

N.Y. Real Property Law Journal



A publication of the Real Property Law Section
of the New York State Bar Association



Inside

- Donating a Facade Conservation Easement
- Partnerships and § 1031 Exchanges
- Real Property Tax Law § 420-a
- Tax Certiorari
- Loft Law Questions and Answers

Table of Contents

Message from the Outgoing Section Chair.....	4
<i>(David L. Berkey)</i>	
Message from the Incoming Section Chair.....	5
<i>(Leon T. Sawyko)</i>	
The Unforeseen and Unfortunate Consequences of Donating a Facade Conservation Easement.....	7
<i>(Jeremy M. Klausner)</i>	
Partnerships and § 1031 Exchanges: Available Options for Partners and Partnerships	15
<i>(William F. Webster and Pamela A. Michaels)</i>	
Real Property Tax Law § 420-a: Exemption from Real Property Taxation.....	17
<i>(Karen M. Richards)</i>	
Tax Certiorari: Recent Appellate Division Split in Interpreting New York Real Property Tax Law § 727(1).....	26
<i>(Daniel M. Lehmann)</i>	
Important Questions and Answers on the New and Old Rules of the Loft Law	29
<i>(Adam Leitman Bailey and Dov Treiman)</i>	
BERGMAN ON MORTGAGE FORECLOSURES: Borrower Waiver of Counterclaim Enforced	35
<i>(Bruce J. Bergman)</i>	
Scenes from the Real Property Law Section Summer Meeting	36

Tax Certiorari: Recent Appellate Division Split in Interpreting New York Real Property Tax Law § 727(1)

By Daniel M. Lehmann

I. Introduction

A recent Appellate Division, Fourth Department, Real Property Tax Law (RPTL) decision created a Division split concerning the automatic three year tax assessment freeze under RPTL § 727(1) after reducing a tax assessment. The Fourth Department in *Torok Trust v. Town Board of Town of Alexandria*¹ affirmed the trial court and held that a property owner who successfully reduced an assessment for a tax year did not have to bring subsequent reduction challenges for the next three tax years while the initial reduction challenge was pending.² The Third Department (and Second Department) held the opposite.³ Both the Third and Fourth Departments support their conclusions on contrary interpretations of the legislative intent of RPTL § 727.⁴

II. RPTL § 727

RPTL § 727(1) provides that,

[e]xcept as hereinafter provided,...where an assessment being reviewed pursuant to this article is found to be unlawful, unequal, excessive or misclassified by final court order or judgment, the assessed valuation so determined shall not be changed for such property for the next three succeeding assessment rolls prepared on the basis of the three taxable status dates next occurring on or after the taxable status date of the most recent assessment under review in the proceeding subject to such final order or judgment. Where the assessor or other local official having custody and control

of the assessment roll receives notice of the order or judgment subsequent to the filing of the next assessment roll, he or she is authorized and directed to correct the entry of assessed valuation on the assessment roll to conform to the provisions of this section.⁵

III. The Third Department's Interpretation of RPTL § 727

In *Scellen v. Assessor for the City of Glen Falls*, the property owner brought a tax certiorari proceeding under RPTL Article 7 to reduce its 1998 tax year assessment.⁶ The property owner reached a reduction agreement with the City in December 2000 but did not agree on whether RPTL § 727 required a reduction in the unchallenged 1999 through 2001 assessments based on the reduced 1998 assessment. The property owner moved to compel reduction of the 1999 through 2001 assessments. The trial court held that the property owner waived its right to reductions because it failed to commence challenges to those assessments.⁷

The Third Department affirmed, supporting its conclusion on the

statutory scheme underlying RPTL article 7 [that] evinces a clear legislative intent that a separate proceeding be timely commenced to challenge each tax assessment for which relief is sought,⁸ and the legislative history of RPTL 727 gives no indication that the Legislature intended to relieve petitioner of this requirement in the case of assessment rolls established during the

pendency of a prior RPTL article 7 proceeding.⁹

The Third Department recently reaffirmed its *Scellen* holding.

In *Highbridge Broadway, LLC v. Assessor of the City of Schenectady*, the commercial property owner became eligible in 2005 for the 10 year business investment property tax exemption under RPTL § 485-b.¹⁰ The property owner only applied for the exemption in 2008, at which time it was granted. In July 2008, the property owner brought an RPTL Article 7 challenge for an assessment reduction because the assessor undervalued the exemption. The School District was notified but did not appear. In 2011, the trial court found for the property owner and that the property owner was entitled to the exemption from 2008 through 2014. The property owner conceded that it waived the exemption for 2005 through 2007.

Thereafter, the City and County issued refunds to the property owner for previously paid tax years in accordance with the 2011 judgment. The District did not respond. The trial court held that the District did not have to refund for the 2008 tax year because it utilized the 2007 pre-exemption assessment roll but that it did have to refund for 2009 through 2011 because the property owner was not required to file an application every year to apply the exemption.¹¹

The Third Department stated that the issue was "whether [the property owner] was required to annually commence separate proceedings while its 2008 challenge was pending in order for the court's 2011 judgment increasing the RPTL 485-b exemption to be binding on the subsequent years."¹² The District relied on *Scellen* that a separate annual challenge must be brought and the Third Department

agreed. It reasoned that “property owners must preserve their right to relief through annual challenges to the assessment pending a determination of the original assessment challenge. Since petitioner failed to do so here, Supreme Court lacked jurisdiction to direct the District to refund payments made based on the 2009 through 2011 assessments.”¹³

IV. The Second Department’s Concurrence with the Third Department

It seems that the Second Department agrees with the Third Department.

In *Jonsheer Realty Corp./Melba, Inc. v. Board of Assessors*, the property owner brought RPTL Article 7 proceedings challenging the assessments for tax years 1998 through 2006.¹⁴ The trial court directed a reduction of the assessments and refund of overpayments. The Second Department affirmed in 2010.

The property owner then brought a Civil Practice Law and Rules (CPLR) Article 78 proceeding to force the assessor to calculate transition assessments under RPTL § 1805(3) for the 2007 tax year and to refund any overpayments triggered by the granted 2006 assessment reduction. The trial court granted the requested relief.¹⁵

The Second Department reversed and held that the property owner was time-barred because it should have properly brought an RPTL Article 7 challenge right after the filing of the final assessment roll in 2007, which has a 30-day statute of limitations, and not the CPLR Article 78 challenge after appellate affirmance, which has a four-month statute of limitations.¹⁶

The property owner argued that the four-month statute of limitations applied because recalculation of the 2007 assessment under RPTL § 1805 only became necessary after the trial court reduced the 2006 assessment and the Second Department affirmed in 2010.¹⁷

The Second Department disagreed and, citing *Scellen*, stated that it found the Third Department’s analysis to be persuasive. It reasoned that because the property owner sought an assessment reduction for 2006, it knew or should have known that if it was successful, it would be entitled to transition assessments in the following years and that judicial resolution could take several years. The property owner should have preserved its challenge to the 2007 assessment by exhausting its administrative remedies by filing timely, annual grievances with the assessing authorities and if it did not receive the requested relief, to then timely bring a separate RPTL Article 7 proceeding to challenge those assessments no later than 30 days after the filing of the final assessment roll. Because it failed to do so, the property owner was not entitled to its requested relief.¹⁸

V. The Fourth Department’s Interpretation of RPTL § 727

However, the Fourth Department reached the opposite conclusion.

In *Torok Trust v. Town Board of Town of Alexandria*, the property owner brought a tax certiorari proceeding in July 2007 pursuant to RPTL Article 7 to reduce the tax assessment on its property for the 2007 tax year.¹⁹ The School District was served but did not intervene. The property owner reached an agreement with the Town in January 2009 to reduce the assessment for the 2007 tax year. The parties agreed that RPTL § 727 applied to the settlement and that, if the property owner had previously paid any taxes levied prior to the settlement order, the District would refund the excess based on the reduced assessment. The District issued a refund for the 2007 school tax year but not for the 2008 school tax year. The property owner moved to compel issuance of the 2008 refund and the District argued that the property owner never brought a tax certiorari proceeding for the 2008 tax year. The trial court held for the property owner.

The Fourth Department considered the plain language of the statute, which imposes a three year assessment freeze where an “order or judgment” determines that the assessment is “unlawful, unequal, excessive or misclassified.”²⁰ The court reasoned that the parties’ reduction stipulation had the same effect as a judicial determination. Therefore, the freeze applied to next three succeeding assessment rolls—the 2008 through 2010 tax years—which must have the same assessment as the tax year under review.²¹

Further, the court noted that RPTL § 727(1) states that where the assessor received the order or judgment after the next assessment roll has already been filed, the assessor must correct the assessed valuation and then the property owner may apply for a refund under RPTL § 726(1)(c).²² Therefore, there was an automatic assessment reduction for the 2008 tax year without the property owner bringing a separate reduction challenge.²³

The court supported its conclusion with the legislative intent of RPTL § 727 to “reduce the need for [annually] repeated litigation in challenging tax assessments.”²⁴

VI. A Wrinkle in the Third Department’s Position?

The Third Department’s interpretation of the legislative history and intent of RPTL § 727 in *Rosen v. Assessor of the City of Troy*²⁵ is seemingly at odds with the Third Department’s interpretation in *Scellen*,²⁶ and instead is in accord with the Fourth Department’s interpretation in *Torok*.²⁷

In *Rosen*, the issue was whether RPTL § 727 included stipulations settling an RPTL Article 7 assessment challenge when there was no express trial court finding that the challenged assessment was “unlawful, unequal, excessive or misclassified.”²⁸

The Third Department in *Rosen* held that the Legislature’s intent included stipulations and was not “nar-

rowly restricted to those instances in which an assessment is expressly and judicially determined to be 'unlawful, unequal, excessive or misclassified,' as this interpretation would eviscerate the statute's intent."²⁹

The Third Department in *Rosen* explained the statute's intent. "The legislative history of RPTL 727, enacted in 1995, indicates that its purpose was to prevent assessing units from increasing judicially reduced assessments in succeeding years, to prevent taxpayers from perpetually challenging their assessments and to spare all parties the time and expense of repeated court intervention."³⁰

VII. Conclusion

Time will tell whether the First Department will join the RPTL § 727(1) fray. Time will also tell whether the Court of Appeals will resolve this split. Until this disparity is resolved, the cautious tax certiorari practitioner in the First, Second, Third, and even Fourth Department jurisdictions should timely file real property tax assessment reduction grievances and challenges every tax year, regardless of whether or not the property owner is in the process of achieving or has achieved assessment reductions for certain tax years by stipulation or judicial order. No one has ever lost a real property tax assessment reduction proceeding because of filing too often.

Endnotes

- 128 A.D.3d 97, 7 N.Y.S.3d 748 (4th Dep't 2015).
- Torok Trust*, 128 A.D.3d at 99-101, 7 N.Y.S.3d at 750-51.
- See Scellen v. Assessor for the City of Glen Falls*, 300 A.D.2d 979, 979-81, 753 N.Y.S.2d 536, 537 (3d Dep't 2002); *see also Jonsher Realty Corp./Melba, Inc. v. Board of Assessors*, 118 A.D.3d 787, 789-90, 988 N.Y.S.2d 203, 206 (2d Dep't 2014).
- See Scellen*, 300 A.D.2d at 980, 753 N.Y.S.2d at 537 (holding that the statutory scheme underlying RPTL article 7 evinces a clear legislative intent that a separate proceeding be timely commenced to challenge each tax assessment for which relief is sought).
- N.Y. REAL PROP. TAX LAW § 727(1) (McKinney 2015).
- Scellen*, 300 A.D.2d at 980, 753 N.Y.S.2d at 537; cf. *Wagner & Stoll, L.L.C. v. City of Schenectady*, 107 A.D.3d 1225, 1228-29, 967 N.Y.S.2d 238, 241-42 (3d Dep't 2013). ("Although no RPTL article 7 petition was filed for 2011, the parties' stipulation reflected their agreement that the reduced assessment would apply to the two years that were the subject of the RPTL article 7 petitions as well as the three-year period thereafter.")
- Scellen*, 300 A.D.2d at 980, 753 N.Y.S.2d at 537.
- Id.* (citing N.Y. RPTL §§ 702, 704, 706; N.Y.C.C.R. tit. 22, ch. II, § 202.59(d)(2) (McKinney 2015)).
- Scellen*, 300 A.D.2d at 980, 753 N.Y.S.2d at 537.
- Highbridge*, 124 A.D.3d at 1193, 2 N.Y.S.3d at 680.
- Id.* at 1194, 2 N.Y.S.3d at 681.
- Id.*
- Id.* at 1195, 2 N.Y.S.3d at 681-82.
- 118 A.D.3d 787, 787, 988 N.Y.S.2d 203, 205 (2d Dep't 2014); *see also MRE Realty Corp. v. Assessor of the Town of Greenburgh*, 8 Misc.3d 1027(A), 806 N.Y.S.2d 446 (Sup. Ct. Westchester Cnty. 2005), *aff'd*, 33 A.D.3d 802, 822 N.Y.S.2d 629 (2d Dep't 2006) (affirming Supreme Court ruling that under moratorium statute property owner was not entitled to reductions and refund of excess real property taxes).
- Jonsher Realty Corp.*, 118 A.D.3d at 787, 988 N.Y.S.2d at 205.
- See id.* at 789, 988 N.Y.S.2d at 206.
- Id.* at 788-89, 988 N.Y.S.2d at 206.
- Although distinguishable on the facts, it is arguable whether the dictum in *ELT Harriman, LLC. v. Assessor of Town of Woodbury* is consistent with the Third or Fourth Department. 128 A.D.3d 201, 208, 209, 210-11, 7 N.Y.S.3d 422, 426, 427, 428 (2d Dep't 2015) (citing legislative history of RPTL § 727).
- 128 A.D.3d 97, 98, 7 N.Y.S.3d 748, 749 (4th Dep't 2015).
- Id.* at 99, 7 N.Y.S.3d 750.
- Torok Trust*, 128 A.D.3d at 99-100, 7 N.Y.S.3d at 750.
- Id.* at 100, 7 N.Y.S.3d 748 (referencing N.Y. REAL PROP. TAX LAW § 726(1)(C) (McKinney 2015). An owner may only apply for a tax refund under this statute after a final order or judgment has been received by the assessor and the assessor has rendered a new assessment of the property.)
- Id.* at 100, 7 N.Y.S.3d at 750.
- Id.* at 100, 7 N.Y.S.3d at 750-51.
- See* 261 A.D.2d 9, 12-13, 699 N.Y.S.2d 787, 790 (3d Dep't 1999).
- See Scellen v. Assessor for the City of Glen Falls*, 300 A.D.2d 979, 980-81, 753 N.Y.S.2d 536, 537 (3d Dep't 2002).
- See Torok Trust v. Town Bd. of Town of Alexandria*, 128 A.D.3d 97, 99-100, 7 N.Y.S.3d 748, 750-51 (4th Dep't 2015).
- Rosen*, 261 A.D.2d at 12, 699 N.Y.S.2d at 789.
- Id.* at 12, 699 N.Y.S.2d at 790.
- Id.*

Daniel M. Lehmann practices Eminent Domain and Tax Certiorari Law and has authored articles in the *New York Law Journal* on Eminent Domain. He is a graduate of The George Washington University Law School. He can be reached at NYcondemnation@gmail.com.