Westchester County Clerk's Index No. 23040/09
Appellate Division, Second Department Docket No. 2017-03016

Court of Appeals

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-Respondents,

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 the Board of Assessment Review,

Respondents-Appellants.

NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS' MOTION FOR LEAVE TO APPEAL

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Date Completed: March 5, 2021

COURT OF APPEALS
STATE OF NEW YORK

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

Petitioner-Respondent,

-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 the Board Of Assessment Review,

Respondents-Appellants.

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Docket No.

2017-03016

NOTICE OF MOTION FOR LEAVE TO FILE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S MOTION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE that upon the annexed affirmation of Kevin M. Clyne dated March 24, 2021, and the Memorandum of Law, submitted herewith, the Proposed *Amicus Curiae,* Wakefern Food Corporation, will move this Court, at the Courthouse thereof, located at 20 Eagle Street, Albany, New York 12207, on March 24, 2021, at 10:00 am in forenoon of that date, or as soon thereafter as counsel may be heard, for an order pursuant to 22 NYCRR 1250.4(f) granting movant leave to file said Memorandum of Law as *Amicus Curiae* in support of Petitioner's Motion for Leave to Appeal, together with such order and further relief as may seem just and equitable.

Dated: Melville, New York
March 4, 2021

HERMAN KATZ CANGEMI WILKES & CLYNE, LLP
Attorneys for Proposed Amicus Curiae
Wakefern Food Corp.

By: _____

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COURT OF APPEALS
STATE OF NEW YORK

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

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Docket No.

2017-03016

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO FILE AS *AMICUS CURIAE* IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

KEVIN M. CLYNE, ESQ., an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms under the penalties of perjury as follows:

1. I am a partner with the firm of Herman Katz Cangemi Wilkes & Clyne, LLP. We are the counsel to the proposed *Amicus Curiae,* Wakefern Food Corp.

2. I have reviewed the appellate record, the decision and order of the Appellate Division dated December 11, 2019 in Matter of DCH auto, etc., et al v. Town of Mamaroneck, etc., et al, 178 A.D. 3d 553 (2d Dep't 2019), and the Petitioner's Motion for Leave to Appeal dated February 6, 2020.

3. This affirmation is submitted pursuant to 22 NYCRR 1250.4(f) in support of the application by Wakefern Food Corp. for leave to file a memorandum of law in support of Petitioner's Motion for Leave to Appeal.

4. In DCH Auto V. Board of Assessors, the Petitioner was the 100% net tenant, paid the real property taxes and had the contractual right to file property tax appeals. However, the assessor in DCH Auto argued that the petitioner lacked standing to file an administrative complaint pursuant to Article 5 of the Real Property Tax Law simply because it was the record owner. 178 A.D.3d 823, 111 N.Y.S.3d 553 [2d Dep. 2019]. The Second Department has broadly ruled that in filing the administrative complaints under RPTL §524 in its own name, it failed to satisfy a condition precedent to the commencement of an RPTL article 7 proceeding because it was neither the owner nor identified as an agent of the owner.

5. Wakefern Food Corp. is the net tenant of dozens of retail supermarkets, where it has the contractual obligation to pay them the real estate taxes levied against the real property and which authorizes them to contest the real property assessments. As such, it has relied on long standing precedent in New York that tenants may file administrative complaints under article 5 of the RPTL. Moreover, in reliance on such precedent, Wakefern has agreed to resulting lease provisions addressing property taxes, and in commencing proceedings pursuant to both Article 5 and Article 7 of the Real Property Tax Law.

6. If the DCH Auto decision is not reversed, its impact on Wakefern and other similarly situated tenants will be catastrophic, as its contractual rights will be retroactively abrogated and its right to challenge property tax assessments which impact it directly and solely will be undermined.

WAKEFERN FOOD CORP.'S INTEREST AS *AMICUS CURIAE* IN THIS MOTION FOR LEAVE TO APPEAL

7. Founded in 1946, Wakefern Food Corp. is the largest retailer-owned cooperative in the United States, consisting of 51 member companies. See https://www2.wakefern.com/home/who-we-are/. Wakefern operates under the ShopRite and PriceRite brand names in New York.

8. These member companies independently own and operate 354 retail supermarkets and employ over 70,000 people. Id.

9. The real estate taxes imposed on the real property containing these supermarkets are frequently paid by Wakefern or related tenants/subtenants of the member companies. It is common in the commercial real estate industry for commercial net leases to assign the tenant the obligation to pay real estate taxes as well as assign the right to challenge the assessments on which those taxes are based.

10. The decision and order in this appeal clearly affects a substantial right of the tenants of these member companies, because it takes away their contractual right under the net lease to challenge the real estate assessments. The decision leaves those taxpayers with the contractual burden of paying the taxes but takes away their ability to enforce the contractual right to challenge the property assessment on which the taxes are based.

11. We ask that Wakefern Food Corp. be granted leave to appear as *amicus curiae* in support of the Petitioner's motion for leave to appeal so that the court may consider the arguments made in connection with the memorandum of law submitted herewith.

SUMMARY STATEMENT

12. As more fully set forth in the accompanying memorandum of law, Wakefern Food Corp. supports Petitioner's motion for leave to appeal to the Court of Appeals pursuant to CPLR §5602(a)(1)(i) and 22 NYCRR 670.6(c), on the grounds that there is an apparent conflict in authority concerning the scope of appropriate challengers under RTPL §524.

13. The net lease in DCH Auto clearly designates the tenant as an agent of the owner for purposes of paying the real property taxes and commencing a property tax appeal.

14. The holding in DCH Auto is contrary to decades of judicial authority, where the courts in the state of New York have exercised subject matter jurisdiction to review real property assessments in which a non-owner taxpayer filed the administrative complaint.

15. The conflict among various New York courts on this issue following Matter of Circulo Hous. Dev. Fund Corp. v. Assessor of City of Long Beach (96 A.D.3d 1053 (2d Dep't 2012) requires a review by the state's highest court to ensure uniformity of judicial authority. The appellate courts of this state have recognized the standing of entities who are non-owner taxpayers to commence a proceeding for judicial review of real property assessments. See Big V Supermarkets, Inc., Store #217 v. Assessor of Town of East Greenbush, 114 A.D.2d 726 (3d Dep't 1985); Matter of Ames Dept. Stores v. Assessor of Town of Concord, 102 A.D.2d 9 (4th Dep't 1984); McLean's Dept. Stores, Inc. v. Comm'r of Assessment of City of Binghampton, 2 A.D.2d 98, 100 (3d Dep't 1956).

16. As is explained in greater detail, the holdings in cases like DCH Auto, and its forbears Circulo and Larchmont Pancake House v. Assessor, Town of Mamaroneck, (124 N.E.3d 230 (N.Y. 2019)), has been limited to courts in the 2nd Department. Trial courts located in the 3rd and 4th Departments continue to follow the precedent that a net tenant with contractual

appeal rights may file both the administrative complaint pursuant to RPTL 524(3) and the subsequent court petition pursuant to RPTL 704. This is explained in greater detail in the accompanying memorandum of law.

17. On behalf of Wakefern Food Corp, we ask that the Court to hold once and for all, that a person who is not an owner but is contractually obligated to pay real estate axes and has the owner's authority to challenge the real estate taxes has standing to file a complaint for administrative review under RPTL article 5 (the condition precedent to the filing of an Article 7 petition).

18. The undersigned was counsel to the Petitioner in the previously referenced Larchmont Pancake House case. I am uniquely aware of the issues presented to net tenants who are impacted by the Second Department's veering away from established precedence with its holdings in Circulo, Larchmont Pancake House, and DCH Auto. These decisions (1) abrogate the contractual rights of owners and tenants alike, (2) result in setting provisions of the Real Property Tax Law in conflict with each other; (3) compel non-interested owners into the assessment review process and/or simultaneously frustrate the ability of truly interested taxpayer tenants from challenging the underlying assessments that are the basis for their tax bills and (4) generally frustrate the remedial intent of the Real Property Tax Law. The arguments presented herein will be of assistance to the Court in deciding these issues.

19. Accordingly, we respectfully request leave of this Court to file a memorandum of law as *amicus curiae* so that Wakefern Food Corp. may advocate on an issue that is of importance to it and similarly situated parties.

Dated: March 4, 2021
Melville, New York

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COURT OF APPEALS
STATE OF NEW YORK

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In the Matter of DCH AUTO, etc., et al.

Docket No. 2017-03016

Petitioner- Respondent,

-against-

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

Respondents- Appellants.

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MEMORANDUM OF LAW OF PROPOSED *AMICUS CURIAE* WAKEFERN FOOD CORP. IN SUPPORT OF PETITIONER-RESPONDENT

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SUMMARY STATEMENT

This memorandum of law is submitted *amicus curiae* by Wakefern Food Corp., in support of the motion by DCH Auto, (hereinafter "DCH Auto" or "Petitioner") for leave to appeal the so-ordered Stipulation and Judgment Dismissing Severed Proceedings of the Supreme Court, Westchester County, dated January 21, 2021, and entered January 27, 2021, which finally resolves the underlying proceedings under index number 23040/2009, and brings up for review the non-final Decision and Order Supreme Court, Second Department dated December 11, 2019 in the above-captioned appeal (Matter of DCH Auto v. Board of Assessors,178 A.D.3d 823, 111 N.Y.S.3d 553 [2d Dep. 2019], leave to appeal dismissed, 36 N.Y.3d 941, 160 N.E.3d 331 (2020), pursuant to CPLR 2221 and 22 NYCRR 670.6.

In DCH Auto, the Town and the Village argued that the administrative complaints filed pursuant to RPTL §524 were defective since they were not brought in the name of the owner. 178 A.D.3d 823 at 825. A properly filed RPTL §524 administrative complaint is a necessary predicate to a proceeding commenced in Supreme Court pursuant to RPTL §704. The Appellate Division, Second Department affirmed the dismissal of subject consolidated proceedings, holding,

> "in filing the administrative complaints under RPTL §524 in its own name, it failed to satisfy a condition precedent to the commencement of an RPTL Article 7 proceeding since it was neither the owner, nor identified in the complaints as an agent of the owner". Id.

The Court of Appeals recently had this issue before it and declined to follow this the 2nd Department holdings on the class of persons who can file an administrative grievance pursuant to RPTL 524 (3), as detailed in Larchmont Pancake House v. Bd. of Assessors, 61 N.Y.S.3d 45

(N.Y. App.Div.2d Dept.2017)("Larchmont/2nd Dept.") or Circulo Hous. Dev. Fund Corp. v. Assessor of City of Long Beach, 947 N.Y.S.2d 559 (N.Y. App. Div. 2d Dept. 2012)("Circulo").

In Larchmont Pancake House v Bd. of Assessors and/or the Assessor of the Town of Mamaroneck, 124 N.E.3d 230 (N.Y. 2019)[1] ("Larchmont/COA"), the Court of Appeals held that the petitioner lacked standing under RPTL Article 7, and therefore, decided not to consider the dispute concerning the scope of appropriate challengers under RPTL §524. In declining to consider scope of challenges under RPTL §524, this Court makes it clear that there is no bright line statutory restriction.

Wakefern Food Corp. respectfully requests that this Court recognize the difference between the underlying facts presented in the Larchmont Pancake House case, and the those presented herein. In summary, the taxpayer/filing entity here:

(1) was a net tenant, operating under a written lease that unequivocally grants appeal rights to the tenant, and

(2) paid the subject property taxes pursuant to lease obligation to do so. As such, the tenant here has the direct legal obligation to assume the undivided tax liability emanating from the assessment challenged.

Without reversal of the DCH Auto decision, tenants with a contractual obligation to pay real estate taxes will not be able to exercise their contractual right to challenge the real property assessment, which the taxes they pay are based on. Courts in the Second Department, starting with the interpretation of RPTL §524(3) in Circulo in 2012, and including the decision herein,

[1] The undersigned was counsel to the Petitioner-Appellant in Larchmont Pancake House.

have threatened the rights of taxpayers to have their assessments challenged. Circulo Hous. Dev. Fund Corp. v. Assessor of City of Long Beach, 947 N.Y.S.2d 559 (N.Y. App.Div.2d Dept.2012).

The decision and order in this appeal affects a substantial right of tenants under net leases because it abrogates the rights of taxpayers who relied on decades of unchallenged and universally accepted precedent in drafting leases. Consequently, this shifts the burdens of appeal to uninterested parties, i.e., non-property tax paying owners. Ultimately, the DCH Auto decision (as well as Circulo and Larchmont/2nd Dept.), leaves those taxpayers under net leases with the contractual burden of paying the taxes but without the ability to enforce the contractual right to challenge the property assessment. Further, it defeats the remedial purpose of the Real Property Tax Law without any clear statutory basis for doing so.

DCH Auto furthers the Second Department's break from established precedent that began with Circulo and Larchmont/2nd Dept and ignores the Court of Appeals' refusal to affirm these cases on the RPTL 524 standing issue in Larchmont /COA.

The DCH Auto decision is also in conflict with the prior rulings of this Court in Waldbaum, Inc. v. Fin. Adm'r City of New York, 74 NY2d 128, 129 (1989), the Third Department in McLean's Dept. Stores, Inc. v. Commissioner of Assessments of City of Binghampton, 2 A.D.2d 98 (3d Dep't 1956), and Big V Supermarkets, Inc., Store #217 v. Assessor of Town of East Greenbush, 114 A.D.2d 726 (3d Dep't 1985), and the 4th Department in Ames Dept. Store, Inc., No. 418 v. Assessor, Bd of Assessors, 261 AD2d 835, 835 (4th Dept. 1999)(quoting Waldbaum, Inc. v. Fin. Adm'r of City of New York, 74 NY2d 128, 129 (1989) (each stating that a lessee who is obligated to pay taxes as part of a lease and the right to challenge the assessment possesses the requisite unitary property interest necessary to maintain an Article 7 action).

Not only has this Court declined to extend the Second Department break from established precedent on the RPTL §524 (3) issue, but some lower courts in New York State have also declined to follow the Second Department decisions.

In Rite Aid Corporation v. Town of Irondequoit, Index No. 2017/1377 (February 27, 2018) (Doyle, J.) (Sup. Ct., Monroe County), where a non-owner tenant with the contractual authority to contest real estate taxes, filed the tax grievance, the Supreme Court, Monroe County denied the Respondents motion to dismiss, which relied principally on the Second Department decisions in Circulo and Larchmont. The trial court determines that the 2nd Department decisions in Larchmont and Circulo involve petitioners who did not have a provision in their leases which authorized them to contest real estate taxes, and as such were inapposite to the case before it.

Further, the trial court opined that the rules of statutory construction do not favor the Respondent's restrictive construction of the Second Department's reading of RPTL §524(3). Id. The Court holds that the language of RPTL §524 is not restrictive and the Second Department's construction is not favored by decisional authority. Decisional authority holds that a "lessee who is obligated to pay taxes as a part of a lease and the right to challenge the assessment possesses the "requisite unitary property interest" necessary to maintain an Article 7 action". Rite Aid Corporation v. Town of Irondequoit, Index No. 2017/1377 (February 27, 2018) (Doyle, J.)(Sup. Ct., Monroe County) (Sup. Ct., Monroe County citing Ames Dept. Store, No.418 v. Bd. of Assessors, 261 A.D.2d 835 [4th Dept 1999]; Walgreen Eastern Co. v. Assessor, Index No. 2017/7289 (Doyle, J)(Supreme Court, Monroe County)(March 6, 2018).

A trial court in the Second Department[2] also refused to dismiss an action based on an administrative grievance filed by a non- owner, finding that "limitation of RPTL §524(3) to property owners creates a condition precedent that would modify RPTL §704(1) since a petitioner may not necessarily be the aggrieved taxpayer". See Soundview II Associates v. Assessor, Town of Riverhead, Index # 2567/14) (Leo, J) (Sup. Ct, Suffolk County).

The Supreme Court, Westchester County[3] continues to go its own way and follow the 2nd Department in its interpretation that RPTL §524(3) limits filings to owners, but does so noting the fact that it had been reversed in Larchmont, and with the ambivalence expressed below:

> In the Matter of DCH Auto v Town if Mamaroneck, 178 AD3d 823 (2nd Dept. 2019), the Court established the formula now used to determine correct filings *in this judicial department (emphasis added)*...In The Matter of Larchmont Pancake House v Bd of Assessors , 153 AD2d 521 (2nd Dept 2017), this Court was in fact reversed when it allowed for non owners to go forward on an Article 7 matter when in fact the Article 5 complains were not filed by the owners. In the Matter of the Application of 1201 Main Street I and II c/o Walgreen Eastern Co., Index #'s 62798/14, 63952/15, November 25, 2020 (Tolbert, J.), (Sup Ct., Westchester County).

There is an obvious conflict in authority throughout the State which requires a uniform determination by the state's highest court on which class of persons may file an administrative complaint under RPTL §524(3). We respectfully request that this Court determine that a person who is not an owner but is contractually obligated to pay real estate taxes and has the owner's authority to challenge the real estate taxes has standing to file a complaint for administrative review under RPTL §524 (3).

[2] Subsequent to the Circulo and Larchmont Pancake House 2nd Department decisions, but prior to the 2nd Dept holding in DCH Auto.
[3] The court of origin on both the Larchmont Pancake House and DCH Auto cases.

POINT I

THE PETITONER IN DCH AUTO HAS THE CONTRACTUAL RIGHT TO COMMENCE PROCEEDINGS AND THE CONTRACTUAL OBLIGATION TO PAY THE REAL ESTATE TAXES, AND AS SUCH THIS MATTER IS FACTUALLY AND LEGALLY DISTINGUISHABLE FROM LARCHMONT PANCAKE HOUSE

In Larchmont Pancake House, this Court did not consider the dispute concerning the scope of appropriate challengers under RPTL §524, instead relying on a RPTL §704/aggrieved party analysis. 123 N.E. 3d 230 (N.Y. 2019).

RPTL §524(3) provides, in relevant part, that an administrative complaint must be based on a statement "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." N.Y. Real Prop. Tax Law §524(3) (McKinney). RPTL §704(1) provides, in relevant part, that "[a]ny person claiming to be aggrieved by an assessment of real property" may commence a judicial proceeding pursuant to RPTL §704(1). N.Y. Real Prop. Tax Law §704(1) (McKinney).

The Court of Appeals acknowledged the dispute about whether a petitioner is qualified as a non-owner to seek administrative review pursuant to RTPL §524(3). Id. The Court of Appeals even stated that, like an owner, a lessee who is "bound by his lease to pay an assessment" is likely to be put to litigation and expense" as a direct result of its legal obligation. Id at 6. Despite this acknowledgement, the Court focused its decision on the point that the petitioner was not "legally responsible" for paying the undivided tax liability, as it had no "direct contractual obligation" to pay the taxes. Id.

Consequently, the Court held that the petitioner lacked standing under RPTL §704 and ultimately declined to decide on the dispute regarding RPTL §524. Id. In focusing on the lack of a formal lease obligation and not following the restrictive, bright line determinations by the Second Department in both Larchmont Pancake House v. Bd. of Assessors, 61 N.Y.S. 3d 45 (N.Y. App. Div.2d Dept. 2017) and Circulo Hous. Deve. Fund Corp. v. Assessor of City of Long Beach, 947 N.Y.S. 2d 559 (N.Y. App. Div.2d Dept. 2012), the Court of Appeals clearly acknowledges that there is no such bright line statutory restriction preventing an appropriate non-owner from filing a RPTL §524(3) administrative complaint.

In DCH Auto, the Second Department Court held that tenant failed to satisfy the RPTL §524 condition precedent as it was not the owner, nor identified as an agent of the owner. It did not recognize the owner agency created by the lease. The facts in DCH Auto are clearly distinguishable from those in Larchmont Pancake House because of the clear, written obligations in the lease. The net lease provided that "the petitioner was to pay the real estate taxes for the period of the lease term, that the petitioner had the right to contest any assessment at its sole cost and expense, and that it had the right to settle any such proceeding without the consent of the owner." DCH Auto v. Town of Mamaroneck, 178 A.D.3d 823, 824, 111 N.Y.S.3d 553 [2d Dep. 2019].

The Court noted that "in the absence of a direct contractual obligation the assessment's remote and consequential impact on petitioner is inadequate to confer standing." Larchmont Pancake House, 124 N.E.3d 230 (N.Y. 2019) at 8. The only logical conclusion to reach from the Court's holdings is that if the tenant in Larchmont Pancake House had a direct, contractual obligation to pay the taxes, it would have been an aggrieved party under RPTL §704. Id.

Here, pursuant to the subject formal lease, the owner delegated its authority to contest real estate taxes to the tenant, and the tenant acted with the agency granted to it. Under this Court's recent holding in Larchmont Pancake House, the petitioner in DCH Auto is clearly an aggrieved party.

It would seem to defeat the remedial nature of the statute to NOT allow an aggrieved party to file the statutory predicate to the RPTL §704 petition, i.e., the RPTL §524 (3) administrative complaint. It is a common rule of statutory construction that when multiple statutes deal with same subject matter, they must be read in a way as to render them compatible, unless a contrary statutory intent is clearly expressed. See In re Enforcement of Tax Liens ex rel County of Orange, 75 AD3d 224, 903 NYS2d 60 (2010); McKinney's cons. Law of NY, Book 1, Statutes §§ 22. It would be contrary to the rules of statutory construction to determine that DCH Auto can file the petition pursuant to RPTL 704, but not the statutory predicate administrative complaint under RPTL §524 (3).

It is well established that the tax law "relating to review of assessments is remedial in character and should be construed to the end that the taxpayer's right to have [its] assessment reviewed should not be defeated by technicality." Larchmont Pancake House, 124 N.E.3d 230 (N.Y. 2019) (Wilson, J., dissenting), quoting People ex rel. New York City Omnibus Corp. v. Miller, 282 NY 5,9 [1939]. Further, courts for almost a century have followed the rule that courts should disregard the technical errors that the majority focuses on, so that taxpayers can vindicate their rights to an accurate and equity property tax assessment (NY Const. art XVI, §2; NY Const, art I §11).

POINT II

THE SECOND DEPARTMENT IMPROPERLY CREATES AN OWNERSHIP REQUIREMENT IN RPTL § 524 (3) THAT SIMPLY DOES NOT EXIST

The Second Department has improperly created an ownership requirement for taxpayers who wish to file administrative grievances. The holding in DCH Auto (and Circulo and Larchmont Pancake- 2nd Dept) clearly contradicts decades of New York precedent, where the predicate administrative grievance was filed by a non-owner of a property and courts found subject matter jurisdiction over the subsequent court proceeding. Furthermore, the holding overlooks the rules of statutory construction.

The Second Department has found that "person" means owner, despite the word "owner," or any derivation of "owner" being used in the section. DCH Auto, 111 N.y.S.3d 553 [N.Y. App. Div. 2d Dept. 2019]; Larchmont Pancake House, 61 N.Y.S.3d 45 (N.Y. App. Div. 2d Dept. 2017); Circulo, 947 N.Y.S.2d 559 (N.Y. App. Div.2d Dept. 2012). The decisions do not explain how it interpreted "person whose property is assessed" to mean "owner."

Article 5 of the RPTL uses the word "owner" over 100 times, yet the word is not used in the provision in question. For example, RPTL §554(2), which sets forth the procedure to correct errors on tax rolls uses the word "owner," It states:

> Whenever it appears *to an owner of real property, OR any person who be entitled to file a complaint pursuant to section five hundred twenty- four of this chapter*, that a clerical error, an unlawful entry or error in essential fact described in subdivision one of this section is present on the tax roll in regard to his real property, *such owner or other person*, may, at any time prior to the expiration of the warrant, file an application in duplicate with the county director of real property tax services for the correction of such error.

N.Y. Real Prop. Tax Law §554 (McKinney) (emphasis added).

RPTL§554 clarifies that property owners are a separate class of the persons and distinct from those who are entitled to file complaints pursuant to RPTL§524(3). If the Legislature intended this statutory construction regarding RTPL §524 (3), then it could have used the word "owner" rather than "person whose property is assessed."

In the construction of a statute, meaning and effect should be given to all of its language, if possible, and words are not to be rejected as superfluous when it is practicable to give each a distinct and separate meaning. Bliss v. Bliss, 66 N.Y.2d 382, 389 (1985) (quoting McKinney's N.Y. Statutes §231 (McKinney)). The word "owner" is used throughout Article 5 of the Real Property Tax Law. There is a presumption that the legislature will use the same term consistently in different statutory sections. Mangam v City of Brooklyn, 98 N.Y. 585, 591-592 (1885). Conversely, when different terms are used in various parts of a statute or rule, it is reasonable to assume that a distinction between them is intended. Orens v. Novello, 99 N.Y.2d 180, 187 (2002).

The highlighted portions of §554(2) clarify two points:

I. Any person who may file a grievance complaint pursuant to RPTL §524 may file a correction of errors petition pursuant to RPTL §554.

II. The class of people who may file a grievance complaint pursuant to RPTL §524 includes, but is not limited to, owners.

"Or" is a disjunctive connector that means "in the alternative", and as such, has specific, intended interpretative consequences when used in a statute. As used within RPTL §554, it means that there is a class of persons beyond owners who can properly file a complaint.

RPTL §554(2) clarifies that property owners are a subset or separate class of the persons who are entitled to file complaints pursuant to RPTL §524. "Owner, or any person entitled to file

a complaint" must mean something. The language of RPTL §554 cannot be ignored such that it is rendered meaningless or superfluous.

Furthermore, RTPL §524(3) provides, "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." N.Y. Real Prop. Tax Law §524(3) (McKinney). The usage of the word "complainant" rather than "owner" implies that the complainant can be someone other than the property owner. Once again if the Legislature had intended for the person to be the property owner, then it would have simply used the word "owner."

"Person whose property is assessed" does not mean "owner". The rules of statutory construction require that the Courts ascribe different meaning to each term, and further, that RPTL §524(3) and §704 be read to be compatible with each other. DCH Auto is an aggrieved party and must be permitted to file the administrative complaint of its real property assessment.

POINT III

THE SECOND DEPARTMENT UNEQUIVOCALLY AND IMPROPERLY CHANGED THE LAW WITH CIRCULO, LARCHMONT PANCAKE HOUSE AND DCH AUTO

The right of a tenant to file property tax appeals (where supported by the lease) was beyond controversy and was not raised in any case between 1956 and 2012, with the exception of one Third Department case. This case was heard prior to the enactment of the Real Property Tax Law. However, the statutory language, "person whose property is assessed," was examined and interpreted. McLean's Dept. Stores, Inc. v. Commissioner of Assessment of the City of Binghampton,2 A.D. 2d 98, 100 (3d Dep't 1956). Here, the Third Department held, "Since the right of judicial review is preserved for the benefit of persons claiming to be 'aggrieved,' it

clearly follows that every complainant whose status is comprehended that that term is entitled to complain to the board and obtain the preliminary review necessarily precedent to the judicial proceeding." McLean's, 2A.D.2d at 100.

Further, this Court in Waldbaum, Inc. v. Finance Adm'r of City of New York, 74 N.Y.2s 128 (1989) cited to the McLean's case as precedent for the fact that non-owner aggrieved party responsible for the entire tax on an undivided assessment unit had a right to seek assessment review. The McLean's precedent that controlled this issue for over 50 years is not cited in one of the recent Second Department decisions.

Several other cases have determined that the condition precedent was adequately satisfied by a non-owner. In Big V Supermarkets, Inc., Store #217 v. Assessor of Town of East Greenbush, 114 A.D.2d 726 (3d Dep't 1985), where a partial lessee and non-owner of a shopping center was bound to pay all of the taxes on the entire property, the Court exercised subject matter jurisdiction by finding that Big V could proceed with its assessment challenge. Additionally, in EFCO Products v. Cullen, 161 A.D. 2d 44 (2d Dep't 199068), the Second Department found the commercial lessee of a property under an Industrial Development Agency lease was able to challenge the assessment of its property at both the administrative and judicial levels. It is noteworthy that in neither case was the grievant the owner, and in neither case was there a finding of a lack of subject matter jurisdiction.

Moreover, this Court's decision overlooks the purpose of the administrative review of assessments. The Court in Sterling Etates, Inc. has underscored the importance of administrative review:

> The review and adjustment process, if adjustment is appropriate, permits the assessors to close the tax roll and establish the tax rate with some confidence

> that the revenues produced by the levy will be sufficient to meet budget requirements. Manifestly this administrative review procedure is not intended to be an idle exercise. It is designed to seriously address claimed inequities and adjust them amiably if it is possible to do so. The *taxpayer* and the municipality have a palpable interest in the amount and accuracy of individual assessments and the municipality has an additional incentive to resolve disputes concerning them as promptly as possible so that the roll may be stabilized and tax rates established. To that end, the Legislature has imposed detailed requirements on the assessors to conduct an orderly assessment process and specific condition on the procedure by which *aggrieved taxpayers* obtain administrative and judicial relief."

Sterling Estates, Inc. v. Board of Assessors of Nassau County, 66 N.Y.2d 122, 125 (1985) (emphasis added). The Court indicated that it was *aggrieved taxpayers* who could seek *both* administrative *and* judicial review, without differentiation between aggrieved taxpayers who owned the property and aggrieved taxpayers who did not.

CONCLUSION

The Second Department's decisions since Circulo (DCH Auto & Larchmont Pancake House) abrogate the rights of untold number of tenants with negotiated obligations to pay real estate taxes and concomitant rights to challenge the assessments that are the basis for these taxes.

These decisions contradict the precedent established in this Court, and both the 3rd and 4th Departments, not to mention its own pre-Circulo jurisprudence. It does so without any statutory basis for doing so.

Furthermore, if DCH Auto stands, and is read together with this Court's recent decision in Larchmont Pancake House regarding when a tenant can be an aggrieved party, the result will be that one class of persons, tenants with clearly written leased based obligations and rights, can file the RPTL Article 7 proceeding but cannot file the predicate administrative complaint under RPTL §524(3). Statutes concerning the same subject matter must be read to be compatible with

each other. Affirming DCH Auto will result in two sections of the Real Property Tax Law being incompatible with each other.

When these cases are read with the overarching gloss that the Real Property Tax Law is a remedial statute that should be liberally construed so as not to defeat the rights of a taxpayer on a technicality, DCH Auto must be overturned.

Dated: Melville, New York
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COURT OF APPEALS
STATE OF NEW YORK
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I hereby certify pursuant to 22 NYCRR § 500.13 that the foregoing brief was prepared on a computer using Microsoft Word 2010.

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