



Jamestown Premier Chelsea Market, L.P. (Premier). The total consideration for the Transfer was \$795,000,000.

An RPTT return with respect to the Transfer (RPTT Return)<sup>2</sup> was signed on July 27, 2011 by a representative of Petitioner as grantor and, on July 28, 2011, by a representative of Premier as grantee. The RPTT Return bears a date stamp of the Office of the New York City Register (City Register's Office) of August 9, 2011.

The RPTT Return reported tax due of \$20,868,750, computed on the entire amount of consideration at the 2.625% RPTT rate applicable to transfers of commercial properties where the consideration exceeds \$500,000. The Parties stipulated that Petitioner paid the RPTT due<sup>3</sup> by submitting to the New York City Department of Finance (Department) a check payable to "NYC Dept of Finance" (Check).<sup>4</sup>

The printed information on the face of the Check indicates that it was drawn on an escrow trust account maintained by Fidelity National Title Insurance Company (Fidelity) at JP Morgan Chase Bank. The name of the payee is followed by the number 2011000400[illegible]44. The date on the face of the Check is not entirely legible but appears to be "August [illegible single digit], 201[illegible single digit]."

The Parties stipulated that the Check was processed by Bank of America on August 11, 2011.<sup>5</sup> On the back of the Check below the printed statement "DO NOT WRITE, STAMP OR SIGN BELOW THIS LINE RESERVED FOR FINANCIAL INSTITUTION USE" is partially legible text that includes the words "Bank of America", several numbers and two dates that are partially legible: "Aug 11 [illegible]" and "[illegible]/11/11".

Petitioner asserts that, before the Transfer, Christoph and Ute Kahl, as husband and wife, had a beneficial ownership interest in the Property aggregating approximately

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<sup>2</sup> Stipulation, exhibit 1.

<sup>3</sup> The Check is for \$30,309,347.21, covering various fees and taxes due including the RPTT, New York State Real Estate Transfer Tax (State RETT), and New York State and City Mortgage Recording Taxes. *See* Affidavit of Annette Hill dated July 21, 2015 (Hill Affidavit 2), exhibit 1.

<sup>4</sup> Stipulation, exhibit 3.

<sup>5</sup> The Stipulation at paragraph 3 states that the Check was processed on "Friday, August 11, 2011" although August 11, 2011 was a Thursday.

9.67% and, after the Transfer, their beneficial ownership interest in the Property aggregated approximately 22.3%.<sup>6</sup>

By a letter dated August 13, 2012, Petitioner requested a refund of RPTT in the amount of \$2,018,008.12 (Refund Request). In the Refund Request, Petitioner stated that an error existed in the computation of the RPTT reported as due on the RPTT Return because the calculation failed to take into account the exemption under §11-2106.b.8 of the Administrative Code of the City of New York (Administrative Code), which exempts transfers from RPTT to the extent that the beneficial ownership of the real property or economic interest remains the same. Petitioner asserted that the Transfer was exempt from RPTT to the extent of 9.67%, based on the retention by Christoph and Ute Kahl of their 9.67% beneficial ownership interest in the Property after the Transfer, and that the correct RPTT due was \$18,850,741.88.

The Department issued a Notice of Disallowance dated September 23, 2013 denying Petitioner's Refund Request on the basis that the claim was not filed within one year of the payment of the tax as required by law. The year 2012 was a leap year.

Respondent submitted three affidavits of Annette Hill, the New York City Register (City Register), and one affidavit of John Conry, Senior Director of the Department's Business Centers Citywide. Both individuals stated that they held those positions at the time of the Transfer and at the time the affidavits were prepared. The affidavits describe in some detail the process whereby documents are received by the Department for recording and payments of RPTT are received and processed. Read together, these affidavits describe the procedures as follows:

“[W]hen the hard copy of the RPTT return is filed with the [City] Register the customer/presenter can either give the check in payment of taxes and fees to the City Register along with the return or bring the check to the Manhattan Payment Center. In either case a ‘Payment Cover Page’ will be generated by the customer/presenter through the [City Register's Automated City Register Information System (ACRIS)] system based on information provided by the

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<sup>6</sup> The Record is not clear as to the nature of the beneficial interest held by Mr. and Mrs. Kahl.

customer/presenter and the Payment Cover Page will accompany the payment.

“The Payment Cover Page has a barcode identifying the transaction number that relates to the payment as well as a payment code which will allow the system to apply the payment to the proper account.”<sup>7</sup>

“If a RPTT tax payment is delivered to the City Register’s Office along with the RPTT return, the payment would be taken by a City Register employee to the Business Center for processing. On occasion, depending on how late in the day the payment is delivered to the City Register’s office, the payment might not be taken to the Business Center for processing until the next day.

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“For a document to be recorded it must be accompanied by a ‘Recording and Endorsement Cover Page’.”<sup>8</sup>

“Entries [in the ACRIS system] are made at the time the RPTT payment is processed by the Department of Finance’s Business Center. . . .”<sup>9</sup>

“When the payment and the Payment Cover Page [are] presented to the cashier at the Manhattan Payment Center, either by the City Register employee or by the presenter, the bar code of the payment cover page is scanned and a pop up appears on the computer terminal which tells the cashier to feed the check into the franking reader/printer. The check is then fed by the cashier into a franking reader/printer, which was triggered by the bar code, and which then automatically prints the following endorsement on the back of the check, under the statement ‘endorse here’: ‘FOR DEPOSIT ONLY’ followed by four lines of information: (1) The processing date and time; (2) the transaction id number; (3) amount and (4) receipt number. . . .

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<sup>7</sup> Hill Affidavit 2.

<sup>8</sup> Affidavit of Annette Hill dated March 17, 2015 (Hill Affidavit 1).

<sup>9</sup> *Id.*

“The franking reader/printer also prints the transaction number . . . and the receipt number . . . both unique . . . on the front of the check. . . .

“The franking printer/reader also generates a receipt which can be provided to the presenter. . . .”<sup>10</sup>

Both Ms. Hill and Mr. Conry stated that the ACRIS and NYC Serv systems reflecting the receipt of payments and documents and the recording of documents are automated and the information reflected in the documents generated by those systems is not subject to manual alteration once the payment cover page is accepted and the check and payment cover page are scanned and fed into the franking reader/printer.

Petitioner submitted the affidavit of Thomas A. Glatthaar, the Senior Vice President and Senior Underwriting Counsel for Fidelity, dated May 2, 2016 (Glatthaar Affidavit). He stated that he held that position since 2007. In his affidavit, Mr. Glatthaar stated that based on his personal knowledge and review of Fidelity’s records, it was Fidelity’s practice to have checks and relevant documents hand delivered to the City Register’s office in “all cases” and that this “procedure was followed in” the case of the Transfer. He further stated that Fidelity sent the Check and the relevant documents by Federal Express to a third party contractor who “physically brought the [Check] and the documents to the Office of the City Register.”

In addition to the copies of the RPTT Return and the Check, the Parties submitted copies of several documents from the records of the Department relating to the recording of the deed effecting the Transfer, the filing of the RPTT Return and the payment of the RPTT, as follows:

- A Recording and Endorsement Cover Page (Recording Cover Page)<sup>11</sup> of the City Register’s Office showing a preparation date of August 5, 2011, a recorded/filed date of August 15, 2011, a Document ID number 2011080400544005 and a City Register File No. (CRFN) 2011000287491.

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<sup>10</sup> Affidavit of John Conry, Senior Director of the Business Centers Citywide, dated July 21, 2015 (Conry Affidavit), exhibit 1.

<sup>11</sup> Stipulation, exhibit 2.

- A City Register’s Customer Document Print Summary (Document Print Summary), prepared on 8/3/2012 showing that for Document ID 2011080400544005 and CRFN 2011000287491, a deed dated 8/1/2011 for the Property was recorded on 8/15/2011.<sup>12</sup>
- An ACRIS report dated September 26, 2013 (2013 ACRIS Payment Report).<sup>13</sup> The 2013 ACRIS Payment Report lists a number of documents and shows, for Document ID 2011080400544005, a recorded date of 8/15/2011 and a payment date of 8/10/2011 for an amount of \$24,049,087. A handwritten notation on the 2013 ACRIS Payment Report indicates that the amount, \$24,049,087, represents the total of the RPTT, State RETT, and recording and filing fees.
- A second ACRIS Payment Report dated October 22, 2014 (2014 ACRIS Payment Report)<sup>14</sup> covering only transaction number 2011080400544000, showing a payment date of August 10, 2011 in the amount of \$30,309,347.21 and a receipt number MP070015842.<sup>15</sup>
- A letter dated August 17, 2011 from Annette Hill, the City Register, to King & Spalding LLP confirming that document number 2011080400544005 was submitted for filing on August 12, 2011 and was recorded on August 15, 2011.<sup>16</sup>
- A NYCServ Payment Research Transaction Details Screen Report (NYCServ Report) indicating a transaction date of 08/10/11 for receipt number MP070015842 at the Manhattan Payment Center a transaction in the amount of \$30,309,347.21 for “Recording Fees and Taxes” for “ITEM IDENTIFIER” 2011080400544000011P21CE.<sup>17</sup>

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<sup>12</sup> Stipulation, exhibit 6.

<sup>13</sup> Stipulation, exhibit 5a.

<sup>14</sup> Stipulation, exhibit 5.

<sup>15</sup> The 2014 ACRIS Payment Report also includes a receipt date of “2011-8-10-10.18.16.000000.”

<sup>16</sup> Stipulation, exhibit 4.

<sup>17</sup> Conry Affidavit, exhibit 1.

- A Detailed Receipt number MP070015842 (Receipt) dated 08/10/2011 for transaction ID 2011080400544000011P21CE in the amount of \$30,309,347.21.<sup>18</sup> The copy of the Receipt submitted has a notation indicating that it is a “Re-print”.

Petitioner also submitted a copy of a JPMorgan Chase bank statement for the period of July 30, 2011 through August 31, 2011 for a Fidelity commercial checking account (Fidelity Bank Statement) on which the Check was drawn showing that a check with the same number and for the same amount as the Check was paid on August 11, 2011.<sup>19</sup>

Petitioner asserts that its Refund Request was timely because it occurred within one year from either the date on which Petitioner’s bank transferred the money to the Respondent as evidenced by the date of cancellation of the Check, August 11, 2011, or from August 15, 2011, when the deed was recorded as evidenced by the recording date shown on the Recording Cover Page.<sup>20</sup>

Respondent contends that the Refund Request is barred by the statute of limitations because it was filed more than one year from the date the Check was delivered to the City Register’s Office or to the Business Center,<sup>21</sup> which the Parties agree was either August 9, 2011 or August 10, 2011.

For the following reasons, the ALJ Determination is affirmed and the Notice sustained.

Both Parties made motions for summary determination before the ALJ. The Rules of Practice and Procedure of the New York City Tax Appeals Tribunal, Title 20 RCNY Chapter 1, provide at §1-05(d)(1) that any such motion should be granted where the administrative law judge finds that “no material and triable issue of fact is presented.” Petitioner requests in its Exception that Petitioner’s Cross-Motion be granted and that

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<sup>18</sup> Conry Affidavit, exhibit 2.

<sup>19</sup> Affirmation of Dennis Rimkunas in Support of Petitioner’s Cross-Motion for Summary Determination dated September 10, 2015 (Rimkunas Affirmation), exhibit B.

<sup>20</sup> Exception at 11.

<sup>21</sup> Respondent’s Brief in Opposition to Petitioner’s Exception (Respondent’s Br.) at 2.

Respondent's Motion be denied. Petitioner does not request that this matter be remanded to the ALJ for hearing.

Administrative Code §11-2108.a provides:

“[The] commissioner of finance shall refund or credit, without interest, any tax . . . erroneously, illegally or unconstitutionally collected or paid if application to the commissioner of finance for such refund shall be made *within one year from the payment thereof.*” (Emphasis added.)

There is no dispute that the Refund Request was filed on August 13, 2012. Therefore the primary legal question to be decided is when the payment of the RPTT occurred for purposes of the one year limitations period. Only then is it necessary for us to address the matter of what constitutes “one year” and when the one year period begins.

Administrative Code §11-2105.f provides that payment of the RPTT and filing of the return are “required as a condition precedent to the recording or filing of a deed . . . or other instrument effecting a conveyance or transfer subject to such taxes.” Thus the tax must be paid *before* the deed will be recorded. According to the Glatthaar Affidavit, a third party contractor “physically brought the [Check] and the documents to the Office of the City Register.” Thus the Check and the deed and other documents were all delivered to the City Register at the same time.

Title 19 RCNY Chapter 23 relating to the RPTT (RPTT Rules) provide at §23-14:

“(a) *Persons who may apply.* An application for refund or credit may be made by any one of the following persons, as the case may be:

“(1) The grantor, if he has paid the tax to the Commissioner of Finance;

“(2) The grantee, if he has paid the tax to the Commissioner of Finance;

“(3) Any other person who has actually paid the tax to the Commissioner of Finance.

“(b) . . .

“(2) . . . The application must be accompanied by:

“(i) A cancelled check or other evidence of payment of the tax by the applicant to the Commissioner of Finance.”

Petitioner asserts that the requirement that a request for refund of RPTT be accompanied by a cancelled check or other evidence of payment indicates that a cancelled check is proof of *timely* payment.<sup>22</sup> We disagree. Read together with subsection (a) of that provision, which provides that *only* a person who paid the tax may request a refund, and with RPTT Rule §23-11, which provides that “[e]vidence of payment of tax to the Commissioner of Finance such as a cancelled check, a receipt, or a receipted return, must be preserved,” a cancelled check is intended as evidence of payment, not necessarily timely payment. The evidence in the Record makes it clear that, for a single transaction, the date of a receipt for the RPTT and the date a check for the RPTT is cancelled can vary. Thus the rule cannot be intended to be read as identifying a cancelled check as proof of the date the tax on which was paid, only that it was paid at all and by whom. We note that there is no prohibition against filing a timely refund claim for a RPTT payment that was paid late.

Petitioner further argues that the date noted on the Recording Cover Page in the section “FEES AND TAXES” as the date the deed was recorded, August 15, 2011, represents the date of payment because Administrative Code §11-2105 allows the Commissioner of Finance to “provide for the use of stamps as evidence of payment. . . .”<sup>23</sup> Again, we disagree. Petitioner’s assertion ignores the rest of the quoted sentence from Administrative Code §11-2105, which is: “The commissioner of finance may provide for the use of stamps as evidence of payment and that they shall be affixed to the deed before it is recorded.” The date referred to by Petitioner is not noted on the deed but on the Recording Cover Page.

As noted by Petitioner, the RPTT has its origins in the former federal documentary stamp tax.<sup>24</sup> That tax called for the purchase of physical stamps for the payment of the

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<sup>22</sup> Petitioner’s Br. at 13.

<sup>23</sup> Petitioner’s Br. at 17.

<sup>24</sup> *Id* at 26.

tax and the physical attachment of those stamps to the instrument in question.<sup>25</sup>

Petitioner has not cited any authority for the proposition that the reference to stamps in Administrative Code §11-2105 is to information printed or stamped in ink on a document rather than to physically affixed stamps.

RPTT Rule §23-08(a) provides that the RPTT can be paid “in cash, or by certified check, money order or draft drawn to the order of the Commissioner of Finance.”<sup>26</sup> The Administrative Code does not contain any general rules regarding when a payment made by a check is considered to have been made. Nor do the laws of New York State (State).

The only specific provision on this point is 20 NYCRR §152.18(b)(1), which provides that, with regard to a payment of any State Personal Income Tax:

“if payment is made in the form of check, money order or cash, and is delivered in person to a district office of the Department of Taxation and Finance, the date on which the check, money order or cash is received will be considered the date of payment unless any check presented for payment is returned dishonored.”

While this provision relates solely to the payment of State Personal Income Tax and has no direct application to the RPTT, it is consistent with the approach taken by federal courts for purposes of determining when federal taxes paid by check are deemed to have been paid.<sup>27</sup> (*Second Nat. Bank of Saginaw v US*, 42 F2d 344 supplementing 39 F2d 759 [Ct Cl 1930], *Lovell Clay Products Co v US*, 190 F Supp 317 [DC WY, 1961].) The judge in *Lovell Clay Products Co, supra*, noted that it would be a hardship for a taxpayer to be held delinquent for a tax because a check delivered to the collection officer by the due date for the tax in question might not be delivered to another IRS office or cashed

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<sup>25</sup> See *Hayutin v CIR*, TC Memo. 1972-127 (US Tax Ct 1972) *affd* 508 F2d 462 (10th Cir 1974). We note that Administrative Code §11-1305.a still calls for the use of physical stamps to be affixed to packages in the case of the New York City Cigarette Tax.

<sup>26</sup> Petitioner concedes that the RPTT in this case was paid by an uncertified check.

<sup>27</sup> Petitioner variously argues that the ALJ erred in citing federal tax authorities and authorities under other State taxes. Petitioner’s Br. at 27, 29. However, Petitioner, itself, cites authorities outside the field of taxation in support of its positions. *Id* at 21-22.

until after the due date through no fault on the taxpayer's part. (*Lovell Clay Products Co*, 190 F Supp 317, 319.)

Petitioner cites two cases in support of its position that the relevant date is the date the check is paid by the drawing bank. The first is *Matter of Tublin*, 1994 WL 109455 NY St Div of Tax Appeals DTA No. 809844, March 24, 1994. That case involved the State Personal Income Tax. Mr. and Mrs. Tublin filed an amended 1980 personal income tax return on December 30, 1986 and later sought a refund. The administrative law judge stated "A copy of [taxpayers'] cancelled check shows that the payment was received on January 2, 1987." The case turned on whether the taxpayers were entitled to a refund of tax because the payment in 1987 was after the last date the 1980 tax could be assessed, which in that case was April 15, 1984.

The second case cited by Petitioner is *Matter of Champion Abstract LLC*, 2008 WL 4843629 NY St Div of Tax Appeals DTA No. 822233, October 30, 2008. That case involved a refund claim for State RETT. The administrative law judge in that case found that the taxpayer "remitted a check . . . dated February 11, 2005, in the amount of \$120,873.00. The check was endorsed on February 25, 2005." The taxpayer in that case filed a refund claim on November 8, 2007, which was denied as untimely having been filed more than two years after the date the tax was paid. The administrative law judge found that the payment date was February 25, 2005.

Petitioner cites both of these cases as support for its position that the relevant payment date under the RPTT should be interpreted to be the date the check is paid by the bank on which it is drawn. We disagree. Neither case makes any reference to the date the drawing bank made payment. The first case merely concludes that the tax was paid on January 2, 1987 without further explanation as to what the administrative law judge meant by "payment". Nor was the exact date of payment relevant as the applicable limitations period had expired over two years earlier. In the second case, the administrative law judge concluded that payment was made on the date the check was endorsed, but endorsement is not the same as payment by the drawing bank. Again, the refund claim was filed several months too late so the exact date of payment was

irrelevant. We note further that both of these cases are State Tax Appeals Tribunal administrative law judge determinations, which are not binding precedent before this Tribunal.<sup>28</sup>

Finally, Petitioner argues that the statute is ambiguous as to what is meant by payment for purposes of the limitations period on refunds and, therefore, the ambiguity must be resolved in Petitioner's favor. (*Am. Cyanamid & Chem. Corp. v Joseph*, 308 NY 259 [1955].) While we do not disagree with the general principle articulated in that case, it is necessary to identify an appropriate interpretation to resolve any such ambiguity. The interpretation proffered by Petitioner, that the date of payment is the date the check is paid by the drawing bank or the date the deed is recorded, would take control of the timely payment of taxes out of the taxpayer's hands and put it in the sole control of the taxing authority. The District Court judge in *Lovell Clay Products Co, supra*, found such an outcome disturbing. (*Lovell Clay Products Co*, 190 F Supp 317, 319.) We are similarly concerned by such an interpretation.

The date of payment of a tax is relevant both to the question of whether a tax is timely paid and to the timeliness of a refund claim. Certainly payment for both refund and deficiency purposes should be interpreted consistently and Petitioner does not suggest otherwise. A taxing authority should not be able to impose interest and penalties for late payment of taxes resulting from delays in the deposit or presentment of a check to the drawing bank caused by the taxing authority's own procedural failures. A taxing authority cannot assert penalties and interest for late payment of a tax when it did not deposit a check, if the taxpayer presents sufficient proof that the check was properly mailed in a timely fashion. (*Matter of Mutual Life Ins. Co. of NY v New York State Tax Commn*, 142 AD2d 41[4th Dept, 1988].)

Administrative Code §11-2116.d provides that:

“If . . . any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of this chapter is, after such period or such date, delivered by United States mail . . . the date of the United

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<sup>28</sup> Tax Law §2010.5.

States postmark stamped on the envelope shall be deemed to be the date of delivery.” (Emphasis added.)

While the payment in the present case was not delivered by United States mail, the above provision makes it clear that a required RPTT payment is considered to have been made when delivered. If delivery does not constitute payment, the above provision serves no purpose with regard to a payment delivered by mail. Treatment of delivery as constituting payment is consistent with 20 NYCRR §152.18(b)(1) regarding payments of State Personal Income Tax by check cited above. Therefore, the date of cancellation of the check or any of the other dates asserted by Petitioner as the payment date are not relevant to when a RPTT payment is considered made. The Parties agree that the check was delivered no later than August 10, 2011. Therefore, we conclude that the RPTT was paid no later than August 10, 2011.

We turn next to the question of when the period “one year from the date of payment” expired. General Construction Law §58 provides:

“The term year in a statute, contract, or any public or private instrument, means three hundred and sixty-five days, but the added day of a leap year and the day immediately preceding shall for the purpose of such computation be counted as one day.”

General Construction Law §20 provides:

“A number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made. . . . The day from which any specified period of time is reckoned shall be excluded in making the reckoning.”

We disagree with the ALJ’s reliance on the Filing Date and Deadline Calculator of Atkinson Baker Court Reporters and rely, instead, on the above provisions. Reading these provisions together, one year from August 10, 2011 (the latest date the RPTT could be considered to have been paid) is determined by counting 365 days starting with August 11, 2011. Thus, one year from August 10, 2011 was Friday, August 10, 2012. The fact that 2012 was a leap year is disregarded as is made clear by General

Construction Law §58. Based on the foregoing, we conclude that the Refund Request filed on August 13, 2012 was time-barred.

Therefore, the ALJ Determination is affirmed and the Notice is sustained.<sup>29</sup>

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

Dated: January 31, 2018  
New York, NY

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Ellen E. Hoffman  
President and Commissioner

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Robert J. Firestone  
Commissioner

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<sup>29</sup> We have considered all of the other arguments of the Parties and find them unpersuasive.