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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Index Number : 105286/2011

RCN TELECOM SERVICES

VS.

CITY OF NEW YORK, ET AL

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. 105286/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

n this motion to/for

	PAPERS NUMBERED
Notice of ~~Motion~~/ ~~Order to Show Cause~~ Petition/ Affidavits — Exhibits A-S	1, 2, 3, 4, 5
Answering Affidavits — Exhibits 1-7	6
Replying Affidavits -Exhibits T-Z	7, 8
Sur-Reply Aff. -Exhibits 1-5	9

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, It is ordered that this ~~motion~~ petition motion is decided in accordance with the attached decision and order.

FILED

MAR 15 2012

COUNTY CLERK'S OFFICE
NEW YORK

Dated: March 12, 2012

MARTIN SHULMAN J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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In the Matter of the Application of:

RCN TELECOM SERVICES OF NEW YORK, *et al*,

Petitioners,

-against-

THE CITY OF NEW YORK, *et al.*,

Respondents.

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Index No. 105286/11

Decision and Order

SHULMAN, J.:

Petitioners bring two (2) applications under motion sequence numbers 1 and 2 which are consolidated for disposition. Petitioners' application under sequence number 1 was brought as a CPLR Article 78 proceeding[1] and seeks a declaration that certain real property tax assessments for tax years 2010-2011 and 2011-2012 on properties identified as Block 72553, Lot 21 and Block 72746, Lot 21 are nullities.[2] In sequence 2 petitioners move pursuant to CPLR 408 for leave to conduct discovery.

The petition describes the property at issue as equipment located at various premises petitioners lease in New York City and "used to provide emergency back-up

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[1] This proceeding was originally assigned to the Hon. Carol Edmead but was referred to this tax certiorari part by so-ordered stipulation dated September 9, 2011 because the issues raised herein involve disputed real property taxes. This court will treat the petition as an RPTL Article 7 proceeding and analyze petitioners' requests for relief under the same standards applicable to motions for summary judgment.

[2] The assessments at issue resulted from a change in respondent New York City Department of Finance's ("DOF") assessment policy as stated in DOF's Statement of Assessment Procedure ("SAP") dated December 10, 2009 and entitled "When Will Equipment be Separately Assessed". This SAP reversed DOF's prior determination to no longer assess the property at issue in this proceeding, consisting of tenant owned backup generators, effective as of tax year 2006-2007.

power to support petitioners' telecommunications related operations." Petition at ¶10. Petitioners argue that the subject assessments are nullities because:

(1) The property at issue is not assessable as real property since: a) it is lessee-installed, owned and operated equipment used for trade purposes; b) it is telecommunications equipment (Ch. 416, L.1987); and c) it is moveable machinery used for trade and manufacture and thus exempt from real property taxation under RPTL §102(12)(f);

(2) Respondents have acted discriminatorily, arbitrarily and capriciously in assessing the subject property in violation of the RPTL and the New York and United States Constitutions; and

(3) Respondents have failed to provide timely notice of the assessments as required by statute and under the due process clause of the United States and New York State Constitutions.

In support of their contention that the property at issue is not assessable as real property petitioners rely heavily on the text of RPTL §102(12)(f)'s second clause which enumerates the classes of property excluded from the statutory definition of real property. The following are specifically excluded:

> . . . movable machinery, or equipment consisting of structures or erections to the operation of which machinery is essential, owned by a corporation taxable under article nine-a of the tax law, used for trade or manufacture and not essential for the support of the building, structure or super-structure, and removable without material injury thereto.

However, the statute's first clause enumerates those classes of property included in the definition of real estate and "power generating apparatus" is clearly one of them (RPTL §102 [12][f]). Petitioners contend their power generating equipment

which is the subject of this proceeding is exempt because it is "moveable machinery" used in trade or manufacture, owned by an Article 9-a corporation and not essential for the building's support.

Accepted rules of statutory interpretation provide:

> It is a universal principle in the interpretation of statutes that *expressio unius est exclusio alterius*. That is, to say, the specific mention of one person or thing implies the exclusion of other persons or thing *(sic)*. As otherwise expressed, where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded. (McKinney's Statutes §240)

The enumeration of "power generating apparatus" in the statute's first clause together with other classes of property intended to be taxable, and the failure to include it in the second clause which enumerates classes of property which are exempt, demonstrates the legislature's clear intention to make power generating apparatus taxable as real property no matter which other classes of property it might coincidentally fall into.

When reviewed using the foregoing rule of interpretation, RPTL §102(12)(f) is clear. However, even if it was ambiguous, it would be unavailing to petitioners. "'Tax exemptions . . . are limitations of sovereignty and are strictly construed (citations omitted). If ambiguity or uncertainty occurs, all doubts must be resolved against the exemption' (citations omitted)." *Matter of City of Lackawanna v State Bd. of Equalization & Assessment of State of New York*, 16 NY2d 222, 230 (1965).

Petitioners' memorandum of law fervently argues legislative history to the contrary. However, legislative history cannot be used to negate the unambiguous

language of a statute. See *Riley v County of Broome*, 95 NY2d 455, 463 (2000); *Lloyd v Grella*, 83 NY2d 537, 545-546 (1994).

Summary judgment is an appropriate remedy in a RPTL Article 7 proceeding (*Sailors' Snug Harbor in City of New York v Tax Commn. of City of New York*, 26 NY2d 444, 450 [1970]). Moreover, the CPLR is deemed to "expressly . . . apply to all 'civil judicial proceedings' except where procedure is regulated 'by [an] inconsistent statute'". (*Id*). In this special proceeding, CPLR 409 (b) provides that "(t)he court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised. The court may make any orders permitted on a motion for summary judgment." Under CPLR 3212 (b), summary judgment may be awarded to any party if the court deems it appropriate, "without the necessity of a cross-motion."

Accordingly, so much of petitioners' application as seeks a declaration that the assessments herein are nullities on the grounds that they are not assessable under RPTL §102(12)(f) is denied. Upon searching the record, summary judgment is granted to the respondents dismissing such claims because the statute is clear that power generating equipment is taxable as real estate.

Turning to the portion of the petitioners' application for a declaration that the assessments at issue are nullities based on unlawfully discriminatory, arbitrary and capricious selectivity in assessing similar properties, petitioners offer no evidentiary proof conclusively supporting this branch of the application. Petitioners contend that respondents' alleged unlawful selectivity violates the equal protection clauses of the

New York and United States Constitutions. Petitioners specifically claim that respondent DOF selectively assesses only lessee installed backup power systems, without assessing RPTL §102(12)(f)'s other categories of assessable lessee improvements including "boilers, ventilating apparatus, elevators, plumbing, heating, lighting . . . apparatus, shafting . . . and equipment for the distribution of heat, light, power, gases and liquids."

Petitioners' counsel avers that he personally inspected the tax assessment rolls for all five boroughs for tax years 2010-2011 and 2011-2012 and found that only 56 assessments on leasehold improvements were imposed against 47 taxpayers, all in Manhattan, for each tax year. This, according to petitioners, is incredible given the thousands of commercial properties and tenants in New York City.

In response, respondents explain why merely perusing the tax assessment rolls will not indicate whether DOF has assessed RPTL §102(12)(f) equipment. Among other reasons, respondents note that the equipment in question will only appear on the assessment roll when the equipment owner differs from the owner of the building in which it is located.

Here, respondents' opposition does not conclusively refute petitioners' allegation that the subject assessments were selectively imposed. Notwithstanding the uncertain nature of petitioners' discriminatory selectivity claim, at this juncture an issue of fact has been raised and petitioners should be permitted to pursue discovery in connection with this claim. Accordingly, the portion of the application seeking a declaration that the assessments at issue here are nullities on the grounds of unlawful discrimination is denied and the issue is reserved for trial.

Petitioners seek a further declaration that the assessments at issue are nullities and all statutes of limitations for filing tax commission applications and tax certiorari proceedings in connection therewith should be tolled and such applications deemed timely. This branch of the application is grounded on petitioners' failure to receive mailed written notice of the assessments at their current place of business.

The respondents rely on case law (*Garden Homes Woodlands Co. v Town of Dover*, 95 NY2d 516 [2000]) to establish that direct mailed notice of a hearing to consider objections to special assessments may in fact be required, but no such notice is required for a *general* assessment, as in the instant matter. In the latter instance, posting and publication are deemed sufficient (RPTL §506). Respondents also rely on applicable statutory authority to the effect that wherever mailed notice *is* required, there is a specific provision that failure to comply with such notice will not invalidate the assessment (RPTL §§ 508, 510-a, 510[1],510-a[2], 922[3]). To the extent that the petitioners seek a declaration invalidating the assessments on these grounds, summary judgment is awarded to respondents dismissing this claim.

However, the affidavit of Michael O'Day dated April 25, 2011 and submitted in support of the petition presents an issue of fact as to whether or not the posted notice was searchable under the circumstances, and therefore whether or not it was reasonable to deem the posted notice adequate. Accordingly, to the extent that the petition seeks the tolling of any statute of limitations which would limit challenges to the assessments as untimely, issues of fact have been raised and those issues are reserved for trial.

Petitioners' application under sequence number 2 for leave of this court to depose the New York City Department of Finance is denied with leave to renew only on the issues reserved for trial in this decision. For all of the foregoing reasons, it is

ORDERED that branch 1(a) of the application (see notice of petition at pp. 2-3) seeking a declaration that the assessments at issue here are nullities as a result of respondents' failure to provide timely notice thereof is denied, summary judgment is awarded to respondents on this issue and this branch of the petition is dismissed; and it is further

ORDERED that the branch of the application seeking a declaration that the assessments at issue here are nullities because the assessed property is unassessable as a matter of law is denied as to petitioners and granted as to respondents, and branches 1 (b), (c), (d) and (e) of the application are dismissed; and it is further

ORDERED that branch 1(f) of the application seeking a declaration that the respondents have assessed the property at issue in an unlawful and discriminatory manner is denied, and the issue is reserved for trial; and it is further

ORDERED that branch 2 of the application seeking a declaration that all statutes of limitations applicable to challenges to the assessments at issue are tolled is denied and the issue reserved for trial; and it is further

ORDERED that all remaining branches of the application under sequence number 1 are denied in all respects; and it is further

ORDERED that the motion for discovery under sequence number 2 is denied with leave to renew only upon those issues reserved for trial in this decision.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: New York, New York
March 12, 2012

Hon. Martin Shulman, J.S.C.