

ON THE LEVEL (Newsletter Summer 2005)



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Most taxes are voluntary: they rely on the co-operation and integrity of the taxpayer. Personal Income Tax, Corporation Tax, Capital Gains Tax, HST/GST, Deed Transfer Tax, are prime examples. They place the onus for determining their quantum firmly on the shoulders of the taxpayer. The State retains the jurisdiction to challenge the taxpayer's self assessment and may impose a penalty if the latter proves inadequate whether by incompetence or dishonesty. This is in sharp contrast to the property taxation system, which depends on the State, usually the province, occasionally the municipality, to determine the assessment. Here the onus to "get it right" rests on the shoulders of the taxing authority ... and it is left to the taxpayer to mount a challenge when the former proves inadequate. Unfortunately there is no countervailing compensation when the State fails to make the grade: in fact the taxpayer wears the cost of the State's incompetence because they cannot recover their overpayment of taxes from previous years. To rub salt into the wound, some Assessors are overtly hostile to the taxpayer's challenge to their property assessment and fail to recognise that the appeal process itself is an integral part of "getting it right". Perhaps Assessors should suffer the same retribution as taxpayers ... punitive financial penalties or jail time unless they "get it right". Oh happy days!

Of course, the argument could, and is, raised by Provincial Assessors that they lack the resources to do the job. If such really is the case, the provinces should abandon the charade and move to taxpayer self assessment of property taxes. Logic dictates that this should be done in any event: it would eliminate much of its adversarial flavour and remove the temptation for politicians to distort it by "assessment caps" or similar meddling. If they are unwilling to cede responsibility for assessment to the taxpayer Assessment Departments should put up or shut up ... and recognise that the appeal process must be open, transparent and inexpensive; and devote their efforts to ensuring that these objectives are achieved.

Nova Scotia: Uniform or Uninformed?

Many provincial Assessment Acts, including the Nova Scotia legislation mandate a "uniformity provision". Although the basis for the assessed value is the market value of the property on a "base date" (January 1st two years preceding the assessment year in Nova Scotia) the Act requires that "taxation must fall in a uniform manner". Provincial case law has established that this uniformity provision must be applied across, rather than within, asset classes in the municipality. So *all*

commercial property has to be assessed uniformly ... office buildings cannot be compared solely with other office properties, but must be compared with every commercial assessment in the municipality. This "General Level of Assessment" is calculated by dividing the sum of the assessments, for those properties that have sold within six months of the base date, by the aggregate of their sale prices. If this aggregate assessment to sale price ratio is 80%, then all properties must be assessed at 80% of their market value. If the property is assessed at a higher rate than 80%, the owner and occupiers will pay too much in taxes. The Provincial Assessment Department, Service Nova Scotia (SNS), calculates the General Level of Assessment, for each municipality, every year. Since sale prices are not public knowledge in Nova Scotia, private taxpayers are unable to calculate the General Level of Assessment because the relevant data is not available to them. They must instead rely on Service Nova Scotia's calculations. It follows therefore that there is a heavy responsibility on SNS to "get it right" ... since if they fail to fulfil this responsibility *half of the commercial properties will shoulder too high a tax load, and half will pay too little in property and business occupancy taxes.* In 2001, Homco Realty Fund (20) Limited, the owners of a major downtown Halifax office building, challenged Service Nova Scotia's calculation of the General Level of Assessment for commercial properties in the Halifax Regional Municipality (HRM). The objective of Homco's concern was 1741 Brunswick Street, a building situated rather appropriately, opposite Halifax's Town Clock, an edifice that has held Haligonians accountable since 1803. (This was not the first time one of Richard Homburg's companies had attempted to hold the authorities to account. On an earlier occasion he tried to ensure that HRM enforce its own unsightly premises by-law by taking them to court, albeit without success).

The Homco Realty Fund (20) Limited General Level of Assessment appeal was heard by the Nova Scotia Utility and Review Board (NSUARB). Their 118 page decision, rendered on 28th February 2005, allowed Homco's appeal and determined that SNS' *"general level of assessment is wrong"* and calculated it at 91.7% (SNS had insisted it was 98.4%). The Utility Board's weighty decision, as befitted six days of hearings over a five month period in 2003 and 2004, is thoughtful and carefully reasoned. It is available on NSUARB's web site. The case was adjudicated by a seasoned three person panel. Homco Realty Fund was represented by Michael J. O'Hara L.L.B. aided by Giselle Kakamousias, the Manager of our Property Tax Division. She was charged with the task of undertaking a review of SNS's calculations and sales data. Service Nova Scotia, happily unconstrained by the same financial imperatives as the taxpayer, devoted two lawyers to the case, Randall R. Duplak, QC and Kirby E. Grant L.L.B.; *and even flew in an expert from Phoenix, Arizona specially for the case.*

Unfortunately after sitting their Phoenix fella through the entire first three day session of Homco's testimony, Service Nova Scotia declared themselves so impoverished they were unable to fly him back again to give his *own* testimony at the second three day session ... a great shame; perhaps they ran out of Air Miles ... Nonetheless SNS were not expertless: their Assessor Mr. M. Musycsyn had prepared a report and rendered testimony.

Homco Realty Fund included, as the main plank of its appeal, the fact that its assessment represented 97% of its market value (the property had been sold shortly after the base date). Other comparable sales were assessed at assessment/sale price ratios of between 55% and 82%. The sole valuation issue before the hearing was that of uniformity of assessment, and the kernel of the disagreement between the taxpayer and SNS lay in the inclusion, or exclusion, of certain sales in the General Level of Assessment calculation. SNS also argued that the General Level of Assessment calculation methodology favoured by case law was incorrect and should be abandoned and replaced by SNS' "mass appraisal approach", mathematical Mumbo-jumbo rightly rejected as such by the Board and the Court of Appeal in previous cases but apparently still worshipped by the Assessment Department. The Board again declined to be seduced by this whiff of brimstone, recklessly believing perhaps, that they and the Court of Appeal were still correct and tartly pointing out to Provincial government lawyers Duplak, QC and Grant L.L.B. that there had been no legislative changes since the Court of Appeal last

rendered its decision on the matter. SNS also attempted to escalate the appeal to the Supreme Court by arguing that the Utility Board lacked the jurisdiction to hear the case. The Board disagreed.

Service Nova Scotia excluded all properties from its General Level of Assessment calculation whose sale price was determined using discounted cash flow. Since all major investment type properties are valued on this basis, all were excluded from the calculation! The Board determined that SNS' decision to exclude these sales was based on (1) *administrative convenience*, and (2) *a misinterpretation of a previous court decision (City of Halifax and Revenue Hotels Limited v. Director of Assessment 1988, NSMB-122-85-A)*. The Board observed that as a result of the foregoing *"the assessments of many large and expensive commercial properties in the HRM have been set at values lower than they should have been"*. (The corollary of course, is that the other properties have had to pick up this substantial tax shortfall). Service Nova Scotia's Mr. Musycsyn excluded the sale price of the subject property, 1741 Brunswick Street, even though it sold close to the base date, as evidence of its market value! He also excluded the sale of Purdy's Wharf, HRM's trophy office complex and acknowledged that he would have done so even if it had not been sold on a discounted cash flow basis because it was an *"outlier"* i.e. it was so under-assessed its inclusion in his data would have substantially reduced his General Level of Assessment calculation! The Board referred to this practice as a *"systemic error"* and observed that *"this problem is further aggravated by the Director's attempt to (in the Board's view) artificially protect the Director's claimed general level of assessment by excluding sales of such large transactions"* and *"while the Director not surprisingly appears to be content with a claimed general level of assessment which is close to 100%, one of the ways the Director achieves this result is to automatically exclude sales which would otherwise lower it"*. On another occasion Service Nova Scotia's Mr. Musycsyn excluded a purchase by the Hospitals of Ontario Pension Plan partly on the grounds that the purchaser was *"a pension plan"* and a *"national purchaser"*, causing the Board to observe *"the Director appears ready to disqualify any sale involving a REIT or pension fund without further inquiry as to the market circumstances of the sale"*. Mr. Musycsyn's rationale apparently was that REITS and other "national" purchasers were lamentably lacking in sophistication and consequently paid far too much for property ... so these sales had to be excluded from his analysis!

Service Nova Scotia subsequently appealed the Utility Board's decision and lost.