To be Submitted by:
WILLIAM MAKER, JR.

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 *AMICUS CURIAE* INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC. (ICSC)

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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.

Table of Contents

Table of Cases and Authorities

Table of Cases and Authorities, cont.

Table of Cases and Authorities, cont.

This brief responds to the brief filed by the International Council of Shopping Centers, Inc. (ICSC) in support of the petitioners-appellants.

Questions Presented

1. Is 700 Waverly Ave Corp., the owner of the property at issue, the "person whose property is assessed" and therefore the person who had to file administrative complaints challenging the assessment of 700 Waverly Ave?

The Second Department answered in the affirmative.

2. Did 700 Waverly Ave Corp. participate in the administrative reviews?

The Second Department answered in the negative.

3. Can a Court correct the error committed by the petitioners-appellants during the administrative reviews?

The Second Department did not address this question; but the answer is No. The Court is bound to the record developed by the petitioners-appellants before the Board of Assessment Review.

Point L[1]

ICSC avoids the fundamental issues.

We cannot lose sight of the fact that this case is a matter of statutory construction. Instead of addressing the language of the relevant statutes, however, ICSC wends its way through the inner workings of *Matter of Circulo Housing Dev. Fund Corp. v Assessor* (96 AD3d 1053 [2d Dept 2012]) and *Matter of Larchmont Pancake House v Bd. of Assessors* (153 AD3d 521 [2d Dept 2017], *affd on other grounds* 33 NY3d 228 [2019]) (*see* brief for amicus ICSC at 7-12).

Here are the questions posed by the relevant statutes that ICSC did not answer:

Who is the "person whose property is assessed"?

Upon whom are real estate taxes imposed, i.e., who is the taxpayer?

How can the dramatically different language of RPTL 524 (3) and RPTL 704 (1) be harmonized so that each retains meaning and plays a role in the process for challenging tax assessments?

What should the Courts conclude from the Legislature's decision not to amend RPTL 524 (3) after it enacted RPTL 523-b, which, unlike RPTL 524 (3), allows "any

[1] The Town respondents-respondents have submitted briefs in opposition to three other amici, CVS Albany LLC et al., Stop & Shop and Wakefern Food Corp. Those briefs were divided into lettered points ending with Point K. This brief begins with Point L to avoid confusion that may be caused by repetitive point headings.

person or corporation claiming to aggrieved by the assessment of real estate" to file an administrative complaint in Nassau County (*see* RPTL 523-b [6] [a])?

The Town respondents-respondents did address the statutes and showed how the Second Department's holding is supported by those statutes.

A. The "person whose property is assessed".

As its name implies, the Real Property Tax Law deals only with real property, going so far as to declare: "Notwithstanding any provision of this chapter or of any general, special or local law, personal property, whether tangible or intangible, shall not be liable to ad valorem taxation" (*see* RPTL 300). Therefore, when RPTL 524 (3) refers to "property . . . assessed", it is referring to real property (*see* Town's Brief at 22-24).[2]

This leads to the next question. Was the petitioners-appellants' leasehold the real property that the Town of Mamaroneck assessed? The answer is no. Under New York law, leaseholds are not real property. Since the Real Property Tax Law is focused exclusively on real property, the petitioners-appellants' leasehold could not have been the "property . . . assessed" (*see* Town's Brief at 24-25).

[2] "Town's Brief" refers to the brief dated September 15, 2021 that the Town of Mamaroneck, its Assessor and Board of Assessment Review filed on this appeal.

The "property . . . assessed" was the real property that the petitioners-appellants leased from 700 Waverly Ave Corp. (*see e.g.* RPTL 502 [2] where in setting forth the basic content of an assessment roll, the Legislature mandated that "Provision shall be made with respect to each separately assessed parcel of real property for the entry . . . of the name of the *owner*, *last known owner* or *reputed owner* . . . ." [emphasis added]).

Therefore, a proper reading of the Real Property Tax Law leads to the conclusion that the "person whose property is assessed" can only be 700 Waverly Ave Corp., the owner of the demised premises.

Since RPTL 524 (3) requires an administrative complaint to be filed by the "person whose property is assessed", 700 Waverly Ave Corp. had to be the one who filed, or authorized the filing of, the administrative complaints in order for there to have been a predicate for the ensuing tax certiorari proceedings (*see Matter of Larchmont Pancake House v Bd. of Assessors*, 33 NY3d 228, 235 [2019]["[T]he proper filing of an administrative grievance pursuant to RPTL article 5 is a condition precedent to judicial review pursuant to RPTL article 7"] and *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 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]).

With the exception of the 2014 challenge, 700 Waverly Ave Corp. did not participate in any of the administrative reviews. As a result, the petitioners-appellants failed to satisfy the condition precedent for a tax certiorari proceeding, making each of their proceedings, other than 2014, defective as a matter of law.

The conclusion that 700 Waverly Ave Corp. is the "person whose property is assessed" is supported by the answers to the other three questions posed by the statutes.

B. Who is the taxpayer?

Real estate taxation is *ad valorem* taxation. As this Court has noted: "An ad valorem property tax is always based upon ownership of property" (*see Ampco Printing-Advertisers' Offset Corp. v City of New York* (14 NY2d 11, 22 [1964]). Accordingly, when the taxing authorities issued tax bills based upon the assessors' determination of 700 Waverly Avenue's value, they were not taxing the petitioners-appellants but 700 Waverly Avenue Corp., the owner of the underlying real estate.

The relevant statutes bear out this statement. Westchester County Tax Act § 283.614 (1) imposes personal liability for real property taxes upon the owner, as do

RPTL 304 (2) and RPTL 926 (1), albeit if certain other conditions are met. This Court also has recognized that real property taxes are imposed upon a property's owner (*see Larchmont Pancake House,* 33 NY3d 228, 240 ["[A]rticle 7's aggrievement provision consolidates the authority to seek judicial review of a challenged assessment, generally requiring non-owners to assume a direct obligation to pay *the owner's taxes*" [emphasis added] and *Matter of Waldbaum, Inc. v Fin. Adm'r*, 74 NY2d 128, 133 [1989] ["[T]he party aggrieved was, by contractual rearrangement of the obligation, made wholly responsible for the entire tax levy in the stead of the *owner-taxpayer*" [emphasis added]).

There can be no doubt but that the 'taxpayer' here was 700 Waverly Ave Corp., not the petitioners-appellants. Payment of those taxes by the petitioners-appellants was just a "contractual rearrangement of the obligation" (*id.*).

C. Harmonizing RPTL 524 (3) and RPTL 704 (1).

The distinction between RPTL 524 (3) and RPTL 704 (1) is apparent. Except for the word 'person' and derivatives of the word 'assess', the operative language in these statutes share nothing in common.

RPTL 524(3) requires the complainant at the administrative level to be "the person whose property is assessed, or . . . some person authorized in writing by the complainant or his officer or agent . . .", while RPTL 704 (1) is more expansive,

permitting "[a]ny person claiming to be aggrieved by any assessment of real property . . . ." to be the petitioner in a tax certiorari proceeding (assuming, of course, that the proceeding is preceded by a proper administrative complaint).

The Second Department saw the dichotomy and harmonized the statutory scheme by determining the phrase, "the person whose property is assessed", to be synonymous with "owner", while recognizing that RPTL 704 (1)'s phrase refers to a larger group of potential petitioners in the tax certiorari proceeding that follows an administrative review. In doing so, the Appellate Division did precisely what this Court has directed lower courts to do (*see Matter of the Town of Irondequoit v County of Monroe*, 36 NY3d 177, 182 [2020] ["When the statutory provision to be interpreted is but one component in a larger statutory scheme, it must be analyzed in context and in a manner that harmonizes the related provisions and renders them compatible" (internal quotation marks and citations omitted)] and *People ex rel. McCurdy v Warden*, 36 NY3d 251, 262 [2020] ["As the language of Penal Law § 70.45 [3] and Correction Law § 73 [10] demonstrates, the two provisions serve entirely different purposes and, thus, are not in tension with each other"]).

The Appellate Division's reconciliation of RPTL 524 (3) and RPTL 704 (1) follows this Court's instruction to give meaning to all statutory phrases so that no

part of a statute is rendered superfluous (see Town's Brief at 33-37 for a more complete exposition on harmonizing these two statutes).

D. The Legislature's decision not to amend RPTL 524 (3).

Another compelling reason to conclude that the Legislature intended "the person whose property is assessed" to be the property owner is RPTL 523-b. Added to the Real Property Tax Law in 1998 and drawing heavily from RPTL 524, RPTL 523-b takes a different tack. There the Legislature chose to expand the persons who may file grievances in Nassau County to "any person or corporation claiming to be aggrieved by the assessment of real estate. . . ." (RPTL 523-b [6] [a]). It did not then, and since 1998 has not, amended RPTL 524 (3) to match RPTL 523-b (6) (a).

RPTL 523-b demonstrates that if the Legislature had wanted to give persons, other than property owners, the right to pursue administrative review in their own names in places outside of Nassau County, it knew how to do so. By not broadening RPTL 524 (3) in the wake of RPTL 523-b, the Legislature intended that when RPTL 524 (3) applies, it is the property owner who must file the administrative complaint. (For a more expansive argument on this topic, *see* Town's Brief at 38-40).

Point M

Except in 2014, the property owner did not participate in the administrative reviews.

ICSC's argues that the lease authorized the petitioners-appellants to act on 700 Waverly Ave Corp.'s behalf before the Board of Assessment Review, thereby making the landlord a party to the administrative reviews (*see* brief for amicus ICSC at 22). The record does not support this argument.

First, the lease did not appoint the petitioners-appellants as their landlord's agent for the purpose of filing grievances. Section 5 (h) does appoint the petitioners-appellants as the landlord's attorney-in-fact to make payments to third parties, but this delegation is made specifically "for the *sole purpose* of making [such] payments" (emphasis added) (R. 56). If the landlord meant to appoint the petitioners-appellants as its representative for filing grievances in its name, the lease would have said so, or the delegation in section 5 (h) would not have been so limited.

Second: Except for 2014, Part 4 of Form RP-524 does not contain a "DESIGNATION OF REPRESENTATIVE TO MAKE COMPLAINT" by 700 Waverly Ave Corp. (R. 103-104, R. 116 and R. 118, R. 130 and R. 132, R. 145 and R. 147, R. 163 and R.165).

Third, Except for 2014, paragraphs 1 and 3 of the administrative complaints say that they are being filed by or on behalf of the petitioners-appellants, not 700 Waverly Avenue Corp. (*see* R. 100, R. 113, R. 127, R. 142 and R. 160).

Fourth, RPTL 524 (3) requires the written authorization from the owner to be included among the papers submitted as part of the administrative review. The facts, stipulated to by the petitioners-appellants, are that the administrative complaints did not contain a copy of the lease and except for 2014, the petitioners-appellants' landlord neither signed the RP-524 forms nor a separate authorization that was appended to the administrative complaints (R. 100 - R. 104, R.113 - R.118, R. 127 - R. 133, R. 142 - R. 148 and R. 160 - R.165). In fact, with the exception of 2014, the only written authorizations attached to the administrative complaints are authorizations from the petitioners-appellants to their counsel (R. 104, R. 118, R. 132, R. 147 and R. 165).[3]

Fifth, Even if the lease were relevant to this discussion, it is dated October 10, 2007 which predates the administrative reviews by a number of years (R. 49).

[3] This brief focuses on the filings made with the Town of Mamaroneck. However, the statements made in paragraphs SECOND through FOURTH above also pertain to the filings that initiated administrative reviews of the Village of Mamaroneck assessments (R. 176 - R.181, R. 193 - R. 198 and R. 211 - R. 217).

RPTL 524 (3) requires an authorization to "bear a date within the same calendar year during which the complaint is filed."

In short, except in 2014, the owner did not participate in the administrative reviews.

Point N

The petitioners-appellants did not "unwittingly fail"[4] to satisfy RPTL 524 (3). Their actions were intentional.

ICSC portrays the administrative complaints as the mere "imperfect identification of a complainant" (*see* brief for amicus ICSC at 19). That is not what happened. The petitioners-appellants deliberately decided to bring the administrative reviews in their own name, not as a duly appointed representative of the property owner (*see* paragraph 1 of the administrative complaints where the petitioners-appellants announce that they are proceeding in their own name: "DCH Auto --- lessee, taxpayer" (R. 100), "DCH AUTO AS TENANT OBLIGATED TO PAY TAXES" (R. 113 and R. 127) and "DCH INVESTMENTS (NEW YORK) AS TENANT OBLIGATED TO PAY TAXES" (R. 142).

The petitioners-appellants' action was not an oversight or an inadvertent error. It was a conscious decision, as evidenced by the 2014 administrative review where

[4] (*see* brief for amicus ICSC at 19).

for the one and only time, the name of the owner appears in section 1 of the administrative complaint (R. 160) and the owner authorized the administrative review (R. 165).

Moreover, even if bringing the review in the name of the petitioners-appellants was an accidental blunder, the Court has no authority to overlook it (see Town's Brief at 61-67 for the reasons why Courts cannot ignore or bypass a substantive error made in an administrative review).

Point O

ICSC relies upon irrelevant appellate decisions.

The Town respondents-respondents already have demonstrated why the appellate cases dealing with tax certiorari matters cite by ICSC do not pertain to this case.

The Town respondents-respondents have shown that *Matter of McLean=s Dept Stores, Inc. v Commr.* (2 AD2d 98 [3d Dept 1956])[5] is irrelevant (*see* Town's Brief at 48-50).

Matter of Big V Supermarkets, Inc., Store #217 v Assessor (114 AD2d 726

[5] (*see* brief for amicus ICSC at 13).

[2d Dept 1985])[6] is another case involving an Industrial Development Agency. The Town respondents-respondents have used this Court's teaching in *Davidson Pipe Supply Co. v Wyoming County Indus. Dev. Agency* (85 NY2d 281, 286 [1995]) to demonstrate that for administrative reviews of assessments, an IDA's tenant is considered the owner of the underlying real estate (*see* Town's Brief at 73-75).

Matter of Rotblit v Bd. of Assessors (121 AD2d 727 [2d Dept 1986])[7] and *Matter of Miller v Bd. of Assessors* (81 NY2d 82 [1997])[8] lack relevance because each dealt with a defect in a judicial proceeding where Courts have leeway to correct certain mistakes. This case, however, involves a defect in the administrative reviews that preceded litigation. Courts must deal with the record as it was created before an administrative agency. Courts cannot ignore or change the facts (see Town's Brief at 59-68 for the reasons why Courts are able to rectify errors made in litigation but not substantive flaws in an administrative review).

The issue in *Matter of Ames Dept Store, Inc., No. 18 v Assessor* (261 AD2d 835 (4th Dept 1999]) was whether a tenant, required by lease to pay the real estate

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[6] (*id.*)

[7] (*see* brief for amicus ICSC at 22).

[8] (*see* brief for amicus ICSC at 21-22).

taxes proportionate to the fraction of the overall lot it occupied, was an "aggrieved person within the meaning of Real Property Tax Law § 704 (1)." The administrative review was not an issue.

Finally, there is *People ex rel W. S. & B. R. Co. v Johnson* (29 AD 75 [4th Dept 1898]) which ICSC portrays as a case involving "language similar to RPTL § 524 (3)" (*see* brief for amicus ICSC at 16). In fact, Tax Law § 36, as it appeared in Chapter 908 of the Laws of 1896, and RPTL 524 (3) have a major difference.

Tax Law § 36 provided that the administrative complaint be made under oath and that its verification "must be made by *the person assessed or whose property is assessed* . . . ." (emphasis added). RPTL 524 (3) eliminated the oath but requires the administrative complaint to be made "by *the person whose property is assessed* . . . ." (emphasis added). The disjunctive in the 1896 law makes it sufficiently distinctive that cases construing its meaning should not be used to construe the modern statute.

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 defective[9] and did not supply a predicate for subject matter jurisdiction.

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

Dated: April 29, 2022

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[9] with the exception of 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.

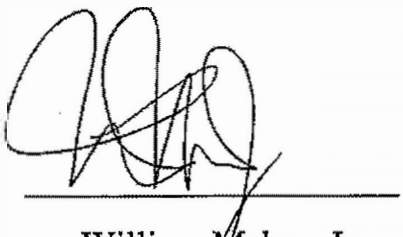
2. The type face is Times New Roman.

3. The point size of the main text and footntes 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 2,900 words.

Dated: April 29, 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 *AMICUS CURIAE* INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC. (ICSC)

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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Sworn to before me this
2nd day of May, 2022

Notary Public

Ivan Diaz

ERIC R. LARKE
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