

**Matter of 24-60 47th St. LLC v City of New York**

2017 NY Slip Op 32216(U)

October 3, 2017

Supreme Court, Queens County

Docket Number: 803/17

Judge: Howard G. Lane

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Short Form Order/Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IA PART 6

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In the Matter of the Application of

Index No. 803/17

24-60 47<sup>TH</sup> STREET LLC,  
Petitioner,

Motion  
Date May 24, 2017

-against-

Motion  
Cal. No. 215

THE CITY OF NEW YORK DEPARTMENT  
OF FINANCE and THE NEW YORK CITY  
COMMISSIONER OF FINANCE,

Motion  
Seq. No. 2

Respondents.

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The following papers read on this Article 78 proceeding by petitioner 24-06 47th Street LLC for a judgment reversing respondents City of New York Department of Finance (DOF) and Commissioner of Finance’s determination to remove and not reinstate petitioner’s Industrial and Commercial Inventive Program (ICIP) exemption for tax years 2013/2014, 2014/2015, and 2016/2017. Respondents cross-move to dismiss the petition on the grounds of a defense based on documentary evidence; failure to state a cause of action; and statute of limitations, pursuant to CPLR 3211(a)(1) (5) (7) and 7804(f).

	<u>Papers Numbered</u>
Amended Notice of Petition-Verified Petition-Affidavit- Affirmation-Exhibits.....	1-5
Notice of Cross Motion-Affirmation-Exhibits.....	6-9
Affidavit in Support of the Cross Motion.....	10-11

Upon the foregoing papers the petition and cross motion are determined as follows:

The ICIP program, which sunset on June 30, 2009, provides partial exemption from property taxes for a period of up to 25 years, for eligible industrial and commercial buildings that are built, modernized, rehabilitated, expanded or otherwise physically improved. A preliminary application for ICIP benefits must have been filed on or before June 30, 2008 (Administrative Code of the City of New York §11-260 [a]). To qualify for ICIP, all construction work performed must have been completed before December 31, 2013 (Administrative Code of the City of New York §11-259 [j][1]). For the duration of the benefit period the recipient must file annually with the DOF, on or before the taxable status date of January 5, a certificate of continuing use (CCU), stating the purposes of which the property described in the certificate of eligibility is being used and the net square footage allotted to each such purpose (Administrative Code of the City of New York §11-261[b]; RPTL §489-ggg). The DOF has the authority to terminate benefits upon the failure of the recipient to file such certificate by the taxable status date, and the burden of proof is on the recipient to establish continuing eligibility for benefits (*Id.*).

24-60 47th Street LLC is the owner of improved commercial real property located at 24-60 47th Street, Queens, New York 11103 (Block 732, Lot 18). The property owner renovated said real property in 2003, and applied for and received ICIP benefits commencing in tax year 2004/2005. The property owner did not receive ICIP tax exemptions for the tax years 2013/2014, 2014/2015 and 2016/2017.

On June 14, 2016, Seth Goldberg, the property owner's real property tax counsel, contacted the DOF and inquired as to the reason the property owner had not received ICIP exemptions for tax years 2013/2014, 2014/2015 and 2016/2017, and was informed that the DOF records showed that CCUs had not been filed for said tax years.<sup>1</sup> Mr. Goldberg filed a FOIL request with the DOF on August 12, 2016, seeking copies of notices that were allegedly sent to the property owner pertaining to the filing of the CCUs. The DOF in response provided Mr. Goldberg with copies of notices dated March 3, 2014 and January 29, 2016. Both notices informed the property owner that it had not filed the CCU form by the due date; provided an opportunity for a late filing; and supplied the User ID and Password that was needed to file the CCU on the appropriate website. Both notices used the following address for the property owner: "2460 47th St Long Island City, NY 11103-1010".

In a letter dated September 29, 2016, Perry S. Friedman, counsel for the property owner, requested that the DOF reinstate the ICIP tax exemptions for tax years 2013/2014,

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<sup>1</sup>The property owner received a partial tax exemption for the tax year 2015/2016. Petitioner does not state whether it filed a CCU form for said tax year.

2014/2015 and 2016/2017. Mr. Friedman stated that he was advised by the property owner “that the reason the CCU’s were not filed was because it did not receive any notices from the New York City Department of Finance for those tax years. I have been advised that commencing with the 2014/2015 Tax Year that the CCU was to be filled out and filed online and that the mailed notice provided the Property Owner with the website address, the Property Owner’s User Id and password. Without the receipt of the mailed written notice it would be impossible to comply with the CCU requirement.” He further stated that the property owner’s address set forth in the DOF’s notices was incorrect, in that the property owner is located in Astoria, New York, while the notices stated that it was located in Long Island City, New York; that he had “been advised by the Property Owner that it does not receive mail when it is addressed to Long Island City”; that as the DOF notices were not properly addressed, there was no presumption of receipt; and that if necessary, the property owner would file the CCUs for the previous tax years.

Erica K.P. Chan, the Deputy Director in the DOF’s Commercial Exemption Unit, in an email dated October 7, 2016, informed Mr. Friedman that “[a]s per our conversation, the suspend status for ICIP benefit for tax year 2013/2014 & 2014/2015 is remained the same. We will reinstate 2016/2017 ICIP benefit if 2017/2018 CCU is filed on time and approve [sic]”.

Mr. Friedman, in an email to Ms. Chan, dated October 13, 2016, inquired as to why the ICIP tax status for 2013/2014 and 2015/2016 could not also be reinstated. He stated that he was attaching a copy of the most recent tax coupon that was sent to and received by his client indicating a mailing address as Astoria and not Long Island City, and asserted that “[t]his seems to support my client’s position that the other notices were not received”.

Ms. Chan, in a reply email of the same date, stated that as she had explained in their conversation that “the Zip code is the major factor affects the mailing [sic], not City. Please advise the home owner to update the mailing address on-line. We will reinstate one year retroactive back of your [sic] file the CCU on time if we approved 2017/2018. The on-line filing system for 2017/2018 has been opened on 10/11/2016.” Said email included the User Id and Password that the property owner needed to file the CCU for the 2017/2018 tax year.

Petitioner 24-60 47th Street LLC commenced the within Article 78 proceeding on January 26, 2017, and alleges it was arbitrary and capricious for the DOF “to forgive the 2015/2016 tax year, to offer to forgive the 2016/2017 tax year but not forgive the other tax years despite the fact that the circumstances were the same in all instances”. Petitioner argues that “once DOF learned that it had not been sending the Notices to the

correct address that it should have agreed to reinstate the ICIP tax exemptions for all the tax years for which the Petitioner did not receive exemptions due to the essential nature that the Notices were not received". Petitioner asserts that the DOF has not given a sound reason for restoring the exemption for the 2016/2017 tax year, but not the 2013/2104 and 2014/2015 tax years. It is alleged that the DOF notices were not properly addressed and therefore there can be no presumption of receipt of said mailings. Petitioner further asserts that there was no rational basis for only restoring the 2016/2017 ICIP tax exemption but not for the prior tax years when the notices to file the CCUs were not received by the petitioner.

Respondents cross-move to dismiss the petition on the grounds of documentary evidence, statute of limitations, and failure to state a cause of action. Respondent submits documentary evidence that it has used the neighborhood designation of Long Island City for Notice of Property Value statements, tax bills and other correspondence for years 2012 through 2015. It is asserted that the zip code used for petitioner's address is correct, regardless of whether the neighborhood is designated as Long Island City or Astoria; that there is only one property located at said address, regardless of the neighborhood designation; that and the United States Postal Service website lists both Astoria and Long Island City as acceptable city names for zip code 11103.

Respondents assert that petitioner admittedly failed to file CCUs for tax years 2013/2014 and 2014/2015, and thus could not have been unaware of the fact that it paid higher taxes for said years. Respondents assert that the exclusive remedy for challenging a denial of a partial tax exemption is a Real Property Tax Law Article 7 proceeding, and that an Article 78 proceeding is not the proper vehicle for such a challenge; that petitioner failed to exhaust its administrative remedies prior to commencing an Article 78 proceeding; and that as the statute of limitations has expired for any challenge to tax years 2013/2014 and 2014/2015.

Respondents further assert that its denial of ICIP exemptions for tax years 2013/2014 and 2014/2015 were not arbitrary and capricious, as petitioner did not file the required CCUs, and did not timely and properly challenge the imposition of the tax. Finally, it is asserted that to the extent that petitioner argues that the DOF should reinstate the exemption for all tax years based upon its agreement to reinstate the exemption for tax year 2016/2017, said argument sounds in waiver or estoppel, which cannot be raised against a governmental entity.

Ms. Chan, in an affidavit in support of the cross motion, states that the DOF's billing/ mailing file indicates that the property owner's address is 24-60 47th Street, Long Island City, New York 11103-1010; that said address was listed with the DOF since 2007,

as that was the last date an address update request was made; that the current address listing is corroborated by a search on the United States Post Office website; and that prior to Mr. Friedman's letter of September 29, 2016, she was unaware of any complaints by petitioner regarding the listed neighborhood designation of Long Island City, rather than Astoria; and that as the 2017/2018 CCU was filed and approved on October 17, 2016, and the exemption for tax year 2016/2017 was reinstated at that time.

Petitioner, in opposition to the cross motion, asserts that a collateral attack can be made on a taxing authority's under certain circumstances, which it claims is appropriate here; that although there is not statutory notice requirement regarding the annual CCU forms, the notice sent by the DOF contains information that is necessary to file said forms; reiterates that there is no presumption of receipt when a letter is not properly addressed; and asserts that the DOF's determination is arbitrary and capricious as it neither adheres to its own prior precedent or indicates its reasons for reaching different conclusion on the same facts.

Petitioner's claim that the DOF notices were not properly addressed, is rejected. The evidence presented establishes that the subject real property's address 24-60 47th Street is located in zip code 11103, and that although Astoria NY is a default designation, Long Island City NY and Long Is City NY are also recognized by the Postal Service as the appropriate "city" for addresses in zip code 11103. There is no evidence that prior to September 2016, petitioner informed the DOF of any change in its address, including the neighborhood designation. As the property owner's address on file with the DOF's contained the Long Island City designation, its use of said designation was proper.

Petitioner's member Neil Wainland, in his affidavit in support of the petition, does not state that the DOF notices, containing the Long Island City designation were not received by the property owner. Rather, he states that he "knows from personal experience that if a mailing is addressed to 24-60 47<sup>th</sup> Street, "Long Island City", rather than "Astoria" will not be received despite the fact that the zip code may be correct". Mr. Wainland, however, fails to provide any details as to said "personal experience".

This court, however, need not determine whether the DOF notices pertaining to the filing of CCUs for tax years 2013/2014 and 2014/2015 were properly mailed and received by the petitioner, as petitioner admittedly did not file the CCUs for said tax years. In order to receive the partial tax exemption, petitioner was required to file annual CCUs, and could not have been unaware that it was paying a higher tax in the years in which it did not receive the partial tax exemption.

It is well established that a tax certiorari proceeding pursuant to RPTL Article 7 is

a taxpayer's exclusive remedy to challenge an allegedly wrongful denial of a partial exemption (*see, Matter of Highbridge Broadway, LLC v. Assessor of the City of Schenectady*, 27 NY3d 450, 461 [2016]; *Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v. Town of Fallsburg*, 78 NY2d 194, 204[1991]; *Hewlett Assoc. v. City of New York*, 57 NY2d 356, 363, [1982]; *Dun & Bradstreet, Inc. v. City of New York*, 276 NY 198, 206 [1937]; *Rochdale Village, Inc. v. Finance Adm'r of New York*, 159 AD2d 494 [2d Dept 1990]; *Laurel Hill Farms, Inc. v. Board of Assessors of Nassau County*, 51 AD3d 794 [2d Dept 2008]; *Stabile v. Half Hollow Hills Central School District of Huntington and Babylon*, 83 AD2d 945 [2d Dept 1981]).

There are two (2) exceptions to the general rule. A taxpayer may bring an Article 78 proceeding when the tax is claimed to be unconstitutional or the jurisdiction of the taxing authority is being challenged (*Hewlett Associates v. New York*, 57 NY2d 356 [1982]). In addition, a petitioner may collaterally attack the taxing authority's determination when challenging the method of assessment (*Krugman v. Board of Assessors of the Village of Atlantic Beach*, 141 AD2d 175 [2d Dept 1988] ; *see also, 1688 Rojav Realty LLC v Frankel*, 32 Misc 3d 1247[A] [Sup Ct, NY County 2011]). None of these exceptions apply here. Therefore, petitioner's exclusive remedy to redress the denial of its request to restore the ICIP partial tax exemption for tax years 2013/2014 and 2014/2015, is an RPTL Article 7 proceeding. As the statutory limitations period for challenging the tax assessments for the tax years 2013/2014 and 2014/2015 has long since passed (*see, RPTL 702; New York City Charter §§ 165, 166; see also, NYCTL 1996-1 Trust v. Westmoreland Associates*, 2 AD3d 811, 812 [2d Dept 2003]), this court will not convert the within Article 78 proceeding to a tax certiorari proceeding, as such a proceeding would be untimely (*see, Matter of Laurel Hill Farms, Inc. v. Bd. of Assessors of Nassau County*, 51 AD3d at 795).

In view of the foregoing, respondents' cross motion to dismiss the petition is granted.

Dated: October 3, 2017

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**Howard G. Lane, J.S.C.**