

### THE ORDER HAS BEEN ISSUED...AND THE PROPERTY TAX INCENTIVES PLAN ALREADY STARTED!

On our previous edition of *The Tax Advisor* we reported the enactment of Act No. 71 on July 2, 2010 ("Act 71") and the beginning of the countdown to take advantage of the Property Tax Incentives Plan (or "Amnesty"). As you may recall, Act 71 provides for the opportunity to pay personal and real property tax debts with a total waiver of interest, surcharges and penalties during a term of 120 days starting upon the issuance of an administrative order by the Municipal Revenue Collection Center ("CRIM", for its Spanish acronym).

Well, on July 30, 2010, the CRIM issued the Administrative Order 2010-05 (the "Order") establishing the beginning date of the amnesty to be **August 16, 2010**. Consequently, the 120-day period of the amnesty will end on **December 13, 2010**.

The Order establishes the requirements to be eligible for the incentives, including a list of documents that the taxpayers must submit to the CRIM:

- a debt certificate from the Puerto Rico Treasury Department ("PRTD") to show that the taxpayer paid the Special Real Property Tax (i.e. the ad-

ditional real property tax imposed by Act No. 7 of 2009) for the taxable year 2009-2010;

- a water or electric bill (original and copy) issued during the previous two months showing the property's mailing address.

In addition, and pursuant to the Order, the taxpayer would apply for the benefits of Act 71 by filling out Form BC-70, which must be sworn before a CRIM's representative.

Finally, the taxpayer must be up to date with regards to the payment of the real and personal property tax. That means that the taxpayer must have paid:

- the real property tax corresponding to fiscal year 2009-2010 and the current semester of 2010-2011, and;
- the personal property tax corresponding to taxable year 2009.

The Order also includes other provisions that may or may not be applicable to you. For example, it provides that if the taxpayer has not filed the corresponding personal property tax returns, then, to apply for the benefits of the incentives plan, he must file those past due returns

and pay the principal balance. The Order even provides that those returns may not be amended after the payment is made. The list is long... and you should contact your tax advisor for assistance.

#### Property Registry

By now, you should be asking yourself: What about the Real Property Registry? As we all know, Act 71 also provided for the creation of a mandatory registry for unassessed real property and commercial and industrial real property improvements (the "Property Registry"). However, the Interagency Committee established by the Act 71 has not issued any order or regulation regarding how this Property Registry is going to work. The Order, as issued by the CRIM, does not address any of the concerns in connection with the Property Registry. But do not worry, we will keep you posted of any developments.

**Continues on Page 2**



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**The order has been issued...**  
**Continued from Page 1**

### **Real Property**

Since we are talking about real property, let us take several lines to discuss the term. To that effect, it seems relevant to discuss the expressions and conclusions of the Puerto Rico Supreme Court in Plaza Las Américas Inc. vs. Centro de Recaudaciones Municipales; sentence of March 18, 2010.

Even though this is not an opinion of the Supreme Court, and therefore it cannot be relied upon as precedent, it is interesting as it provides guidance on a common situation and further clarification to the meaning of the term "real property".

In summary, Plaza Las Américas (the "Landlord" or "Plaza") argued that the real property tax attributable to the improvements (considered or treated as real property) made by its tenants should be assessed to the latter. The Landlord was relying on a stipulation signed by Plaza and the Secretary of the PRTD back in 1988. Even though a good part of the sentence addresses the issue on whether or not such stipulation governed the controversy, we will limit our comments to the issue resolved by the Supreme Court. That is, that the real property improvements made by the tenants should be assessed to the registered owner of the property (i.e. Plaza). Also, we will discuss certain relevant aspects of the sentence addressing the definition of real property.

The Supreme Court based

its decision on the text of Article 3.18 of the Municipal Property Tax Act ("MPTA"), which establishes that, in the case of property registered at the Property Registry, the CRIM will appraise the property tax on behalf of the person under whose name it is registered at the Property Registry unless the CRIM had knowledge that said person is not the true owner, in which case, they would perform the appraisal on behalf of the true owner. And, since the text of the law is clear, the Supreme Court had no space for further interpretation.

However, the important part of this case is the one related to the definition of real property as it reaffirms that, for tax purposes, the *doctrine of indivisibility* prevails. This doctrine does not consider as the "owner" a person that does not have all the rights associated to the item. Therefore, it is not possible to separate the rights of the tenant (possession) and consider him an owner for tax purposes.

Consequently, the term "real property", for property tax purposes, includes any structures, objects, machinery, and devices as long as they are attached to a building or the land in any way which indicates permanency. This concept does not take into consideration whether or not the owner of the object or machinery (or the building) is the owner of the structure (or the land). As the Supreme Court emphasized, based on the text of Article 3.11 of the MPTA, it is not possible to separate the property in pieces. Once the object is considered attached to a building or the land indicating permanency, such object is considered

indivisible and would be taxable to the registered owner of the property to which it was attached.

Moreover, it would not matter other aspects such as the intention of the contracting parties which affect the property or other aspects which are not objective conditions of the property itself. The only factor to be taken into consideration is the objective one (i.e. the manner in which the object is attached to the building or the land).

### **Z&A Comments on the Puerto Rico Supreme Court Decision**

It is true... this case does not add any different interpretation to the MPTA meaning of real and personal property. However, landlords should keep it in mind when classifying the improvements made on their premises between real and personal property. It should also be taken into consideration when negotiating contracts terms with tenants.

It is a good reminder, especially now in connection with the enactment of Act 71 and the creation of the Real Property Registry. If you have a similar case, it may be a good opportunity to register those improvements and save property taxes!

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