

**Matter of 655 Fifth Dutch Equities LLC v Tax
Commn. of the City of N.Y.**

2017 NY Slip Op 32486(U)

November 3, 2017

Supreme Court, Kings County

Docket Number: 406331/13

Judge: Michael L. Pesce

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At an IAS Term, Part 76 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of November, 2017.

PRESENT:

HON. MICHAEL L. PESCE,
Justice.

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IN THE MATTER OF
655 FIFTH DUTCH EQUITIES LLC,

Petitioner,

- against -

THE TAX COMMISSION OF THE CITY OF NEW YORK
AND THE DEPARTMENT OF FINANCE OF THE CITY OF
NEW YORK,

Respondents.

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The following e-filed papers read herein:

Index No. 406331/13

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
_____ Affidavit (Affirmation) _____
Memoranda of Law _____

Index Nos. 406331/13
403881/14
400001/15
403636/16

Papers Numbered

2-3, 21-22 5-9, 13-17

23-24

10, 18

Index No. 403881/14

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____

Papers Numbered

2-8 11-15, 19-23

Reply Affidavits (Affirmations)_____	<u>28-29</u>	<u>30-31</u>
_____Affidavit (Affirmation)_____	_____	_____
Memoranda of Law_____	<u>9, 27</u>	<u>16, 24</u>

Upon the foregoing papers, in this RPTL article 7 tax certiorari proceeding by petitioner 655 Fifth Dutch Equities LLC (petitioner) against respondents the Tax Commission of the City of New York and the Department of Finance of the City of New York (the DOF) (collectively, respondents), petitioner moves for an order granting consolidation of the proceeding under index number 406331/13 (for tax year 2013/14) with the related proceedings under index number 403881/14 (for tax year 2014/15), index number 400001/15 (for tax year 2015/16), and index number 403636/16 (for tax year 2016/17). Petitioner also moves for an order: (1) granting partial¹ summary judgment, finding that the DOF has erroneously misclassified the subject property in tax class 2 since 2003/04 and that the 2013/14 and 2014/15 assessments are not in accordance with the statutory limitation of RPTL 1805 (2), (2) directing the subject property’s assessed value for the 2013/14 tax year to be set at \$274,983 and the assessed value for the 2014/15 tax year to be set at \$294,315, in accordance with RPTL 1805 (2), on the basis that the property should have been classified

¹While petitioner’s notice of motion states that petitioner is moving for summary judgment, respondents point out that the petition, in addition to alleging that the property is misclassified, contains other allegations, including that the assessment was excessive, unlawful, and unequal. Respondents assert that since petitioner, by its motion, is seeking to challenge the assessment on the sole ground that the property was misclassified, the appropriate requested relief by petitioner should have been partial summary judgment. Petitioner, in response, acknowledges that its motion should have been a request for partial summary judgment.

in tax class 2, subclass 2B, since 2003/04, and (3) granting it a refund of its alleged overpayment of taxes. Respondents cross-move for an order: (1) denying petitioner's motion for partial summary judgment and all relief requested therein in its entirety, and (2) pursuant to CPLR 3212 (e), granting them partial summary judgment as a matter of law.

FACTS AND PROCEDURAL BACKGROUND

Petitioner is the owner of property located at 653-655 5th Avenue, Brooklyn, New York, designated on the City of New York tax map as Borough of Kings, Block 879, Lot 1 (the property). Petitioner became the owner of the property pursuant to a deed dated April 29, 2013. The property consists of two buildings. One of these buildings is a one-story single residential dwelling unit and the other building is a four-story walk-up apartment building with one commercial unit and nine residential dwelling units, for a total of 10 residential dwelling units and one commercial unit. The property underwent construction in 2000, and it was issued a certificate of occupancy, dated November 8, 2000, which confirms that it has had 10 residential dwelling units and one commercial unit since November 8, 2000. Following the issuance of the certificate of occupancy, there has been no construction performed to the property which would change the property's use or occupancy.

RPTL 1805 (2) provides as follows:

"The assessment roll of a special assessing unit wholly contained within a city shall identify those parcels classified in class two which have fewer than eleven residential units. The assessor of any such special assessing unit shall not increase the assessment of any parcel so identified in any one year, as measured from the actual assessment on the previous year's

assessment roll, by more than eight percent and shall not increase such assessment by more than thirty percent in any five-year period. The first such five-year period shall be measured from the individual assessment appearing on the assessment roll completed in nineteen hundred eighty-one provided that, if such parcel would not have been subject to the provisions of this subdivision in nineteen hundred eighty-one had this subdivision then been in effect, the first such five-year period shall be measured from the first year after nineteen hundred eighty-one in which this subdivision applied to such parcel or would have applied to such parcel had this subdivision been in effect in such year” (emphasis added).

Thus, RPTL 1805 (2) provides that assessments for tax class 2 properties identified on the assessment roll as having less than 11 residential units shall not increase by more than eight percent in any one year (the one-year 8% cap) or by thirty percent in any five-year period (the five-year 30% cap) (collectively, the assessment increase limitations). Pursuant to RPTL 1805 (2), the one-year 8% cap is to be applied beginning with “the actual assessment on the previous year’s assessment roll.” With respect to the five-year 30% cap, the first five-year period is to be measured from 1981 or the first year after 1981 in which RPTL 1805 (2) would have applied to the property had this subdivision been in effect in such year.

The property was properly classified as tax class 2, subclass 2B on the City’s real property tax rolls in the 2001/02² and 2002/03 tax years because it had no more than 10

²In the 2000/01 tax year, the property was classified as tax class 4, as shown by petitioner’s exhibit A to its affirmation in opposition and reply. Although both petitioner and respondents, in their papers, at times, erroneously state that the property was classified as tax subclass 2B in the 2000/01 tax year, respondents acknowledge and correct this misstatement in their reply affirmation.

residential units. Commencing in 2003/04, the DOF inexplicably erroneously misclassified the property, in contravention of RPTL 1805 (2), in tax class 2, instead of in tax class 2, subclass 2B. This misclassification of the property in tax class 2 has continued from the 2003/04 tax year to date with each subsequent tax year misclassifying the property in tax class 2. As a result of this misclassification, petitioner did not receive the benefit of RPTL 1805 (2)'s assessment increase limitations.

For the tax years 2003/04, 2004/05, 2005/06, and 2006/07, the percentage difference for each of these years from the previous year was less than eight percent. However, in the 2007/08 tax year, when the actual assessed value was \$324,000, the percentage difference from the actual assessed value of \$181,350 in the previous 2006/07 tax year was 78.7%. Petitioner asserts that the one-year 8% cap should have been applied to the \$181,350 assessment so that it would have only increased by 8% (\$14,508) to \$195,858. Petitioner states that this resulted in an overassessment, and that, continuing in the subsequent tax years, the property continued to be overassessed because the assessment increase limitations were not applied due to its being classified as class 2, instead of class 2, subclass 2B.

Petitioner has calculated what the assessed values should have been if the statutory limits were applied for each of the following tax years. Petitioner asserts that the assessments became most egregious, beginning with the 2012/13 assessment, when the actual assessed value was \$707,850, which, it asserts, was a 50% difference from the 2011/12 tax year and was 178% over what the assessment would have been if the assessment increase

limitations had been applied. Petitioner further asserts that the 2013/14 assessment increased to 286% higher than what it should have been if the assessment increase limitations had been applied, and that the 2014/15 assessment increased to 306.6% higher than it would have been if the assessment increase limitations had been applied. Petitioner calculates that if the property had been classified in tax subclass 2B from 2000/01 through the present, the current 2017 assessment would be only \$330,999. Petitioner states that due to respondents' error the 2017/18 actual assessed value is \$1,651,950, which is a 500% increase compared to what the assessment would have been if not for respondents' repeated error in the classification of the property.

Petitioner maintains that while it is too late for the previous owner of the property to recoup \$81,227 (which is the amount that it claims such previous owner overpaid in taxes during its ownership), the assessments of the property should now be recalculated to determine what the assessments would have been if respondents had kept the property in tax subclass 2B, instead of erroneously changing it to tax class 2, in 2003/04. Petitioner asserts that the correct assessed value for the 2013/14 tax year should be \$274,983 and the correct assessed value for the 2014/15 tax year should be \$294,315.

The following chart shows the actual assessed values for the property from the 2001/02 tax year³ to the 2016/17 tax year:

³As noted above, the property was correctly classified as class 2, subclass 2B for the 2001/2002 and 2002/2003 tax years, but the property was incorrectly classified as class 2, without the subclass 2B, for all of the following years. However, the property only first became in contravention of the one-year 8% cap in the 2007/08 tax year.

Tax Year	Actual Assessed Value
2001/02	\$166,500
2002/03	\$169,650
2003/04	\$169,650
2004/05	\$174,150
2005/06	\$178,200
2006/07	\$181,350
2007/08	\$324,000
2008/09	\$385,650
2009/10	\$430,200
2010/11	\$381,600
2011/12	\$474,050
2012/13	\$707,850
2013/14	\$1,061,550
2014/15	\$1,196,550
2015/16	\$1,363,950
2016/17	\$1,543,950

Although the DOF has erroneously misclassified the property for the 2003/04 tax year through the 2016/17 tax year, petitioner, which, as noted above, first became an owner of the property on April 26, 2013, only seeks relief beginning with the 2013/14 tax year, which is the first tax year for which petitioner, on October 23, 2013,⁴ has filed a RPTL article 7 tax

⁴Petitioner consents to respondents' request that a duplicate proceeding for the 2013/14 tax year, which was filed by Jerneb Corp., be dismissed as Jerneb Corp. was the contract vendee for the purchase of the property before petitioner's corporate entity was created to take title to the property. ✓

certiorari proceeding. On October 16, 2014, petitioner filed a RPTL article 7 tax certiorari proceeding for the 2014/15 tax year. On September 16, 2015, petitioner filed a RPTL article 7 tax certiorari proceeding for the 2015/16 tax year. On October 14, 2016, petitioner filed a RPTL article 7 proceeding for the 2016/17 tax year.

Petitioner now moves to consolidate these four actions, and also moves for partial summary judgment. Respondents do not oppose petitioner's motion for consolidation. Respondents also do not oppose petitioner's motion for partial summary judgment insofar as it seeks a reclassification of the property from tax class 2 to tax class 2, tax subclass 2B, for the tax years 2013/14, 2014/15, and thereafter. Respondents, however, vehemently dispute the methodology used by petitioner to calculate the corrected assessed values for these tax years.

DISCUSSION

Consolidation

CPLR 602 (a) provides that “[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion . . . may order the actions consolidated.” Furthermore, RPTL 710 provides that “[a] justice before whom separate petitions to review assessments of real property are pending may on his [or her] own motion consolidate or order to be tried together two or more proceedings where the same grounds of review are asserted and a common question of law or fact is presented.” Thus, “[w]here ‘the same grounds of review are asserted and a common question of law or fact is presented,’

the trial court may consolidate proceedings in its discretion” (*Matter of Long Is. Indus. Group v Board of Assessors*, 72 AD3d 1090, 1091 [2d Dept 2010], quoting RPTL 710; *see also* CPLR 602 [a]).

In the four proceedings, petitioner challenges the assessed values for the same property, and the same grounds of review are asserted. Specifically, petitioner alleges in each of these proceedings that due to the property being misclassified, the assessments of the property are excessive because the property was assessed in contravention of RPTL 1805 (2). The only differences in these four proceedings are the different tax years for which they are brought. Thus, the questions of law and fact raised by these proceedings are the same and respondents will not be prejudiced by these matters being consolidated. Furthermore, a consolidation of these proceedings further the interest of judicial economy.

Respondents do not oppose the consolidation of these proceedings. Consequently, inasmuch as there are common questions of law and fact, an order consolidating these four proceedings is warranted⁵ (*see* RPTL 710).

⁵It is noted that 22 NYCRR 202.60 (f) provides that the “[c]onsolidation or joint trial of real property tax assessment review proceedings in the discretion of the court shall be conditioned upon service having been made of the verified or certified income and expense statement, or a statement that the property is not income-producing, for each of the tax years under review.” However, regardless of whether such service has been made, where, as here, the issue is one of classification of the property as a matter of law, the proceedings may be consolidated for purposes of such a determination (*see Matter of JAM Enter., LLC v Tax Commn. of the City of N.Y.*, 36 Misc 3d 762, 765 [Sup Ct, NY County 2012]).

Partial Summary Judgment

As discussed above, respondents, in response to petitioner's partial summary judgment motion, have agreed to change the tax class of the property from tax class 2 to tax class 2, tax subclass 2B, for the tax years 2013/14 through 2014/15 and thereafter. Thus, petitioner is entitled to partial summary judgment to the extent that it seeks a finding that the DOF has erroneously misclassified the property in tax class 2 and that the property should be reclassified as tax class 2, subclass 2B (*see* CPLR 3212 [e]).

This change in the tax class of the property requires the DOF to adjust the assessed values of the property for the tax years under review in these consolidated RPTL article 7 proceedings⁶ in order to comply with the assessment increase limitations of RPTL 1805 (2). Petitioner and respondents sharply dispute the proper methodology to be used to calculate the corrected assessed values. Specifically, they disagree as to the first year in which the RPTL 1805 (2) assessment increase limitations should apply to the property.

⁶While petitioner has filed its motion for partial summary judgment and respondents have filed their cross motion for partial summary judgment under index number 406331/13 and index number 403881/14, the motion and cross motion are equally applicable to the other two consolidated proceedings under index number 400001/15 and index number 403636/16 since they are identical except for the tax years involved. Petitioner, in its affirmation in opposition, in document no. 28, under index number 403881/14, states that it is seeking summary judgment calculating the assessment for the property pursuant to RPTL 1805 (2) for tax years 2013/14 through 2016/17, which encompasses the tax years in the two latest proceedings. Thus, since respondents do not object and have discussed proposed calculations for the 2015/16 and 2016/17 tax years in their papers, the court will also address the motion and cross motion with respect to these tax years as well as the 2013/14 and 2014/15 tax years. ✓

Petitioner contends that the appropriate methodology is to have the RPTL 1805 (2) assessment increase limitations commence in 2003/04, the first year that the property was misclassified as tax class 2, when it should have been classified on the assessment roll as tax subclass 2B. Petitioner relies on *Matter of JAM Enter., LLC v Tax Commn. of the City of N.Y.* (36 Misc 3d 762 [Sup Ct, NY County 2012]) for the proposition that the retroactive review of final assessments of prior tax years is permissible for this purpose.

In *Matter of JAM Enter., LLC* (36 Misc 3d at 763), JAM Enterprise LLC (JAM), which was the petitioner therein, sought a judgment declaring that the respondents erroneously misclassified certain property since 2001/2002 and that the 2010/2011 and 2011/2012 assessments on that property were not in accordance with the RPTL 1805 (2)'s assessment increase limitation. JAM also sought to have the assessed value for the tax year 2010/2011 and the assessed value for the tax year 2011/2012 be reset in accordance with RPTL 1805 (2) (*id.*). Justice Cynthia S. Kern, in determining a motion for summary judgment by JAM on these claims, applied RPTL 1805 (2)'s assessment increase limitations retroactively to the first year that the property should have been identified on the assessment roll as having less than 11 residential units (*id.* at 765). In doing so, Justice Kern adopted JAM's argument that the assessments of the property for tax years 2010/2011 and 2011/2012 should be recalculated based on what the prior assessments would have hypothetically been if that property had been correctly classified from tax year 2001/2002 and afforded the benefits of RPTL 1805 (2) (*id.* at 766-767).

Here, petitioner seeks summary judgment setting the assessed values based on calculations which apply the methodology used in *Matter of JAM Enter., LLC* and refunding the claimed amount of its overpayment of taxes. Specifically, petitioner, in applying this methodology, argues that the base year for the one-year 8% cap and the five-year 30% cap would be tax year 2003/04 and that the corrected assessed values should be \$274,983 in tax year 2013/14 and \$294,315 for tax year 2014/15 if RPTL 1805 (2)'s assessment increase limitations are applied beginning in 2003/04.

Respondents, on the other hand, contend that the appropriate methodology for determining the corrected assessed values in 2013/14 through 2014/15 and thereafter is to apply the RPTL 1805 (2) assessment increase limitations to the property in 2013/14, the first year that the property shall be actually reclassified to tax subclass 2B due to petitioner's RPTL article 7 proceeding with respect to that tax year. Respondents, in their cross motion, seek partial summary judgment declaring that the 2013/14 tax year is the first year that RPTL 1805 (2) applied to the property for purposes of calculating RPTL 1805 (2)'s assessment increase limitations.⁷

In support of their cross motion and their argument as to the methodology to be employed, respondents rely upon both *Matter of 436 Condominium Board of Mgrs. v Tax Commn. of the City of N.Y.* (2015 WL 9271688 [Sup Ct, NY County 2015]) and *Matter of*

⁷While respondents, in their notice of cross motion, do not set forth what they seek in their partial summary judgment cross motion, it is apparent from their supporting papers that what they seek is an order declaring that the 2013/2014 tax year is the first year that RPTL 1805 (2) applied to the property.

Oakwood Condominium v Tax Commn. of the City of N.Y. (2012 NY Slip Op 31249[U]). In both *Matter of 436 Condominium Board of Mgrs.* and *Matter of Oakwood Condominium*, the petitioners therein, similarly to the petitioner here, had property which was classified in the wrong tax class and the petitioners did not challenge the misclassification for several years. As a result, the petitioners in those cases, like the petitioner here, did not receive the benefit of RPTL 1805 (2)'s assessment increase limitations. Upon motions for partial summary judgment by the petitioners in *Matter of 436 Condominium Board of Mgrs.* and *Matter of Oakwood Condominium*, Justice Martin Shulman held that RPTL 1805 (2)'s "clear and unambiguous language" did "not mandate a 'rollback'" as the petitioners in those cases urged. Indeed, Justice Shulman ruled that to recalculate the property's assessed value for the tax years under review by going back to the first tax year in which the property was misclassified, but which was never challenged, and apply RPTL 1805 (2)'s 8% and 30% caps retroactively to all tax years from that tax year forward "would effectively rewrite history."

In ascertaining whether *Matter of JAM Enter., LLC* or *Matter of 436 Condominium Board of Mgrs.* and *Matter of Oakwood Condominium* represent the correct view of the law which should be followed here, the court notes that "[w]hen interpreting a statute, it is fundamental that a court . . . should attempt to effectuate the intent of the Legislature" (*Matter of Crucible Materials Corp. v New York Power Auth.*, 13 NY3d 223, 229 [2009], *rearg denied* 13 NY3d 927 [2010][internal quotations omitted]; *see also Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 286 [2009]). "The starting point is always to look to the

language itself and where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning” (*Crucible Materials Corp.*, 13 NY3d at 229). Here, as quoted above, RPTL 1805 (2)’s clear and unambiguous language provides that the assessment of properties with less than 11 units will not increase by more than 8% in any year “as measured from the actual assessment on the previous year’s assessment roll” and will not increase more than 30% over successive five-year periods starting in 1981 or the first year after 1981 that the property had less than 11 residential units.

Petitioner, in urging that this court adopt the calculation methodology used in *Matter of JAM Enter., LLC.*, argues that adopting respondents’ calculation methodology would be inconsistent with the intent of RPTL 1805 (2) to protect small property owners from unlimited year-to-year assessment increases. Significantly, however, in *Matter of 436 Condominium Board of Mgrs.* (2015 WL 9271688, *6), Justice Shulman expressly rejected the calculation methodology used in *Matter of JAM Enter., LLC*, finding “no basis in the statutory language [of RPTL 1805 (2)] for such a calculation methodology. While Justice Shulman acknowledged that the result in *Matter of JAM Enter., LLC* “serves the laudatory goal of protecting small property owners,” he pointed to the statutory language in RPTL 1805 (2) which expressly provides for the one-year 8% cap to be “measured from the **actual assessment** on the previous year’s assessment roll” (*id.*, quoting RPTL 1805 (2) [emphasis in original]).

In addition, Justice Shulman, consistent with his earlier decisions in *Matter of 436 Condominium Board of Mgrs.* and *Matter of Oakwood Condominium*, recently held in *Matter of Rotunda Realty Corp. v the Tax Commn. of the City of N.Y.* (2016 NY Slip Op 31205[U], *5-6 [Sup Ct, NY County 2016]) that where property was mistakenly classified as a tax class 4, rather than as a tax class 2, subclass 2A property, tax year 2010/11, which was the first year in which the property would be properly classified on the assessment roll in tax class 2, subclass 2A, was the first year RPTL 1805 (2) would apply to the property. He specifically ruled that since the petitioners therein failed to challenge the classification error prior to the 2010/11 tax year, they were not entitled to claim RPTL 1805 (2)'s benefits for the prior unchallenged tax years (*id.*).

The holdings by Justice Shulman in *Matter of 436 Condominium Board of Mgrs.* and *Matter of Oakwood Condominium* are also supported by prior case law, which was cited in those decisions, namely, *Matter of Brigandi v Finance Adm'r* (Sup Ct, Kings County, Nov. 13, 1991, S. Leone, J., index No. 28369/90, *aff'd* 201 AD2d 646 [2d Dept 1994], *lv denied* 86 NY2d 712 [1995]) and *Epstein v Tax Commn. of the City of N.Y.* (Sup Ct, Kings County, April 16, 1990, S. Leone, J., index No. 24024/89). In *Matter of Brigandi*, Justice Sebastian Leone held that where property was mistakenly classified in tax class 4 starting in 1980, RPTL 1805 (1) did not apply to the property until the 1990/91 tax year, which was the first year that the property became classified as a tax class 1 property. Notably, *Matter of Brigandi* was affirmed by the Appellate Division, Second Department. In *Epstein*, Justice

Leone similarly held that where a property was mistakenly classified as a tax class 4 property beginning with the 1984/85 tax year, RPTL 1805 (2) did not apply until the 1989/90 tax year, which was the first year that the petitioner therein challenged the property's classification and the property was reclassified as tax class 2A.

Petitioner argues that RPTL 1805 (2) does not require the property to be specifically labeled in tax subclass 2B on the assessment roll in order for it to enjoy the assessment limitations set forth in RPTL 1805 (2). This argument is rejected. As discussed above, RPTL 1805 (2) requires that “[t]he assessment roll of a special assessing unit wholly contained within a city shall identify those parcels classified in class two which have fewer than eleven residential units.” As required by RPTL 1805 (2), and pursuant to its statutory authority, the DOF identifies properties in tax class 2 which have fewer than 11 residential units on the assessment roll by designating such properties in tax subclass 2A, 2B, or 2C. Therefore, it necessarily follows that in order for a property to benefit from RPTL 1805 (2)’s assessment increase limitations, it must be identified on the assessment roll by the DOF as belonging in tax subclass 2A, 2B, or 2C.

Here, although the property had less than 11 residential units and was classified as a tax class 2 property for tax years 2003/04 to 2012/13, the property cannot benefit from RPTL 1805 (2)’s assessment increase limitations because it was not identified by the DOF as such being a tax class 2 property with less than 11 residential units on the assessment roll, i.e., as being part of tax subclass 2B in these tax years. Consequently, petitioner's argument that

because it had less than 11 residential units and was in tax class 2, it should have benefitted from the RPTL 1805 (2)'s assessment increase limitations, contradicts RPTL 1805 (2) and the practice, custom, and legal framework of the DOF. Petitioner's argument that since the property had been classified in tax subclass 2B in the 2001/2002 and 2002/03 tax years, 2001/02 should be deemed year one with respect to the assessment increase limitations of RPTL 1805 (2), is rejected. In *Matter of Oakwood Condominium* (2012 NY Slip Op 31249[U]), Justice Shulman specifically held that the fact that the petitioner's property might have qualified to receive the benefits of RPTL 1805 (2) in prior tax years was of no import where the petitioner admittedly failed to challenge the respondents' failure to identify the property as having less than eleven residential units.

Petitioner concedes that it has no standing to correct assessments on the final assessment roll for tax years prior to the 2013/14 tax year. Petitioner states, however, that it is not seeking to collaterally attack tax years before 2013/14 since it not requesting the court to change or disturb any of the assessed values on the final assessment roll for the tax years before 2013/2014 nor does it seek refunds for taxes paid prior to 2013/2014. Petitioner asserts that it is, instead, asking that the court calculate the one-year 8% cap and the five-year 30% cap of RPTL 1805 (2), starting from the 2001/02 tax year, when the property was first classified in tax subclass 2B, so that it can be put in the same position in which it would have been had the property been afforded the assessment caps that it was entitled to receive from the 2001/2002 tax year forward.

While petitioner claims that it is not collaterally attacking the prior final assessments of the property, in order to arrive at its proposed calculations for the presently challenged tax years, the assessed values for these prior years would necessarily be implicated in reclassifying the property under tax subclass 2B for purposes of applying the assessment limitations of RPTL 1805 (2), starting with the 2003/04 tax year. In this regard, it is noted that the prior owner of the property was on notice of any increases in the property's assessed value from 2003/04 to 2012/13, as well as of the property's tax classification, but did not challenge these assessments or the tax classification. As respondents point out, the prior owner arguably may have chosen not to challenge the 2003/04 to 2012/13 assessments because it wished to benefit in these earlier tax years from the fact that the property's assessed values increased by less than eight percent for each tax year until the 2007/08 tax year (for a total of four years) and that in the 2010/11 tax year, the percentage difference from the previous year decreased by 11.3%, as well as the fact that the property was entitled to transitional assessments, which are available to tax class 2 properties, but are unavailable to tax subclass 2B properties. Thus, if hypothetical corrected assessments are assigned to the 2003/04 to 2012/13 tax years in which assessments have been finalized, as requested by petitioner, this could inequitably result in the prior owner having benefitted from the transitional assessments in earlier years with petitioner now benefitting in current years from the result of applying the RPTL 1805 (2)'s assessment limitations retrospectively to these

same earlier years. Such a result could not have been intended by the legislature, and RPTL 1805 (2) should not be construed so as to permit this to occur.

Petitioner further argues that if the one-year 8% cap and the five-year 30% cap of RPTL 1805 (2) are not calculated starting from the 2001/02 tax year, to bring it back in the position in which it would have been had there been no misclassification, respondents will permanently benefit from their admitted mistake to its financial detriment and the unequal protection of it, as the property owner. Petitioner asserts that if the assessed values of prior years are not recalculated by applying the RPTL 1805 (2) assessment limits, and reducing the assessed values by assigning hypothetical corrected assessments to each tax year, beginning with the 2003/04 assessment (when the property was first misclassified), the property will always have an inflated assessment due to respondents' mistake. It contends that respondents will, therefore, financially benefit from their admitted mistake by subjecting it to a continuously higher tax than if the mistake had not occurred.

This argument by petitioner, however, must be rejected. Justice Shulman, in *Matter of 436 Condominium Board of Mgrs.* and *Matter of Oakwood Condominium*, emphasized the fact that “[p]rior assessments are final if not challenged and are not subject to review.” Here, petitioner, who did not own the property until April 29, 2013, did not and could not have challenged the assessments of the property prior to the 2013/14 tax year. Since there was no timely challenge to these prior assessments, they are final and not subject to review (*see* RPTL 702 [3]). Consequently, there can be no retroactive application of RPTL 1805 (2).

The court cannot rollback the assessed values to the 2003/04 tax year and retroactively change the actual final assessments by using hypothetical corrected assessments for all of these prior tax years from the 2003/04 tax year forward in order to calculate the assessed values of the tax years under review. Rather, the court finds, based upon the statutory language of RPTL 1805 (2) and the reasoning of Justice Shulman, that *Matter of 436 Condominium Board of Mgrs.* and *Matter of Oakwood Condominium* represent the correct view of the law. The court, therefore, adopts and applies the methodology enunciated by Justice Shulman in *Matter of 436 Condominium Board of Mgrs.* and *Matter of Oakwood Condominium*, and rejects the methodology used by Justice Kern in *Matter of JAM Enter., LLC*.

With respect to the calculation of the five-year 30% cap, petitioner argues that respondents' actual policy is to calculate the five-year 30% cap using the method advocated by it where each successive tax year is measured against the tax year five years prior to it to determine whether the five-year 30% cap has been breached, rather than applying the method used in *Matter of 436 Condominium Board of Mgrs.* and *Matter of Oakwood Condominium* of measuring it against successive five-year periods, beginning with the first year after 1981 that RPTL 1805 (2) would be applicable to the property. Petitioner argues that respondents have calculated the limitations imposed by RPTL 1805 (2) on an adjacent property owned by it, which has always been correctly classified in tax subclass 2B so that if one were to

select any tax year, the assessment of the property which is five years after that tax year will always be no more than 50% higher than the selected tax year.

This argument is unavailing. “[A] proceeding under RPTL article 7 is in the nature of “a trial de novo to decide whether the total assessment of the property is correct and if it is not[,] to correct it” (*Matter of Town of Pleasant Val. v New York State Bd. of Real Prop. Servs.*, 253 AD2d 8, 14 [2d Dept 1999]). Thus, a review of the manner of assessment with respect to a different property is not within the scope of this court’s review pursuant to RPTL article 7.

Following the reasoning in *Matter of 436 Condominium Board of Mgrs.* and *Matter of Oakwood Condominium*, the court finds that the base year for calculating the one-year 8% cap is the 2012/13 tax assessment since, pursuant to RPTL 1805 (2), this is the actual assessment on the immediately preceding year’s assessment roll. As to the five-year 30% cap, the first year after 1981 that RPTL 1805 (2) would have been applied to the property was the 2001/02 tax year, as demonstrated by petitioner’s certificate of occupancy showing fewer than 11 residential units. Therefore, the first five-year period commenced in 2001/02, the second five-year period commenced in 2006/07, and the third five-year period commenced in 2011/12. Since 2013/14 is the first tax year under review, the relevant five-year period that encompasses 2013/14 is the five-year period commencing in 2011/12 since this is the most recent five-year period to include the 2013/14 tax year, the first tax year being

challenged. Consequently, the base year for the five-year 30% cap is 2011/12, which falls within the third applicable five-year period.

Having determined that the base year for the five-year 30% cap is the 2011/12 tax year and that the base year for the one-year 8% cap is the 2012/13 tax year, the court must next determine whether the 2012/13 assessment complies with the five-year 30% cap before calculating the 2013/14 tax assessment. The 2012/13 tax assessment of \$707,850 is an increase of 50% over the 2011/12 assessment of \$472,050 and is in violation of the five-year 30% cap. Therefore, as proposed by respondents, the revised corrected assessed values for the 2013/14 and 2014/15 tax years must both be \$613,655, which is equal to a 30% increase from the 2011/12 assessment, thereby complying with the five-year 30% cap and the one-year 8% cap. With respect to the tax assessment for the 2015/16 tax year, as proposed by respondents, the corrected assessed value must also be \$613,655 in order for the assessment to comply with the five-year 30% cap period commencing on 2011/12. Since the 2016/17 tax year is the first year of the next five-year period, the 2016/17 corrected assessed value must be \$662,747, which is equal to an 8% increase from the 2015/16 assessment of \$613,655. These assessed values for these tax years must be reduced accordingly, and any overpayments made by petitioner refunded.

CONCLUSION

Accordingly, petitioner's motion for consolidation of the proceedings is granted. Petitioner's motion for partial summary judgment, insofar as it seeks a finding that the DOF

has erroneously misclassified the property in tax class 2 and an order directing respondents to reclassify the property as tax class 2, subclass 2B, for tax years 2013/14, 2014/15, 2015/16, and 2016/17 is granted, on respondents' consent. Petitioner's motion is also granted to the extent that respondents are directed to correct the property's assessed values for tax years 2013/14, 2014/15, 2015/16, and 2016/17 to reflect RPTL 1805 (2)'s limitations, which shall be calculated in accordance with this decision, and to refund any overpayments to petitioner. Petitioner's motion is denied to the extent that petitioner's proposed methodology and its calculation of the property's assessed values for the challenged tax years is rejected, and it is also denied in all other respects. Respondents' cross motion is granted insofar as it seeks partial summary judgment declaring that the 2013/2014 tax year is the first year that RPTL 1805 (2) applied to the property. The court shall schedule a date for the appraisal reports to be exchanged and filed pursuant to 22 NYCRR 202.60 (g).

This constitutes the decision and order of the court.

E N T E R,



J. S. C.