

New York City Tax Appeals Tribunal

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In the Matter of :  
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JONIS REALTY/E. 29TH STREET, LLC : ORDER  
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TAT (E) 09-9 (RP)MR  
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In response to an Exception filed in the name of Jonis Realty/E.29th Street, LLC ("Jonis") (the "Exception") to a Determination of the then Deputy Chief Administrative Law Judge ("DCALJ") dated July 21, 2010 (the "DCALJ Determination"), this Tribunal issued an order dated October 24, 2011 (the "Order"), granting the portion of the Exception seeking a remand. The DCALJ Determination granted the New York City Commissioner of Finance's ("Respondent's") motion for summary determination and sustained the Notice of Disallowance issued by the New York City Department of Finance (the "Department") dated May 21, 2008, denying a claim for refund of New York City Real Property Transfer Tax ("RPTT").

In the Order we remanded the matter, reversed the DCALJ's grant of summary determination and reinstated the Petition for Hearing because our review of the documents submitted by the Parties indicated that there were material issues of fact requiring a hearing.

In response to the Order, Respondent filed a Notice of Motion for Leave to Reargue dated November 23, 2011 (the "Motion to Reargue"), accompanied by the Affirmation of Joshua M. Wolf In Support of Motion for Leave to Reargue (the "Affirmation in Support").

Jonis is represented by Matthew Hearle, Esq. and Andrew W. Albstein, Esq. of Goldberg Weprin Finkel Goldstein LLP. Respondent is represented by Joshua M. Wolf, Esq., Assistant Corporation Counsel, New York City Law Department. Briefs were filed by the Parties. We denied Respondent's request for oral argument.

The Affirmation in Support requests that, pursuant to 20 RCNY § 1-05(a) of the Rules of Practice and Procedure of the New York City Tax Appeals Tribunal (the "Tribunal Rules") and CPLR § 2221(a) and (d), this Tribunal issue an order granting Respondent leave to reargue and modifying the Order to deny the Exception and to affirm the DCALJ Determination on the grounds that there is no material issue of fact requiring a trial "and that the facts and law mandate a determination in favor of Respondent." Affirmation in Support, at 1.

Respondent states two grounds in support of his Motion to Reargue. Respondent argues that "the Tribunal overlooked or misapprehended facts already in the record in deciding both that a factual question existed requiring the denial of Respondent's motion for summary determination, and that the 'factual question to be resolved on remand is whether Steven Halegua was the grantor of an interest in Jonis and paid the RPTT that is the subject of the refund claim and, therefore, the true party in interest in this matter . . .'" Affirmation in Support, at 3 quoting the Order.

Respondent also argues that "the Tribunal overlooked or misapprehended the appropriate legal standard to be applied on a motion for summary determination." Respondent asserts that "[a] question of law, such as 'whether Jonis could ratify any of the actions taken on its behalf by Steven Halegua . . . in light of the failure to submit a proper power of attorney prior to October 2010,' is insufficient to defeat a motion for summary determination in the absence of a material issue of fact requiring a trial." Affirmation in

Support, at 4 quoting the Order.

The Tribunal Rules at § 1-05(a) permit "a motion to the tribunal for an order that is appropriate in a proceeding governed by the CPLR . . . ." CPLR § 2221(d).2 states that a motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." The Tribunal will consider motions to reargue where appropriate. Matter of RCA International Development Corp., TAT (E) 93-32 (GC)MR (August 29, 1997).

The Record, which at this stage of the proceedings is limited to the various pleadings, the affidavits submitted by the Parties in connection with Respondent's motions, and the DCALJ Determination, is undeveloped. Absent further factual development on the issues we identified, we believe it is premature to grant summary determination at this juncture. *Cf. Lettieri v. Cushing*, 80 A.D.3d 574 (N.Y. Slip Op. 00194) (2d Dept. 2011).

Respondent argues that we misapprehended or overlooked several facts in the Record that "conclusively" establish Jonis as "the true party in interest." Among the facts cited by Respondent are that Jonis is listed as the grantor on the RPTT return filed with Respondent, and that Steven Halegua chose to name Jonis as the only party in interest in the caption to this matter. Respondent's Brief, at 6.

We disagree. The various affidavits and pleadings submitted by Steven Halegua (in the name of Jonis) during these proceedings consistently state that it was Steven Halegua's transfer of his entire interest in Jonis that, when aggregated by the Department with other transfers by Jonis during the prior three-year period, resulted in a "controlling interest"

transfer under the regulatory presumption.<sup>1</sup> *See, e.g.*, Motion to Reargue, Exs. 1, 6, & 7. Assuming he can prove the facts asserted, Steven Halegua would be the "grantor"<sup>2</sup> responsible for the third transfer culminating in the RPTT liability being disputed. Whether Steven Halegua was entitled to file a refund claim on his own behalf would be an issue before the Administrative Law Judge ("ALJ") conducting the hearing on remand.

We reiterate that we do not take any position on the specific questions and issues that we have raised, nor do we place any limitations on the extent to which the ALJ can make a record and proceed on remand.

Next we address Respondent's contention that: "[a] question of law, such as 'whether Jonis could ratify any of the actions taken on its behalf by Steven Halegua . . . in light of the failure to submit a proper power of attorney prior to October 2010,' is insufficient to defeat a motion for summary determination in the absence of a material issue of fact requiring a trial." (Emphasis added.) Affirmation in Support, at 4 quoting the Order.

Respondent misreads our Order. The issue of whether Jonis could ratify the actions taken on its behalf by Steven Halegua "in light of the failure to submit a proper power of attorney prior to October 2010" is not solely a question of law, but a mixed question of fact and law. On remand, the ALJ can make a complete record on this issue.

Respondent has also submitted the New York State Tax Appeals Tribunal (the "State Tribunal") decision in Matter of Chuck Realty Corp., New York State Tax Appeals Tribunal

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<sup>1</sup>New York City Administrative Code ("Code") §11-2101.7 (defining "transfer") and 19 RCNY §23-02 (defining "controlling interest").

<sup>2</sup>Code §11-2101.14 defines "grantor" to include "the person or persons who transfer an economic interest in real property." (Emphasis added.)

(March 22, 2012) for our consideration. In Chuck Realty Corp., the "petition was signed by an individual who only provided his name but no corporate title or other designation indicating his authority to sign the petition on behalf of petitioner, a corporation." The petitioner was notified that the petition was not in proper form and although the petitioner was given additional time to provide "an indication of the authority of the individual executing the petition," no such information was provided by the petitioner. The State Tribunal determined that the Division of Tax Appeals did not have jurisdiction to hear and determine the matter and affirmed the Order Dismissing Petition for lack of jurisdiction.

Respondent incorrectly asserts that State Tribunal decision in Chuck Realty Corp., is controlling precedent in the matter at bar. Section 170.d of the New York City Charter (the "City Charter") provides that the Tribunal "shall follow as precedent the prior precedential decisions of . . . the New York State Tax Appeals Tribunal . . . insofar as those decisions pertain to any substantive legal issues currently before the [Tribunal]." Our review of the documents submitted by the Parties indicates that there are material issues of fact requiring a hearing. A review of the facts set forth in the Chuck Realty Corp., decision does not lead to the same conclusion. The facts presented in the State Tribunal decision are that a petition was filed and that the individual signing the petition did not indicate, on the petition or subsequently, his authority to sign the petition despite repeated requests for the information. Thus, there were no apparent material issues of fact involved in the matter. The two cases are clearly very different factually. Furthermore, as this State Tribunal decision dealt with a procedural issue and not a substantive legal issue, the Chuck Realty Corp., decision is not binding precedent for this Tribunal pursuant to §170.d of the City Charter.

As we remand this matter without prejudice to any claim or argument that may be presented by the Parties, the Parties are free to explore all relevant areas in making a record before the ALJ on remand, including any factual statements made in the various pleadings,

the affidavits submitted by the Parties in connection with Respondent's motions, and the DCALJ Determination.

Respondent's Motion to Reargue is denied. The matter is remanded for further proceedings consistent with the Order.

IT IS SO ORDERED.

Dated: September 28, 2012  
New York, New York

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GLENN NEWMAN  
President and Commissioner

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ELLEN E. HOFFMAN  
Commissioner

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ROBERT J. FIRESTONE  
Commissioner