

**NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION**

In the Matter of the Petition : **DETERMINATION**
of : **TAT(H) 00-8(CR)**
PATTERSON, BELKNAP, WEBB & TYLER LLP:

Murphy, A.L.J.:

Petitioner, Patterson, Belknap, Webb & Tyler LLP, filed a Petition for Hearing with the New York City ("City") Tax Appeals Tribunal ("Tribunal"), requesting a redetermination of a deficiency of City Commercial Rent Tax ("CRT") for the period June 1, 1996 through May 31, 1997 ("Tax Year").

Petitioner was represented by Henry F. Bubel, Esq., and Terence Dougherty, Esq. Respondent, Commissioner of Finance ("Respondent") was represented by Frances J. Henn, Esq., Assistant Corporation Counsel.

On June 22, 2004, a hearing was held in this matter, at which time evidence was admitted, testimony taken and a stipulation to certain documents was submitted as an exhibit.

Petitioner's representative submitted a Brief in support of its position dated January 19, 2005, and Respondent's representative submitted a Memorandum of Law in reply dated February 16, 2005. Subsequently the representatives agreed that no

further arguments would be submitted. All correspondence was filed by April 6, 2005.

ISSUE

Whether Petitioner may adjust its CRT base rent for the Tax Year by subtracting from gross rents paid to its present landlord an amount equal to a refund of its proportionate share of City Real Property Transfer Tax ("RPT") paid to and refunded by a former landlord.

FINDINGS OF FACT

1. Petitioner Patterson, Belknap, Webb & Tyler LLP is a law firm, presently situated at 1133 Avenue of the Americas in the City.

2. From 1989 through 1994 ("Earlier Period"), Petitioner leased space at 30 Rockefeller Plaza in the City from Rockefeller Center Properties ("Properties").

3. During the Earlier Period, Petitioner filed CRT returns and paid CRT computed against a base comprised of rent paid to Properties.

4. Pursuant to the lease between Petitioner and Properties ("Properties Lease"), base rent for the Earlier Period included amounts representing Petitioner's proportionate share (based on a square footage formula) of Properties' RPT liability. Properties issued to Petitioner annual Escalation Statements which included charges for Petitioner's share of RPT.

5. Article 24 of the Properties Lease provided that Properties would refund to Petitioner its proportionate share of Properties' overpayment of RPT for the Earlier Period: "[I]n case the Real Estate Taxes for any Computation Year . . . shall be reduced after a payment shall have been made . . . the Landlord shall refund . . . to the Tenant an amount equal to [the Tenant's proportionate share]."

6. In 1994, Petitioner moved its offices to 1133 Avenue of the Americas, leasing these premises from 1133 Avenue of the Americas Corp ("1133 Corp.").

7. Under its lease with 1133 Corp. ("1133 Lease"), Petitioner agreed to pay rent plus an amount denominated as "additional rent" which included an amount representing "Tenant's Tax Percentage" of RPT payments made by 1133 Corp. Tenant's Tax Percentage was the proportionate share of payments computed by application of a square footage percentage.

8. Article 4.01 of the 1133 Lease specifically provided that 1133 Corp. would pay Petitioner its proportionate share of any RPT refund, computed according to Petitioner's Tax Percentage.

9. Properties protested RPT assessments which it had paid for the Earlier Period and, in 1996, received a refund of RPT.

10. On August 1, 1996, IBJ Schroder Trust Company, on behalf of Properties, issued Petitioner a check in the amount of \$272,302.81, representing Petitioner's proportionate share of Properties' Earlier Period RPT refund.

11. Petitioner timely filed CRT returns for the Tax Year. Petitioner computed CRT due against a base comprised of monthly fixed rental payments plus payments for certain other charges, such as its proportionate share of elevator, condensed water and supplemental HVAC expenses.

12. Petitioner filed a CRT return for the period June 1, 1996 through August 31, 1996 ("CR-Q"), reporting the following "Gross Rent Paid" to 1133 Corp.: a "basic rent payment" of \$864,238.08 and a deduction from that amount of \$272,302.81, denominated "real estate tax escalation." The deduction represented the refund from Properties. With other adjustments not relevant to this proceeding,¹ "Total Gross Rent Paid" for this quarter was \$633,982. Applying the statutory 25% rent reduction, the "Total Base Rent" reported for this quarter was \$475,487, and CRT reported due was \$28,529.22.

13. Generally, Petitioner's reported monthly rent for the Tax Year included four fixed amounts paid to 1133 Corp.: (a) \$277,698.97 for the 20th - 25th floors; (b) \$10,021.10 for 26th floor; (c) \$3,509.16 for 33rd floor; and (d) a variable amount from \$10,021.10 (June) to (\$14,713.70) (August) for the subcellar. On a worksheet submitted with the CR-Q, Petitioner calculated a "Total Rent Payment" of \$22,728.70 for the month of August 1996 which represented the fixed rents reported for the month, \$279,827.76, adjusted by deduction of the RPT refund (\$272,302.81), identified on the return as a "Rockefeller Center Rent Escalation Refunds," and an addition of miscellaneous items in the amount of \$15,203.75.

¹ Also there were additions to income of \$680.80 (operating cost escalation) and \$41,386.25 (other payments in lieu of rent).

14. No evidence was submitted which indicates that for August 1996 Petitioner paid 1133 Corp. an amount less than that provided for in the 1133 Lease. The noted base rent adjustment appeared only on the CR-Q, and related solely to the Properties Lease.

15. Petitioner did not file a refund claim with respect to CRT paid for the Tax Year.

16. In 1999, the City Department of Finance ("Department") performed an audit of Petitioner's books and records for purposes of reviewing the CRT liability for the period June 1, 1995 through May 31, 1998. The Department's auditor determined that Petitioner was not liable for additional CRT for the period June 1, 1995 through May 31, 1996, and for the period June 1, 1997 through May 31, 1998, and the CRT returns for those periods were accepted as filed. However, the auditor asserted additional CRT due for the Tax Year in the amount of \$15,765.76. This deficiency principally involved the disallowance of the credit claimed against base rent in the amount of the Properties RPT refund.

17. On April 8, 1999, Petitioner wrote the Department's Bureau of Conciliation, disputing the proposed deficiency.²

18. On May 28, 1999, Respondent issued to Petitioner a Notice of Determination of CRT due ("Notice") in the base tax amount of \$15,765.76, with interest and penalties computed to the date of the Notice.

² This correspondence was a premature protest as a Notice of Determination had not been issued. Further, Petitioner later filed a timely request for a Conciliation Conference, as well as a Petition for Hearing with the Tribunal. This correspondence is the first instance of Petitioner's having informed Respondent of its disagreement with the audit findings.

19. On June 2, 1999, Petitioner filed a request for a conciliation conference with the Bureau of Conciliation.

20. On November 30, 1999, the Director of the Department's Conciliation Bureau issued a Conciliation Decision, affirming the Notice and discontinuing the conciliation proceedings.

21. Petitioner filed the Petition protesting the Conciliation Decision on February 17, 2000.

22. At hearing, Respondent's representative permitted a previously disallowed rent concession credit in the amount of \$73,568.50, reducing the asserted CRT deficiency by \$3,310.50.

23. In 2000, at the written request of the parties, a Notice of Adjournment Sine Die was issued and this matter was placed on a *sine die* calendar pending the final determination in *Matter of Fried, Frank, Harris, Shriver & Jacobson*, which was then pending before this Tribunal. The Notice of Adjournment Sine Die indicated that the parties requested the adjournment because the "the outcome [of the unrelated case] . . . will be determinative of all or some of the issues raised by the Petition." This matter was returned to the hearing calendar following the decision of the Appeals Division of the Tribunal in *Matter of Fried, Frank, Harris, Shriver & Jacobson*, TAT(E) 97-16(CR) (January 23, 2003).

STATEMENT OF POSITIONS

Petitioner asserts that as a result of its receipt of the proportionate share of the RPT refund from its former landlord, Properties, it paid more CRT in the earlier Period than was required. Petitioner argues that it should therefore be permitted

to reduce its Tax Year CRT base rent by the amount of this overpayment and adjust its CRT liability accordingly. Petitioner further alleges that as it was unable to file a timely claim for CRT refund for the Earlier Period, due process requires that it be permitted to adjust its CRT liability in the Tax Year. Petitioner asserts that it is irrelevant that the amounts were directly refunded by Properties after its tenancy with Properties had ended.

Respondent argues that Petitioner is liable for CRT on all of the base rent paid 1133 Corp. during the Tax Year. Respondent asserts that Petitioner, as a departed tenant, is not entitled to adjust its Tax Year liability by an amount representing CRT computed against the amount of RPT refunded by its former landlord, Properties. Respondent further alleges that Petitioner was not deprived of due process and is not entitled to refund of CRT as it failed to timely file either a refund claim or a protective refund claim.

CONCLUSIONS OF LAW

Code §11-702 imposes a tax on base rent actually paid by a commercial tenant in a given report period. The Code defines "base rent" as "rent paid for each taxable premises by a tenant to his or her landlord for a period, less the amounts received by or due such tenant for the same period from any tenant of any part of such premises." Code §11-701.7. Section 11-701.6 defines "rent" to include:

The consideration paid or required to be paid by a tenant for the use or occupancy of premises . . . including all credits and property or services of any kind and including any payment required to be made by a tenant on behalf of his or her landlord for

real estate taxes, . . . normally payable by a
landlord

CRT returns are required to be filed, and CRT paid, on a quarterly basis. Code §11-705(a). If CRT is paid in error, the taxpayer's remedy is to file either a timely claim for refund or a protective refund claim. The Code permits a refund of CRT paid provided application to the Commissioner is made "within eighteen months from the date . . . for filing the return . . . or within six months of payment" of CRT, whichever period is later. Code §11-709(a). There is nothing in the Code which precludes filing a "protective" refund claim to remedy a subsequently-determined overpayment. *See, Fried, Frank, supra*, where the Appeals Division of the Tribunal noted:

The Department has not published procedures for filing refund claims that are contingent upon the occurrence of a future event ("Protective Refund Claims"). However, taxpayers have filed such claims with respect to both income and excise taxes, including the CRT, and the Department has established internal procedures for processing such claims

During the Earlier Period, Petitioner paid CRT computed against a base comprised of rent it paid to Properties. For the Tax Year, Petitioner paid CRT computed against a base comprised of rent it paid to 1133 Corp. In each instance CRT returns were timely filed, and, in each instance, Petitioner's base rent included amounts representing its proportionate share of the particular landlord's RPT liability (referred to variously as real estate tax payments or escalations). Further, each lease provided that when the landlord received a refund of previously paid RPT, Petitioner would receive its proportionate share in the form of a direct payment. Neither the Properties Lease, nor the 1133 Lease,

permitted Petitioner to adjust prospective rent liabilities by amounts representing refund of previously paid RPT.

In 1996, pursuant to Article 24 of the Properties Lease, Petitioner received a payment of \$272,302.81 representing its proportionate share of RPT refunded to Properties for the Earlier Period. At issue in this proceeding is Petitioner's decision to adjust its August 1996 CRT liability, as reported on the Quarterly Return for Tax Year quarter June 1, 1996 through August 31, 1996, by subtracting the amount of the Properties refund from the amount of base rent paid 1133 Corp.

In *Fried, Frank, supra*, the taxpayer, a City law firm, paid base rent to its landlord which included a "Property Tax Escalation" amount representing its proportionate share of its landlord's RPT liability. Pursuant to the terms of its lease, a proportionate share of any refund of prior period RPT received by the landlord, and adjusted for expenses, was to be credited against the tenant's future rent payments. *Id. at 14*. In the event the tenancy had expired, the lease provided that the landlord would remit the net amount directly to the former tenant. During the taxable year 1993, *Fried, Frank's* landlord received an RPT refund, and in turn paid that taxpayer a net rebate. Although the methodology used by the landlord and tenant did not strictly conform to the terms of the lease,³ as the taxpayer was still a tenant of that landlord, *Fried, Frank* adjusted its CRT base rent accordingly for a subsequent period.

³ While the lease provided for a adjusting subsequent rent liability in the amount of the refund, the landlord refunded the amount directly to *Fried, Frank*. *Fried, Frank, supra at 4-5*.

The Commissioners of the Tribunal in *Fried, Frank* considered whether, and to what extent, a tenant's proportionate share of prior RPT refunded by a landlord may be used to adjust that tenant's subsequent base rent and corresponding CRT liability. Relying on the specific provisions of the lease, the Commissioners concluded that the taxpayer had paid "more [base rent] than was necessary in a prior tax period and paid CRT on such amount." *Id. at 16.* The Commissioners held that the taxpayer was entitled under the lease to reduce prospective base rent by the amount of the RPT refund, and to compute CRT on that adjusted rent amount.

The Commissioners emphasized that its decision was intended to respect the terms of the agreement between the taxpayer and its landlord to credit any RPT refund from a prior period against a future rent liability. *Id. at 17-18.* More important, they clearly noted that the facts of that case were not readily applicable to other situations, particularly with respect to a "Departed Tenant" who received an RPT refund from a prior landlord. *Id. at 18.*

During the Earlier Period, when Petitioner paid CRT on base rent paid to Properties (which included its proportionate share of Properties' RPT), the RPT was properly assessed and the CRT properly computed. Several years later, following Properties' successful protest of its RPT liability, an adjustment to Properties' RPT assessment was required. Pursuant to the terms of the Properties Lease, Petitioner became entitled to a reimbursement. At that point, it first could be determined that a portion of the CRT originally paid by Petitioner was paid in error. However, Petitioner was by then precluded from the statutory remedy for recovery of CRT paid on the erroneously collected base rent, as the RPT adjustment was made after the time frame permitted for refunds of CRT had expired. Therefore, while Petitioner could have timely

filed a protective CRT refund claim at a point when the tax was not yet erroneously paid, by the time the RPT refund was issued, the statutory refund remedy was time-barred and no longer available. Code §11-709.a.

Petitioner's remedy was that it should have filed a protective refund claim. Despite Petitioner's assertion to the contrary, this remedy was always available. See, *CWM Chemical Services L.L.C. v. Roth, et al.*, 15 A.D.3d 77, 85 (4th Dept. 2004); *Matter of Bault v. New York State Tax Appeals Tribunal*, 265 A.D.2d 700, 701 (3rd Dept. 1999).⁴ As the Commissioners noted in *Fried, Frank, supra*, while there is no requirement to "use Protective Refund Claims in order to avoid overpayment of CRT, there is no rule endorsed here which would prohibit use of such claims." *Id. at 18, fn. 16.*

Unlike the facts before the Tribunal in *Fried, Frank, supra*, the Properties Lease did not provide for a prospective base rent reduction for a prior period adjustment. That lease only specified that Petitioner would be refunded these amounts. See, Properties Lease, Art. 24, which states that the landlord "shall refund" to Petitioner its proportionate share of a New York real estate tax reduction. Even if the Properties Lease did contain the prospective base rent adjustment provisions, Petitioner was not Properties' tenant when the RPT refund became available. Clearly the 1133 Lease did not provide for a base rent adjustment for refunds attributable to another unrelated tenancy.

⁴ In 2000, the Department effectively resolved this issue for future years. See, Finance Memorandum, 00-8 (October 23, 2000) which states that all CRT returns for tax periods on or after June 1, 2000, will provide an automatic protective refund claim for "any overpayment of tax due to the inclusion in the base rent reported on the return of property tax escalation payments for which the tenant later receives a credit or rebate."

Since the RPT refund was paid substantially after the statute of limitations had run on claims for refund of CRT paid for the Earlier Period, the only remedy available to Petitioner was to have filed a protective refund claim. It is clear that the parties envisioned the possibility of RPT adjustments made after the close of a specific taxable period, as, under the lease, Properties agreed to directly refund Petitioner its proportionate share of any subsequent RPT reduction. See, Properties Lease, Art. 24(g). As this Tribunal noted in *Fried, Frank, supra* at 18: "[T]o the extent a Departed Tenant did not file . . . timely Protective Refund Claims, he or she cannot be rescued from the effect of contractual provisions specifically and voluntarily entered into."

Petitioner has not been denied Due Process by operation of the statutory refund provisions. See, *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1989). See, also, *Matter of Bault, supra*, where the Appellate Division noted:

. . . the Supreme Court has recognized that a State may, consistent with due process principles, invoke procedural protections such as limiting refunds to taxpayers who pay under protest or to those who provide some other timely notice of complaint [citing *McKesson*]
. . . the Court has also sanctioned the imposition of relatively short Statutes of Limitation . . . 165 A.D.2d at 701-702.

Due process is assured by virtue of the provisions of Code §11-709.a., and the fact that a protective refund claim was always available to preserve potential refund requests.

Finally, Petitioner argues that the terms of the Notice of Adjournment Sine Die require that it prevail. This argument is rejected. The parties agreed to be bound by the result in *Fried, Frank, supra*, and not by the exact relief which that taxpayer

received. Moreover, *Fried, Frank* does not stand for the proposition that all taxpayers who receive tax escalation refunds will be able to reduce their CRT liability by the amount of the refund in the year it is received. The Commissioners in *Fried, Frank* granted relief under limited circumstances which are not herein applicable.⁵

ACCORDINGLY, IT IS CONCLUDED THAT Petitioner is not entitled to reduce its Tax Year CRT liability by subtracting from Tax Year base rent its proportionate share of Properties' RPT refund for the Earlier Period. The Notice of Determination, dated May 28, 1999, therefore is sustained, except as provided in Finding of Fact 22, *supra*.

DATED: September 13, 2005
New York, New York

ANNE W. MURPHY
Administrative Law Judge

⁵ All other arguments presented by Petitioner have been considered and are rejected.