was created with an eye towards grocery stores

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and food deserts, and has been used by companies like Fresh Thyme in River Forest in renovating a former Dominick's store.¹⁰ However the 7c's broad ranging eligibility requirements provides strong potential for other commercial properties throughout Cook County looking to expand or rehabilitate. ■

1. David, Scott. "Cook County Adopts New Class 7c Real Estate Tax Incentive for Commer-

cial Property." *The National Law Review*. Published November 13, 2014. Online Posting. <http://www.natlawreview.com/article/cook-county-adopts-new-class-7c-real-estate-tax-incentive-commercial-property>.

2. Berrios, Joseph. Cook County Assessor. "Class 7c Eligibility Bulletin." Cook County Assessor's Office. Online Posting. <http://www.cookcountyassessor.com/forms/cls7cb.pdf>.

3. Cook County Ord. Amendment 14-1930. Adopted June 17, 2014.

4. *Id.*

5. Berrios, Joseph.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Kadin, Deb. "County OKs tax break for Fresh Thyme in River Forest." *Wednesday Journal*. Published November 19, 2014. Online Posting. <http://www.oakpark.com/News/Articles/11-19-2014/County-OKs-tax-break-for-Fresh-Thyme-in-River-Forest/>.

United States Supreme Court holds that "similarly situated competitors" in a jurisdiction represent a comparison class and equivalent comparable state taxes to be considered in deciding discrimination

By David J. Kupiec JD, CPA and Natalie M. Martin JD, of Kupiec & Martin, LLC, and Evan Schanerberger JD, Northwestern University School of Law, Tax LLM Candidate of 2017

On March 4, 2015, the United States Supreme Court issued a 7-2 majority Opinion holding that CSX Transportation, Inc.'s (hereafter "CSX" or "Taxpayer") motor and water carrier competitors are an appropriate comparison class for purposes of its Railroad Revitalization and Regulation Reform Act of 1976, 49 U.S.C. Section 11501(b)(4), (hereafter "Subsection (b)(4)") claim concerning the State of Alabama's sales and use tax. The United States Supreme Court also held that the Eleventh Circuit erred in refusing to consider whether the State of Alabama could justify its decision to exempt motor carriers from its sales and use taxes through its decision to subject motor carriers to a fuel-excise tax, *Alabama Department of Revenue et al. v. CSX Transportation, Inc.*, Case No. 13-553 (March 4, 2015).

At issue in this case is whether the State of Alabama violated the federal law prohibiting States from imposing taxes that discriminate against a rail carrier, as provided in Subsection (b)(4), by taxing diesel fuel purchases made by a rail carrier while exempting similar purchases made by its competitors. Also at issue is whether other tax provisions can offset such discrimination. Specifically, the State of Alabama applies a 4% sales tax to CSX and other railroads' purchase or use of diesel fuel for their respective rail operations while ex-

empting from the same tax purchases and uses of diesel fuel by trucking transport companies (hereafter "motor carriers") as well as companies that transport goods interstate through navigable waters (hereafter "water carriers"). Notwithstanding, the motor carriers did pay a \$0.19-per-gallon fuel excise tax on diesel while the water carriers pay neither the State of Alabama sales tax nor fuel-excise tax on their diesel.

By way of background, both the District Court and the Eleventh Circuit initially rejected CSX's complaint. When this case first appeared before the United States Supreme Court, the State of Alabama's argument that sales and use tax exemptions cannot discriminate within the meaning of Subsection (b)(4) was rejected and the case was remanded back to the lower court. On remand the District Court again rejected CSX's claim after a trial. However, this time the Eleventh Circuit reversed holding that CSX could establish discrimination by showing that the State of Alabama taxed rail carriers differently than their competitors. Please note that the parties had stipulated that CSX's competitors included motor and water carriers. Moreover, the Eleventh Circuit rejected the State of Alabama's argument that its fuel excise taxes offset the sales taxes.

The United States Supreme Court granted

certiorari to address: 1) if the Eleventh Circuit properly regarded CSX's competitors as an appropriate comparison class for its subsection (b)(4) claim; and 2) whether a court should consider all aspects of a State's tax scheme apart from the challenged provision when resolving a claim of unlawful tax discrimination. 573 U.S. _____ (2014).

The first issue addressed by the Supreme Court was who was part of the comparison class for purposes of the subsection (b)(4) claim. The Supreme Court explained:

Nothing in the ordinary meaning of the word 'discrimination' suggests that it occurs only when the victim is singled out relative to the population at large. If, for example, a State offers free college education to all returning combat veterans, but arbitrarily excepts those who served in the Marines, we would say that Marines have experienced discrimination. That would remain the case even though the Marines are treated the same way as members of the general public, who have to pay for their education.

The Supreme Court added that what Subsection (b)(4) requires, and what subsections (b)(1)-(3) do not, is a showing of discrimination—a failure to treat similarly situated persons alike. The Court further provided that a

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comparison class will thus support a discrimination claim only if it consists of individuals similarly situated to the claimant.

The Supreme Court further explained that under the Equal Protection Clause of the United States Constitution, very few taxpayers are regarded as similarly situated and thus entitled to equal treatment. They noted that a State may tax different lines of business differently with near-impunity, even if they are apparently similar. The Supreme Court also cited J. Hellerstein & W. Hellerstein, *State Taxation's treatise* which stated that the Court recognizes the “wide latitude state legislatures enjoy in drawing tax classifications under the Equal Protection Clause.” The Supreme Court explained that it would be permissible, as far as the Equal Protection Clause is concerned, for a State to tax a rail carrier more than a motor carrier, despite the seeming similarity in their lines, but that

the concept of “similarly situated” individuals cannot be so narrow in the instant case. Accordingly, the Supreme Court determined that the Eleventh Circuit correctly held that based on CSX's complaint and the parties stipulation, a comparison class of competitors consisting of motor carriers and water carriers is appropriate and that differing treatment constitutes discrimination.

The Supreme Court next addressed the issue of whether the State of Alabama can justify a decision to exempt motor carriers from a sales and use tax by imposing another tax, for example a fuel excise tax, on motor carriers. The Supreme Court added that its negative Commerce Clause cases endorsed the proposition that an additional tax on third parties may justify an otherwise discriminatory tax. The Court further stated that an alternative roughly equivalent tax is one possible justification that renders a tax disparity

nondiscriminatory. Thus, the Supreme Court reversed the Eleventh Circuit and held that there is simply no discrimination when there are roughly comparable taxes and remanded this matter back to the Eleventh Circuit for that court to consider whether Alabama's fuel-excise tax is the rough equivalent of Alabama's sales tax as applied to diesel fuel, thereby justifying the motor carrier sales-tax exemption.

As of the day this article was prepared, the Eleventh Circuit had not yet rendered its decision pursuant to the remand. Notwithstanding, the United States Supreme Court's aforementioned acknowledgment of a more broad based “appropriate comparative class” as well as its support for offsetting a potential discriminatory state tax with an “equivalent tax” may result in the filing of additional state tax challenges across the country. ■