

**To: New Jersey Law Revision Commission**  
**From: Wendy Llewellyn**  
**Re: Tax refunds - N.J.S. 54:4-54 (*Hanover Floral Co. v. E. Hanover Twp.*)**  
**Date: October 8, 2018**

## MEMORANDUM

### Executive Summary

In *Hanover Floral Co. v. E. Hanover Twp.*,<sup>1</sup> the Tax Court considered, among other issues, whether refunding a mistakenly-paid property tax is mandatory or permissive under N.J.S. 54:4-54,<sup>2</sup> and also addressed the three-year statute of limitations under the Appellate Division decision in *Cerame*.<sup>3</sup>

The Tax Court determined in this published decision that, despite the use of the word “may” instead of “shall” in the statute, a refund of taxes that were mistakenly paid due to the municipality’s error was mandatory, and that the municipality did not have discretion as to whether or not to provide a refund to one who had mistakenly paid taxes on a property due to the municipality’s error.<sup>4</sup> The Tax Court further noted its disagreement with a previous and binding Appellate Division decision that bound the Tax Court to limit Hanover Floral’s damages to only those taxes paid in the previous three years.<sup>5</sup>

### Background

During the conveyance of Lot 100 from a developer to Hanover Township (the Township), the owner of neighboring Lot 98, Hanover Floral, acquired a portion of Lot 100 through adverse possession.<sup>6</sup> Lot 100 was then split, and the adversely-possessed portion was incorporated into Hanover Floral’s Lot 98, while the rest of Lot 100 remained under the ownership of the developer and was dedicated to the Township for draining and conservation purposes as part of the developer’s plan.<sup>7</sup> In 2001, the Tax Assessor mistakenly listed Hanover Floral as the owner of the reconfigured Lot 100 and began sending tax bills for Lot 100 to Hanover Floral.<sup>8</sup> Hanover Floral paid those tax bills, believing them to be for that portion of Lot 100 they had acquired through adverse possession.<sup>9</sup> After realizing the mistake during a title search that was conducted in conjunction with a loan application in 2011, Hanover Floral

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<sup>1</sup> *Hanover Floral Co. v. E. Hanover Twp.* 30 N.J. Tax 181 (2017), as corrected (February 13, 2018).

<sup>2</sup> *Id.* at 189.

<sup>3</sup> *Id.* at 199.

<sup>4</sup> *Id.* at 194-95.

<sup>5</sup> *Id.* at 199, n. 6.

<sup>6</sup> *Id.* at 184-85.

<sup>7</sup> *Id.* at 185.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

brought the mistakenly-paid taxes to the attention of the Township's Tax Assessor, who admitted that Hanover Floral had been mistakenly assessed for Lot 100.<sup>10</sup> The Tax Assessor informed Hanover Floral that they would need to file a tax appeal, and the Township continued to bill Hanover Floral for taxes on Lot 100, until, in accordance with its agreement with the developer, the Township acquired Lot 100 in a Deed of Dedication, and, after becoming the legal owner of Lot 100, cancelled the outstanding taxes on Lot 100 on February 8, 2016.<sup>11</sup>

In the meantime, Hanover Floral filed a complaint in December of 2012 for a refund, as per N.J.S. 54:4-54, of those taxes they had mistakenly paid on Lot 100.<sup>12</sup> After the matter was moved from the Chancery Division to the Tax Court, the Township filed a Motion for Summary Judgment to dismiss all claims with prejudice, and Hanover Floral responded with a Cross-Motion for Summary Judgment, one of the issues in dispute being whether the Township was required to refund Hanover Floral the mistakenly-paid taxes, or whether the Township merely had discretion to pay Hanover Floral under N.J.S. 54:4-54.<sup>13</sup>

The Tax Court determined that the Township was required under N.J.S. 54:4-54 to refund all of Hanover Floral's mistakenly-paid taxes from 2009 onward, which encompassed those taxes that were mistakenly paid within the three-year statute of limitations.<sup>14</sup>

The relevant portion of N.J.S. 54:4-54 states the following:

Where one person has by mistake paid the tax on the property of another supposing it to be his own, the governing body after a hearing, on five days' notice to the owner, *may* return the money paid in error ...<sup>15</sup>

While the Township argued that the use of the permissive "may" indicates that, by the plain language of the statute, the Township had discretion as to whether or not to refund Hanover Floral for mistakenly-paid taxes, the Tax Court rejected that argument, noting that case law had found repayment of mistakenly-paid taxes to be "mandatory not discretionary even though N.J.S.[] 54:4-54 provides that 'the governing body ... *may return* the money paid in error ...'"<sup>16</sup> The Tax Court noted that repayment of mistakenly-paid taxes was found to be mandatory in both

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<sup>10</sup> *Id.* at 185-86.

<sup>11</sup> *Id.* at 187-88.

<sup>12</sup> *Id.* at 186.

<sup>13</sup> *Id.* at 187-89.

<sup>14</sup> *Id.* at 189.

<sup>15</sup> N.J.S. 54:4-54 (emphasis added).

<sup>16</sup> *Hanover Floral*, 30 N.J. Tax at 194-95 (quoting *JC Trapper, LLC v. City of Jersey City*, 19 N.J. Tax 421, 430 (Tax 2001), *aff'd o.b.*, 20 N.J. Tax 239 (App. Div. 2002)).

*McShain v. Township of Evesham* and *Farmingdale Realty Co. v. Borough of Farmingdale*<sup>17</sup>, and that in its decision, the *McShain* court looked to the New Jersey Supreme Court’s statement in *Farmingdale* that “[i]t is only just that the municipality and not the wronged taxpayer should bear the burden of the unilateral clerical errors of an assessor resulting in the payment of taxes to which the municipality is not entitled,”<sup>18</sup> and that “[t]here is no reason to involve the Taxpayer who paid by mistake; he is entitled to recover in any event. A contrary result would be unfair.”<sup>19</sup>

As to the three-year-limitation on the refund of mistakenly-paid taxes, the Tax Court here reluctantly conceded they were bound by the Appellate Division decision in *Cerame v. Township Committee of Middletown*, where the Appellate Division read N.J.S. 54:4-54 together with N.J.S. 54:51A-7, noting that they were both “correction-of-errors statutes [] intended to correct the same wrongs ...”<sup>20</sup> and that whether a suit was brought under N.J.S. 54:4-54, the statute at issue here, or under N.J.S. 54:51A-7, both would be bound by the three-year statute of limitations in N.J.S. 54:51A-7.<sup>21</sup> In a footnote, the Tax Court went on to analyze both statutes, disagreeing with the Appellate Division in *Cerame* that the two statutes should be read together, as it was the Tax Court’s opinion that the errors both statutes seek to correct are different, and that “it is apparent that the Legislature intended the remedy for N.J.S. 54:4-54 to extend indefinitely.”<sup>22</sup> However, the Tax Court noted that they were required to limit Hanover Floral’s repayment to the three-year statute of limitations, as while a trial court is permitted to disagree with Appellate Division decisions, “they are not free to disobey.”<sup>23</sup>

Since the plain language of the statute has the discretionary word “may,” but the case law indicates that it would be unfair to allow the burden of mistakenly-paid taxes to remain on the taxpayer when those taxes were initially paid because of the municipality’s own error, it seems that this statute could benefit from a change in language to make it clear that a municipality *must* re-pay taxes, at least in cases where those taxes were mistakenly paid as a result of a municipality’s error and not through the fault of the taxpayer.

Further, since the Tax Court vehemently disagreed with the Appellate Division that N.J.S. 54:4-54 and N.J.S. 54:51A-7 should be read together, resulting in the three year statute of limitations in the latter to be conferred onto the former, and it was the Tax Court’s opinion that both statutes deal with different “mistakes,” where the Appellate Division declared they deal

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<sup>17</sup> It is important to note that although N.J.S. 54:4-54 was the statute at issue in *Farmingdale*, that case dealt with the first sentence pertaining to *duplicate* payments, not payments mistakenly-made due to a municipality’s error, and the first part of the statute pertaining to duplicate payments contains the word *shall* and not *may*.

<sup>18</sup> *Id.* at 195 (quoting *McShain v. Twp. of Evesham*, 163 N.J. Super. 522, 527 (Law Div. 1978) (citing *Farmingdale Realty Co. v. Borough of Farmingdale*, 55 N.J. 103, 110-11 (1969))).

<sup>19</sup> *Id.* at 195 (quoting *McShain*, 163 N.J. Super. at 527).

<sup>20</sup> *Id.* At 199, n. 6.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at n. 6.

<sup>23</sup> *Id.* at 199, n. 6 (quoting *Tuition Plan v. Director, Div. of Taxation*, 4 N.J. Tax 470, 485 (Tax 1982)).

with the “same wrongs,” it may be useful to review those two statutes and their relationship to each other.

### **Conclusion**

Staff seeks authorization to conduct research and additional outreach regarding this issue to determine whether modifying N.J.S. 54:4-54 to clarify whether repayment of taxes mistakenly-paid due to the error of a municipality is mandatory, not discretionary, as well as whether N.J.S. 54:4-54 and N.J.S. 54:51A-7 should be read together, would be beneficial and provide clarity.