

NEW YORK CITY TAX APPEALS TRIBUNAL

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In the Matter of		:	
STEUBEN DELSHAH, LLC		:	
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	Petitioner.	:	ORDER
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-----X		:	TAT (E) 12-12 (RP)
		:	TAT (E) 12-23 (RP)
In the Matter of		:	
AFRICAN-AMERICAN PARENT COUNCIL, INC.		:	
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		:	
	Petitioner.	:	
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The Commissioner of Finance of the City of New York (Respondent) filed an Exception dated March 2, 2018 (Exception) to an Order and Determination of an Administrative Law Judge (ALJ), dated January 9, 2018 (ALJ Determination), that granted the motion of Steuben DelShah, LLC (Steuben) for summary determination (Summary Determination Motion), granted the Petitions of Steuben and African-American Parent Council, Inc. (AAPC), and cancelled Notices of Determination issued to Steuben and AAPC, both dated January 13, 2012, asserting New York City Real Property Transfer Tax (RPTT) on transfers of property to AAPC (AAPC Notice) and to Steuben (Steuben Notice) (collectively Notices) more fully described below. In the Exception, Respondent also takes exception to an order, dated November 27, 2013, issued by the ALJ previously assigned to these cases (Prior ALJ), that denied, in part, Respondent’s Motion to Consolidate the case arising out of the Steuben Notice with seven other cases (Consolidation Order).<sup>1</sup>

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<sup>1</sup> The Consolidation Order consolidated the cases involving the grantee and grantor of the same property. Thus, the cases arising out of the Notices were consolidated. Consolidation Order at 12-13.

Respondent was represented by Andrew G. Lipkin, Esq., Senior Counsel of the New York City Law Department. Steuben was represented by Irwin M. Slomka, Esq. of Morrison and Foerster LLP, and John W. Mitchell, Esq., of the Law Office of John W. Mitchell.<sup>2</sup> Oral argument took place before the Tribunal Commissioners on December 17, 2018.

Steuben is a New York limited liability company, in which Michael K. Shah (Michael Shah) has a 99% ownership interest and also is the managing member.<sup>3</sup> The description of Michael Shah on the website of DelShah Capital LLC (DelShah) describes him as having a degree in chemistry from Harvard University, a master's degree in finance and economics from the London School of Economics and a law degree from Harvard Law School and having spent a short time at a major New York law firm.<sup>4</sup> That website says that Michael Shah formed DelShah and describes DelShah as a “full-service real estate investment, acquisition, development, management and marketing company . . . that acquires, owns, manages and develops special situation U.S property deals.”<sup>5</sup>

E-mails between Michael Shah and Mitchell Taras, Esq. of Sadis & Goldberg LLP submitted by Respondent indicate that negotiations for the purchase of two properties located at 195 and 231 Steuben Street in Staten Island (Block 2893 Lot 1 and Block 2894 Lot 1) (collectively the Property) between Michael Shah on behalf of Steuben and the owner of the Property, Greentree Steuben LLC (Greentree), began at least as early as July 2007.<sup>6</sup> However, Rockwell Abstract LLC, the title company working on the transactions, apparently did not become aware of the involvement of AAPC until July 2008 as

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<sup>2</sup> AAPC was represented at the ALJ Division of the Tribunal by Lorenzo A. DeLuca, Esq. However, despite several attempts to contact Mr. DeLuca regarding the Exception, Mr. DeLuca did not participate in the oral argument or submit any brief in this matter.

<sup>3</sup> Affidavit of Michael K. Shah dated June 22, 2015 (Shah Aff.) Ex. A to Petitioner's Memorandum in Support of Motion for Summary Determination and Motion to Dismiss at ¶2. Michael Shah signed the RPTT return for the transfer between AAPC and Steuben, described more fully below, as “Managing Member”. Shah Aff., Ex. C. We note that the Shah Aff. has exhibits lettered A, B, C, etc. References to Shah Aff., Ex. \_\_ are to the exhibits to that affidavit.

<sup>4</sup> Affirmation of Andrew G. Lipkin in opposition to the Summary Determination Motion (Lipkin Aff.), printout of page from DelShah.com/partners.html dated 9/1/2015, Ex. 37.

<sup>5</sup> *Id.*

<sup>6</sup> Lipkin Aff., Ex. 3; ALJ Determination at 4.

evidenced by an e-mail from Antoinette Liotine dated July 8, 2008 to Mr. Taras in which she states “I was given the name of Steuben Delshah, LLC as the purchaser. Did the name of the purchaser change because you have African American Parent Council, Inc. as the purchaser or is [sic] there going to be 2 deeds?”<sup>7</sup>

AAPC was incorporated in 1992 by Minnie Graham.<sup>8</sup> In 1993, the Internal Revenue Service granted AAPC a federal income tax exemption under Internal Revenue Code §501(c)(3).<sup>9</sup> AAPC received “virtually no financial support from government or established charities.” Ms. Graham stated in her affidavit that AAPC entered into an agreement with Steuben to participate in the sale of the Property to obtain funding for its activities.<sup>10</sup>

Greentree entered into a Contract of Sale, dated July 19, 2007 (Greentree Contract), to sell the Property to AAPC for a purchase price of \$22,000,000.<sup>11</sup> The purchase price was payable in the form of an initial deposit with the remaining balance to be paid at the closing.<sup>12</sup> The Greentree Contract was signed on behalf of AAPC by both Minnie Graham and Darshan Shah.<sup>13</sup> Darshan Shah is Michael Shah’s father. Appearing beneath Darshan Shah’s signature on the Greentree Contract under the caption “Title” are the words “For the Council”.<sup>14</sup>

As one of the “Conditions to Closing for Benefit of Seller” under the Greentree Contract, §6.2(c) provides that “[a]n entity of which Darshan Shah or Michael Shah is a direct or indirect owner (the ‘Manager’) shall have managerial control over the [Property].” The Greentree Contract, therefore, requires an entity controlled by Michael

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<sup>7</sup> Lipkin Aff., Ex. 42.

<sup>8</sup> Affidavit of Minnie Graham dated December 4, 2015 (Graham Aff.), Petitioner’s Reply Brief, Ex. A at ¶3.

<sup>9</sup> Shah Aff., Ex. A. The IRS eventually revoked AAPC’s federal income tax exemption for failing to make necessary filings. Graham Aff. at ¶8.

<sup>10</sup> *Id.* at ¶¶8 & 9.

<sup>11</sup> Lipkin Aff., Ex. 5.

<sup>12</sup> Although the Greentree Contract required a \$500,000 initial deposit, a second deposit of \$2,000,000 was added later, for a total of \$2,500,000. Lipkin Aff., Ex. 27.

<sup>13</sup> Lipkin Aff., Ex. 5.

<sup>14</sup> A July 5, 2007 e-mail from Mitchell Taras, Esq. to Michael Shah reads: “*I still believe my client is making arrangements with your Dad to sign. Please advise if this is true.*” (Emphasis added.) Lipkin Aff., Ex. 3.

Shah or his father, rather than AAPC, to assume control of the Property immediately upon the sale to AAPC.

Section 14.2 of the Greentree Contract provides that it may not be assigned without the consent of the seller, Greentree, with one exception:

“Notwithstanding the foregoing, this Contract *may be assigned to an entity under the control of the Manager* provided (a) the assignee assumes in writing all of the obligations of Purchaser [AAPC] to be performed hereunder in a form reasonably acceptable to the Seller, (b) Purchaser furnishes assignees [sic] name and EIN number at least seven (7) days prior to Closing and (c) a copy of such fully executed assignment and assumption agreement is delivered to Seller at Closing. No assignment of this Contract shall relieve Purchaser from any of its obligations set forth herein.” (Emphasis added.)

Also on July 19, 2007, Greentree and AAPC entered into a second agreement (7/19/07 Agreement) under which AAPC could elect to pay the “Transfer Tax”<sup>15</sup> and receive a credit for that amount against the purchase price. The 7/19/07 Agreement further provided that if Greentree were “legally exempt” from paying the “Transfer Tax”, AAPC would receive a credit for the amount of the “Transfer Tax savings.” In that event, “Darshan Shah, [AAPC] and any successors in interest . . . agree to indemnify” Greentree from any liability for failure to pay the “Transfer Tax”. The 7/19/07 Agreement also permitted the Greentree Contract and the 7/19/07 Agreement to be assigned to another nonprofit corporation provided that “assignee is controlled by the same director as [AAPC].” Finally, the 7/19/07 Agreement provided that “[t]he [Greentree] Contract and this [7/19/07] Agreement, constitute the entire agreement of the parties and shall not be amended except by written instrument executed by both [sic] [Greentree], [AAPC] and Darshan Shah.” The 7/19/07 Agreement is signed by Darshan Shah, Greentree and AAPC.

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<sup>15</sup> The term “Transfer Tax” is not defined.

Approximately six months later, AAPC and Steuben entered into an Assignment and Assumption Agreement, dated January 25, 2008 (Assignment), under which AAPC, as Assignor, assigned “all rights and obligations under the [Greentree] Contract to Assignee, including those that survive closing of title.”<sup>16</sup> Steuben, as Assignee, similarly agreed to assume “all rights and obligations under the [Greentree] Contract from Assignor [AAPC], including those that survive closing of title.”<sup>17</sup> Section 3.1 of the Assignment provides “Assignor shall use its best efforts to sell the [Property] within 1 month of the date hereof to Assignee at a price not below \$22,030,000.” The Assignment makes no reference to the 7/19/07 Agreement and nothing in the Record indicates that the 7/19/07 Agreement was similarly assigned to Steuben. Although the Assignment identifies Steuben as the Assignee, the fourth “Whereas” clause states:

“WHEREAS, the board of directors . . . of Assignee has determined that the assignment upon the terms and subject to the conditions set forth in this Agreement is advisable, fair to and in the best interest of Assignee *for advancing its charitable purpose. . . .*” (Emphasis added.)

Also on January 25, 2008, AAPC and Steuben executed a document entitled “Contract of Sale – Office, Commercial and Multi-Family Residential Premises” (AAPC Contract), which provided for a sale of the Property from AAPC to Steuben for a contract price of \$22,030,000.<sup>18</sup> The document was on a preprinted form, which contained none of the terms and conditions governing the sale of the Property stated in the Greentree Contract and makes no reference to the Greentree Contract, the 7/19/07 Agreement or the Assignment.

On March 4, 2008, just over two months after assigning all of its interests and obligations under the Greentree Contract to Steuben, AAPC entered into an Amendment to Contract with Greentree (Amendment).<sup>19</sup> Under the Amendment, Greentree agreed to

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<sup>16</sup> Lipkin Aff., Ex. 13 at ¶1.1.

<sup>17</sup> *Id.* at ¶1.2.

<sup>18</sup> Lipkin Aff., Ex. 14.

<sup>19</sup> Lipkin Aff., Ex. 18.

deliver a deed to the Property in favor of AAPC to be held by the “Escrowee”.<sup>20</sup> Although the Amendment stated that it was to be signed by Greentree, AAPC and the Escrowee, there is no signature line for, or signature of, the Escrowee. Section 5 of the Amendment states that except as provided in the Amendment, “all of the terms and conditions of the [Greentree] Contract shall remain unmodified and in full force and effect.” The Amendment provided in section 2 that the closing would take place at the offices of the attorneys for Greentree, Sadis & Goldberg LLP, on or about July 15, 2008. The Amendment makes no mention of the Assignment.

Greentree and AAPC entered into another agreement dated July 10, 2008 entitled Settlement Agreement, which purports to resolve certain claims Greentree and AAPC had against one another (Settlement Agreement).<sup>21</sup> Under the Settlement Agreement, AAPC assumed “all responsibility” for preparing New York State and City “transfer documents” and to pay “all fees associated in having the Deed [from Greentree to AAPC held in escrow under the Amendment] recorded. . . .” AAPC represented that it is a nonprofit entity and that the transaction is not subject to RPTT. As a result, Greentree agreed to give AAPC a credit of \$577,500 against the purchase price representing the RPTT savings. AAPC “and any successors in interest by transfer or otherwise” agreed to “indemnify, pay and hold harmless [Greentree], it’s [sic] members, managers, partners, agents, lawyers . . . from any and all liability, claims, fines, penalties, interest, expenses (criminal and civil)” resulting from Greentree’s “failure” to pay the [RPTT], failure to pay the proper amount of New York State RPT or failure to timely record the Deed.” Section 1 of the Settlement Agreement provided that the closing would take place on July 11, 2008 and that the “Escrow Agent”<sup>22</sup> would release the deed at the closing.

In connection with the Settlement Agreement, Darshan Shah signed an Indemnification Agreement dated July [illegible] 2008 (Shah Indemnification)<sup>23</sup> in which

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<sup>20</sup> Section 14.8.1 of the Greentree Contract defines the Escrowee as Sadis & Goldberg LLP.

<sup>21</sup> Lipkin Aff., Ex. 26.

<sup>22</sup> The term “Escrow Agent” is not defined in the Settlement Agreement. It presumably refers to the Escrowee.

<sup>23</sup> Lipkin Aff., Ex 31. The date of the Shah Indemnification is not fully legible on the copy attached to the Lipkin Affirmation.

Darshan Shah agreed to the same indemnification as spelled out in the Settlement Agreement.

Neither the Amendment nor the Settlement Agreement refers to the 7/19/07 Agreement, the Assignment or the AAPC Contract and neither is signed by Steuben as the assignee of the Greentree Contract or as the purchaser under the AAPC Contract.

Leibel Lederman<sup>24</sup> also executed a Guarantee of Obligations dated July 14, 2008, (Lederman Guarantee),<sup>25</sup> in which he guaranteed:

“the representations and obligations of Seller as set forth in 6.1d,f,h,i,j,k,n of the Contract of Sale Dated July 19, 2007 by and between [Greentree] (‘Seller’) and [AAPC] *to Steuben DelShah LLC.*” (Emphasis added.)

The Closing Statement<sup>26</sup> indicates that the closing took place on July 10, 2008, notwithstanding the provision of the Settlement Agreement that it take place the following day. However the Closing Statement states that the transaction was “funded July 15<sup>th</sup>.” No copies of cancelled checks, or other evidence of the source of any of the payments recited in the Closing Statement, have been submitted by any Party. The Closing Statement lists Greentree as the seller and Steuben as the purchaser and lists the individuals present as the attorneys for Greentree (Sadis & Goldberg LLP), Henry Grunbaum and Leibel Lederman for Greentree, Michael Shah, Darshan Shah and two other individuals for Steuben, and Rockwell Abstract LLC as the title company. No one is listed as having been present representing AAPC although note 6 to the Closing Statement states “Purchaser is a not-for-profit thus no transfer tax due.”

Robert Prignoli, Esq., issued a written opinion, dated January 29, 2008 (Prignoli Opinion), that AAPC’s sale of the Property to Steuben would not require AAPC to obtain judicial approval. The Prignoli Opinion stated that: “[AAPC] would have had to borrow

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<sup>24</sup> Although nothing in the Record indicates Mr. Lederman’s precise position with Greentree, he appears to be a principal. In addition to signing the Lederman Guarantee, Mr. Lederman signed the Greentree Contract along with other individuals for Greentree, he is listed in the Closing Statement as attending for Greentree and he signed a letter to the Department described below as an “Authorized Signatory”.

<sup>25</sup> Lipkin Aff., Ex. 29.

<sup>26</sup> Lipkin Aff., Ex. 27.

the funds to close on the Property, resulting in the value of the [P]roperty being entirely offset by liability, essentially a \$0 value asset.” In the Prignoli Opinion, Mr. Prignoli states that he “reviewed and relied on” the Greentree Contract (although he erroneously describes it as dated July 17, 2007) and “made such other investigations and examinations” as he thought “appropriate.” Although he mentions the Assignment in the opinion, he stated only that he “reviewed and relied on” the Greentree Contract. He also makes no mention of the AAPC Contract executed days prior to his opinion. The Prignoli Opinion concluded that the sale of the Property by AAPC was not “a disposition of all or substantially all of its assets” requiring judicial approval, based on the fact that AAPC had no funds to purchase the Property and, therefore, would not be using any of its assets in the transaction.

Mr. Prignoli further stated that “[o]n the basis of the foregoing,” both sales are exempt from RPTT.<sup>27</sup> The “foregoing” was limited to the discussion of whether judicial approval was required. Mr. Prignoli stated that his “opinion is based upon New York State statutory law and relevant New York State caselaw.” Although the Prignoli Opinion is addressed to Steuben, Mr. Prignoli stated in the opinion that he represented AAPC and that while the opinion was addressed to Steuben, that was as a courtesy to his client, AAPC, and that his opinion “may not be relied upon by anyone other than my Client or for any purpose, or relied upon by, or furnished to, any other person, firm or corporation without my prior written consent.” In a subsequent letter addressed to Steuben dated February 12, 2008 (Prignoli Letter),<sup>28</sup> Mr. Prignoli expressly authorized Steuben to rely on the Prignoli Opinion “for all legal purposes involving any aspect of the transaction . . . it being understood that [Steuben’s] use of the [Prignoli Opinion] shall in no way create an attorney client relationship with our firm.”

The ALJ found that Michael Shah “had been attempting to employ strategies to avoid RPTT.”<sup>29</sup> In an e-mail among Michael Shah, Mr. Taras and two other attorneys

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<sup>27</sup> Lipkin Aff., Ex. 15.

<sup>28</sup> Lipkin Aff., Ex. 16.

<sup>29</sup> ALJ Determination at 5.



dated June 11, 2008, Mr. Shah noted that one of the other attorneys was representing him in another transaction involving AAPC and that “[h]e would be best suited to helping structure the transactional sequence necessary to make steuben street bullet proof.”<sup>30</sup> Although the Record contains copies of letters from that attorney to the Department on which an entity controlled by Michael Shah<sup>31</sup> was copied, they relate to another transaction and make no reference to the Property.<sup>32</sup>

Section 6.7 of the Greentree Contract provides:

“It shall be a condition of Closing that HUD [U.S. Department of Housing and Urban Development] consents to the assignment of the existing HAP [Housing Assistance Payments] contract to Purchaser [AAPC]. [AAPC] shall within thirty (30) business days of the date of this Agreement apply to HUD to obtain its consent. [AAPC] shall work diligently and in good faith to obtain HUD’s consent. [AAPC] represents and warrants that it has no reason to believe that [AAPC] would be unable to obtain the consent of HUD. If denied this Contract shall be cancelled and the return of the Deposit, plus interest, if any.”<sup>33</sup>

In the third “Whereas” clause of the Amendment, AAPC “acknowledges that it has received the consent of HUD to the assignment of the existing HAP contract to [AAPC] and is awaiting HUD management certification.” Nevertheless, AAPC did not apply to HUD for its consent. In a letter dated December 11, 2007, addressed to Michael Shah at DelShah Capital with no reference to AAPC,<sup>34</sup> HUD consented to the assignment of the HAP contract stating that “[a]s the new owner, you will be expected to maintain the property in a decent, safe and sanitary condition.” It is not clear whether the author of the letter was referring to Michael Shah or DelShah Capital as the “new owner”. Neither Steuben nor AAPC is mentioned and none of the application documents submitted to HUD are in the Record. In his Supplemental Affidavit, Michael Shah acknowledges that

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<sup>30</sup> Lipkin Aff., Ex. 24.

<sup>31</sup> Petitioner’s Reply Brief, Ex. B, Supplemental Affidavit of Michael K. Shah, dated December 1, 2015 (Shah Supp. Aff.) at ¶11.

<sup>32</sup> Shah Supp. Aff., Ex. B; Lipkin Aff., Exs. 8 and 9.

<sup>33</sup> Lipkin Aff., Ex. 5.

<sup>34</sup> Lipkin Aff., Ex. 10.

AAPC did not apply to HUD for consent to an assignment of the HAP contract to AAPC. Shah explains: “The reason that the application for assignment was made directly by [Steuben], and not by AAPC, was that the parties to the transactions *had contracted for the Property to be ‘flipped’ to and from AAPC, and thus there was no reason for AAPC to seek additional HUD approval.*” (Emphasis added.)<sup>35</sup>

The Record contains a copy of an Assignment, Assumption and Amendment Agreement Section 8 Housing Assistance Payments Contract (HAP Assignment) among Greentree, Steuben and HUD.<sup>36</sup> The HAP Assignment refers to a contract of sale between Greentree and Steuben dated July 7, 2007 and provides that Steuben will assume responsibility under the HAP contract and that HUD agrees to the assignment of the HAP contract to Steuben. Although the HAP Assignment is signed, it is not fully dated. Only the year, 2007, is listed. No copy of any contract of sale between Greentree and Steuben dated July 7, 2007 is in the Record.

The Record contains copies of RPTT returns, New York State Real Estate Transfer Tax (RETT) returns and several Recording and Endorsement Cover Pages relating to the filing of deeds and RPTT returns for the purported transfers of the Property among Greentree, AAPC and Steuben:

- A Recording and Endorsement Cover Page reporting a document date of March 4, 2008, a preparation date of July 16, 2008 and reporting the grantor as Greentree and the grantee as AAPC. The property referenced is the Property although the “document type” is listed as “deed non-residential”. This document is date stamped as having been examined on July 21, 2008 and recorded in Richmond County on July 22, 2008 with a “Doc” number of 260743.<sup>37</sup>
- A copy of a RPTT return signed by Henry Grunbaum and Millie Graham reporting the transfer of the Property from Greentree to AAPC (Greentree Return). The

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<sup>35</sup> Shah Supp. Aff. at ¶23, at SJ130-SJ131.

<sup>36</sup> Supplemental Affirmation of Andrew G. Lipkin dated February 5, 2016 in opposition to the Summary Determination Motion (Supp. Lipkin Aff.), Ex. 16.

<sup>37</sup> Shah Aff., Ex. B at SJ013.

reported date of the transfer is March 4, 2008. This document bears a date stamp from the Richmond County Clerk of July 22, 2008. This document also bears a “Doc” number of 260743.<sup>38</sup>

- A copy of a Recording and Endorsement Cover Page showing a document date of March 4, 2008, a preparation date of September 30, 2008 and a recording date of October 1, 2008. The document type indicated is “NYC Real Property Transfer Tax” and the property referenced is the Property. The grantor is listed as Greentree and the grantee is listed as AAPC. The presenter is identified as the NYC Dept. of Finance with an address of 66 John Street 13<sup>th</sup> Fl. This document does not bear a date stamp.<sup>39</sup>
- A copy of a Recording and Endorsement Cover Page showing a document date of July 11, 2008 and a preparation date of July 24, 2008. The document type listed is “Deed Non-residential”. However the property referenced is the Property, which is described as “Apartment Building”. This document bears a stamp from the Richmond County Clerk indicating that it was examined on August 7, 2008 and recorded on September 19, 2008. The grantor listed is AAPC and the grantee listed is Steuben.<sup>40</sup>
- A copy of a Recording and Endorsement Cover Page showing a document date of July 11, 2008 and a preparation date of November 13, 2008. The document type listed is “NYC Real Property Transfer Tax”. The property referenced is the Property. The grantor listed is AAPC and the grantee is Steuben. The document is reported as recorded/filed with the New York City Register on November 18, 2008. This document lists the Presenter as the Bronx City Register.<sup>41</sup>
- A copy of a RPTT return reporting the transfer of the Property from AAPC to Steuben (AAPC Return) (the Greentree Return and the AAPC Return are collectively referred

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<sup>38</sup> *Id.*

<sup>39</sup> Undated Affirmation of Lorenzo DeLuca faxed to the Prior ALJ on December 7, 2015 (DeLuca Affirmation), Ex. C.

<sup>40</sup> DeLuca Affirmation, Ex. D.

<sup>41</sup> Shah Aff., Ex C at SJ030.

to as the RPTT Returns) bearing a stamp from the Richmond County Clerk dated September 19, 2008.<sup>42</sup>

The Explanation of Adjustment(s) attached to each of the Notices contains the following:

“Transfer 1 date: 3/4/2008  
Transfer 2 date: 7/11/2008

“RPTT Return, date 1: 10/1/2008  
RPTT Return date 2: 11/18/2008

“Deemed Transfer date: 3/4/2008  
Deemed RPTT return filing date: 10/1/2008”

Petitioners have asserted that the apparent delay in filing the AAPC Return was caused by the Department.<sup>43</sup> Because of the inconsistencies in the dates indicated and stamped on the various Recording and Endorsement Cover Pages, it is not clear when the various deeds were presented for recording or were recorded or when the RPTT Returns were filed or offered for filing.

The Total Consideration reported on the Greentree Return is \$22,000,000 cash. The Greentree Return was signed July 10, 2008 although the date of the transfer is reported as March 4, 2008. The condition of transfer section of the Greentree Return includes a check in the box marked “Transfer by or to a tax exempt organization”. The type of property is indicated as “Apartment building”.

The Record includes a series of e-mails among Michael Shah, Mr. Taras and Ms. Liotine of Rockwell Abstract LLC, listed as the Title Company in the Closing Statement, regarding the date of the deed and the date of closing to be reported for purposes of ACRIS.<sup>44</sup> Michael Shah e-mailed: “the first transfer should be the date of your escrow

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<sup>42</sup> *Id.* at SJ033.

<sup>43</sup> DeLuca Affirmation at ¶¶4 and 5; Shah Supp. Aff. at ¶¶6 and 7.

<sup>44</sup> Lipkin Aff. Exs. 25 and 40. ACRIS stands for the Department’s Automated City Register Information System, which is used for recording various property documents including deeds.

deed”, i.e., March 4, 2008.<sup>45</sup> An e-mail from 12:37 PM on July 8, 2008 from Ms. Liotine to Michael Shah and Mr. Taras states that one of their attorneys was “checking to make sure there will be no transfer tax and no penalty.” Ms. Liotine noted in a later e-mail on the same date that if the transfer were recorded with a date of March 4, 2008 penalties would apply.

The RETT Return filed in connection with the recording of the first deed and signed by Minnie Graham and Greentree<sup>46</sup> reports the type of property transferred as being “Commercial” but on the RP-5217NYC State Board of Real Property Services Form (RP-5217NYC) included with the RETT return, the space for entering the building class is blank.<sup>47</sup> The buyer’s attorney listed on the Certification on the RP-5217NYC is Robert Prignoli, Esq. A Department of Housing Preservation and Development Affidavit in Lieu of Registration Statement executed by Minnie Graham on July 10, 2008 (First HPD Affidavit) included with the RP-5217NYC<sup>48</sup> states:

“1. I am familiar with the [Property] and make this affidavit . . . in connection with a deed of lease which transfers an interest in the above real property, is dated MARCH 4, 2008, and is between [Greentree] as GRANTOR and [AAPC] as GRANTEE.

“2. The statements made in this affidavit are true of my own knowledge and I submit this affidavit in order that this Instrument be accepted for recording without being accompanied by a registration statement. . . . *The Instrument does not affect a dwelling which is or is to be occupied as the residence of three or more families* because it affects the following. . . .” (Emphasis added.)

Immediately following that statement is a checked box indicating that the affected property is a “commercial building”. Paragraph 3 of the affidavit states “I am aware that

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<sup>45</sup> *Id.*

<sup>46</sup> Shah Aff., Ex. B at SJ023-25. The signature for Greentree is illegible.

<sup>47</sup> Shah Aff., Ex. B at SJ027. The Property is in building class D1, which is a semi-fireproof elevator apartment building without stores.

<sup>48</sup> Shah Aff., Ex. B at SJ028.

false statements made in this affidavit may be punishable as a felony or misdemeanor. . . .”

The AAPC Return signed July 11, 2008 also reports the Condition of Transfer as by or to a tax exempt organization and reports the consideration as \$22,030,000 cash. That return also reports the type of property as an apartment building. However, the RETT return filed in connection with the second deed again reports the Property as “Commercial/Industrial”. A Department of Housing Preservation and Development Affidavit in Lieu of Registration Statement dated July 11, 2008, identical to the one dated July 10, 2008, signed by Minnie Graham and again describing the Property as a commercial building (Second HPD Affidavit), was filed in connection with the second transfer.

Maureen Kokeas, First Deputy Sheriff in the Office of the New York City Sheriff, stated that her office is a part of the Department and that her duties include investigating cases of suspected tax fraud.<sup>49</sup> She stated that in September 2009, she was contacted by an Assistant District Attorney (ADA) in the Richmond County District Attorney’s Office, who informed her that he was investigating a series of transactions by Michael Shah, in which “he sets up numerous corporations to be the owners” of properties he has purchased in Richmond County and one in the Bronx, and uses two not-for-profit organizations as “straw buyers” to avoid paying RPTT.<sup>50</sup> Ms. Kokeas stated that the ADA was investigating the transaction in this case and had requested documents relating to AAPC and that she provided the ADA with whatever documents she was able to procure.

Ms. Kokeas also stated that:

“Because the matter was the subject of a criminal investigation, I did not pursue an intensive investigation on DOF’s behalf. It is DOF policy to refrain from conducting a parallel civil fraud investigation until any related criminal

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<sup>49</sup> Affidavit of Maureen Kokeas, dated September 22, 2015 (Kokeas Aff.) at ¶1.

<sup>50</sup>*Id.* at ¶¶3 & 4.

investigation is completed. In this way, DOF avoids any potential interference which could adversely affect the criminal process.”<sup>51</sup>

Ms. Kokeas stated that “[d]uring the pendency of the criminal investigation, DOF continued on a limited basis to gather information about real property transfers to and from . . . (‘AAPC’) involving entities controlled by Michael Shah.”<sup>52</sup> She also stated that, “[a]t some time near the end of 2011” she learned that the Richmond County DA “determined not to pursue any criminal action.” The Department then determined to pursue RPTT “deficiencies against both AAPC and the Shah-controlled entities involved in each of the transactions which DOF had discovered. There were many discussions concerning any applicable statute of limitations and whether there was sufficient evidence to support fraud penalties.”<sup>53</sup>

Ms. Kokeas further stated that the Department received a letter from Kerim Odekon of HPD that “I have a list of buildings where I see a sale recorded to a Staten Island non-profit [AAPC] who then sells the building to an LLC owned by DelShah Capital . . . but the documents on ACRIS don’t show any NYC RPTT paid.”<sup>54</sup> Ms. Kokeas stated that once the Department was satisfied “that the facts and law supported the assertion of fraud penalties, the matters were transferred to the Audit Division to calculate the tax due, together with interest and penalties.”<sup>55</sup>

The Department issued the Notices on January 13, 2012. It appears that the Department also issued a Notice of Determination to Greentree. A letter from Mr. Lederman to the Department dated March 11, 2012 (Lederman Letter) responding to a Notice of Determination dated January 13, 2012 asserts, among other things, that

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<sup>51</sup> *Id.* at ¶7.

<sup>52</sup> *Id.* at ¶15.

<sup>53</sup> *Id.* at ¶16.

<sup>54</sup> *Id.* at ¶17.

<sup>55</sup> *Id.* at ¶19.

Greentree had been indemnified against any RPTT liability and was “not involved with any plan to transfer the subject property between [AAPC] and [Steuben].”<sup>56</sup>

In the Exception, Respondent asserts that the ALJ erred in granting the Summary Determination Motion because there are material issues of fact in the form of “unexplained ambiguities”<sup>57</sup> in the various documents and that the element of intent in the context of an assertion of fraud is inherently a factual issue. Respondent also asserts that the ALJ “misconstrued the standard for summary determination” applicable before the Tribunal and that, even by the standard asserted by the ALJ, there were factual issues requiring a hearing.<sup>58</sup> Respondent further asserts that the Prior ALJ erred in denying Respondent’s Motion to Consolidate the case arising out of the Steuben Notice with seven cases involving transfers of other properties because each of the transfers involve AAPC and entities asserted by Respondent to be managed by Michael Shah and, as asserted by Respondent, each transfer used substantially similar structures.<sup>59</sup> Respondent asserts that all of the cases involve common questions of law and fact and that Steuben’s objections to consolidation were not reasonable.

Steuben asserts that the ALJ properly granted summary determination because the Record “presented no material questions of fact” as to whether the RPTT Returns filed in the present case were false or fraudulent and that they contained all of the required information necessary to assess tax. Therefore, because the Notices were issued more than three years after the RPTT Returns were filed, the statute of limitations had expired.

Steuben further asserts that the Prior ALJ properly denied Respondent’s Motion to Consolidate because the transactions in question involved different returns, unrelated transactions occurring on different dates involving different sellers and different

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<sup>56</sup> Lipkin Aff., Ex. 33.

<sup>57</sup> Exception at 5.

<sup>58</sup> Exception at 6.

<sup>59</sup> Exception at 4.



properties. Steuben further asserts that a consolidated hearing would be “unduly burdensome.”<sup>60</sup>

For the reasons below, we find that the question of fraud is an inherently factual one and that there are material issues of fact relating to each of the elements of fraud requiring a full evidentiary hearing and, therefore, summary determination was improperly granted. We further find that, as explained below, the Prior ALJ improperly denied Respondent’s Motion to Consolidate.

Administrative Code §11-2116.b provides that “except in the case of a wilfully [sic] false or fraudulent return with intent to evade the tax” the Department cannot assess additional RPTT more than three years after the filing of the return. The Notices were issued on January 13, 2012, which is more than three years after the latest filing date of the AAPC Return, November 18, 2008, and more than three years after the latest filing date of the Greentree Return, October 1, 2008. Therefore, the Notices must be dismissed unless the RPTT Returns are found to be wilfully “false or fraudulent . . . with intent to evade” the RPTT.

The Rules of Practice and Procedure of the Tax Appeals Tribunal (Tribunal Rules) at 20 RCNY §1-05(d)(1) provide:

“After issue has been joined, any party may move for summary determination. Such motion shall be supported by an affidavit, by a copy of the pleadings, and by any other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact to be tried and that the facts mandate a determination in the moving party’s favor. The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows sufficient basis to require a hearing of any issue of fact.”

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<sup>60</sup> Petitioner’s Answering Brief at 35.

Thus under the Tribunal Rules, to be granted summary determination in its favor, the moving party must “show that there is no material and triable issue of fact” requiring a factual hearing. Tribunal Rule §1-05(d)(1) is substantially identical to CPLR Rule 3212(b). The ALJ correctly stated that the burden to make such a showing rests on the moving party, Steuben<sup>61</sup> in the present case. The Court of Appeals in *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) stated “[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (citations omitted).” *See also Voss v Netherlands Ins. Co.*, 22 NY3d 728 (2014); *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 (2013).

The ALJ granted the Summary Determination Motion and cancelled the Notices. The ALJ concluded that, based upon his review of the papers submitted, the Record “presents no material questions of fact on whether the [RPTT Returns] were fraudulent” and, therefore, the Notices were time barred.<sup>62</sup> The ALJ concluded that, because the burden of proof as to the issue of fraud falls on the Department,<sup>63</sup> summary determination should be granted if, based on the proof submitted, Respondent cannot prove an element of fraud.<sup>64</sup> The ALJ relied on *Celotex v Catrett*, 477 US 317 (1986), describing it as a case “addressing the interplay between fraud and summary judgment”.<sup>65</sup> While *Celotex* did not involve the issue of fraud, the Court held that:

“In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial. In such a situation, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.

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<sup>61</sup> The Summary Determination Motion was made by Steuben and not joined by AAPC.

<sup>62</sup> ALJ Determination at 42-43.

<sup>63</sup> Although Administrative Code Title 11, Ch. 21 governing the RPTT does not explicitly impose the burden of proof as to fraud on the Department, §170.d of the New York City Charter provides “Unless otherwise provided by law, the party seeking relief as to each issue shall bear the burden of proof.”

<sup>64</sup> ALJ Determination at 28.

<sup>65</sup> *Id.*

The moving party is ‘entitled to a judgment as a matter of law’ because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.” (477 US 317, 322-23.)

*Celotex* relied on Federal Rule 56 of Civil Procedure. We find that the ALJ’s reliance on *Celotex* and Federal Rule 56 of Civil Procedure was misplaced. Judge Smith of the New York Court of Appeals noted in his concurring opinion in *Yun Tung Chow v Reckitt & Colman, Inc.*, 17 NY3d 29 (2011):

“As to issues on which the nonmoving party would have the burden of proof at trial, the United States Supreme Court has rejected the idea ‘that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact,’ and has held instead that ‘the burden on the moving party may be discharged by . . . pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party’s case’ (*Celotex Corp. v. Catrett*, 477 U.S. 317, 325[1986]). If we were writing on a clean slate, I might prefer the *Celotex* rule to ours, but we are not, and I am not urging a change in our law. I am urging, however, that parties moving for summary judgment in the future be alert to the burden that New York law places on a moving party.” (17 NY3d 29, 36.)

Further, we find that the ALJ misapplied *Celotex* in describing the applicable standard. The Court in *Celotex* did not require the nonmoving party to prove its claims stating:

“Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact. . . . One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.[footnote omitted]. . . .

“In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, . . . Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’

“We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. . . . Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.” 477 US 317, 323-24.

The ALJ held that “to carry its burden, Respondent must establish that the returns contain ‘wrongful acts or omissions’ that resulted in an underpayment.”<sup>66</sup> In other words, the ALJ imposed the same standard of proof on Respondent as would have applied in an evidentiary hearing to prove that the returns were fraudulent. By contrast, the Court in *Celotex* merely required the nonmoving party “to make a showing *sufficient to establish the existence of an element essential to that party’s case*, and on which that party will bear the burden of proof at trial.”<sup>67</sup> (Emphasis added.)

Not only do we find that the ALJ applied an incorrect standard in ordering summary determination in favor of Petitioners, but we disagree with several key factual findings relied on by the ALJ in applying that standard. The ALJ stated that “[o]n tax returns, perfect accuracy and completeness is not required so long as the reporting ‘evinces an honest and genuine endeavor to satisfy the law.’”<sup>68</sup> He concluded that “[b]oth returns provided all information necessary to audit and assess the reported transfers.”<sup>69</sup> The ALJ cited *John D. Alkire Inv. Co. v Nicholas*, 114 F2d 607 (10th Cir,

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<sup>66</sup> ALJ Determination at 28 (citing *Matter of Marquez*, 2007 WL 1544506 (NYC Tax Tribunal, TAT(E) 97-107(UB), May 16, 2007).

<sup>67</sup> 477 US 317, 322.

<sup>68</sup> *Zellerbach Paper Co. v Helvering*, 293 US 172, 180 (1934).

<sup>69</sup> ALJ Determination at 30.

1940) for the proposition that “failing to report the necessary information tolls the running of the limitations period. . . .”<sup>70</sup> The court in that case further held that the returns in question “not only failed to disclose requisite information but were *misleading and calculated to prevent discovery of material facts*. Returns of that kind are not effective to start the period of limitation running.” (Emphasis added.) 114 F2d 607, 610. In examining the returns in the present case, the ALJ, concluded that:

“[i]t is axiomatic that information cannot be concealed if that information is neither asked for, nor required to be reported. *Herein, the RPTT return does not ask if the reported transfer is a bona fide transfer. It does not request reporting whether the transfer is to a dummy, straw person, nominee or agent of another party.* (Emphasis added.)”<sup>71</sup>

The ALJ’s statement is simply wrong. The RPTT return form in the “Condition of Transfer” section includes condition h “transfer from principal to agent, dummy, strawman or conduit or vice-versa” and requires a Schedule E to be completed if that condition is checked. Although Michael Shah describes AAPC’s involvement in the transaction as “nominal”<sup>72</sup> condition h is not checked on either the Greentree Return or the AAPC Return. If AAPC’s role in these transfers was as a nominee, condition h should have been checked and Schedule E filed. Moreover, every RPTT return is required to be signed under a certification that reads: “I swear or affirm that this return, including any accompanying schedules, affidavits and attachments, has been examined by me and is, to the best of my knowledge, a *true and complete return made in good faith*. . . .” (Emphasis added.) That certification is clearly intended to assure the taxing authorities that the return is not willfully false and that the transaction reported is bona fide. It defies logic to conclude that a return cannot be fraudulent merely because it does not require an affirmative statement by the signor that it is *not* fraudulent.

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<sup>70</sup> ALJ Determination at 29.

<sup>71</sup> ALJ Determination at 35.

<sup>72</sup> Shah Supp. Aff. at ¶23.

The ALJ concluded that “the instant plan did not rely upon either falsely reporting or concealing material information. . . . The scheme herein lacks the characteristic criminal conviction or plea of fraud penalty cases, and the requisite proof of either false representations, or material concealments.”<sup>73</sup> However, as we have noted, it is not necessary for Respondent to prove all of the elements of civil fraud to defeat the Summary Determination Motion. Moreover, we disagree with the ALJ’s suggestion that fraud penalties are rarely sustained in the absence of a criminal case<sup>74</sup> or that the District Attorney’s decision not to pursue criminal charges in the present case is relevant to the issue of whether material issues of fact relating to the elements of civil fraud exist warranting a full evidentiary hearing.

Applying the appropriate standard on a motion for summary determination, Steuben was obligated to establish that there were no material issues of fact relating to the issue of fraud requiring an evidentiary hearing. In the Summary Determination Motion, Steuben recited the basic facts of the dates of the various documents and returns but those facts do not establish that there are no material issues of fact.<sup>75</sup> Steuben recited legal authorities as to the importance of the statute of limitations and on the burden of proof as to fraud generally. Steuben asserted that “[t]he Department has also not established, or sufficiently plead, any of the elements of fraudulent intent. . . . [T]he Department has failed to identify any false statements in the returns themselves.”<sup>76</sup> These arguments merely note the general burden of proof as to fraud but do not satisfy Steuben’s burden of showing the absence of a material issue of fact necessary to sustain a motion for summary determination.

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<sup>73</sup> ALJ Determination at 38.

<sup>74</sup> *Id.* We note that in the case cited by the ALJ, a civil fraud penalty was upheld despite the District Attorney’s office declining to pursue a criminal case. *Matter of Rodriguez v Tax Appeals Trib. of the State of NY*, 82 NY3d 1302 Slip Op. 01546 (3d Dept 2011).

<sup>75</sup> As noted below, there are anomalies in the dates of the various filing documents that, in and of themselves, suggest material issues of fact.

<sup>76</sup> Summary Determination Motion at 14.

Steuben and the ALJ note that the Richmond County Clerk's office accepted the RPTT Returns for filing.<sup>77</sup> The ALJ further found that the acceptance of the RPTT Returns "after a period of review underscores the sufficiency of the reporting."<sup>78</sup> However, the county clerk is not responsible for performing tax audits or making determinations as to the taxability of transactions reported. County Law §525 describes the function of the county clerk as: providing "all books, files and other necessary equipment for the filing, recording and depositing of documents, maps, papers in actions and special proceedings. . . ." The county clerk has no authority or obligation to conduct a RPTT audit of the papers submitted for filing.<sup>79</sup> The Summary Determination Motion asserts that the RPTT Returns "were complete and accurate, because they provided the Department with all of the information it needed to assess the RPTT within the three year statute of limitations."<sup>80</sup> This is a conclusory statement and not sufficient to satisfy Steuben's burden of showing that there is no material issue of fact in this case relating to the elements of fraud requiring a hearing.

We are cognizant of the ultimate burden borne by Respondent to establish the elements of fraud necessary to support the validity of the Notices. However, Respondent's obligation to meet that burden need not be satisfied to rebut a motion for summary determination. As noted above, Steuben as the movant, had the obligation to show the absence of any material issue of fact. That Steuben failed to do.

It is readily apparent that the issue of fraud is an inherently factual one. We previously have described the requisite elements of fraud in our decision in *Matter of Marquez*, 2007 WL 1544506 (NYC Tax Tribunal, TAT(E) 97-107(UB), May 16, 2007). The standard of proof requires "clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations, resulting in deliberate nonpayment or

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<sup>77</sup> Id. at 27; ALJ Determination at 30, 34.

<sup>78</sup> ALJ Determination at 30.

<sup>79</sup> See 1976 N.Y. Op. Atty. Gen. No. 303 (N.Y.A.G.), 1976 WL 350324.

<sup>80</sup> Summary Determination Motion at 29.

underpayment of taxes due and owing.’ [Citations omitted.] Fraud can be established through a taxpayer’s entire course of conduct and drawing reasonable inferences therefrom. [Citations omitted.] Further, a finding of fraud can be based on circumstantial evidence. [Citations omitted.] Courts look for ‘badges of fraud’ in examining a taxpayer’s conduct for fraudulent intent including: ‘(1) consistent and substantial understatement of income; (2) failure to maintain adequate records; (3) failure to cooperate with an . . . investigation; (4) inconsistent or implausible explanations of behavior and (5) awareness of the obligation to file returns and pay taxes. [citations omitted]’ *Campfield v Commissioner*, 133 F3d 906 (2d Cir. 1997) (*full text at 80 AFTR2d 7765*).” The court in *Matter of Rodriguez v Tax Appeals Trib. of the State of NY*, 82 NY3d 1302 Slip Op. 01546 (3d Dept 2011) noted that “circumstantial evidence may be used to prove that a taxpayer has deliberately filed a fraudulent tax return [citations omitted]. . . .” (*Id.*, at 1304.)

The Record is replete with inconsistent and ambiguous documents containing inaccurate, and in a few instances demonstrably false, statements. Even the ALJ noted “[t]aken as a whole, the record raises questions as to whether the Greentree-AAPC and AAPC-Steuben transfers should be collapsed into a single transaction.”<sup>81</sup> We highlight the following significant factual issues raised by the Record and directly related to a determination as to whether the transactions were knowingly and intentionally misrepresented on the RPTT Returns with the intent of evading payment of RPTT:

- The signature by Darshan Shah, Michael Shah’s father, on behalf of AAPC and his separate indemnification of Greentree against civil and criminal liability for failing to pay the RPTT or timely file the RPTT Returns in both the 7/19/07 Agreement and the Shah Indemnification are inconsistent with the assertion that AAPC was an independent party acting in furtherance of its charitable purposes. If Darshan Shah, Michael Shah’s father, is an officer of, or otherwise authorized to act for, AAPC, that

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<sup>81</sup> ALJ Determination at 35.



calls into question AAPC's independence. If he is not so authorized, his signature on the Greentree Contract raises additional questions about the validity of that contract.

- Michael Shah's assertion that it was unnecessary for AAPC to apply for the assignment of the HAP contract is not only inconsistent with the requirement of the Greentree Contract but also in direct contradiction to the affirmative representation of AAPC in the Amendment. As noted above, the application to HUD is not in the Record. Moreover, as noted below, the reference in the HAP Assignment to a July 7, 2007 contract between Greentree and Steuben suggests that the involvement of AAPC may have been deliberately concealed from HUD.
- The condition in the Greentree Contract that the Property be managed by an entity controlled by either Michael or Darshan Shah and the exception to the assignment prohibition for an assignment to an entity controlled by either of them further casts doubt on whether AAPC was acting on its own behalf.
- The apparent absence of any representative of AAPC at the closing and the apparent absence of any other closing on a sale of the Property by AAPC to Steuben further suggest that AAPC was not acting as a principal and raise significant issues as to whether the AAPC Return was "true and complete" and was signed by AAPC "in good faith".
- Michael Shah admits that AAPC's role was "nominal" and that the Property was to be "'flipped' to and from AAPC." Yet condition h is not checked and Schedule E not completed on either of the RPTT Returns, which would have disclosed the relationship between the two transactions.
- The absence of any cancelled checks or other evidence of the source of any of the payments for the Property and whether any payment was made by AAPC at all, as reported on the Greentree Return, raises questions as to whether that return was "true and complete" and whether AAPC signed it "in good faith". We note that Mr. Prignoli stated in his opinion that AAPC lacked the funds to make the purchase and would have had to borrow the funds to make the purchase. Yet no lender was listed in the Closing Statement as funding the purchase on behalf of AAPC. The Closing

Statement lists payments made to or on behalf of Greentree as the seller in payment of several loans, and additional accrued interest due to the delay in funding, all of which are described as made by the purchaser defined as Steuben, not AAPC.

- The Lederman Guarantee of representations in the Greentree Contract *to Steuben*, although not a party to that contract, and the disingenuous statement by Mr. Lederman in the Lederman Letter that Greentree “was not involved with any plan to transfer the [Property] between AAPC and [Steuben]” are inconsistent with Greentree’s signature on the Greentree Return under the certification that the return is “true and complete” and signed “in good faith”. Moreover, the Lederman Guarantee, dated July 14, 2008, around the same time as the closing was funded and issued to Steuben rather than AAPC, guarantees to Steuben representations made by Greentree in the Greentree Contract further suggesting that Steuben, rather than AAPC, was the intended purchaser under the Greentree Contract. The Lederman Guarantee is consistent with the Assignment of the Greentree Contract to Steuben, makes no mention of the 7/19/07 Agreement, the Amendment or the Settlement Agreement and is inconsistent with the AAPC Contract.
- The Assignment expressly provides that AAPC assigned all of its rights and obligations under the Greentree Contract to Steuben. But then AAPC states that it will use its best efforts to sell the Property to Steuben. The subsequent Amendment and Settlement Agreement are inconsistent with an assignment of the Greentree Contract but the Closing Statement is wholly consistent with the Assignment by AAPC of its rights to purchase the Property under the Greentree Contract. The RPTT Returns also are inconsistent with the Assignment further calling into question whether the RPTT Returns were “true and complete” and signed “in good faith”.
- None of the documents executed after the Assignment, notably the Amendment and the Settlement Agreement between Greentree and AAPC, makes any reference to the AAPC Contract.

Moreover, the documents, supposedly drawn and executed by experienced professional real property investors, contain numerous significant and unexplained irregularities raising material questions as to the bona fides of these transactions, whether the documents were deliberately contradictory and misleading and, ultimately, whether the transactions were accurately reported on the RPTT Returns:

- The identification of Steuben as a nonprofit purchaser of the Property in the Closing Statement and the representation that as the Assignee under the Assignment, its assumption of the right to purchase the Property was in furtherance of its “charitable purpose” were clearly erroneous.
- AAPC’s execution of the Assignment expressly ended all of its rights and obligations under the Greentree Contract but AAPC, nevertheless, continued to enter into the Amendment and Settlement Agreement.
- AAPC’s representation in the Amendment that it had obtained the consent of HUD to the assignment of the HAP contract is admittedly false.
- The failure of the Escrowee to sign the Amendment, although that signature was expressly called for, and the apparent absence of an escrow agreement altogether are irregular to say the least.
- The significant gaps in time among the dates of the deeds, the recording of the deeds and the filing of the RPTT Returns and the apparent inconsistencies between the date stamps and the Recording and Endorsement Cover Page for the deed from AAPC obscure the simultaneous timing of the transfers raising the question as to whether that obfuscation was intentional.<sup>82</sup>

Additionally, several facts raise substantial questions bearing on the intent of the parties who signed the RPTT Returns:

- Mr. Prignoli asserted that his opinion was issued in reliance on the Greentree Contract without reference to the Assignment, although he was clearly aware of it. Mr.

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<sup>82</sup> Michael Shah’s statement that the Richmond County Clerk refused to record the deed pending an examination explains only one of the temporal anomalies.

Prignoli initially stated that no one but his client, AAPC, could rely on the opinion and only later agreed to allow Steuben to rely on it while denying any resulting attorney client relationship. These facts raise questions as to whether Michael Shah could have reasonably relied on the Prignoli Opinion.

- Michael Shah’s suggestion in an e-mail included in the Record that another attorney would help structure these transactions to make them “bullet proof” further calls into question his reliance on the Prignoli Opinion.
- The clearly false statements made by Ms. Graham in the RP-5217NYCs and the First and Second HPD Affidavits, and Mr. Prignoli’s signature on one of the RETT returns describing the Property as commercial raise doubts as to the veracity of other statements made, and documents signed, by those individuals.
- The reference in the HAP Assignment to a contract of sale between Greentree and Steuben dated July 7, 2007 that was not included in the Record, is particularly troublesome in that it suggests that the documents submitted to HUD were significantly different from the documents in the Record and raises substantial questions as to the validity of the documents in the Record, whether multiple, inconsistent, and specious documents were intentionally created and whether the Record contains all of the relevant documents. We note that July 7, 2007 is less than two weeks prior to the date of the Greentree Contract but the Greentree Contract makes no reference to any earlier contract.
- We also note Michael Shah’s insistence on using the March 4, 2008 date as the transfer date on the Greentree Return despite the title company’s apparent reluctance to do so and the risk of late filing penalties. No explanation is offered for using that date rather than the date the deed supposedly was delivered out of escrow. It is indisputable that under New York law a transfer of real property does not occur until the deed is delivered and a deed delivered in escrow is not delivered until all of the conditions of escrow are satisfied. *McLoughlin v McLoughlin*, 237 AD2d 336 (2d Dept 1997). We disagree with the ALJ that the reporting of the transfer date as March

4, rather than July 11 “does not impact the ability to assess the transfer.”<sup>83</sup> It is relevant to the question of whether reporting the transfer date as preceding the actual transfer to Steuben by several months was a deliberate attempt to conceal the contemporaneousness of the purported transfers and further raises questions as to whether the Greentree Return was “true” and signed “in good faith”.

Because the ultimate burden of proof as to fraud lies with Respondent, in the absence of a full evidentiary hearing, we refrain from drawing any legal conclusions from the foregoing. Nevertheless, we do find that there is a plethora of material factual issues bearing directly on the various elements of fraud sufficient to defeat the Summary Determination Motion. As noted by the Court of Appeals in *Millerton Agway Cooperative, Inc. v Briarcliff Farms, Inc.*, 17 NY2d 57 (1966), summary determination is a “‘drastic remedy’ [citations omitted]”. The court noted that, while the facts asserted by both sides in that case appeared “implausible” or “unlikely” they were not “impossible” and the court held that:

“In the face of these disputes and uncertainties the Appellate Division has granted summary judgment on the ground that the defense is not only improbable but feigned—that is, false. We cannot agree. However appropriate the summary judgment method may be for disposing without trial cases where there is no issue at all, this is not that kind of case. The truth as to these matters must be arrived at in the lawful and customary way, this is, by a trial where the witnesses can be examined and cross-examined and their demeanor and their versions put under the scrutiny of the triers of the facts.” 17 NY2d 57, 63-64.

In the present case, the facts asserted by Respondent raise significant material questions of fact as to whether there were two transfers or only one sale directly by Greentree to Steuben as described in the Closing Statement, and therefore, whether the RPTT Returns were “true and complete” and signed “in good faith”. Moreover, Michael Shah’s statement that AAPC’s role was “nominal” and that the Property was “flipped” to and

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<sup>83</sup> ALJ Determination, at 32.

from AAPC and the other factual issues noted above raise further material questions of fact as to whether the RPTT Returns were “true and complete” and signed “in good faith” because condition h was not checked and Schedule E was not completed. For these reasons, we find that the ALJ erred in granting the Summary Determination Motion and dismissing the Notices.

We turn now to Respondent’s exception to the Consolidation Order. Respondent moved to consolidate the case involving the petition filed by Steuben in response to the Steuben Notice with seven other cases involving transfers to entities asserted to be controlled by Michael Shah and involving AAPC pending before the ALJ Division. The Prior ALJ denied the motion except insofar as she consolidated the cases involving the grantee and grantor of each property.<sup>84</sup>

Tribunal Rule §1-05(g)(1) provides: “On the motion of either party, cases may be consolidated and joined for hearing where there exist common parties, common questions of law or fact, or both, or in such other circumstances as justice and efficiency may require, provided there is no reasonable objection interposed.”<sup>85</sup> The question of what constitutes a “reasonable objection” has not been addressed by this Tribunal.<sup>86</sup> Section 602(a) of the CPLR providing for consolidation states: “When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.” We note that the courts of New York have held:

“In exercising that discretion, the controlling principle is that ‘the interests of justice and judicial economy are better served by joint trials wherever possible.’ *Coakley v. Africano*, 181 A.D.2d 1071, 1072 (4th Dep’t 1992). Thus, a motion for a joint trial ‘should be granted where there are common issues of law or fact unless the party resisting joint trials

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<sup>84</sup> Consolidation Order at 12-13.

<sup>85</sup> We note that counsel for AAPC did not object to consolidation of the cases. Consolidation Order at 9.

<sup>86</sup> We note that in *Matter of Katz Communications Inc., et al*, NYC Tax App. Trib. TAT (H) 98-32 (CR) (December 24, 2001), an ALJ determination that is not binding precedent before this Tribunal, the ALJ cited *Maigur v Saratogian, Inc.*, 47 AD2d 982 (3d Dept 1975) in applying the CPLR §602 standard.

demonstrates prejudice to a substantial right.’ [Citations omitted.] The burden to demonstrate prejudice to a substantial right falls on the party resisting joinder.’<sup>87</sup>

In that case, the court described the defendants’ concern that:

“they will be prejudiced by a joint trial and the jurors will be confused and unable to separate and distinguish evidence of malpractice or other wrongdoing among the several plaintiffs, treating dentists and Forba defendants. Defendants’ position ignores that all of plaintiffs’ claims flow from their allegations of an overriding scheme to maximize corporate profits at the expense of dental care.”<sup>88</sup>

In the present case, Steuben similarly argued that consolidation is not appropriate because the transactions in question involved different sellers, different properties, different RPTT returns, different purchasing entities and transactions occurring on different dates. As did the court in *Varano*, we find that those objections ignore Respondent’s assertion that these transactions all involve a common intent on Michael Shah’s part to acquire the various properties free of RPTT through the fraudulent use of AAPC, a nonprofit entity. The identities of the sellers and the properties are irrelevant to that issue. While the ultimate purchasers were different, each was affiliated with, and, as asserted by Respondent, controlled by, Michael Shah. Respondent asserted in his motion that Michael Shah was the principal of each of the purchasing entities, signed the powers of attorney submitted to the ALJ Division in connection with the petitions filed in each case and signed various documents in each transaction. Thus the common legal and factual inquiry is whether the RPTT returns filed in connection with each transaction were willfully false and fraudulent with an intent to avoid the RPTT. We note also that in cases before the Tribunal there is no jury and thus, no risk of confusion.

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<sup>87</sup> *Varano v Forba Holdings, LLC*, 43 Misc3d 642, 647-48 (Sup Ct Onondaga County, 2014) cited in Vincent C. Alexander, 2018 Supp. Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B CPLR §602, 2019 Pocket Part at 110.

<sup>88</sup> *Id.* at 649.

Steuben asserted two objections to consolidation before the Prior ALJ. The first was that tax secrecy would be violated. As the RPTT returns at issue are not subject to tax secrecy, this argument is unpersuasive. Administrative Code §11-2115.e.<sup>89</sup>

The second objection was that consolidation would result in the introduction of “evidence in one case as evidence in all four cases. The Department’s strategy will be to prove fraud through unrelated transactions. . . .”<sup>90</sup> Respondent has conceded that it will seek to introduce evidence of the other transactions at the evidentiary hearing on each transaction. In *Maigur v Saratogian, Inc.*, 47 AD2d 982 (3d Dept 1975) the court ruled that consolidation is generally appropriate where “evidence admissible in one action is admissible or relevant in the other.” 47 AD2d 982, 983. As noted above, fraud may be established through circumstantial evidence and an examination of a course of conduct. This Tribunal is not bound by formal rules of evidence and has routinely applied flexible standards regarding the admissibility of evidence generally admitting evidence for whatever value it may have.

The Prior ALJ concluded that Steuben’s objections were reasonable based on its assertion that the transactions were different and there was “no common question of law or fact”.<sup>91</sup> We disagree that those objections were reasonable. As noted above, the differences in the transactions are irrelevant to the fundamental assertion that each reflected a scheme by Michael Shah to evade RPTT on the transactions through the use of AAPC as a straw purchaser. Tribunal Rule §1-01(d) directs the Tribunal Rules to be “liberally construed to secure the just, speedy and inexpensive determination of every controversy”. In response to the Exception, Steuben asserts that consolidated hearings would be burdensome. We disagree. Separate hearings would require the repeated introduction of the same evidence, increased legal fees for Petitioners and additional time for Respondent’s counsel and Tribunal administrative law judges. Moreover, if different

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<sup>89</sup> Administrative Code §11-2115.e was added by L 2006, ch. 385, §3, effective July 26, 2006 and applicable to returns filed, and with respect to transactions occurring, on or after January 1, 2003.

<sup>90</sup> Steuben’s Memorandum of Law in Opposition to Respondent’s Motion to Consolidate at 2.

<sup>91</sup> Consolidation Order at 12.



administrative law judges hear the cases, there is a risk of inconsistent rulings on identical questions that would have to be reconciled on appeal. For these reasons, we find that the Prior ALJ erred in denying Respondent's Motion to Consolidate.

Therefore, based on the foregoing, the ALJ Determination is reversed, the Notices reinstated and the matter remanded to the ALJ Division for hearing. Moreover the Consolidation Order is reversed and it is ordered that this matter be consolidated for hearing with Chillum Place LLC, TAT (H) 13-4 (RP), MDS Management Services LLC, TAT (H) 13-5 (RP), 2025 Seward Partners LLC, TAT (H) 13-6 (RP), AAPC, TAT (H) 12-22 (RP), AAPC, TAT (H) 12-24 (RP), and AAPC, TAT (H) 12-25 (RP).<sup>92</sup>

Commissioner Frances J. Henn did not participate in this decision.

Dated: June 24, 2019

\_\_\_\_\_/s/\_\_\_\_\_  
Ellen E. Hoffman  
Commissioner and President

\_\_\_\_\_/s/\_\_\_\_\_  
Robert J. Firestone  
Commissioner

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<sup>92</sup> We have considered all of the other arguments of the Parties and find them unpersuasive.