(18)

At an IAS Term, Part 74T 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 20th day of December, 2019.

P R E S E N T:

HON. MICHAEL L. PESCE,
Justice.

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IN THE MATTER OF
ALBERT WILK AND WILK AND RE MIAMI 11 LLC,

Petitioner,

- against -

Index No. 405657/15

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

Respondents.

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The following e-filed papers read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-29 32-35
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	40 41
Respondents' Memorandum of Law	36

Upon the foregoing papers, in this RPTL article 7 tax certiorari proceeding, petitioners Albert Wilk and Wilk Re Miami 11 LLC (collectively, petitioners) move, under motion sequence number one, for an order: (1) reclassifying the subject real property in tax class 2, subclass 2A, in tax years 2015/16, 2016/17, 2017/18, and 2018/19; (2) applying the tax class 2 tax rates to the assessment in each of these tax years; (3) consolidating the pending

petitions for review of the property's 2015/16 through 2018/19 assessments, which bear index numbers 405657/15, 402658/16, 400382/17, and 405267/18; (5) reducing the assessments according to the statutory limits on assessment increases applicable to tax subclass 2A of 8% per year and 30% per five years, pursuant to RPTL 1805 (2), as per a schedule annexed by petitioners on page 8 of their attorney's affirmation; and (6) directing the payment of the appropriate refund of the overpayment of taxes with appropriate statutory interest.

Respondents the Tax Commission of the City of New York and the Commissioner of Finance of the City of New York (collectively, respondents) cross-move, under motion sequence number two, for a judgment, pursuant to CPLR 3212, granting them summary judgment, as well as costs, fees, and disbursements.

Facts and Procedural Background

The subject property, which is owned by petitioners, is located at 626 Avenue U, Brooklyn, New York, and designated on the tax map of the City of New York as Kings County, Block 7133, Lot 10 (the property). The property lot measures 20 feet 6 inches wide by 100 feet long, equaling 2,050 square feet. Before 2008, the property was improved with a two-story and basement structure. The Department of Finance (DOF) Notices of Property Value (NOPVs)[1] for 2006 and 2007 state that the structure on the property measured 20 feet

[1]The Notice of Property Value (NOPV) is defined on the DOF's website as: "Your annual notice with details about your property that is produced every January, [which] reflects your property's physical condition as of January 5 [and] is used for the tax year that begins on July 1." This definition further informs the property owner that "[i]f your value is changed you will receive a Revised Notice of Property Value."

6 inches by 64 feet, for a total gross building area of 2,624 square feet (20.5 ft. x 64 ft. x 2 = 2,624). The DOF did not count any cellar space in the total building area.

As set forth in the DOF's website, property in New York City is divided into four classes. Class 1 consists of "[m]ost residential property of up to three units (family homes and small stores or offices with one or two apartments attached), and most condominiums that are not more than three stories." Class 2 consists of "[a]ll other property that is not in Class 1 and is primarily residential (rentals, cooperatives and condominiums)." Class 2 includes subclasses, namely, subclass 2A for four to six-unit rental buildings, subclass 2B for seven to ten-unit rental buildings, and subclass 2C for two to ten-unit cooperatives or condominiums. Class 2, without a subclass, is the designation for when the class two property has 11 units or more. Class 3 includes "[m]ost utility property." Class 4 includes "[a]ll commercial and industrial properties, such as office, retail, factory buildings and all other properties not included in tax classes 1, 2 or 3."

In 2005, 2007, and 2008,[2] the DOF classified the pre-alteration building in class one, as primarily residential with one nonresidential unit and two residential units. Classification in class one means that the DOF determined that the residential area of a building exceeded its non-residential area.

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[2]In the 2006 tax year, the property was classified as tax four based on its having three nonresidential units. In the 2007 tax year, the property was first classified as class four, but this classification was revised to class one by a Notice of Revised Property Value.

During 2008, pursuant to a permit issued by the Department of Buildings (DOB), which was approved on October 30, 2007, the building on the property was altered. This alteration extended the first floor, which contains one commercial unit to the rear of the lot, and a new third floor was added. The cellar was not enlarged. This alteration roughly doubled the residential area, resulting in four residential units, with two residential units on the second floor and two residential units on the new third floor. The enlarged first floor remained non-residential.

On January 21, 2010, the DOB issued a certificate of occupancy for the property, which permitted the use and occupancy of four residential apartments on the second and third floors. The certificate of occupancy designates the ground floor as office space. The certificate of occupancy states that the permissible use of the cellar is for "open accessory storage"; it does not permit the cellar to be occupied for commercial purposes.

In the NOPVs for 2009, 2011, and 2013,[3] the DOF reported 3,524 square feet as the building gross square footage for the property, which was an increase of 900 square feet from prior years. The NOPVs for 2009, 2011, 2012, and 2013 listed the property as being in class 2A.

Although there were no further changes made to the property, in the NOPV for 2014, the DOF listed the property as being in class 4 despite the fact that the prior alteration had actually added more residential space than nonresidential space, which indicated

[3]The NOPV for 2012 did not list the building gross square footage for the property.

predominantly residential use. In fact, the DOF's 2014 NOPV stated that the gross residential square footage was 3,640 square feet, and the gross commercial square footage was 2,000 square feet, reflecting that there was more residential than nonresidential area. In the NOPV for 2014, the DOF reported 5,640 square feet as the building gross square footage

The NOPVS for 2015, 2016, and 2017 continued to list the property as being in class 4. In the NOPV for 2015, the DOF also reported 5,640 square feet as the building gross square footage, but stated that the gross residential square footage was 2,640 square feet, and the gross commercial square footage was 3,000 square feet. In the NOPVs for 2016 and 2017, the DOF reported 5,600 square feet as the building gross square footage, with the gross residential square footage as being 2,600 square feet, and the gross commercial square footage as being 3,000 square feet. These calculations of building gross square footage equal either 3,116 or 3,076 square feet more than the DOF's pre-alteration building area of 2,524 square feet. The alteration added approximately 1,312 square feet of third floor residential space (20.5 ft. by 64 ft.) and, at most, 738 square feet of nonresidential space on the first floor (20.5 ft. by 36 ft.). The DOF's 2017's estimate of the property's total building area of 5,600 square feet, therefore, exceeded the amount of added space by about 1,000 square feet (2,524 + 1,312 + 738 = 4,574).

A DOF Classification Inspection Report shows that an inspection of the property took place on March 30, 2016, and that the DOF counted 1,000 square feet in the cellar, categorized it as used for nonresidential purposes, and added the cellar floor area to the gross

building area above ground. This inclusion of the cellar's square footage is the basis for the DOF's conclusion that the property was primarily nonresidential and class 4, rather than class 2, subclass A.[4] The DOF continues to classify the property as class 4.

When the DOF reclassified the property in 2014 as class 4, the DOF nearly tripled the assessment from $44,209 in 2013 to $174,150 in 2014. The property's 2018 assessment is more than six times its 2013 assessment.

Petitioners point out that the certificate of occupancy for the property does not allow commercial occupancy of the cellar. Petitioners assert that the cellar is not used for commercial purposes, and that consistent with the limit on permitted occupancy, the cellar is only used to store files and other unused items. Petitioners state that meetings, transactions, or any other active business functions may not be and are not conducted in the cellar. Petitioners further assert that the residential tenants living upstairs store personal items in the cellar, as permitted in their leases, which expressly provide that they may use the cellar only for storage of their personal belongings.[5] Petitioners also maintain that the inclusion of cellar floor area in the building area conflicts with the DOF's longstanding practice of excluding such space from total building area.

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[4]The court notes that this is inconsistent with the NOPV for 2014, which set forth that there was more residential square footage than commercial square footage, but nevertheless classified the property as class 4.

[5]Petitioners have annexed the residential leases, which specifically state that the tenants may only use the cellar for storage of their personal belongings.

RPTL 1805 (2) limits increases of assessed value of properties in the City that are in tax class 2, "which have fewer than eleven residential units . . . in any one year, as measured from the actual assessment on the previous year's assessment roll, by more than eight percent and . . . by more than thirty percent in any five-year period." Thus, pursuant to RPTL 1805 (2), the DOF is limited in how much it can increase an assessment from year to year on tax class 2 properties. Specifically, the assessment cannot be increased by more than eight percent annually or by more than thirty percent in any five-year period.

Petitioners assert that there is no factual question that they, as the owners of the property, used the property primarily for residential purposes from 2010 to the present, with a lesser portion of the building area used for commercial purposes. They contend that the DOF erroneously included cellar space in its calculation of the total building area of the property and wrongly attributed nonresidential commercial use to that cellar space despite the fact that the cellar space may not legally be so used.

Petitioners set forth that the DOF recognized in 2014/15 that most of the building area was used for a residential purpose, but nevertheless inconsistently placed the property in class 4. Petitioners assert that the DOF, rather than correctly classifying the property in tax class 2A the next year, compounded its error by improperly including the cellar space in the commercial area calculation. Petitioners state that the DOF thereby made erroneous usage designations conform to its erroneous classification of the property as commercial.

Petitioner Albert Wilk (Mr. Wilk) attests that, after having experienced five years of assessments of the property as class 2A, he discovered the reclassification of the property as class 4 upon receiving the initial 2014/15 tax bill, dated June 6, 2014. By that time, it was too late to timely file a 2014/15 Tax Commission application by the March 1, 2014 deadline, which had already passed. In the following years, however, petitioners filed timely Tax Commission applications. On October 21, 2015, petitioners filed the instant RPTL article 7 petition, and, subsequently, they filed RPTL article 7 petitions for the 2016/17, 2017/18, and 2018/19 tax years. Petitioners request that the property's assessment in tax years 2015/16 through 2018/19 be brought to the level that it would have been if respondents had not erroneously reclassified the property as class 4 in 2014 and thereafter.

While petitioners assert that respondents first erroneously reclassified its property as tax class 4 in the 2014/15 tax year, petitioners do not seek correction of that year's assessment or a refund for overpayment in that year since their first petition, i.e., the instant petition, was filed for the 2015/16 tax year. Petitioners contend that respondents should not forever profit from their error in denying the property its assessment limits, pursuant to RPTL 1805 (2), which the property would have had as class 2A property.

On May 10, 2019, petitioners filed their instant motion for consolidation and summary judgment. On September 18, 2019, respondents filed their instant cross motion for summary judgment.

Discussion

Consolidation

Petitioners request consolidation of this proceeding with three other tax certiorari proceedings filed by them for review of the property's assessments for subsequent years, namely, for the 2016/17 tax year, the 2017/18 tax year, and the 2018/19 tax year, under index numbers 402658/16, 400382/17, and 405267/18, respectively. Petitioners note the longstanding practice by courts of favoring the consolidation of RPTL article 7 proceedings for different tax years.

Respondents oppose the consolidation of these proceedings. Respondents argue that consolidation is unnecessary because petitioners' concerns can be addressed without consolidation. Respondents note that the court has the discretion to grant or deny consolidation.

Respondents also argue that consolidation is potentially prejudicial to them because their ability to seek dismissal or further discovery with regard to any particular proceeding may be foreclosed once the proceedings are consolidated. Respondents do not point to any particular discovery that they might need in another proceeding or what different basis of dismissal they might assert in these virtually identical proceedings. Respondents also claim that the parties' conduct relating to one or more discrete tax years may be inadvertently attributed to other tax years. However, respondents have stated no logical reason why this

hypothetical error would occur, given that consolidating proceedings for multiple tax years is common and accepted practice in tax certiorari proceedings.

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 tax certiorari proceedings filed by petitioners, petitioners challenge the assessed values for the same property, and the same grounds of review are asserted. Specifically, petitioners allege in each of these proceedings that due to the property being misclassified as class 4, 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 were filed. 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. Moreover, a consolidation of these proceedings furthers the interest of judicial economy.

The consolidation of these proceedings would serve to prevent unnecessary costs and delay to both the court and the parties. Respondents have failed to demonstrate that they will be prejudiced by these proceedings being consolidated in one proceeding (*see Matter of 436 Condominium Board of Mgrs. v Tax Commn. of the City of N.Y.*, 2015 NY Slip Op 32770[U] [Sup Ct, NY County 2015]). Consequently, inasmuch as there are common questions of law and fact, an order consolidating these four proceedings is warranted (*see* RPTL 710; *Matter of 655 Fifth Dutch Equities LLC v The Tax Commn. of the City of N.Y.*, 2017 NY Slip Op 32486[U], *8-9 [Sup Ct, Kings County 2017]; *Matter of JAM Enter., LLC v Tax Commn. of the City of N.Y*, 36 Misc 3d 762, 764 [Sup Ct, NY County 2012]).

Summary Judgment

Both petitioners and respondents seek summary judgment. Petitioners contend that there can be no factual dispute that the property was misclassified as tax class 4. Respondents assert that the reclassification of the property as tax class 4 was warranted by the presence of 1,000 square feet in the cellar, which the DOF started counting as commercial space. They have submitted the affidavit of Carmela Quintos (Ms. Quintos), the Assistant Commissioner for Property Valuation and Mapping for the DOF. Ms. Quintos sets forth that the residential square footage of the property was approximately 2,600 square feet. Ms. Quintos further sets forth that the square footage of the commercial space on the first

floor of the property was approximately 2000 square feet, counting the 1,000 square feet in the cellar. Ms. Quintos, in her affidavit, states that "[c]ellar square footage, generally, is regarded as *neither* residential nor commercial space *unless* . . . [it meets] two of three criteria: 1) the space is active, 2) the space is finished, and/or 3) the space is publically [sic] accessible" (emphasis added). Ms. Quintos does not point to any statutory or regulatory authority nor any written policy showing the existence of these three criteria. She also does not define "active."

Ms. Quintos' affidavit does not explain which two of these criteria were found to be met by the DOF. As to the first criteria that the cellar space must be active, Mr. Wilk, by his sworn affidavit, attests that the 1,000 square feet in the cellar are used only for storage of office records and miscellaneous items, such as office equipment, furniture that is no longer useful, and residential storage. This is also confirmed by the leases of the residential tenants. Ancillary storage is not an active use.

Petitioners have submitted the sworn affidavit of Robert James Palermo (Mr. Palermo), a registered architect licensed to practice in New York. Mr. Palermo states that he examined the approved set of drawings and documents filed at the DOB in its Brooklyn office under Application #310037545, the application by which the property obtained City approval to be altered. Mr. Palermo further states that he also inspected the property on July 17, 2018. Mr. Palermo sets forth his finding that the filed documents clearly indicate that the cellar level was constructed for ordinary accessory storage only, and that his inspection

confirms this finding. Mr. Palermo concludes that, under the requirements of the Building Code, the cellar area below the first floor of the property can only be used for accessory storage and cannot be used for commercial purposes. As to the third[6] criteria that the cellar space must be publicly accessible, Mr. Palermo, in his affidavit, confirms that the cellar space is not publicly accessible since there is only one way in and out, down a staircase, that is accessible only from the interior of the ground floor office.

Mr. Palermo explains that the cellar can never be occupied for commercial purposes because it fails to meet three requirements of the New York City Building Code. He states that the first requirement not met is that the cellar lacks two means of egress required by the 1968 Building Code Article C26-603.2 which governed this alteration. As previously noted, the cellar does not even have one legal means of egress since the convenience stair connecting the ground floor office to the accessory cellar does not discharge directly to the street, but, instead, the stairs lead to the interior of the first floor office.

Mr. Palermo states that the second Building Code requirement not met is that the cellar space does not meet the minimum headroom requirement of 7' 6" in the corridor leading from the first floor to the cellar. He explains that the corridor must be at least 7' 6" high for the cellar to be legally occupied under Building Code article C26-604.2. He sets forth that the cellar story is deficient by approximately nine inches.

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[6]As to the second criteria, the parties do not address whether the cellar is finished, and the court assumes that the cellar is finished.

Mr. Palermo asserts that the third Building Code requirement not met is that the cellar story does not have full sprinklers as required by Building Code article C26-1703.1 for occupiable space below grade not naturally ventilated by at least 35 square feet of openable area per 10,000 cubic feet. He sets forth that the entire cellar has no natural ventilation openings, and, therefore, would require full sprinklers for occupancy to be legally permitted.

In addition, as discussed above, the certificate of occupancy does not permit commercial use of the cellar. Thus, petitioners have established, prima facie, that the cellar space is not active and is not publicly accessible.

In opposition, respondents have not submitted any evidentiary facts to refute this showing or which raises any triable issue of fact with respect to it. Respondents merely state that the DOF's treatment of the cellar space as commercial is based on six annual inspections (the 2013 and 2015-2019 inspections) out of eight annual inspections conducted by it between 2012 and 2018. Ms. Quintos, however, concedes that in the 2012 inspection, after the alterations (which, as noted above, left the cellar unchanged) were already completed and the certificate of occupancy issued, the DOF did not regard the cellar as commercial space, and, therefore, classified the property into tax class 2A during that tax year. Significantly, Ms. Quintos, in her affidavit, does not discuss the 2014 inspection, but in stating that in six out of the eight annual inspections, the cellar space of the property was found to be commercial in use and met the requisite criteria, she necessarily implies that in 2014, the DOF, in its April 10, 2014 inspection report, found that the cellar space was not commercial

in use and did not meet the requisite criteria. Respondents, in their reply, concede that the April 10, 2014 inspection failed to find that the cellar space was commercial in nature, and that the DOF, nevertheless, classified the property as tax class 4 in 2014.

Moreover, while respondents rely heavily on the inspection reports to claim that the cellar was commercial in nature, they fail to submit to the court even a single written inspection report. The only inspection report submitted to the court is petitioner's exhibit 10 (Doc #29), which is a substantially redacted copy of a March 30, 2016 inspection report, which respondents produced after petitioner demanded its release under the Freedom of Information Law. This copy, however, omits all comments of the inspector. Respondents also have failed to present any affidavits from the DOF employees who performed the inspections. Respondents do not state how it was determined that the cellar was "active" or publicly accessible. Thus, respondents' argument that the DOF inspectors found that the cellar space met two out of the three criteria required to constitute commercial space is unsupported, and is based only upon Ms. Quintos' bare conclusory assertion.

Respondents do not deny that the commercial use of the cellar is prohibited by the property's certificate of occupancy. Respondents do not claim that petitioners are using the property in violation of its certificate of occupancy. Notably, if the cellar were so used, the City would enjoin such use and subject petitioners to penalties. Ms. Quintos merely states that "from time to time, [the] DOF's conclusions from inspection and resultant assessment decisions may be at odds with publicly issued documents such as [c]ertificates of

[o]ccupancy." Left unexplained is how respondents can tax the space for a use that is actually prohibited by the City. Respondents also do not address Mr. Palermo's affidavit. Moreover, respondents concede that, aside from the cellar space, the property contains more residential area than commercial area, and respondents have provided no factual foundation for their conclusion that the cellar space is commercial.

Thus, petitioners are entitled to summary judgment reclassifying the property from tax class 4, to tax class 2, subclass 2A for the tax years 2015/16 through 2018/19. Respondents must be directed to correct the property's assessed values for tax years 2015/16, 2016/17, 2017/18, and 2018/19 to reflect RPTL 1805 (2)'s limitations, and to refund any overpayments to petitioners (*see Matter of 655 Fifth Dutch Equities LLC*, 2017 NY Slip Op 32486[U], *23 [Sup Ct, Kings County 2017]). Petitioners are also entitled to statutory interest thereon (*see Matter of Shore Dev. Partners v Board of Assessors of County of Nassau*, 112 AD3d 724, 726 [2d Dept 2013]).

Petitioners have annexed the following chart showing the tax year, the actual assessed value, the corrected assessed value as tax class 2, subclass 2A, and the assessment increase from the prior year as tax class 2, subclass 2A.

Tax Year	Actual Assessed Value (Class 4 in 2014/15-2018/19	Corrected Assessed Value as Subclass 2A	Assessment Increase from Prior Year (as 2A)
2009/10	$34,007	$34,007	-
2010/11	$36,727	$36,727	8.0%
2011/12	$39,655	$39,655	8.0%
2012/13	$42,838	$42,838	8.0%
2013/14	$44,209	$44,209	3.2%*
2014/15	$174,150	$44,209	0.0%
2015/16	$239,400	$47,745	8.0%
2016/17	$259,650	$51,565	8.0%
2017/18	$263,250	$55,689	8.0%
2018/19	$281,700	$57,472	3.2%*

*Maximum assessment increase within five years is 30%.

Respondents do not dispute the accuracy of petitioners' calculations, as reflected in the above chart. Respondents only argue that the property was properly classified for the subject years under review as a tax class 4 property, and, therefore, the limitations on the increase in the property's assessed values pursuant to RPTL 1805 (2) do not apply. The above chart correctly calculates the tax assessments, applying the five-year 30% cap and the one-year 8% cap pursuant to RPTL 1805 (2) (*see Matter of 655 Fifth Dutch Equities LLC*, 2017 NY Slip Op 32486[U], *23; *Matter of 436 Condominium Board of Mgrs.*, 2015 NY

Slip Op 32770[U]; *Matter of Oakwood Condominium v Tax Commn. of the City of N.Y.*, 2012 NY Slip Op 31249[U]).

Conclusion

Accordingly, petitioners' motion is granted for: (1) consolidation of the pending tax certiorari proceedings; (2) summary judgment finding that the DOF erroneously misclassified the property in tax class 4 and directing respondents to reclassify the property as tax class 2, subclass 2A, for tax years 2015/16, 2016/17, 2017/18, and 2018/19; (3) an order directing respondents to correct the property's assessed values for tax years 2013/14, 2014/15, 2015/16, 2016/17, 2017/18, and 2018/19 to reflect RPTL 1805 (2)'s limitations, which shall be calculated in accordance with this decision; and (4) an order directing respondents to refund any overpayments to petitioners, with statutory interest. Respondents' cross motion for summary judgment is denied.

This constitutes the decision, order, and judgment of the court.

E N T E R,

J. S. C.

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KINGS COUNTY CLERK
FILED