New York City Tax Appeals Tribunal

In the Matter of PATTERSON, BELKNAP, WEBB & TYLER, LLP Petitioner.	:	DECISION TAT (E) 00-8 (CR)

Patterson, Belknap, Webb & Tyler, LLP ("Petitioner") filed an Exception to a Determination of an Administrative Law Judge ("ALJ") dated September, 13, 2005 (the "Determination"), sustaining a Notice of Determination (the "Notice") issued by the New York City Department of Finance (the "Department") that asserted a New York City Commercial Rent Tax ("CRT") deficiency in the amount of $15,765.76 plus interest and penalties for the period June 1, 1996 through May 31, 1997 (the "Tax Period").

Petitioner appeared by Henry P. Bubel, Esq., of Petitioner, and the Commissioner of Finance of the City of New York (the "Commissioner" or "Respondent") appeared by Frances J. Henn, Esq., Senior Counsel, New York City Law Department. The parties filed memoranda or letter briefs and the Tribunal heard oral argument.

Petitioner is a law firm, presently having its offices at 1133 Avenue of the Americas in the City of New York (the "City").[1]

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

During the Earlier Period, Petitioner filed CRT returns and paid CRT on the rent paid to RC.

Pursuant to the lease between Petitioner and RC (the "RC Lease"), base rent for the Earlier Period included amounts representing Petitioner's proportionate share (based on a square footage formula) of RC's New York City Real Property Tax ("RPT") liability. Petitioner received annual Escalation Statements that included charges for Petitioner's share of RC's RPT.

Article 24 of the RC Lease provided that "[i]n case the Real Estate Taxes for any Computation Year . . . shall be reduced after a payment shall have been made . . . the Landlord shall refund . . . to the Tenant an amount equal to [the Tenant's proportionate share]."

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

[1]Petitioner does not take exception to any of the ALJ's Findings of Fact, which, although amplified and paraphrased in part, generally are adopted for purposes of this Decision except with respect to the ALJ's Finding of Fact 23, which is modified as noted *infra*. Only those findings germane to this decision have been restated herein.

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

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

RC protested RPT assessments that it had paid for the Earlier Period and, in 1996, received a refund of RPT.

IBJ Schroder Bank & Trust Company, on behalf of RC, issued to Petitioner a check dated August 1, 1996, in the amount of $272,302.81, representing Petitioner's proportionate share of RC's RPT refund for the Earlier Period (the "RC RPT Refund").

Petitioner filed a quarterly CRT return for the period June 1, 1996 through August 31, 1996 (the "CR-Q"), reporting the following "Gross Rent Paid" to 1133 Corp.: a "basic rent payment" of $864,218.08 and, on the line designated "real estate tax escalation," a deduction of $272,302.81. That deduction represented the RC RPT Refund. With other adjustments not relevant to this proceeding, Petitioner reported $633,982.32 as "Total Gross Rent Paid" for the quarter. Applying the statutory 25% rent reduction, the "Total Base Rent" reported for the quarter was $475,486.74, and $28,529.22 was reported as CRT due.

On a worksheet submitted with the CR-Q, Petitioner calculated a "Total Rent Payment" of $22,728.70 for the month of August 1996, which represented the fixed rents reported for the month, $279,827.76, reduced by the RC RPT Refund ($272,302.81), identified on the return as a "Rockefeller Center Rent Escalation Refund," and increased by miscellaneous items in the amount of $15,203.75.

None of the evidence submitted indicates that for August 1996 Petitioner paid 1133 Corp. an amount less than that provided for in the 1133 Lease.

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

In 1999, the Department audited Petitioner's books and records for purposes of reviewing its CRT liability for the period June 1, 1995 through May 31, 1998. The Department's auditor determined that Petitioner was not liable for additional CRT for the period June 1, 1995 through May 31, 1996, or for the period June 1, 1997 through May 31, 1998, and the CRT returns for those periods were accepted as filed. However, the auditor calculated additional CRT due for the Tax Period in the amount of $15,765.76. This deficiency resulted principally from the disallowance of the deduction claimed for the RC RPT Refund.

Respondent issued the Notice, dated May 28, 1999, to Petitioner for $15,765.76 in tax, plus penalties and interest.

Petitioner filed a request for a conciliation conference, dated June 2, 1999, with the Department's Conciliation Bureau.

The Department's Conciliation Bureau issued a Conciliation Decision, dated November 30, 1999, discontinuing the conciliation proceedings and affirming the Notice on the grounds that Petitioner expressly disagreed with the Conciliation Bureau's proposed resolution.

Petitioner filed a Petition, dated February 17, 2000, protesting the assessment of all but $201.66 of the additional CRT and the assessment of interest and penalties.

At the hearing on June 22, 2004, Respondent's representative permitted a previously disallowed rent concession credit in the amount of $73,568.50, reducing the principal amount of the asserted CRT deficiency by $3,310.50.

On June 19, 2000, a Notice of Adjournment Sine Die (the "Adjournment Notice") was issued and this matter was placed on a *sine die* calendar pending a final determination in Matter of Fried, Frank, Harris, Shriver & Jacobson, TAT(E) 97-16 (CR), ("Fried Frank"), which was then pending before the Appeals Division of this Tribunal. The Adjournment Notice stated that the parties requested the adjournment because "the outcome [of Fried Frank] … will be determinative of all or some of the issues raised by the Petition." This matter was returned to the hearing calendar following the decision of the Appeals Division of this Tribunal in Fried Frank dated January 23, 2003.[2]

[2] We have modified the first sentence of this finding of fact, ALJ's Finding of Fact 23, which originally read: "In 2000, at the written request of the parties, a Notice of Adjournment Sine Die was issued and this matter was placed on a *sine die* calendar pending the final determination in *Matter of Fried, Frank, Harris, Shriver & Jacobson* which was

The ALJ concluded that Petitioner was not entitled to deduct the RC RPT Refund in determining its base rent for the Tax Period and that the expiration of the limitations period for filing a CRT refund claim for the Earlier Period did not deprive Petitioner of due process of law because Petitioner had the option of filing a timely protective refund claim. The ALJ further concluded that the Adjournment Notice did not require Respondent to give Petitioner the same relief as was granted to the taxpayer in Fried Frank.

Petitioner takes the position that it overpaid its CRT liability for the Earlier Period but the fact and amount of the overpayment were unknown until it received the RC RPT Refund in 1996, at which time the statutory period within which it could file a CRT refund claim for the Earlier Period had expired. Therefore, the appropriate remedy for that overpayment is to allow Petitioner to deduct the RC RPT Refund in calculating its base rent subject to CRT for the Tax Period. Petitioner takes exception to the ALJ's conclusion that it could have filed a timely protective refund claim for the Earlier Period.

Petitioner also takes exception to the ALJ's interpretation of the terms of the Adjournment Notice and argues that the Adjournment Notice represents an agreement between the parties that Petitioner would be entitled to the same remedy as the taxpayer in Fried Frank received if that taxpayer prevailed. Therefore, Petitioner should be permitted to reduce its base rent subject to the CRT for the Tax Period by the amount of the RC RPT Refund.

The Commissioner responds arguing that the ALJ properly concluded that the appropriate remedy for Petitioner was to file a protective refund claim for CRT for the

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then pending before this Tribunal." Notwithstanding the ALJ's finding, there is no evidence in the Record indicating that the parties requested an adjournment in writing.

Earlier Period and disputes Petitioner's claim that there was any stipulation or agreement between the parties to be bound by the outcome of Fried Frank and Petitioner's claim that the Adjournment Notice represents any such stipulation or agreement.

For the following reasons, we sustain the Deficiency but conclude that Petitioner is not liable for any penalties.

Section 11-702.a(1) of the Administrative Code of the City of New York (the "Code") imposes the CRT on a tenant's "base rent" for the year. Code section 11-701.7 defines "base rent" as the "rent paid for each taxable premises by a tenant to his or her landlord…." "Rent" is defined in Code section 11-701.6 as:

> The consideration paid or required to be paid by a tenant for the use or occupancy of premises, valued in money, whether received in money or otherwise, including all credits and property or services of any kind and including any payment required to be made by a tenant on behalf of his or her landlord for real estate taxes, water rents or charges, sewer rents or any other expenses (including insurance) normally payable by a landlord who owns the realty other than expenses for the improvement, repair or maintenance of the tenant's premises.

Code section 11-701.5 defines "Taxable premises" as "[a]ny premises in the city occupied, used or intended to be occupied or used for the purpose of carrying on or exercising any trade, business, profession, vocation or commercial activity…." The Department's rules governing the CRT[3] (the "CRT Rules") define "premises" as "any real property or part thereof, and any structure thereon or space therein." 19 RCNY §7-01.

[3] 19 RCNY Ch. 7.

The applicable authorities clearly indicate that the CRT applies separately to each premises occupied by a tenant.[4] The CRT Rules provide that if a person occupies two or more locations in the same premises, all of the rents paid for all the locations in the same premises are deemed to be rent for "one taxable premises" for purposes of filing returns and paying the CRT. 19 RCNY §7-01.

Code section 11-705 provides that for tax periods beginning on and after June 1, 1995 and ending on or before May 31, 1997, no annual return is required from a tenant "with respect to *taxable premises* if (1) the tenant's rent for *such premises*" does not exceed $15,000 for the tax period and "(2) in the case of a tenant *who has more than one taxable premises*, the aggregate rents for *all such premises*" do not exceed $15,000 for the tax period.[5] (Emphasis added.)

Code Section 11-702.b states "[n]othing contained in this chapter shall be deemed to require payment of a double or multiple tax pursuant to this chapter on any part of any taxable premises." The CRT Rules governing the deduction for rents received from a subtenant amplify this provision providing that:

> …[W]here a tenant sublets the entire taxable premises to another person who is liable for payment of the tax, such tenant is not required to pay the tax on the amount of rent paid to him by the subtenant. *This section shall not be construed as permitting*

[4] *Compare* Code section 11-704.a(5), which exempts from the CRT any tenant whose CRT liability "with respect to *all* taxable premises used by the tenant" is not more than one dollar. (Emphasis added.)

[5] For tax periods beginning on or after June 1, 2001, that section similarly provides that no annual return is required "with respect to *any taxable premises* if (1) the tenant's rent for *such premises*, determined without regard to any deduction from or reduction in rent or base rent allowed by this chapter, does not exceed two hundred thousand dollars for the tax year…." (Emphasis added.)

base rent of a tenant for one taxable premises to be reduced by deducting rents received by him for another taxable premises of which he is also a tenant."[6] (Emphasis added.)

In Matter of Orion Limited Partnership, TAT (E) 93-31 (CR) (May 23, 1995), this Tribunal ruled that, for CRT purposes, a tenant under a ground lease was entitled to deduct the amount of rent received from a subtenant of the building constructed on the leased parcel of land, but not in excess of the taxpayer's own rent paid under the ground lease for the same premises. This Tribunal ruled that to allow a deduction in excess of the sublessor's own rent would improperly permit a taxpayer to deduct rent received from a subtenant of one premises against its base rent for other premises. *Id.* n.5. Thus, under the statute, CRT Rules and applicable case law, the taxable base rent for one premises occupied by a tenant is determined without regard to rents paid or deductions allowable with respect to other premises occupied by the same tenant.

Petitioner relies on Fried Frank as authority for its position that in determining its base rent subject to the CRT for the Tax Period as a tenant of premises rented from 1133 Corp., it should be permitted to deduct amounts refunded to it by RC, an unrelated prior landlord under a terminated lease for other premises. The facts of Fried Frank are clearly distinguishable from those in the present case. Fried Frank involved a single lease for one premises under which the landlord could apply the amount refundable to the tenant for its share of a refund of the landlord's RPT against the next installment of rent due from the tenant. By contrast, the RC Lease did not permit Petitioner to apply its share of any RPT refund received by RC toward Petitioner's rent due under the RC Lease; only a refund was provided for. Moreover, Petitioner was no longer a tenant under the RC Lease at the time the RC RPT Refund was received.

[6] 19 RCNY §7-02.

The 1133 Lease also did not provide for any application against rent due under that lease for Petitioner's share of any RPT refund that 1133 Corp. may have received nor did it provide for any credit against rent due from Petitioner for Petitioner's share of any RPT refund to which Petitioner might be entitled under any other lease with any other landlord. The 1133 Lease and the RC Lease covered different premises leased from different landlords. Petitioner does not dispute that it paid to 1133 Corp. the full amount of rent required to be paid under the 1133 Lease for the Tax Period nor does Petitioner contend that it could have reduced the amount it was required to pay to 1133 Corp. by the RC RPT Refund.

Petitioner's reliance on Fried Frank is misplaced. In Fried Frank, this Tribunal concluded that the taxpayer should have been permitted to reduce the amount of base rent on which it paid CRT for the period June 1, 1992 through May 31, 1993 by the amount of a net rent rebate received from its landlord as a result of RPT refunds received by the landlord for earlier periods because, otherwise, the tenant would be required to pay double CRT on the same rent for the same taxable premises, a result contrary to the statute. *See*, Code §11-702.b. However, disallowing Petitioner's deduction from its base rent for the premises at 1133 Avenue of the Americas for the Tax Period in the amount of the RC RPT Refund received with respect to the premises at 30 Rockefeller Plaza for the Earlier Period does not result in Petitioner paying double CRT on the same rent for the same taxable premises. Petitioner has not established that without the deduction, it will pay double CRT on its rent paid for its premises at 1133 Avenue of the Americas.

The Commissioner does not dispute that Petitioner has overpaid its CRT liability for the Earlier Period for the premises at 30 Rockefeller Plaza. However, we agree with the ALJ that Petitioner's only remedy for that overpayment was to file a protective refund claim

within the applicable limitations period. Petitioner is in the position of the "Departed Tenant" described in Fried Frank, (a tenant that was no longer renting or occupying the premises in question at the time the RPT refund was received from the landlord of those premises.) In that decision, we noted that a Departed Tenant would not have access to the same remedy provided to the taxpayer in that case but limiting a Departed Tenant to the remedy of a protective refund claim was reasonable.[7]

Petitioner has argued that the ALJ erred when she stated that during the Earlier Period, the Department had internal procedures under which Petitioner could have filed a protective refund claim.[8] Petitioner bases its argument in part on Mr. Bubel's testimony that no such procedures existed and that he knew of taxpayers who had attempted to file protective refund claims for CRT that were rejected.[9] However, Mr. Bubel did not substantiate his testimony with affidavits or other evidence regarding those other taxpayers' efforts. In the absence of any such evidence, we do not find Mr. Bubel's testimony persuasive.

Mr. Bubel acknowledged in his testimony that he knew the remedy of a protective refund claim was available in the federal income tax area notwithstanding the absence of any provision for such claims in the Internal Revenue Code.[10] Mr. Bubel further acknowledged that protective refund claims were available in New York State.[11] The New York State Tax Appeals Tribunal decision in Union Carbide Chemicals & Plastics Company, Inc., DTA No.

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[7] *See*, Fried Frank at 11, 18.

[8] Determination at 8, citing Fried Frank.

[9] Transcript, at 16, 30. At the hearing, Petitioner was represented by Terence Dougherty, Esq. of Petitioner and by Mr. Bubel, who also was the sole witness for Petitioner.

[10] Transcript, at 27.

[11] Transcript at 23.

806619 (September 2, 1993), supports the ALJ's determination that protective refund claims were recognized in New York for excise taxes during the Earlier Period. In that case, a taxpayer had paid New York Real Property Transfer Gains Tax ("Gains Tax") on its gain from a sale of land, buildings and improvements. The taxpayer filed a protective Gains Tax refund claim while it protested an assessment of New York Sales Tax on certain property involved in that same transaction.

Petitioner points to Finance Memorandum 00-8 (October 23, 2000) as evidence of the Department's lack of protective refund procedures during the Earlier Period. The Finance Memorandum provides that, effective for tax periods beginning on and after June 1, 2000, the filing of the annual CRT return is deemed to constitute a protective refund claim for the tax period with respect to possible refunds of RPT escalation payments reported on that return. Petitioner argues that the Department's establishment of that automatic protective refund policy in 2000 substantiates his claim that the Department had no protective refund policy prior to the issuance of that Finance Memorandum. While the Finance Memorandum clearly establishes a new procedure for *automatic* protective refund claims, the creation of a new procedure does not imply that prior to that time taxpayers were precluded from filing such claims on their own initiative or that the Department lacked procedures for processing such claims.

In Fried Frank, this Tribunal found that the Department had procedures for processing protective refund claims for income and excise taxes, including the CRT. Petitioner relies heavily on that decision as support for its primary argument in the present case and argues that it entered into an agreement with Respondent to be bound by the final outcome in that case. Thus, Petitioner should be presumed to be aware of our finding in Fried Frank with respect to the Department's protective refund procedures. Nevertheless, Petitioner has not

introduced any evidence, other than Mr. Bubel's self-serving testimony, to support its view that no such procedures existed. Under the circumstances, we are authorized under New York law to take judicial notice of our finding in Fried Frank that the Department had procedures for processing protective refund claims for CRT during the Earlier Period. Sangirardi v. State of New York, 205 AD2d 603 (2nd Dept., 1994). We therefore, sustain the ALJ's determination that Petitioner could have filed a protective refund claim for the Earlier Period.

As noted above, Petitioner argues that the Commissioner expressly agreed that Petitioner would be entitled to the same remedy as was provided to the taxpayer in Fried Frank should that taxpayer prevail. Petitioner argues that the Adjournment Notice is evidence of that agreement. The Adjournment Notice states that the parties agreed to adjourn the matter "as there is a matter pending before the Tax Appeals Tribunal, the outcome of which will be determinative of all or some of the issues raised by the Petition." The parties did not sign the Adjournment Notice; only the ALJ's signature appears. Moreover, the Record contains no written correspondence from either party regarding the adjournment of this matter pending the outcome of Fried Frank. In his testimony, Mr. Bubel stated that he had exchanged faxes with the then representative for the Commissioner, David Steiner, Esq., Assistant Corporation Counsel, regarding adjourning this matter.[12] However, Mr. Bubel did not provide copies of that correspondence. Petitioner's decision not to present copies of those faxes permits us to draw a negative inference from their absence. Interstate Circuit, Inc. v. U.S., 306 U.S. 208 (1939); Prince, Richardson on Evidence, 11th Ed., §3-139. Therefore, based on the Record, we are not persuaded that the above-quoted portion of the Adjournment Notice reflects an understanding between the parties on any point other than

[12] Transcript, at 23.

that this matter was to be adjourned to an unspecified date pending the conclusion of Fried Frank.

The Department asserted negligence penalties under Code section 11-715(d) equal to 5% of the deficiency plus 50% of the interest payable on that deficiency. Those penalties apply if any part of the underpayment is due to negligence or intentional disregard of the law or rules. Although there are no Department rules defining negligence or intentional disregard of the Code and rules, the federal law related to similar penalties under the Internal Revenue Code ("IRC") provides guidance. Under IRC section 6662(c) "[n]egligence includes any failure to make a reasonable attempt to comply with the provisions of [the IRC]." Treasury Regulation section 1.6662-3(b)(1) defines "negligence" to include any "failure to make a reasonable attempt to comply with the provisions of the internal revenue laws or to exercise ordinary and reasonable care in the preparation of a tax return." The courts have elaborated on these definitions: "[n]egligence is lack of due care or failure to do what a reasonable and ordinarily prudent person would do under the circumstances." Neely v. Commissioner, 85 T.C. 934, 947 (1985), *citing* Marcello v. Commissioner, 380 F.2d 499, 506 (5th Cir. 1967).

In the present case, there is no evidence that during the Earlier Period there were any rules, case law or other published guidance readily available to taxpayers addressing the issue of how to handle refunds of amounts paid to a landlord that are received after the limitations period for a refund of CRT has expired. Thus, Petitioner cannot be said to have intentionally disregarded any applicable law or rules. Although we have concluded that Petitioner's interpretation of the law and rules in preparing its CRT return for the Tax Period was erroneous, that does not mean that Petitioner was negligent in deducting the RC RPT Refund in computing its base rent for the Tax Period. In Fried Frank, this Tribunal concluded that the taxpayer could reduce its base rent by the amount of an RPT refund received under the

same lease relating to an earlier period. Although Petitioner could not have relied on that decision in preparing its return for the Tax Period, the position that Petitioner took on its return, while ultimately found to be wrong, was not so far removed from the position ultimately sustained in Fried Frank as to be considered negligent. Therefore, we find that Petitioner is not subject to the negligence penalties under Code section 11-715(d).

Accordingly, the Determination is affirmed in part and modified in part.[13] The deficiency is sustained, except with respect to the ALJ's Finding of Fact 22 as noted in the Determination, and Petitioner is not liable for penalties under Code section 11-715(d).

Dated: July 7, 2006
New York, New York

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GLENN NEWMAN
Commissioner and President

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ELLEN E. HOFFMAN
Commissioner

[13]We have considered all of the other arguments raised by Petitioner and find them unpersuasive.