
Court of Appeals
of the
State of New York



In the Matter of
DCH AUTO, as Tenant Obligated to Pay Taxes and
DCH INVESTMENTS INC. (NEW YORK),
as Tenant Obligated to Pay Taxes,

Petitioners-Appellants,

– against –

THE TOWN OF MAMARONECK, a Municipal Corporation, its Assessor and
Board of Assessment Review and THE VILLAGE OF MAMARONECK, a
Municipal Corporation, its Assessor and Board of Assessment Review,

Respondents-Respondents.

For a Review under Article 7 of the RPTL

**BRIEF OF RESPONDENT-RESPONDENT
THE TOWN OF MAMARONECK IN RESPONSE
TO *AMICI CURIAE* STOP & SHOP AND SIMILARLY
SITUATED TENANTS AND TAXPAYERS**

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**Westchester County Clerk's Index No.: 23040/2009
Appellate Division Second Department, Docket No.: 2017-03016**

**Statement pursuant to 22 NYCRR § 500.13 (a)
of the Status of Related Litigation**

There is no related litigation as of this date.

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Questions Presented

1. Do the Second Department’s holdings in the *Circulo/LPH/DCH* trilogy¹ ignore “decades of caselaw in New York” (*see* heading “B” in the brief for amicus Stop & Shop at 19)?

The Appellate Division answered in the negative.

2. Is *Matter of Circulo Housing Dev. Fund Corp. v Assessor* (96 AD3d 1053 [2d Dept 2012]) limited to cases involving tax exemptions?

The Second Department answered: No.

Preliminary Statement

Stop & Shop ignores the major points argued by the respondents-respondents, Town of Mamaroneck, its Assessor and Board of Assessment Review in their brief dated September 15, 2021 (Town’s Brief). Rather than repeat Mamaroneck’s

¹ This shorthand refers to the Appellate Division’s decisions in *Matter of Circulo Housing Dev. Fund Corp. v Assessor* (96 AD3d 1053 [2d Dept 2012]), *Matter of Larchmont Pancake House v Bd. of Assessors* (153 AD3d 521 [2d Dept 2017]) and the subject of this appeal, *Matter of DCH Auto v Town of Mamaroneck* (178 AD3d 823 [2d Dept 2019]).

arguments, Point E² of this brief refers to those areas of the Town’s Brief where each issue is argued.

We begin, however, with an exposition on why the *Circulo/LPH/DCH* trilogy is not a departure from existing case law (Point C), followed by the rebuttal of the argument that *Circulo* should be limited to cases involving tax exemptions (Point D). This brief ends in Point F with another statutory mechanism created by the Legislature that allows an assessment to be challenged without complying with RPTL § 524 (3).

Point C

The Second Department has followed precedent, not deviated from it.

The main theme of Stop & Shop’s brief is that the Second Department has established a rule for the administrative challenge of assessments that “has altered the long-understood meaning and interpretation of a clause in RPTL § 524 (3)” (*see* brief for amicus Stop & Shop at 9). In advancing that proposition, this amicus ignores *Matter of Sterling Estates, Inc. v Bd. of Assessors* (66 NY2d 122, 126 [1985]): “[T]he Legislature has specified that protest is a condition precedent to a

² On September 16, 2021, the Town respondents-respondents submitted a brief in opposition to another amicus, CVS Albany LLC et al. That brief was divided into two points denominated “A” and “B”. To avoid the confusion that may be caused by overlapping point headings, this brief begins with Point C.

proceeding under Real Property Tax Law article 7 by providing that a petition seeking review must show that a complaint was made in time to the proper officers to correct such assessment. Failure to comply with that requirement requires dismissal of the aggrieved taxpayer’s petition” (internal quotation marks and citations omitted),³ *Matter of Raer Corp. v Vil. Bd. of Trustees* (78 AD2d 989, 989 [4th Dept 1980]), *lv dismissed*, 52 NY2d 602 and 677 [1981]) (“Such statutes provide that *an owner of real property* may protest the tax assessment” [emphasis added]) and *Matter of Raddison Community Assn. v Long* (3 AD3d 135, 139 [4th Dept 2003]), *lv dismissed* 4 NY3d 870 [2005]) (“[T]he construction urged by petitioner would be contrary to the purpose of RPTL 524, which requires that *a property owner* file a complaint with the assessor . . . before seeking relief in court (*compare* RPTL 524, *with* RPTL 706) [emphasis of “a property owner” added].” (This statement is followed by a four-sentence discussion of the administrative review of an assessment in which the words “property owner” or “owner” appear seven times.)

³ Lest the term “aggrieved taxpayer” cause confusion, the Sterling Estates petitioner was the owner of the real property whose assessment was being challenged (*id.* at 124). Furthermore, the term “taxpayer” refers to the property owner (*see* Town’s Brief at 26-28).

Instead, Stop & Shop offers only three cases in section B. of its brief to support its hypothesis. Each case was addressed in the Town’s Brief. The first, *Matter of EFCO Products v Cullen* (161 AD2d 44 [2d Dept 1990]), involved an Industrial Development Agency (*see* brief for amicus Stop & Shop at 19-21). The Town respondents-respondents pointed out that this Court has construed the intricate relationship behind IDA financed projects “as a mechanism to facilitate financing and . . . not a genuine allocation of ownership in the agency” (*see Davidson Pipe Supply Co. v Wyoming County Indus. Dev. Agency* (85 NY2d 281, 286 [1995])). Thus, an administrative complaint filed by an IDA lessee is a complaint filed by a property owner.⁴

⁴ The discussion of ground leases on pages 26-28 of the Stop & Shop brief is a distraction since the petitioners-appellants’ lease is not a ground lease. When a case involving the filing of an administrative complaint by a ground lessee arises, this Court may conduct a *Davidson Pipe Supply* analysis, conclude that a ground lessee is the functional owner of the property and allow it to grieve the assessment, just like tenants of IDAs can. However, ground leases are complicated arrangements where depending upon the terms of the lease, the tenant may or may not be considered the owner of the improvements (*see e.g. Matter of Natl Cold Storage Co. v Boyland*, 16 AD2d 267, 275 [1st Dept 1962] [“If an agreement between landlord and tenant should provide that the tenant is the owner of the building, such fact alone would not, in all cases or for all purposes, be absolutely conclusive”]). How this Court may handle ground leases in tax certiorari proceedings in the future is not an issue here. The Court should await a proper record before delving into that issue.

The second case proffered by Stop & Shop is *Matter of Long Island Power Auth. v Assessor* (164 AD2d 591 [2d Dept 2018]) (*see* brief for amicus Stop & Shop at 21). That case has no bearing on this appeal since the owner of the property at issue had commenced its own tax certiorari proceeding and therefore must have filed an administrative complaint (*see* Compendium for the Town Respondents-Respondents at Comp. 180).⁵

The final case advanced by Stop and Shop is *Matter of McLean=s Dept Stores, Inc. v Commr.* (2 AD2d 98 [3d Dept 1956]) (*see* brief for amicus Stop & Shop at 21-22). The Town respondents-respondents have given a thorough explanation of why *McLean* does not apply here (*see* Town’s Brief at 48-50).

Rather than having “conjured a new interpretation of RPTL § 524” (*see* brief for amicus Stop & Shop at 4), the *Circulo/LPH/DCH* trilogy are recent applications of the rules that have been in place for a long time.

⁵ The Town respondents-respondents have no quarrel with an aggrieved party being a petitioner in a tax certiorari proceeding so long as the proceeding is preceded by an administrative complaint filed by the property owner (*see* Town’s Brief at 18 n. 4 and at 51-52).

Point D

***Circulo* is not rooted in the tax exemption statutes.**

An offshoot of the main theme of this amicus' brief is its argument that the foundation for the *Circulo/LPH/DCH* trilogy is faulty since *Circulo* involved the denial of a tax exemption (*see* brief for amicus Stop & Shop at 8-11). In Point X of the Town's Brief, this argument is refuted (*see* Town's Brief at 69-71).

Point E

The amicus fails to address the issues that are the focal point of this appeal.

Probably because it has no answer for them, Stop & Shop bypasses the key issues. It would be tedious to repeat all those issues and the reasons why their resolution compels an affirmance. Instead, we list most of the major ones and cite the pages in the Town's Brief where an explication can be found.

- The Real Property Tax Law empowers assessors to assess real property only. Personal property, like the petitioners-appellants' lease, is not assessed. Therefore, as a matter of law, the petitioners-appellants cannot be "the person whose property is assessed" (*see* Town's Brief at 22-25).
- Since only real property can be assessed "the person whose property is assessed" can only be the owner of the property (*see* Town's Brief at

25-26). The Westchester County Tax Act reinforces that conclusion by making the property owner personally liable for real property taxes (*see* Town’s Brief at 26-27 and Westchester County Tax Act § 283.614 [1]). So do RPTL § 304 (2) and RPTL § 926 (1) under the proper circumstances.

- The holdings in the *Circulo/LPH/DCH* trilogy are the only way to harmonize the very different language of RPTL § 524 (3) and RPTL § 704 (1) so that both sections have meaning and purpose (*see* Town’s Brief at 33-37).
- The petitioners-appellants could have complied with RPTL § 524 (3) and in fact did comply in 2014. So can all tenants (*see* Town’s Brief at 51-53).
- RPTL § 523-b shows that the Legislature knows how to choose the persons who are entitled to file an administrative complaint. By not amending RPTL § 524 (3) to include “any person or corporation claiming to be aggrieved by the assessment of real estate. . . .” (RPTL 523-b [6] [a]), the Legislature demonstrated its intention to require administrative complaints to be filed by property owners in places where RPTL § 524 (3) controls (*see* Town’s Brief at 38-40).

But RPTL § 523-b is not the only situation where the Legislature has altered the rules regarding administrative review. We conclude with Title 4-a of the Real Property Tax Law.

Point F

RPTL § 586 (4) is another example of the Legislature choosing to allow a nonowner to file an administrative complaint.

Title 4-a of the Real Property Tax Law deals with assessments of properties in certain counties of the State that are burdened with watershed conservation easements designed to protect New York City’s drinking water. Properties so burdened remain taxable; however, responsibility for the tax is allocated between the property owner and the City of New York (*see* RPTL § 586 [1] and [2] and RPTL § 588 [1]).⁶

Even though the City of New York’s easement may not cover the entire parcel and even though the property owner is not responsible for the taxes levied upon the watershed conservation easement, RPTL 586 (4) allows either the City or the

⁶ (*see* RPTL § 586 [2]: “After subtracting the assessment for each watershed conservation easement . . . from the parcel’s total assessment, the remaining assessment shall be entered on the assessment roll as taxable to the owner of the property” and RPTL § 588 [1]: “The city shall pay taxes levied on . . . watershed conservation easements pursuant to the foregoing sections of this title in the same manner as any other taxes levied upon real property.”)

property owner to seek “*administrative* or judicial review of the assessment of the land subject to such easement”, the only requirement being that the party seeking review notify the other “of the filing of a *complaint* or the service of the petition” (*id.*) (emphasis added). Thereafter, both parties are “deemed a party to the proceeding with full rights to participate” (*id.*).

Like RPTL § 523-b, RPTL § 586 (4) is another statutory example of an administrative review process that does not require compliance with RPTL § 524 (3). These statutes emphasize that the Legislature knew that it could create a system in areas of the State where administrative review is governed by RPTL § 524 (3) that would allow a tenant, like the petitioners-appellants, to grieve the assessment of the property it leases in its own names. Yet, it consciously chose not to do so.

Conclusion

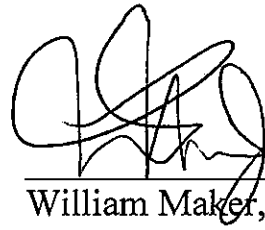
This Court is asked to interpret and apply the words of RPTL 524 (3) as written, against the backdrop of the Real Property Tax Law which deals only with real property and the common law which characterizes leaseholds as personal, not real property.

Applying the facts to these principles leads to the conclusion that the petitioners-appellants were not “the person whose property is assessed.” Hence, the

administrative reviews were defective⁷ and did not supply a predicate for subject matter jurisdiction.

Nothing in Stop & Shop's brief persuasively argues against the Second Department analysis or its conclusion.

Dated: April 27, 2022



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⁷ except for 2014.

Certification of Compliance

This certification is being made pursuant to 22 NYCRR §500.13 (c).

1. This brief was prepared on a computer using the Microsoft Word word-processing program.
2. The type face is Times New Roman.
3. The point size of the main text and footnotes is 14.
4. The lines are double-spaced.
5. According to the word count function of the word-processing system, starting after the questions presented, the brief contains 2,075 words.

Dated: April 27, 2022



William Maker, Jr.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)
COUNTY OF WESTCHESTER)

Ivan Diaz, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at 2160 Holland Avenue, Bronx, New York 10462.

That on the 2nd day of May, 2022, deponent served the within:

**BRIEF OF RESPONDENT-RESPONDENT THE TOWN OF MAMARONECK
IN RESPONSE TO AMICI CURIAE STOP & SHOP AND SIMILARLY
SITUATED TENANTS AND TAXPAYERS**

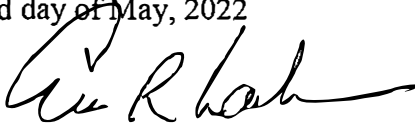
upon designated parties indicated herein at the addresses provided below by means of Federal Express Standard Overnight Delivery of 3 true copies of the same at the addresses of said attorney/parties with the names of each represented party:

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Notary Public

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Qualified in Westchester County
Commission Expires March 5, 2023



Ivan Diaz