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Appellate Division, Second Department Docket No. 2017-03016

Court of Appeals

STATE OF NEW YORK

In the Matter of

DCH AUTO, etc., et al.,

Petitioner-Respondent,

against

THE BOARD OF ASSESSORS,
THE ASSESOR OF THE TOWN OF MAMARONECK,
and THE BOARD OF ASSESSMENT REVIEW,

Respondents-Appellants.

BRIEF OF *AMICI CURIAE* STOP & SHOP AND SIMILARLY SITUTATED TENANTS AND TAXPAYERS IN SUPPORT OF PETITIONER-RESPONDENT

CRONIN & CRONIN LAW FIRM, PLLC
Attorneys for Amicus Curiae
Stop & Shop and similarly situated tenants and taxpayers
200 Old Country Road, Suite 470
Mineola, New York 11501
516-747-2220
scronin@cronintaxlaw.com

Of Counsel:

Sean M. Cronin

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DISCLOSURE STATEMENT

Pursuant to 22 NYCRR § 500.1(f), Amicus Curiae, The Stop & Shop Supermarket Company, LLC states that it operates under the U.S. parent company Ahold Delhaize USA, Inc., and identifies the following entities as subsidiaries or affiliates:

- Ahold Delhaize America Holding, Inc.
- Ahold Delhaize Investment Holdings, Inc,

CONTRIBUTION STATEMENT

Pursuant to 22 NYCRR § 500.23(a)(4)(iii), no individual or entity, other than Stop & Shop's counsel, contributed monies or participated in the preparation and content of the Proposed Amicus Brief.

INTEREST OF AMICUS CURIAE

The issue the Petitioners-Appellants seek permission to appeal before this Court is whether under Real Property Tax Law § 524 ("RPTL § 524") an "aggrieved party" within the meaning of RPTL § 704 is precluded from satisfying the condition precedent of grieving the property taxes at the administrative level solely because they are not the owner of the property for which they are obligated to pay taxes.

Amici curiae, Stop & Shop, who obtained the status of an aggrieved party able to prosecute an assessment and tax obligation under § 704 of the Real Property Tax Law as a tenant obligated to pay the real estate taxes on property, is now being prevented from exercising those rights due to the Appellate Division, Second Department's incorrect interpretation of RPTL§ 524(3). Because of this decision, Stop & Shop and other similarly situated entities are unjustly denied the rights given to them under RPTL Article 5 and 7.

DCH Auto is the third decision in which the Appellate Division, Second Department has interpreted Article 5 this way, creating a divergent line of decisions that are detrimentally altering the long-understood interpretation and application of a statute that is the basis for correcting an unconstitutional overtaxing on real property. This Court's review and determination are required in this matter to ensure the uniform application of a statute that is the condition precedent for tens of thousands of petitions each year.

These Appellate Division decisions are allowing municipalities to deny taxpaying tenants and other similarly situated entities their day in court. Over-assessing and over-taxing municipalities who collected the real estate taxes are denying these entities and individuals their right to challenge their paid tax obligation by stating that a claim for tax refund can only be made by owners; entities that, in many instances, do not pay the taxes. Taxpaying tenants, who have been unfairly stripped of their right to challenge their tax obligation, are suffering the loss of millions of dollars in overpaid taxes. This decision is resulting in an unjust deprivation of net tenants' rights by encouraging municipalities to force taxpaying tenants to pay excessive taxes on over-assessed property with little or no right to address the inequity of their tax obligation in many of the highest tax jurisdictions in the United States.

This detrimental result is the product of a rigid, restrictive interpretation of a remedial statute through the addition of an owner requirement that does not appear in the statute itself and has never been construed from the statute's plain language before now. The Appellate Division's decision unjustly precludes the non-owner taxpayer from achieving the condition precedent to bring an action challenging their tax assessment. This decision's incorrect interpretation of RPTL Article 5 and 7 harm both existing and future taxpaying tenants by stripping them of their right to

challenge the taxes already paid and removing their right to challenge their future tax obligation.

For present and future proceedings, the Appellate Division decision, as it stands, will harm past commercial relationships and leases, as well as change future commercial relationships that have already been agreed upon in reliance on the tenants right to challenge the assessment by denying a legally obligated taxpaying tenant their day in court.

The Stop & Shop Supermarket Company, LLC respectfully requests that this Court review and correct the anomalous branch of caselaw that has emerged in the Appellate Division, Second Department due to a misstatement of law and misinterpretation of RPTL § 524 in *Matter of Circulo Housing Dev. Fund Corp. v Assessor of City of Long Beach, Nassau County*, 96 A.D.3d 1053, 947 N.Y.S.2d 559 (2nd Dep't 2012).

SUMMARY OF ARGUMENT

An erroneous, blanket statement of law in the *Circulo* case has now fundamentally changed tax certiorari practices throughout the state. The Appellate Division, Second Department has now twice cited to their decision in *Circulo*, reinforcing a rule that is contrary to decades of caselaw and commonly understood practice without affording the new interpretation a scintilla of statutory analysis.

This has resulted in a significant and detrimental infringement on the rights of tenants with property tax obligations.

Circulo involved RPTL Article 7 proceedings reviewing the denials of property tax exemptions pursuant to RPTL § 420-a by the Board of Assessment Review for the City of Long Beach. Exemption applications pursuant to RPTL § 420-a specifically require a property's owner to file the application. Because the petitioner was not the owner of all the properties for which they filed exemption applications, the Appellate Division, Second Department correctly ruled that petitioner did not have standing to file Article 7 proceedings for those properties it did not own.

Instead of citing to the owner requirement for applications pursuant to RPTL 420-a, however, the court conjured a new interpretation of RPTL § 524 and stated that it requires "the *property owner* file a complaint or grievance to obtain administrative review of the tax assessment . . . ." *Circulo*, 96 A.D.3d at 1056, 947 N.Y.S. 2d at 562. This statement was the first time an owner requirement had ever been attached to RPTL § 524.

The term "owner" does not appear in RPTL § 524. The actual language used in RPTL § 524(3), "[s]uch statement must be made by the person whose property is assessed . . ." has never been interpreted as an exclusory clause requiring filings to be made by the legal owner of the property. The decision contained no methods of

reasoning, no discussions of the interpretation of statutory language, and no prior guiding caselaw the court may have used to reach this unfamiliar and impactful conclusion.

This erroneous interpretation of RPTL § 524 by the Appellate Division, Second Department is the reason we are presently before the Court. These misinterpretations of RPTL § 524 continue to be cited to and relied upon, creating devastating and unjust consequences for taxpaying tenants and similarly situated entities.

In 2017, the Appellate Division, Second Department decided *Matter of Larchmont Pancake House v. Board of Assessors and/or the Assessor of the Town of Mamroneck*, 153 A.D.3d 521, 61 N.Y.S.3d 45 (2nd Dep't 2017) *aff'd on other grounds* 33 N.Y.3d 228 (2019). The court applied the erroneous principle stated in *Circulo* and ruled the petitioner did not have standing under Article 5 to file the initial administrative grievance despite being an "aggrieved party" within the meaning of RPTL Article 7. *Larchmont*, 153 A.D.3d at 521, 61 N.Y.S.3d at 46.

The case presently before this Court is the second case in which *Circulo's* interpretation of Article 5 has been applied to a tax certiorari matter. *DCH Auto v. Town of Mamaroneck*, 178 A.D.3d 823, 111 N.Y.S.3d 553 (Mem) (2nd Dep't 2019), involves the most straightforward set of facts affected by the *Circulo* decision thus

far and presents this Court an opportunity to correct this rigid and misguided interpretation of a statute that requires liberal construction.

This incorrect interpretation of RPTL § 524 alters the entire presently existing commercial assessment challenge system by eliminating a majority of taxpayers from having a right to challenge the taxes they are obligated to pay and creates windfalls and inequitable benefits to over-assessing, over-taxing municipalities.

This ruling also creates implausible results for a remedial statute; there are now significantly more parties eligible to file an Article 7 petition than there are parties who may file the predicate administrative grievance through Article 5. Further nonsensical results are illustrated by situations such as a ground leases in which the lessor and lessee have split ownership of the land and improvements. In these common landlord/tenant relationships, neither party would have standing to file a grievance on both the land and improvements. This could not be what the legislature intended under the plain language of the statute.

The harm this decision causes to both present and future taxpaying tenants could not have been contemplated by the Appellate Division or lawmakers. The two statutes at issue in this case address the same subject matter. Any individual or entity obligated to pay real property taxes may file the judicial complaint, and to hold that the same parties may not file the initial administrative complaint makes these interacting statutes incongruent. The condition precedent was not designed to be a

technicality that eliminates the rights of aggrieved parties. The present status of the commercial real estate market typically has owners, through lease agreements, placing the burden of paying taxes on tenants and other similarly situated individuals and entities.

This decision creates a technical barrier of the sort that this Court has repeatedly instructed should not defeat grievances based on remedial statutes. The uniqueness of the issue before us, however, is the fact that these barriers created by the Appellate Division are not being raised or discussed at the administrative level. No objections based on ownership are being raised by local administrative boards or municipalities when the Article 5 grievances are filed because applications from taxpaying tenants are standard and rightfully accepted at this level.

Because the alleged administrative error is not being perceived by the administrative bodies, by the time the Article 7 is filed it is too late to go back and cure something that could be easily remedied in certain cases. The acceptance of this administrative procedure by the administrative bodies, based on the administrative statute, has been ruled fatal to petitioners by the Second Department.

ARGUMENT

I. The Appellate Division, Second Department's Reliance on Its Decision in *Circulo* Furthers A Clearly Erroneous Statement of Law in a Tax Exemption Case Guided by RPTL§ 420-a.

The legal precedent that the Appellate Division, Second Department relied upon in this case is based on a mistaken statement of the law in their decision in *Matter of Circulo Housing Dev. Fund Corp. v Assessor of City of Long Beach, Nassau County* 96 A.D.3d 1053, 947 N.Y.S. 2d 559 (2nd Dep't 2012). *Circulo* was an exemption case guided by RPTL § 420-a, which involves a strict set of requirements that need to be met to qualify for the real property tax exemption defined therein. RPTL § 420-a specifically requires that the owner of the property must file the tax exemption application. RPTL § 420-a(11).

In *Circulo*, a corporation filed for property tax exemptions on buildings that it did not own. When these applications were denied, they filed administrative grievances pursuant to Article 5 and, subsequently, Article 7 petitions. Because of the strict requirements of RPTL § 420-a, the petitioner never had standing because it could not properly file for exemptions on the properties that it did not own. The Court ultimately came to the same conclusion, but it was not RPTL § 420-a that was cited as the guiding law.

The Court instead pointed out what it believed to be the differences in requirements for RPTL Article 5 and Article 7, stating "while RPTL Article 5

requires that the *property owner* file a complaint or grievance to obtain administrative review of the tax assessment *any person* claiming to be aggrieved by any assessment may file a petition pursuant to RPTL Article 7 to challenge, inter alia, an '[u]nlawful assessment.'" (Emphasis added). RPTL § 704 uses the term "any person" as the court stated, but nowhere in RPTL § 524 does the term "property owner" appear.

It is noted in the decision that the respondents had argued the petitioner lacked standing because the initial administrative action must be filed by the "owner of the property." *Circulo*, 96 A.D.3d at 1055, 957 N.Y.S.2d at 561. The respondents were correct in that the petitioner in this case did not have standing to file 420-a applications for property tax exemptions. Using this new interpretation of RPTL § 524, however, the Court dismissed the petitions but disagreed with even the respondent's arguments as to standing, stating that a failure to meet a condition precedent to file an Article 7 petition was the reason for the dismissal.

Clearly in error, the Appellate Division, Second Department altered the long-understood meaning and interpretation of a clause in RPTL § 524(3) and has created the dispute we argue today. No authority, reasoning or canons of interpretation were cited to as guides to the Court creating this new limitation, despite the fact that no court or administrative body has previously held Article 5's language to be so restrictive.

The *Circulo* ruling went largely unnoticed for over 5 years until the Second Department applied this unfounded statement of law to a tax certiorari matter for the first time in *Matter of Larchmont Pancake House v. Board of Assessors and/or the Assessor of the Town of Mamaroneck*, 153 A.D.3d 521, 61 N.Y.S.3d 45 (2nd Dep't 2017) *aff'd on other grounds* 33 N.Y.3d 228. The Appellate Division's *Larchmont* decision relied upon and mirrored its decision in *Circulo*, despite *Circulo* being an exemption case guided by a completely different statute.

Larchmont involved a complex set of facts; the petitioner was a corporation that operated on land owned by a trust, and the owner of the corporation was a beneficiary of the trust. The administrative grievance was filed by the corporation, and although the corporation paid all property taxes there was no lease or contract in place obligating them to do so. The Appellate Division, Second Department stated that they agreed the petitioner was an "aggrieved party" under RPTL § 704 but cited to *Circulo* when granting Respondents' motion to dismiss based on the Article 5 grounds currently at issue.

Larchmont was granted leave by this Court and was ultimately affirmed on other grounds. Upon further review of relationships between the trust, its beneficiaries, and the Larchmont Pancake House, this Court determined that because petitioner had no obligations to pay the taxes and would suffer no legal consequences if they stopped paying them, they were not an aggrieved party under Article 7.

Larchmont Pancake House v. Board of Assessors, 33 N.Y.3d 228, 12 N.E.3d 230 (2019). Because the Article 7 issue was determinative in this matter, this Court did not address the Article 5 issues presented. *Id*. at 240, 236.

The case currently before the Court arose from the Town of Mamaroneck soon after the Appellate Division's decision in *Larchmont*. *DCH Auto*, however, presents a much more straightforward set of facts. The case involves a long-term net lessee fully obligated to pay all real estate taxes that filed administrative grievances and Article 7 petitions for all years from 2009-2014. Relying on the Second Department's recent decision in *Larchmont*, the Supreme Court granted the Respondent's motion to dismiss on the grounds that DCH Auto did not meet the conditions precedent to filing Article 7 petitions because they did not own the property and filed the Article 5 grievances in their own name. *See DCH Auto*, 178 A.D.3d at 825, 111 N.Y.S.3d at 555.

On review, the Appellate Division, Second Department also cited to both *Larchmont* and *Circulo* as the basis for upholding the Supreme Court's determination. Like *Larchmont* and *Circulo*, the decision contained no discussion of statutory interpretation or guiding precedent. This ruling reinforced the Appellate Division, Second Department's divergent and erroneous interpretation of RPTL § 524, still without any true analysis having taking place.

II. The Appellate Division, Second Department's Decision in *DCH Auto* Ignores the Mandatory Rules of Statutory Construction and Incorrectly Interprets the Language of RPTL § 524 in Violation of this Court's Long-Held Precedent that Tax Laws Relating to Review of Assessments are to be Liberally Construed.

The rules of statutory construction oppose a restricted interpretation of RPTL § 524(3). RPTL § 524 is not designed to establish a terminal, technical barrier that would eliminate a large measure of meritorious claims against taxing authorities and municipalities. The tax laws relating to the review of assessments are "remedial in character and should be liberally construed to the end that the taxpayer's right to have his assessment reviewed should not be defeated by a technicality." *People ex rel. New York City Omnibus Corp. v. Miller*, 282 N.Y. 5, 9, 24 N.E.2d 722 (N.Y. 1939).

As far back as 1857, this Court has expressed its disdain toward distinguishing a taxpaying lessee from the legal owner of a property in cases reviewing assessment challenges. "Nor, if a lessee [is] bound by his lease to pay an assessment laid, can I perceive a difference between him and an owner, in his right to [take] this proceeding, though the assessment be invalid." *In re Burke*, 62 N.Y. 224, 228 (N.Y. 1857).

It is not contested that DCH Auto is an "aggrieved party" as required by RPTL § 704 as they are contractually obligated to pay 100% of the real estate taxes. *See*, *e.g.*, *Matter of Waldbaum, Inc. v Finance Administrator of the City of New York*, 74

N.Y.2d 128, 542 N.E.2d 1078 (N.Y. 1989). To now hold that an aggrieved party may not file the initial administrative grievance that is a condition precedent to an Article 7 petition only because they are not listed on the deed disregards the established precedent that the statute is to be liberally construed in favor of the taxpayer.

A liberal construction "is one [that] is in the interest of those whose rights are to be protected, and if a case is within the beneficial intention of a remedial act it is deemed within the statute [or ordinance], though actually it is not within the letter of the law." *People by Achnedierman v. Ivybrooke Equity Enterprises, LLC*, 175 A.D.3d 1000, 1001, 107 N.Y.S.3d 248, 250 (4th Dep't 2019).

This Court has more recently held that "mere technical irregularities in the commencement process should be disregarded if a substantial right of a party is not prejudiced . . ." and to hold otherwise would be "unduly harsh and contrary to our historically liberal construction of pleading and procedure in tax certiorari proceedings." *Garth v. Bd. of Assessment Review for Town of Richmond*, 13 N.Y.3d 176, 180, 918 N.E.2d 103 (N.Y. 2009).

The Appellate Division, Second Department's current interpretation of RPTL § 524 is contrary to this liberal construction. To interpret RPTL § 524 in a way that does not allow an aggrieved party to file the preceding administrative complaint renders the two interacting statutes incongruent and creates a significant obstacle to

correcting an unconstitutional overtaxing. Even if a liberal construction were not required, a reasonable plain language construction of the statute must hold that a taxpayer who is obligated to pay the taxes — and therefore an aggrieved party with the rights to challenge assessments pursuant to RPTL § 704 — possesses the required property interest necessary to file the condition precedent administrative review.

The operative language at issue in RPTL § 524(3) is: "Such statement must be made by the *person whose property is assessed*, or by some person authorized in writing by the complainant or his officer or agent to make such statement who has knowledge of the facts stated therein." (Emphasis added). The statute notably does not use the word "owner," something the legislature easily could have included if it was their intention. The legislature's conscious choice not to use the word "owner" is evidence that they did not intend to restrict the filing of administrative grievances under RPTL § 524 to only the legal titleholders of property.

There are countless ground leases in New York that have been in place for decades in which the owners are now distant and disinterested. The lessees in these situations have full possession and control of the property and pay 100% of the real estate taxes. The legislature could not have intended to force lessees to track down the now-removed lessors and convince them participate when it does not benefit

them in any way, leaving the lessees with no rights to contest the assessments otherwise.

Respondent-Respondent cites to several cases in Point IX of their Brief in which the courts held jurisdictional issues in the grievance state cannot be corrected once the matter is brought to court. Resp't-Resp't Br. at 59. The flaw in both their argument and this entire section of their brief is that they misconstrue the difference between jurisdictional and technical defects in filings, even though they cite to a case that deals with and distinguishes both.

Matter of Little Falls v. Bd. of Assessors, 69 A.D.2d 734, 418 N.Y.S.2d 809 (4th Dep't 1979) is cited to by Respondent-Respondent as an example of courts being unable to amend a jurisdictional issue with the underlying grievance. What Respondent-Respondent fails to mention is that this case also involved a technical defect in the grievance that was properly disregarded, and the court plainly explained the difference between the two.

The court made clear that the only things needed to establish jurisdiction are "within the time specified a complaint under oath in writing be presented stating the objection and the grounds thereof." *Id.* at 738, 812.

As was the case in *Little Falls*, stating incorrect grounds for relief is seen as a jurisdictional issue that cannot be later corrected, and this was the issue in many of the cases cited by Respondent-Respondent in this section. The court also

properly disregarded a technical defect in petitioner's grievance in this case, ruling the fact that petitioner did not specify the amount in which they claimed their property was overvalued was not fatal to an assessment challenge.

The court properly disregarded that issue on the grievance, in direct contradiction of the argument Respondent-Respondent was making when citing to this case. "The form of the complaint and the particularity with which the property is described or the objections specified are matters of procedure, not jurisdiction." (Citations omitted). *Id.* at 739, 813.

The Petitioners-Appellants in this matter properly filed a complaint specifying their objections and the grounds thereof, thus establishing the court's jurisdiction in this matter. Even if the Second Department's misinterpretation of the language of Article 5 were to stand, this is not a jurisdictional defect that prevents review by the courts.

III. The Holding in DCH Auto Ignores Decades of Caselaw, Guidance Provided by ORPTS for Grieving Assessments, and Severely Distorts Universally Understood Tax Certiorari Practices

Despite the *Circulo* and *DCH* decisions, it has and continues to be a universal understanding in New York that parties that are contractually obligated to pay real estate taxes have standing to file administrative grievances pursuant to RPTL § 524. This is an understanding that has been cemented by the guidelines published by ORPTS, the state agency given the responsibility of promulgating the RP-524 forms

and its instructions. This consensus has been further enforced by decades of caselaw involving Article 7 petitions filed by taxpaying tenants that reached the merits without the alleged issue of the condition precedent arising.

A. Both the agency responsible for promulgating form RP 524 and the municipal boards who adjudicate the grievances interpret the statute to allow taxpaying tenants to file, and the courts should not step in and make opposite rulings once Article 7 petitions are filed.

New York's Office of Real Property Tax Services (ORPTS) is a division of the Department of Taxation and Finance and is the agency that both promulgates the RP 524 form and publishes the instructions for contesting tax assessments. In 2012, ORPTS published Publication 1114 titled Contesting Your Assessment in New York State, more commonly referred to as the "grievance booklet."[1] This document is still available to the public through the Department of Tax and Finance's website.[2] Under the section titled Grievance Procedures, the instructions read "[a]ny person who pays property taxes can grieve an assessment, including: property owners; purchasers; tenants who are required to pay property taxes pursuant to a lease or written agreement."

It is settled law that "the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should

[1] CONTESTING YOUR ASSESSMENT IN NEW YORK STATE, Publication 1114, https://www.tax.ny.gov/pdf/publications/orpts/grievancebooklet.pdf.
[2] https://www.tax.ny.gov/pubs_and_bulls/orpts/publications/numeric_listing.htm.

be upheld." *Matter of Howard v. Wyman*, 28 N.Y.2d 434, 438, 322 N.E.2d 528 (N.Y. 1971). "It is also axiomatic that administrative agencies are to be afforded great deference with regard to the construction given statutes and regulations by the agency responsible for their administration, provided that such construction is not irrational or unreasonable." *Koch v. Sheehan*, 95 A.D.3d 82, 89, 940 N.Y.S.2d 734 (4th Dep't 2012).

Moreover, this Court has repeatedly held that technical problems with the party names or signatures on the grievances are not jurisdictional in nature and are curable at no prejudice to the Respondents. *See, e.g.*, *People ex rel. Durham Realty Corp. v. Cantor*, 234 N.Y. 507, 138 N.E. 425 (N.Y. 1922) (Holding the court can amend the name on the petition if the wrong party was entered by error); *Miller v. Board of Assessors*, 91 N.Y.2d 82, 666 N.Y.S.2d 1012 (N.Y. 1997) (Holding the name of the prior owner mistakenly being entered was a "technical defect" that could be corrected by written authorization).

These technical barriers created by the Appellate Division, Second Department are not being raised or discussed at the administrative level, affording petitioners no chance to correct any perceived errors in the filings. Local assessment boards and municipalities recognize and accept grievances from taxpaying tenants uniformly across the state.

According to the Appellate Division, Second Department, however, this recognition of taxpaying tenants as proper parties is fatal to the petitioners, as it creates an error that is not ascertained or contested until a motion to dismiss is filed on the subsequent article 7 petition, at which point it is too late to remedy an issue that otherwise would not be considered terminal.

B. The *DCH Auto* decision ignores decades of caselaw in New York regarding the standing of taxpaying parties who filed both the Article 5 grievances and Article 7 petitions in their own name.

The Appellate Division, Second Department has previously decided cases in favor of taxpaying petitioners that filed the administrative grievance pursuant to Article 5.

In *Matter of EFCO Products v. Cullen*, 161 A.D.2d 44, 560 N.Y.S.2d 158 (2nd Dep't 1990), the petitioner was the lessee of the subject property who had previously transferred ownership to the Dutchess County Industrial Development Agency (IDA). Although the IDA's ownership of the property made it exempt it from property taxes, the petitioner entered into a PILOT agreement with the IDA to make payments in lieu of taxes that were equal to the taxes that would be due if the property was taxable.

After one of the subject property's parcels was reassessed, the petitioner filed the initial administrative grievance and "[t]he City Board of Assessors denied EFCO's application for administrative relief . . . ." *Id.* at 46. While the main issue

in this case involved both the applicability of Article 7 to PILOT agreements and the operative language in the contract, the court did note that "EFCO clearly does have standing to maintain these proceedings pursuant to RTPL Article 7." *Id.* at 46. The court further stated even though petitioner's rights to challenge the assessments were not explicitly stated in the agreement, to hold that they are barred from grieving the assessments "would leave EFCO with no means of challenging any assessment no matter how excessive it might be." *Id.* at 47. The court ultimately reversed the Supreme Court's decision and reinstated the EFCO's petitions, aware that they also filed the preceding administrative grievances.

This case illustrates one of the consequences the *DCH Auto* decision will have in New York if upheld. PILOT agreements between property owner's and IDA's are essential to developing properties that create jobs and add tax income to municipalities when it otherwise would not be economically feasible. Almost all PILOT agreements involve the property owner ceding ownership to the IDA and the IDA then leases it back to them.

To hold that these lessee's can no longer challenge the assessments that dictate their payments in lieu of taxes would leave them with no legal recourse, just as *EFCO* warned. The only method available to challenge the assessments would create a new burden for local IDA's as they would be forced to grieve the

assessments for every property that they owned even though they are not the entity required to make the PILOT payments.

The Second Department again dealt with this issue as recently as 2018 in *Long Island Power Authority v. Assessor of the Town of Huntington*, 164 A.D.3d 591, 81 N.Y.S.3d 189 (N.Y. 2018). This case involved a "Power Supply Agreement" between in which LILCO would sell LIPA all energy produced from LILCO's facilities in Nassau and Suffolk Counties. Pursuant to this agreement, LIPA was obligated to make monthly payments to LILCO that included "property and all other taxes." *Id*. Because LIPA was directly impacted by the tax assessments on LILCO's property, they were the party that commenced the proceedings against the Town of Huntington challenging the assessments on one of LILCO's facilities.

The Assessor for the Town of Huntington moved to dismiss the proceedings, and the Second Department held that "since the PSA required LIPA to pay all of the taxes levied against the property, any tax assessment of the property directly affects LIPA's pecuniary interest and thus, LIPA has standing to challenge the assessments." *Id.*

The Appellate Division, Third Department has also previously weighed in on the language found in RPTL § 524. In 1956, the Appellate Division, Third Department decided *Matter of McLean's Department Stores v. Comm'r of Assessment of City of Binghamton*, 2 A.D.2d 98, 153 N.Y.S.2d 342 (3rd Dep't 1956).

The petitioner in this case was a lessee who was obligated to pay all taxes assessed against the property. The petitioner's application for review of the assessment was denied at the administrative level by the City of Binghamton's Board of Review. The Board cited to their Local Law No. 1 of 1943 which stated the complainant must be "the person assessed or whose property is assessed, or by some person authorized to make such a statement . . . ." Id. at 99. Petitioner applied to the Supreme Court to review the decision under what at that time was Article 13 of the Tax Law, where the City of Binghamton moved to dismiss the petition based on a lack of subject matter jurisdiction and was denied.

The Third Department ruled that the denial of that motion must be upheld, as "petitioner was, under its lease, the owner of such an interest in the property as to constitute it not only a person aggrieved but a person whose property was assessed, within the meaning of the local law." *Id.* at 101.

Respondent-Respondent claims that the Appellate Division, Second Department did not break new ground in *Circulo* when ruling only an owner may file an administrative grievance but cite no prior caselaw that imposes this interpretation of the statute. All citations and quotes presented by Respondent-Respondent are colloquial and identifying uses of the word "owner" by the court in tax certiorari cases where the owner was the party filing.

IV. RPTL §524 Is Not Designed To Preclude Thousands Of Taxpaying Aggrieved Parties Who Have The Right To Judicially Challenge Their Real Estate Tax Obligation Pursuant To RPTL Article 7 By A Technical Point Not Present In The Plain Language Of The Statute Or Legislature's Intent

RPTL § 524 establishes an administrative complaint proceeding designed to create a system whereby the taxing authority and the taxpayer may obtain an earlier, administrative review intended to correct and resolve the assessed value that is being challenged. One of the purposes of RPTL §524 is to alert the municipality of a claim of over-assessment of a property so a correction can be made, and litigation avoided. The fact that the courts have required a liberal construction only accentuates the unreasonableness of an interpretation that would so limit a taxpayer's right.

In the *Matter of Sterling Estates v. Board of Assessors of County of Nassau*, 66 N.Y.2d 122, 485 N.E.2d 993 (N.Y. 1985), the petitioner, in an Article 7 proceeding, attempted to amend the petitions to increase the alleged amount of over-assessment from its original petition. Justice Andrew Simons' decision provides a detailed description of the importance of the assessment process. In explaining the process, Judge Simons interprets the administrative review available by using words such as the "taxpayers right to review." The court does not use the word "owner" in its interpretation but continually uses "taxpayer." In addressing the intent of the administrative process, Judge Simons states the following:

> The contents of the protest are set forth in the Real Property Tax Law. At all times relevant to this appeal, section 512 (1) required complainants to file with the Board of Assessors "a statement *specifying the respect in which* the assessment complained of is illegal, erroneous or unequal" (emphasis added). Similarly, section 706 required that "[a] proceeding to review an assessment *shall be founded upon a petition duly verified setting forth that the assessment is illegal, specifying the grounds* of the alleged illegality, or if erroneous by reason of overvaluation, *stating the extent of* such overvaluation, or if unequal in that the assessment has been made at a higher proportionate valuation than the assessment of other real property on the same roll by the same officers, and stating that the petitioner is or will be injured thereby." In short, the taxpayer must tell the assessors what assessment he protests and why it is wrong. *Id*. at 126 (Internal quotations omitted).

This Court's decision in *Waldbaum*, 74 N.Y.2d 128, 542 N.E.2d 1078 is worth noting in addressing the rights of Stop & Shop. In this case, the Petitioner did not have the right to bring an Article 7 proceeding as a fractional tenant and again the applicable statutes are interpreted and clarified. Judge Bellacosa's statement clarifies a fractional tenant's right to challenge an assessment by stating:

> A fractional lessee lacks standing to maintain a tax certiorari proceeding unless the lease expressly confers the right to assert the lessor's undivided property interest in a challenge of the assessment, or unless the lessee is required to pay directly the taxes levied against the lessor's undivided parcel. In either instance, the assessment must also have a direct adverse effect on the challenger's pecuniary interests. *Id*. at 132.

This case certainly confers upon the tenant taxpayer an aggrieved party status where the lease confers the right upon the tenant to bring a challenge or the lessee-tenant is required to pay the taxes directly. The Court in addressing the tenant/owner scenario provides the criteria for the tenant to make the challenge. Again, the Court

in *Waldbaum* makes all reference to the taxpayer and does not require participation by the owner of the property.

Moreover, in *Matter of Onteora Club v Board of Assessors of Town of Hunter*, 29 A.D.2d 251, 287 N.Y.S.2d 535 (3rd Dep't 1968), the court addressed a slightly different set of facts involving membership rights of a corporation derived from the contract with the owner similar to or exactly in the form of a lease. The court was faced with an argument that petitioner was not a real party in interest under the former Civil Practice Act, but the real question was whether Petitioner was a "person claimed to be aggrieved." The case is cited for the last sentence in the decision that states "[i]t is fundamental, of course, that 'an assessment is levied against the land and not against the owner, the name of the latter being noted merely for the purpose of identification.'" *Id*. at 254, *quoting People ex rel. Bingham Operating Corp. v. Eyrich*, 40 N.Y.S.2d 33, 36 (3rd Dep't 1943).

The Appellate Division, Second Department has mistakenly reached a decision contrary to the language and purpose of the assessment process. In each case the courts declined to take away the rights of a taxpaying tenant to challenge an assessment. A taxpaying tenant carries the status of an aggrieved party under RPTL § 704 and should not be prevented from completing the condition precedent under RPTL § 524. This unfairly makes the taxpaying entity unable to challenge the very assessment that determines its tax obligation.

V. The *DCH Auto* Decision Will Have Nonsensical Results In Situations Such As Long-Term Ground Leases Granting Ownership of Improvements To Tenants

There are countless long-term ground leases in effect in New York State, many of them spanning as far back as 50 or 60 years. Decades-old ground leases of this nature often involve improvements on the land that were constructed by and are owned by lessee.

Because a ground lessee is often only paying for the land, it is common for these lessees to be given ownership rights and rights of removal on all improvements as the lessees often build the structures themselves. This is a significant distinction from traditional commercial leases where the lessees have no ownership rights whatsoever. *See Nat'l Cold Storage Co., Inc. v. Boyland*, 16 A.D.2d 267, 227 N.Y.S.2d 147 (1st Dep't 1962) ("By retaining or receiving ownership, the tenant may have greater rights or obligations, including that of paying taxes on the buildings, than would ordinarily be incident to the status of a tenant.").

This Court has consistently held that certain terms in a ground lease will cause the lessee to be considered the owner of these improvements for real property tax purposes. *See, e.g.*, *People ex rel. Hudson River Day Line v. Franck*, 257 N.Y. 69, 177 N.E. 312 (N.Y. 1931); *Colleges of the Seneca v. City of Geneva*, 94 N.Y.2d 713, 731 N.E.2d 149 (N.Y. 2000).

In both *Hudson River Day Line* and *Colleges of the Seneca*, the owners of the property were exempt from real estate taxes.[3] In each case, however, all improvements on the properties were constructed by lessees pursuant to ground leases. The issue in both cases was whether the improvements were owned by the landlords and thus fully exempt, or the personal property of the lessees and thus fully taxable.

In *Hudson River Day Line*, this Court explained that for the lessee to be considered the owner of the improvements, "clear and explicit language must be employed, indicating with precision that the builder retains the right of removal and remains the owner." *Id.* at 71. In the more recent *Colleges of the Seneca*, the Court cited to *Hudson River Day Line* when explaining "[i]f a right of removal is explicitly reserved to the tenant in the lease, then in certain circumstances the tenant will be regarded as an owner of the real estate for the purposes of real property taxation." *Colleges of the Seneca*, 94 N.Y.2d at 716, 731 N.E.2d at 150-51.

There are countless ground lessees in the State of New York that are considered the owners of the improvements on the property they rent, yet according to the Appellate Division, Second Department they are not the "person whose property is assessed" for the purposes of filing the administrative grievance. If the

[3] In *Hudson River Day Line,* the Commissioners of Palisades Interstate Park of New York owned the property, and in *Colleges of the Seneca* the property was owned by and exempt as an educational corporation chartered by the Regents of the State of New York.

DCH Auto decision is upheld, local administrative bodies and trial courts will regularly find themselves having to analyze lease terms like that in *Colleges of the Seneca* to determine if tenants filing grievances do in fact have ownership rights to their improvements.

If the Appellate Division's holding in *DCH Auto* were to stand, ground leases involving split ownership of land and improvements would result in neither lessor nor lessee having standing to file on both. Two parties would now be required to meet the condition precedent to the Article 7 petition that either party has standing to file on their own, resulting in increased litigation and nonsensical divided valuations

CONCLUSION

Tenants have long understood that by paying the real estate tax burden, they in turn have the right to challenge their assessment. However, if the current decision stands, a tenant, such as Stop & Shop, operating under numerous long-term leases with the obligation to pay the entire real estate tax burden are held hostage by an uncooperative owner. The owner, having no obligation in relation to the real estate taxes, has no vested interest or motivation to cooperate with the tenant. This unjustly results in the government being insulated from any recovery of refunds for excessive over-assessments.

Currently, in courts throughout New York State, there is significant and extensive Article 7 tax certiorari litigation brought by taxpaying entities such as Stop & Shop involving substantial refunds. Under the Appellate Division's mistaken interpretation of RPTL Article 5 and 7, a taxpaying tenant has no rights in relation to the taxes it pays and unjustly suffers the loss of millions of dollars in excessive real estate taxes. In addition, the taxpaying entities that had been invited by the RP-524 instructions to file an administrative complaint, and have been following this procedure for years, are losing all rights to grieve the over-assessment without any due process.

The consequences of these erroneous decisions will change future commercial relationships, harm past commercial relationships, and change the interpretation of the terms of leases that have already been agreed upon in reliance on the tenants right to challenge the assessment. This will result in extensive and expanded litigation throughout the state. This is an unjust outcome.

WHEREFORE, it is respectfully requested that this Court grant Petitioners-Appellants' request to reverse the decision of the Appellate Division, Second Department in *DCH Auto v. Town of Mamaroneck*, 178 A.D.3d 823, 111 N.Y.S.3d 553 (Mem) (2nd Dep't 2019), as this divergent decision is having detrimental effects throughout the state, and a statute is being misinterpreted in a way that is damaging countless commercial tenants.

Dated: February 14, 2022
Mineola, NY

Respectfully Submitted

CRONIN & CRONIN LAW FIRM, PLLC

By: 

Sean M. Cronin
Attorneys for Stop & Shop, and others similarly situated
200 Old Country Road, Suite 470
Mineola, NY 11501
Phone #: (516)747-2220

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

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Dated: February 14, 2022
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CRONIN & CRONIN LAW FIRM, PLLC

By: _____

Sean M. Cronin
Attorneys for Stop & Shop, and others similarly situated
200 Old Country Road, Suite 470
Mineola, NY 11501
Phone #: (516)747-2220