New York City Tax Appeals Tribunal

In the Matter of RHM-88, LLC, Petitioner.	DECISION TAT (E) 01-23(RP)

RHM-88, LLC (the "Petitioner"), filed an Exception to a Determination of an Administrative Law Judge ("ALJ") dated January 11, 2006 (the "ALJ Determination"). The ALJ Determination sustained a Notice of Determination issued July 13, 2001 by the New York City Department of Finance (the "Department") assessing a deficiency of New York City Real Property Transfer Tax ("RPTT") in the amount of $1,373,586.16, including interest, with respect to a transaction that took place on July 23, 1997 (the "Transfer Date"). Petitioner appeared by Richard A. De Palma, Esq. of Baker & McKenzie, LLP. The Commissioner of Finance of the City of New York (the "Commissioner" or the "Respondent") was represented by George P. Lynch, Esq., Assistant Corporation Counsel, New York City Law Department. The Parties filed briefs and oral argument was held before the Tribunal. Commissioner Robert J. Firestone did not participate in this Decision.

Petitioner is a limited liability company organized and existing under the laws of the State of Colorado. Petitioner was formed to acquire and operate the United Nations Plaza

Hotel[1] (the "Hotel") located in New York City (the "City").[2] Petitioner is an affiliate of Regal Hotel Management, Inc. ("Regal").[3]

The Hotel consists of several floors located contiguously in each of two adjacent buildings described in the Record as two towers. Each tower is situated on a separate parcel of land in the City and each has a different street address with the same block but a different lot designation on the City's tax map.

One tower has a street address of 787/793 1st Avenue and also is known as One U.N. Plaza (the "First Tower" or "One U.N. Plaza"). The First Tower is 39 stories. The First Tower formerly had a tax map designation of Manhattan Block:1337, Lot:20, County of New York, State of New York. In connection with the transaction at issue, the First Tower was converted to a condominium having two units pursuant to a condominium declaration dated June 5, 1997 (the "Condominium Declaration"). One condominium unit consists of the portions of the First Tower forming part of the Hotel (the "Hotel Unit") and the other condominium unit includes office space on the remaining floors and common areas of the First Tower. The Hotel Unit has a tax map designation of Manhattan Block:1337, Lot:1101, County of New York, State of New York.[4] The second unit has a tax map designation of Manhattan Block:1337, Lot:1102, County of New York, State of New York.

[1] The Hotel also is referred to in the Record as the "U.N. Plaza Hotel."

[2] The ALJ's Findings of Fact, although amplified and paraphrased in part, generally are adopted for purposes of this Decision except as noted below. Certain Findings of Fact not germane to this Decision have not been restated and can be found in the ALJ Determination. Petitioner takes exception to a number of Findings of Fact made by the ALJ. Except as noted below, we find that the ALJ's Findings of Fact accurately reflect the Record.

[3] Regal is variously described in the Record as the managing member of Petitioner and as the managing member of Regal UN Plaza LLC, the managing member of Petitioner.

[4] ALJ Finding of Fact 3 and the stipulation dated April 14, 2004 between the Parties (the "Stipulation") state that the lot designation for the First Tower is Lot 1101. We have amplified and modified that Finding of Fact to reflect the correct lot numbers for the First Tower both prior to, and following, its conversion to a condominium to more accurately reflect the Record.

The street address for the other tower is variously reflected in the Record as 322 East 45th Street and 323 East 44th Street or 322/334 East 45th Street and is also known as Two U.N. Plaza (the "Second Tower" or "Two U.N. Plaza").[5] The Second Tower has a tax map designation of Manhattan Block:1337, Lot:14, County of New York, State of New York. The Second Tower is 40 stories.

The land and improvements located at One U.N. Plaza and the building located at Two U.N. Plaza were owned by the United Nations Development Corporation ("UNDC") and/or the City for all relevant periods prior to the transactions with Petitioner. The land located at Two U.N. Plaza was owned by a New York general partnership, Bishop Trading Company ("Bishop"), for all relevant periods.

UNDC is a New York public benefit corporation, created by the United Nations Development Corporation Act (Ch. 345, Laws of New York 1968; McKinney's Unconsolidated Laws, Title 27-A, Ch. 1). UNDC is involved in the development and operation of several parcels of land located near the United Nations headquarters in the City. Pursuant to an agreement dated August 1, 1972, the City entered into a lease pursuant to which UNDC leased from the City the land and improvements at One U.N. Plaza for a term of 99 years (the "1972 City Lease") and agreed to construct the improvements that became the First Tower.

Pursuant to an agreement dated August 1, 1980, Bishop leased the land and improvements located at Two U.N. Plaza (the "Bishop Parcel") to UNDC for 99 years ending on July 31, 2079 (the "Bishop Lease"). The Bishop Lease required UNDC to construct a

[5] The Stipulation and the Sublease Return (defined *infra* p. 7) refer to the street address of the Second Tower as 332/334 East 45th Street. However, the Bishop Lease and the 1981 Agreement (defined *infra* pp. 3 and 4, respectively), which predate the Sublease (defined *infra* p. 6), show a street address of 322 East 45th Street and 323 East 44th Street. The Sublease contains only the street address Two U.N. Plaza.

new building on the Bishop Parcel within five years after completion of the demolition of the building located on the Bishop Parcel at the inception of the Bishop Lease. The building subsequently constructed is the Second Tower.

The Bishop Lease contemplates that the building to be constructed on the Bishop Parcel would be operated in conjunction with and could be connected to the building located at One U.N. Plaza but requires the building to be constructed on the Bishop Parcel to be capable of being operated independently. Art. VIII, section 2, of the Bishop Lease. Further, for the duration of the Bishop Lease, "title to any New Building to be constructed by [UNDC] . . . shall remain in" UNDC, however, at the end of the lease term, the building to be constructed becomes the property of Bishop as landlord "without payment or offset." Art. XIII, section 1, of the Bishop Lease.

Simultaneously with entering into the Bishop Lease, Bishop also entered into an agreement with UNDC (the "Option Agreement") granting UNDC an option (the "Bishop Option") to purchase the land and structures extant on the Bishop Parcel at the start of the Bishop Lease (the "Option Premises") at their fair market value as of the date the Bishop Option is exercised. The Bishop Option specifically excluded the value of any subsequent structures constructed by UNDC on the premises (*i.e.*, the Second Tower).

On or about May 8, 1981, UNDC and the City entered into an indenture pursuant to which UNDC conveyed to the City its rights to the Bishop Parcel under the Bishop Lease and to the building to be constructed on the Bishop Parcel.[6] On that same date, UNDC and the City entered into an agreement (the "1981 Agreement") amending the 1972 City Lease and requiring UNDC to construct the Second Tower on the Bishop Parcel on or before January 25, 1984 pursuant to the Bishop Lease and to convey the Second Tower to the City. The

[6] The indenture was not part of the Record.

1981 Agreement also required the City to immediately lease the Second Tower back to UNDC. The 1981 Agreement has a 99-year term.

In 1997, the City put out for bid the sale of its real property interest in the hotel portion of the First Tower and the transfer of its subleasehold interest in the hotel portion of the Second Tower. The Regal Hotels chain was selected.[7]

Petitioner, UNDC, the City and the New York City Economic Development Corporation ("NYCEDC")[8] entered into a Purchase and Sale Agreement dated May 6, 1997 (the "Purchase and Sale Agreement") for the acquisition by Petitioner and the transfer by UNDC and the City of their interests in the Hotel. Section 3.1 of the Purchase and Sale Agreement provides that the "Purchase Price payable hereunder shall be an amount equal to" $102,000,000 (the "Purchase Price"). Schedule A to the Purchase and Sale Agreement provided that the Purchase Price was allocated $59,100,000 to the Hotel Unit at One U.N. Plaza, $36,500,000 to the subleasehold estate at Two U.N. Plaza, and an amount attributable to furniture, fixtures and equipment.

Section 2.1 of the Purchase and Sale Agreement provided that the City would convey the Hotel Unit to NYCEDC and NYCEDC would immediately convey the Hotel Unit to Petitioner. The Parties stipulated that on the Transfer Date, Petitioner acquired fee simple title to the Hotel Unit for a total purchase price of $60,651,375.[9]

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[7] Tr. 421.

[8] NYCEDC is a local development corporation organized under the New York State Not-For-Profit Corporation Law. NYCEDC was involved in the transaction because the Charter of the City of New York required that for the City to dispose of any interest in real property, it would have to be done through a public auction, whereas if the City transferred its interest to NYCEDC, the transaction could be a private sale.

[9] This amount is the total consideration reported on the RPTT return filed in connection with the transfer of the Hotel Unit and includes the $59,100,000 portion of the Purchase Price allocated to the Hotel Unit and $1,551,375 in New York State transfer tax and the RPTT paid by Petitioner.

Section 2.1 of the Purchase and Sale Agreement also specifically requires that UNDC "demise" to Petitioner "a subleasehold estate" in the portion of the Hotel located in Two U.N. Plaza" (the "Hotel Premises").[10]

On or about the Transfer Date, Petitioner filed an RPTT return reporting the purchase of the Hotel Unit (the "Fee Return") for consideration of $60,651,375 and paid $1,592,098.59 in RPTT. The Fee Return describes the property conveyed in the transaction reported on the return as "787/793 1st Avenue a/k/a One UN Plaza"[11] in the Borough of Manhattan, Block:1337, Lot:1101. The Fee Return reports the type of property transferred as a "Commercial condominium unit" and the type of interest transferred as a "Fee." The deed was recorded on October 29, 1997. Documents and testimony indicate that a representative of the City prepared the Fee Return.

Petitioner and UNDC entered into a sublease dated as of July 23, 1997 for all portions of the Second Tower constituting the Hotel (the "Sublease"). The Sublease is for a fixed term of 82 years, expiring on July 30, 2079. Upon the expiration of the Sublease, the use and possession of the Hotel Premises revert absolutely to UNDC for a period of one day; *i.e.*, until the Bishop Lease terminates on July 31, 2079. At the closing, Petitioner paid $36,500,000, which was described in the Sublease as rent "for the entire Term."[12]

Under the Sublease, the Bishop Option may be exercised by UNDC. Petitioner can effectively force UNDC to exercise the Bishop Option. If the Bishop Option is exercised, upon UNDC's acquisition of the Option Premises and conveyance to the City, the City must

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[10] Petitioner takes exception to ALJ Finding of Fact 18 insofar as it states "[a]s required, UNDC delivered the Sublease at closing in exchange for $36,500,000." We have modified ALJ Finding of Fact 18 to delete this statement. *See*, text accompanying footnote 12.

[11] The Fee Return is handwritten and the street address on the copies of the Fee Return contained in the Record are blurred so that the street address could be read as 757/793 1st Avenue. *See*, text accompanying footnotes 15 and 21.

[12] *See*, text accompanying footnote 10.

establish a condominium similar to the arrangement for the First Tower. The City must then transfer the condominium unit containing the Hotel Premises to NYCEDC, which must then transfer the condominium unit containing the Hotel Premises to Petitioner "for no additional payment."

On or about the Transfer Date, Petitioner filed a RPTT return reporting the grant of the Sublease from UNDC to Petitioner (the "Sublease Return"). The Sublease Return reported no consideration and indicated that no RPTT was due. The Sublease Return describes the address of the property as "332/334 East 45 Street AKA Two UN Plaza" in the Borough of Manhattan, Block:1337, Lot:14.[13] The Sublease Return reports the type of property transferred as an "Office building" and the property interest transferred as a "Leasehold grant." The Sublease was recorded on December 16, 1997.

Section 8.4.2 of the Purchase and Sale Agreement provides that Petitioner would be responsible for paying taxes, including (a) RPTT due on the "Real Property," which is defined in section 3.1(a)(i) of the Purchase and Sale Agreement as including the Hotel Unit and the leasehold interest to be acquired by Petitioner under the Sublease, and (b) "any commercial rent and occupancy tax payable in respect to the portion of the Purchase Price allocable to the [Sublease], which shall be payable as and when due." Under the Purchase and Sale Agreement, any RPTT and New York State Real Estate Transfer Tax payable by Petitioner was to be credited against the Purchase Price.

The closing statement for the transaction that took place on the Transfer Date (the "Closing Statement") references a purchase price of $102,000,000. The Closing Statement also refers to amounts due from Petitioner and UNDC with respect to the "1 UN PLAZA

[13] *See*, footnote 5 regarding the street address for the Second Tower.

CONDOMINIUM" and to amounts due from Petitioner to UNDC with respect to the "2 UN PLAZA SUBLEASE."[14]

On or about November 18, 1998, the Department commenced an audit of Petitioner for RPTT (the "Audit"). The Audit was assigned audit number 19347 (the "Audit Number"). An Associate Auditor in the Department's RPTT Group (the "Auditor") conducted the Audit.

The Auditor sent Petitioner a letter dated November 18, 1998 (the "Information Letter") requesting information from Petitioner as grantee "in the above-described transfer." The Information Letter listed the address of the property in question as "757/793 1st Avenue" and listed the tax map designation as "Block:1337 Lot:1101, County: N.Y." (The apparent address, block and lot number for the Hotel Unit as reported on the Fee Return.)[15] The transfer date was listed as "07-23-1997." The Information Letter, which bore the Audit Number, specifically requested that Petitioner send the Auditor a copy of the "sales agreement and closing statement" and requested that Petitioner "refer to the audit number above" in its reply.

The Auditor maintained a written log for the Audit (the "Log") with the first entry dated November 8, 1998. In the Log, the Auditor recorded the day-to-day contacts and details of the Audit, including telephone conversations with Petitioner's various representatives and discussions with Department personnel. Eleven pages of the Log were submitted into the Record beginning with the entry dated "11/8/98" and ending with the entry dated "7/12/01."

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[14] Petitioner takes exception to ALJ Finding of Fact 26, which stated "The Closing Statement references a purchase price of $102,000,000, which includes the payments from Petitioner to UNDC for the "1 UN PLAZA CONDOMINIUM" and the "2 UN PLAZA SUBLEASE" insofar as it states that the Purchase Price includes "payments from Petitioner to UNDC" for the two properties. We have modified ALJ Finding of Fact 26 to more closely reflect the Record.

[15] *See*, footnote 11.

In a letter dated December 8, 1998, Petitioner's representative, Joseph D. Farrell, Esq., then of Coudert Brothers, responded in writing to the Information Letter (the "Farrell Letter") transmitting copies of the Purchase and Sale Agreement, the Closing Statement and a copy of the Fee Return described as the "RPT Real Property Transfer Tax Return for this transaction." The Farrell Letter bore the reference "RHM-88, LLC/Block 1337, Lot 1101" but not the Audit Number.

In his December 29, 1998 Log entry, the Auditor noted the terms of the transaction and recorded the consideration as $59,100,000 for the sale of the Hotel Unit, and $36,500,000 for the Sublease as per Schedule A to the Purchase and Sale Agreement. The Auditor also noted his intention to ask the attorney why no RPTT had been paid on the "sublease to purchaser."

In his September 9, 1999 Log entry, the Auditor noted that Petitioner's representative had explained that the $36,500,000 payment for the Sublease was "all prepaid rent and is not taxable." Further, the Auditor noted that he was discussing the case with other Department personnel with respect to possible liability for New York City Commercial Rent Tax ("CRT") with respect to the Sublease. With a cover letter dated September 9, 1999, Mr. Farrell sent the Auditor a copy of the Sublease. The reference line of that letter was "RHM-88, LLC/Block 1337, Lot 1101" (the designation of the Hotel Unit) but did not include the Audit Number.

In his October 19, 1999 Log entry, the Auditor noted that he and other Department audit personnel, including an auditor in the CRT audit group (the "CRT Auditor"), were considering whether RPTT or CRT should be asserted with respect to the Sublease.

In his November 23, 1999 Log entry, the Auditor indicated that he had been informed by Petitioner that a CRT return was being filed with respect to the Sublease and that it was Petitioner's position that for CRT purposes the amount of rent paid should be allocated over the term of the Sublease.

In his December 9, 1999 Log entry, the Auditor wrote that he prepared RPTT and CRT assessment worksheets for the case and he also commented that in the case of CRT, the amount of rent is "offset [by] revenue received" (*i.e.* hotel room revenue).

In his February 2, 2000 Log entry, the Auditor noted that the statute of limitations on assessment "expires in July for RPTT & possibly earlier for CRT."

On or about February 9, 2000, Mr. Farrell transmitted to the Department two CRT returns for the 1997/1998 period and the 1998/99 period (the "CRT Returns"). The accompanying cover letter bore the reference: "Block 1337, Lot 1101" the designation for the Hotel Unit.[16] The CRT Returns were signed by an officer of Regal and were dated February 8, 2000. They were filed on behalf of RHM-88, LLC, REGAL U.N. PLAZA HOTEL, having an address at: One United Nations Plaza, New York, New York 10017-3515. Although the CRT Returns report only the CRT liability with respect to the Sublease, the second page of each CRT return identifies the premises with respect to which each return was filed as "One United Nations Plaza, 10017-3515" (the address of the Hotel Unit).

In a letter dated the same date, February 9, 2000, which discussed the Sublease, Mr. Farrell sent the Auditor copies of the CRT Returns described as the CRT returns "for the property." The letter bore a reference line of "RHM-88, LLC/Block 1337, Lot 1101/Audit

[16] The CRT returns were sent to NYC Department of Finance, P.O. Box 3213, Church Street Station, New York, New York 10242-0323, as per the instructions on the CRT forms.

#19347" and stated that the response was submitted "in connection with the above-referenced audit." The letter, however, solely addressed the RPTT and CRT treatment of the $36,500,000 payment under the Sublease.

John Gallucio, Esq., then of Coudert Brothers, sent a letter to the Department dated July 13, 2000, with a reference line "RHM-88, LLC/Block 1337, Lot 1101" (the designation of the Hotel Unit) but not the Audit Number. Although the letter indicated that it was transmitting certain material "[i]n connection with the above-referenced entity and property," it only addressed the issue of when and where the CRT Returns were filed. The Auditor is copied on the letter.

Another of Petitioner's representatives, Charles E. Aster, Esq., then of Coudert Brothers, sent a letter to the "Audit Department" of the Department dated October 5, 2000. While the letter was addressed to the CRT Auditor, the salutation was to the Auditor who also was copied on the letter. Although the letter indicated it was being submitted "in connection with the above-referenced audit," it addressed only Petitioner's position with respect to the CRT consequences of the prepayment of rent under the Sublease. The reference line of the letter is "RHM-88, LLC/Block 1337, Lot 1101/Audit #19347."

By a letter dated October 13, 2000, Mr. Farrell transmitted to the Department copies of the Bishop Lease, the Condominium Declaration and a mortgage executed by Petitioner. The reference line of the letter was "RHM-88,LLC/Block 1337, Lot 1101/Audit #19347."

On May 17, 2001, Mr. Aster wrote a letter to an attorney in the Department's Legal Affairs unit (the "Aster Letter"). The Aster Letter referred to a meeting previously held between various representatives of the Department and Petitioner and discussed Petitioner's position with respect to the RPTT and CRT liability for the Sublease. The Aster Letter

referred to the Hotel as the "Property" and the Sublease as pertaining to a "portion of the Property." The Aster Letter bore the reference line "RHM-88 LLC/Block 1337, Lot 1101/Audit #19347 (the 'Audit')."

The Auditor testified that during the course of the Audit it was his impression that the Fee Return was the return for both the Hotel Unit and Sublease transactions (Tr. 280-1) and that no separate return was filed with respect to the Sublease. Tr. 270, 356. The Auditor never asked any of the representatives of Petitioner whether a separate RPTT return was filed with respect to the Sublease. Tr. 271. After the Auditor learned that there was a separate lot number for the property that was the subject of the Sublease, he continued to believe that no separate RPTT return had been filed in connection with the Sublease until some time in December, 2001, when he requested a copy of the Sublease Return. Tr. 354.[17]

The Auditor testified that during the course of the Audit he understood all of the property involved in the transaction had one block and lot designation, *i.e.,* Manhattan Block:1337, Lot:1101. Tr. 275-6.

The Auditor testified that during the period in issue, in the normal course of business, the Department did not index RPTT returns. Rather these returns were physically maintained in the order in which they were received. At that time, the information contained in RPTT returns was not accessible through the Department's FAIRTAX computerized tracking program. Tr. 267-8.

[17] Petitioner takes exception to ALJ Finding of Fact 47 asserting that the Auditor "did not know whether a separate RPTT return was filed in connection with the Sublease Transaction and that he did nothing to find out if a separate RPTT return was filed in connection with the Sublease Transaction." We modify ALJ Finding of Fact 47 to reflect that through most of the Audit, the Auditor believed both that the Fee Return covered both the Fee and the Sublease and that there was no *separate* return for the Sublease, and amplify the Finding of Fact to reflect that the Auditor also testified that he never asked any of the representatives of Petitioner whether a separate RPTT return was filed for the leasehold transaction. Tr. 271.

During the course of the Audit, Petitioner executed two forms identified as "Consent Extending Period of Limitation for Assessment of Real Property Transfer Tax" (the "Consents"). Individuals in the Department prepared the Consents and the Auditor transmitted them to Petitioner's representative.

The first Consent extended the limitations period from July 23, 2000 to January 31, 2001 (the "First Consent") and the second Consent extended the limitations period from January 31, 2001 to July 31, 2001 (the "Second Consent"). Although the First Consent was not available for submission into the Record, the representatives of the Parties agreed to its existence and that it was identical in format to the Second Consent. The Second Consent, a copy of which was admitted into evidence, referred to the Audit Number, listed the property address as 787/793 1st Avenue A/K/A One U.N. Plaza, New York, 10017 and referred to Block:1337, Lot:1101. The Second Consent was signed on behalf of the Petitioner by Lyle L. Boll, Senior Vice President and General Counsel of Regal ("Mr. Boll"), and was dated "21 Nov 00." Petitioner's representative transmitted the Second Consent to the Auditor by facsimile on November 22, 2000. The transmittal document referenced an extension of the statute of limitations to July 31, 2001 "with respect to audit #19347." The Second Consent specifically stated that the taxpayer and the Commissioner agreed that "the amount(s) of any Real Property Transfer Tax due by the above named taxpayer(s) for the transfer of real property located at 787/793 1st Avenue A/K/A One UN Plaza, New York, N.Y. 10017 on 07-23-97 ... may be assessed at any time on or before 07-31-01." The original of the Second Consent was submitted with a cover letter dated November 30, 2000 that had a reference line "RHM-88, LLC/Block 1337, Lot 1101/Audit #19347" and described the Second Consent as extending the limitations period "with respect to the above-referenced property."[18]

[18] Petitioner takes exception to ALJ Finding of Fact 48, which states that "[d]uring the course of the Audit, Petitioner twice agreed, in writing, to extend the period of limitation on RPTT assessment by executing Consents Extending Period of Limitation for Assessment of Real Property Transfer Tax." Petitioner requests that the Finding of

The copy of the Second Consent in the Record was signed by Mr. Boll and did not bear the signature of a Department representative. However, the Log indicates that the Consents were signed by Department personnel.[19]

In his July 12, 2001 Log entry, the Auditor notes that a Notice of Determination was "prepared for 2 UN Plaza for [the] lease transfer. It's assigned new audit #24439." A single page of a log for audit number 24439 was submitted as part of the Record. The Auditor's entry in that log for July 12, 2001 states that "[N]o RPTT return [was] filed" for the Sublease transaction.[20]

The Department issued a Notice of Determination of RPTT dated July 13, 2001 with respect to the Hotel Unit in the total amount of $8,635.07, including interest to August 12, 2001 (the "Fee Notice"). The Fee Notice referenced the Audit Number and the address 757/793 1st AVENUE Block:1337 Lot:1101 County: NY.[21] The Fee Notice represents the assessment of additional RPTT computed with respect to the increase in the consideration for the Hotel Unit as a result of a gross-up attributable to taxes paid by Petitioner as grantee. Petitioner paid this deficiency on August 28, 2001. This deficiency is not at issue in the case at bar.

The Department also issued to Petitioner a second Notice of Determination dated July

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Fact be modified to indicated that Petitioner agreed to extend the limitations period "in connection with the First Tower." We decline to modify ALJ Finding of Fact to so characterize the Consents. However, we have amplified ALJ Finding of Fact 48 to more specifically describe the Consents and Petitioner's transmittal documents.

[19] While section 11-2116(c) of the New York City Administrative Code only requires that the taxpayer "consent in writing" to an extension of the statutory period, the preprinted form of the consent states "VALID WHEN EXECUTED ON BEHALF OF BOTH THE DEPARTMENT OF FINANCE AND THE TAXPAYER BEFORE THE EXPIRATION OF THE TIME PRESCRIBED IN SECTION 11-2116 OF THE ADMINISTRATIVE CODE FOR THE ASSESSMENT OF TAX." Copies of the countersigned Consents were not part of the Record.

[20] ALJ Finding of Fact 50 indicates that the quoted entry was "noted [by the Auditor] in his Log entry for July 12, 2001." Petitioner takes exception to ALJ Finding of Fact 50 as being "incomplete." We have modified ALJ Finding of Fact 50 to more fully reflect the Record to indicate that the log notation was in connection with the opening of a second audit with a new audit number.

[21] See footnote 11 regarding the street address for the First Tower.

13, 2001, assessing RPTT in the amount of $1,373,586.16, including interest to August 12, 2001, with respect to the Sublease (the "Sublease Notice"). The Sublease Notice referenced audit number 24439 and the address TWO U.N. PLAZA Block:1337 Lot:14 County: NY. The Sublease Notice represents the assessment of RPTT on the $36,500,000 paid with respect to the Sublease.

Petitioner filed a Petition on October 9, 2001 and an amended Petition dated October 11, 2001 seeking a redetermination of the deficiency asserted in the Sublease Notice. In the ALJ Determination, the ALJ sustained the Sublease Notice concluding that Petitioner, the City, NYCEDC and UNDC intended the Sublease to effect a transfer of an interest in real property as part of a unitary transaction that included the sale of the Hotel Unit and that no part of the $36,500,000 paid in connection with the Sublease was rent but was consideration subject to the RPTT.

The ALJ further concluded that the Department and Petitioner intended to extend the limitations period for assessing RPTT on both the Hotel Unit and on the Sublease to July 31, 2001 and that there was a mutual mistake in the wording of the Consents that should be reformed to reflect the agreement between the Parties to prevent an unintended and unexpected windfall.

Petitioner takes exception to both of the ALJ's conclusions and argues that the ALJ Determination should be reversed. Petitioner asserts that the Sublease was a bona fide lease transaction and that the payment of $36,500,000 represented a prepayment of rent for the entire term of the Sublease and therefore, was not consideration subject to the RPTT. Petitioner also asserts that the Sublease Notice was invalid and should be dismissed because it was issued after the expiration of the three-year limitations period for assessing RPTT.

Respondent contends that the ALJ correctly concluded that the RPTT applied to the $36,500,000 paid in connection with the Sublease and that the Consents should be reformed to reflect the agreement of the Parties to extend the limitations period for both the Fee Notice and the Sublease Notice.

For the reasons set forth below, we agree with Petitioner that the Sublease Notice was issued after the expiration of the three-year limitations period for assessing RPTT and therefore reverse the ALJ Determination and dismiss the Sublease Notice. Because we concluded that the Sublease Notice was time-barred, we need not address the substantive issue of whether any portion of the $36,500,000 paid pursuant to the Sublease was subject to RPTT.

Subdivision b of section 11-2116 of the New York City Administrative Code (the "Code") provides that, with certain exceptions not applicable here, "no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return...." Subdivision c of that section further provides that a taxpayer can agree in writing to extend the three-year limitations period.

The Sublease Return was filed on or about the Transfer Date. Thus the three-year limitations period ended on or about July 23, 2000.[22] The Sublease Notice was issued July 13, 2001. Once it is established that the Sublease Notice was issued more than three years after the Sublease Return was filed, Respondent bears the burden of going forward by producing evidence that the Sublease Notice was not time-barred. Adler v. Commissioner, 85 T.C. 535 (1985). That burden is met by introducing a valid consent extending the limitations period for assessment to the date that the Sublease Notice was issued.

[22] The Sublease was recorded on December 16, 1997, thus the three-year limitations period would have expired no later than December 16, 2000 in the absence of a valid extension.

Petitioner does not contend that the Consents are invalid on their face but contends that by their terms, they serve to extend the limitations period for assessing RPTT only with respect to the property described on the Consents as "787/793 1st Avenue A/K/A One UN Plaza New York, NY 10017" Block: 1337, Lot: 1101.[23] The Parties do not dispute that the property so described is the Hotel Unit. Thus, Respondent bears the burden of going forward with evidence that the Consents also extended the limitations period with respect to the Sublease.

Respondent contends that, as concluded by the ALJ, the Parties intended to extend the limitations period with respect to both the Hotel Unit and the Sublease but that as a result of a mutual mistake, the wording of the Consents did not reflect the agreement of the Parties. Petitioner disputes this contention and takes exception to the ALJ's conclusion of law that the Consents should be reformed to reflect the intent of the Parties to include the Sublease.

A consent to extend the limitations period for assessing a tax is not a contract but a unilateral waiver of a defense to the assessment of tax. Strange v. United States, 282 U.S. 270 (1931); Piarulle v. Commissioner, 80 T.C. 1035 (1983). Nevertheless, because Code section 11-2116(c) requires the taxpayer to "consent in writing" to the extension of the limitations period, and because Respondent's preprinted form provided that the consent would be valid when executed on behalf of both the Department and the taxpayer, the principles of contract law can be instructive in analyzing the effect of the Consents.[24] Piarulle v. Commissioner, 80 T.C. at 1042.

[23] While only the Second Consent was available and admitted into evidence, the Parties agreed that the First Consent was identical to the Second Consent.

[24] Although only the Second Consent is included in the Record, our analysis in this decision addresses both Consents because the Parties have agreed that the First Consent was identical to the Second Consent in format.

Section 155 of the Restatement (Second) of Contracts states that

> Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of *both parties* as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement... [Emphasis added.]

Comment a to that section states that "[f]or the rule stated in this Section to be invoked, therefore, there must have been some agreement between the parties prior to the writing."

Thus, a contract will not be reformed unless there was an agreement between the parties that was not properly reduced to writing due to the mutual mistake of both parties.[25] The unilateral mistake of one party is insufficient to support reformation of a contract unless that mistake was induced by actions of the other party. George Backer Management Corp. v. Acme Quilting Co., Inc., 46 N.Y.2d 211 (1978).

In the present case, the Consents are clear in applying only to a determination of the RPTT due "for the transfer of real property located at 787/793 1st Avenue A/K/A One UN Plaza" on the Transfer Date. Nothing on the face of the Consents indicates any intention that they should apply to the Sublease of Two U.N. Plaza. Thus, there is no ambiguity on the face of the Consents that requires an examination of the underlying intent of the Parties. However, the absence of any facial ambiguity in the writing does not preclude an examination as to whether, because of a mutual mistake, the Consents do not reflect the actual agreement between Petitioner and Respondent. Woods v. Commissioner, 92 T.C. 776 (1989). The burden of establishing that there was a *mutual* mistake is on the party seeking to reform a contract and must be established by clear and convincing evidence. George Backer

[25] The remedy in the case of a mutual mistake of both parties "as to a basic assumption on which both parties made the contract" is recission of the contract, not reformation. Restatement (Second) of Contracts, section 152, Comment b.

Management Corp., 46 N.Y.2d at 219; Nash v. Kornblum, 12 N.Y.2d 42, 46 (1962).

The ALJ found that the Parties believed the transactions in questions were "separate parts of a single event: the sale/transfer to Petitioner of the Hotel property" and that the Parties believed that the address of the Hotel Unit "encompassed" the address of the Sublease.[26] The ALJ determined that there was a mutual mistake in the wording of the Consents and that they should be reformed to reflect the intentions of the Parties to extend the limitations period for assessing RPTT on both the Hotel Unit and the Sublease.[27] Petitioner takes exception to the ALJ's conclusions.

We agree with the ALJ that the Auditor pursued the Audit and obtained the Consents under the mistaken belief that the Fee Return covered both the Hotel Unit and the Sublease. The Auditor testified that the Audit "was based on the [Fee Return], whatever the return was." Tr. 235. "Whatever was covered by this [Fee Return], that is what [the Audit] was based on." Tr. 283. He further testified that he believed that the Fee Return covered both the Hotel Unit and the Sublease. Tr. 278, 280, 281. That belief was based on the following language from the Farrell Letter:[28]

> I enclose (a) a copy of the Purchase and Sale Agreement *for the sale of the above-referenced property*... and (b) a copy of the closing statement *for such transaction*. I also enclose for your convenience a copy of the RPT Real Property Transfer Tax Return *for this transaction*.... [Emphasis added.]

However, the references in the above-quoted passage to "the above-referenced property," "such transaction" and "this transaction" are internally consistent in that they all relate back

[26] ALJ Determination at 27.
[27] ALJ Determination at 28.
[28] Tr. 280-282, 288-290.

to the property described in the reference line of that letter, which was Block:1337, Lot:1101 *i.e.,* the Hotel Unit.

The Auditor testified that he thought that there was one block and lot for both the Hotel Unit and the Sublease. Tr. 274. Thus, it is clear that the Auditor was laboring under a mistaken understanding of the facts. It is evident from his testimony that his mistaken belief that the Hotel Unit and the Sublease were covered by a single block and lot designation was a result of his belief, based the above-quoted statement in the Farrell Letter, that the Fee Return covered the entire transaction. Having once formed the impression that there was but one return filed, which referred to Block: 1337, Lot: 1101, the Auditor's subsequent conduct of the Audit was based on that belief.

A mistake sufficient to support reformation must be shared by all of the parties to the agreement. Restatement (Second) Contracts, section 153, Comment a. In the present case, the Record is replete with erroneous or inconsistent references to the addresses for the First and Second Towers. The Sublease Return used a street address for the Second Tower that is inconsistent with the 1981 Agreement and the Bishop Lease. The Information Letter and the Fee Notice used an erroneous street address for the First Tower. In the Stipulation, the Parties' representatives incorrectly referred to the block and lot designation of the First Tower as Block:1337, Lot:1101, although that is only the lot designation for the Hotel Unit, and repeat the inconsistent street address for the Second Tower appearing on the Sublease Return. Finally, the CRT Returns for the Sublease erroneously refer to the premises covered by the returns as "One United Nations Plaza."[29] Thus, it is possible that one or more of

[29] The ALJ stated that the CRT Returns referred to the Sublease premises by the address, block and lot designation of One UN Plaza. Tr. 26. While the cover letter submitted by Mr. Farrell with the CRT Returns contains the reference line "Block 1337, Lot 1101" the CRT returns themselves do not contain any reference to the tax map designation for the property. The CRT Returns were filed in the name of Petitioner, Regal U.N. Plaza Hotel with a mailing address of One United Nations Plaza. Based on the Record, One U.N. Plaza appears to be the correct mailing address of the Hotel. Thus it is only the reference to the premises covered by the CRT Returns as One United Nations Plaza that appears to be incorrect. *See*, discussion *infra* p. 22.

Petitioner and its representatives believed that both Towers bore a single tax map block and lot designation. However, there is no evidence in the Record that Petitioner shared the Auditor's mistaken belief that the Fee Return covered both the Hotel Unit and the Sublease. Both Mr. Asher, who was involved in the transactions at the time of the closing, and Mr. Farrell testified that they were aware that two returns were filed, the Fee Return and the Sublease Return. Tr. 43-45, 215.

To support reformation, the actual agreement between the parties must be established by the parties' "overt acts, not the parties' secret intentions...." Kronish v. Commissioner, 90 T.C. 684, 693 (1988). Thus, the next inquiry is whether any acts of the Parties constitute clear and convincing evidence that they intended to extend the limitations period with respect to the Sublease. It is clear from the Record that the Auditor believed that both Towers were covered by a single return and that they shared the same tax map designation of Block:1337, Lot:1101. Thus, we agree with the ALJ that the Auditor intended the Consents to cover both the Hotel Unit and the Sublease.[30]

The more difficult question is whether Petitioner shared that intent. Both Mr. Farrell and Mr. Asher testified that they never intended to extend the limitations period for the Second Tower. Tr. 61, 184-5. However, we agree with the ALJ that as neither Mr. Asher nor Mr. Farrell signed the Consents, their intentions are not controlling. The Consents were signed by Mr. Boll on behalf of Petitioner. Although Mr. Boll testified at the hearing as a witness for Petitioner, no one asked Mr. Boll whether he believed the Consents covered both

[30] The Auditor testified that he believed that the Fee Return covered both Towers. After the Auditor learned that there were two properties involved, he thought that Petitioner had not filed a return for the Sublease. Tr. 356, 411. In contrast to the Auditor's testimony, both Mr. Aster and Mr. Farrell testified that they told the Auditor that a return was filed for the Sublease. Tr. 48, 165-6. The Auditor's testimony was consistent with his 7/12/01 log entry for Audit No. 24439. We note that if, at the time the Consents were prepared and executed, the Auditor had thought that the Fee Return covered only the Hotel Unit and that a separate return should have been filed for the Sublease but was not, RPTT with respect to the Sublease could have been assessed at any time so the Auditor could not have intended the Consents to cover both Towers. However, we conclude that, at the time the Consents were prepared and executed, the Auditor believed the Fee Return covered both Towers and, therefore, the Auditor intended the Consents to cover both Towers.

the Hotel Unit and the Sublease. Thus, there is no direct evidence of Petitioner's intent in signing the Consents.

Because it is not clear whether Petitioner believed that one lot number covered both Towers, had the Consents referred only to Block:1337, Lot:1101, we might infer that Petitioner believed the Consents to include the Sublease. However, the Consents also listed the property address as "787/793 1st Avenue A/K/A One UN Plaza." The weight of the evidence in the Record indicates that Petitioner and its representatives were aware that the property covered by the Sublease was Two U.N. Plaza and not One U.N. Plaza. While the CRT Returns erroneously described the premises covered as "One United Nations Plaza," nothing in the Record indicates that Petitioner's representatives prepared or reviewed the CRT Returns nor were they signed by Mr. Boll, who signed the Consents. The erroneous reference in the CRT Returns to One U.N. Plaza instead of Two U.N. Plaza is not sufficient to establish that Petitioner or its representatives shared the Auditor's belief that there was one return for the whole transaction or that they intended to extend the limitations period for the Sublease.

Respondent argues that "the only rational explanation"[31] for Petitioner's representatives continuing to discuss the RPTT aspects of the Sublease after the date the limitations period for assessing RPTT on the Second Tower expired is that Petitioner intended the Consents to cover the Sublease. We disagree. The Record clearly indicates that the RPTT liability with respect to the Sublease was discussed in conjunction with a possible alternative liability for CRT arising out of the Sublease. As the limitations period for the CRT Returns did not expire until February 2, 2003, the fact that Petitioner's representatives continue to discuss the Sublease with the Auditor more than three years after the filing of the Sublease Return is not a sufficiently clear indication that Petitioner or its representatives

[31] Brief of Respondent Opposing Exception at 33.

believed that the Consents covered the Sublease.

The ALJ concluded that Petitioner must have intended the Consents to include the Sublease because the RPTT deficiency with respect to the First Tower could have been resolved without any extension of the limitations period. However, we do not find any indication in the Record that the RPTT deficiency arising out of the gross-up of the consideration for the Hotel Unit was addressed by the Parties prior to July 12, 2001, the date of the Auditor's Log entry in which it is first mentioned, or that it was resolved prior to the execution of the Consents. Thus, we find nothing in the Record to indicate that it was unnecessary to extend the limitations period for the First Tower.

The Court of Appeals in Nash v. Kornblum, 12 N.Y.2d at 46, quoting from Ross v. Food Specialties, 6 N.Y.2d 336, 341 (1959), stated that reformation "'may not be granted upon a probability nor even upon a mere preponderance of evidence, but only upon a certainty of error'...." We find no clear and convincing evidence that Petitioner intended to extend the limitations period for the Sublease when Mr. Boll signed the Consents and, therefore, cannot conclude that the Consents were signed under a mutual mistake requiring reformation.

Even in the absence of a mutual mistake that would support reformation of the Consents to cover the Sublease, Petitioner can be estopped from denying the validity of the Consents if Respondent reasonably relied on the Consents as extending the limitations period for the Sublease. Piarulle v. Commissioner, 80 T.C. at 1044. To reform a contract based on a unilateral mistake:

> (1) there must be false representation or wrongful misleading silence; (2) the error must originate in a statement of fact, not in opinion or a statement of law; (3) the one claiming the benefits

> of estoppel must not know the true facts; and (4) that same person must be adversely affected by the acts or statements of the one against whom an estoppel is claimed.[32]

Throughout the Audit, the reference line in Petitioner's correspondence with Respondent included references to Block:1337, Lot:1101. That correspondence sometimes, but not always, also included the Audit Number as requested by the Auditor in the Information Letter. Responding to the Information Letter, the Farrell Letter bore the reference line: "Re: RHM-88, LLC/Block 1337, Lot 1101." In that letter, Mr. Farrell stated that as requested by the Auditor, he was enclosing a copy of the Purchase and Sale Agreement "for the sale of the above-referenced property," *i.e.*, Block:1337, Lot:1101, and a copy of the Closing Statement "for such transaction" and a copy of the RPTT return for "this transaction." In that context, the Fee Return is correctly described as the return for the sale of Block:1337, Lot:1101. The Auditor repeatedly cited this language as the basis for his belief that the Fee Return covered the entire transaction. The Purchase and Sale Agreement and Closing Statement are the only documents that Petitioner could have submitted in response to the request in the Information Letter for the purchase agreement and closing statement for the property identified in that letter as 757/793 1st Avenue, Block:1337 Lot: 1101. Therefore, we do not find the Farrell Letter to contain any false representations or wrongful misleading silences. Having initiated the Audit using references to Block:1337, Lot:1101, Respondent cannot now assert that its auditor was misled by Petitioner's use of those same references in its subsequent correspondence with Respondent. Although Mr. Farrell did not specifically mention in the Farrell Letter that the Purchase and Sale Agreement covered more than the Hotel Unit or that a separate RPTT return was filed for the Sublease, we do not believe those omissions rise to the level of a wrongful misleading silence.

[32] Piarulle v. Commissioner, 80 T.C. at 1044, citing Lignos v. United States, 439 F.2d 1365 (2nd Cir., 1971).

Much of the correspondence from Petitioner and its representatives bearing a reference line of Block:1337, Lot:1101 addressed exclusively issues relating to the Sublease and not the Hotel Unit. While that correspondence did nothing to correct the Auditor's misunderstanding with regard to the lot designation for the Sublease or the property covered by the Fee Return, there were numerous indications elsewhere in the information provided by Petitioner and its representatives that more than one property was involved. Page two of the Purchase and Sale Agreement contains two references to One U.N. Plaza and five references to Two U.N. Plaza. The Closing Statement contains two references to the 1 UN Plaza Condominium and one reference to the 2 UN Plaza Sublease. Page three of the Purchase and Sale Agreement refers to a conveyance to Petitioner of a fee estate in the Hotel Unit by a bargain and sale deed and the execution and delivery of a sublease for Two U.N. Plaza. The Auditor testified that at the beginning of the Audit, Mr. Farrell told him that there were two towers but he did not believe that the two towers represented separate buildings. Tr. 251.

The Auditor testified that he did not understand the Purchase and Sale Agreement (Tr. 255, 256) and that he did not focus on the references in the Purchase and Sale Agreement or the Sublease to One U.N. Plaza or Two U.N. Plaza. Tr. 257, 272, 274-5. He further testified that to the extent he noticed the different addresses he assumed they all referred to a single building because properties can have multiple street addresses. Tr. 275-276.

In his 12/29/98 Log entry, made shortly after the Audit began, the Auditor describes the sale of the Hotel Unit and the Sublease and notes the separate amounts of consideration for each portion of the transaction. The Auditor notes on that same page of the Log that he should ask the attorney why no RPTT was paid on the Sublease. The Fee Return described the property conveyed as a commercial condominium and the type of interest transferred. The Fee Return reported only that portion of the Purchase Price allocated to the Hotel Unit.

In all respects, the Fee Return is a return for only the sale of the Hotel Unit. Nothing on the face of the Fee Return indicates that it includes the Sublease.

The Auditor testified that he did not ask Petitioner's representatives for the block and lot designation for the Sublease, prior to January 1, 2001, or ask whether a return had been filed for the Sublease. Tr. 253-4, 271, 276. While the Department's FAIRTAX system did not contain RPTT return information, the Auditor testified that there were ways to obtain the block and lot designation of a property using the street address and that he did not recall if he had used any of those resources to obtain the block and lot designation of the Second Tower prior to January 1, 2001. Tr. 252-254.

It is clear that the transaction is a very complex one and, unfortunately, the Auditor, who had been with the Department for only six or seven months when he was assigned to conduct the Audit, misunderstood the Farrell Letter in December 1998. However, in light of the numerous allusions to two properties throughout the documents and conversations with Petitioner's representatives, we cannot conclude that Petitioner's use of the reference line of Block:1337, Lot:1101 and the Audit Number constituted false or intentionally misleading statements. There is no evidence in the Record that Petitioner or its representatives were even aware of the Auditor's misunderstanding of the facts. Thus, Petitioner cannot be said to have misled the Auditor by failing to correct his misunderstanding or inform him of the existence of the Sublease Return.

While the CRT Returns erroneously described the premises as One United Nations Plaza, the Auditor did not receive the CRT Returns until February 2000, over a year after he received the Farrell Letter, the Purchase and Sale Agreement and the Closing Statement. The Record does not contain any evidence that the erroneous address in the CRT Returns contributed to the Auditor's belief that the Fee Return covered both the Hotel Unit and the

Sublease. Given that the Auditor did not ascribe any significance to the various references to One and Two U.N. Plaza in the documents already in his possession, we cannot conclude that the erroneous reference in the CRT Returns to One United Nations Plaza amounts to a false representation that should estop Petitioner from asserting that the Sublease Notice was time-barred.

As a second argument in support of its position that the Sublease Notice was not time-barred, Respondent argues that because the transfer of the Hotel Unit and the Sublease were parts of an integrated transaction, if the limitations period was validly extended with respect to the Hotel Unit, the limitations period similarly should be considered extended for the Sublease as having arisen out of the same transaction. In support of this argument, Respondent cites Bloomfield v. Bloomfield, 97 N.Y.2d 188 (2001); Duffy v. Horton Memorial Hospital, 66 N.Y.2d 473 (1985); and Vastola v. Maer, 39 N.Y.2d 1019 (1976). Insofar as those decisions are based on the New York Civil Practice Laws and Rules, they have no application to the assessment of the RPTT. Code section 11-2116(b).

In General Stencils, Inc. v. Chiappa, 18 N.Y.2d 125, 128 (1966), the Court of Appeals has concluded that it can invoke its equitable powers

> to bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant's affirmative wrongdoing ... which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding. [Citations omitted.]

As we have previously concluded that there was no affirmative wrongdoing on Petitioner's part in the form of false statements or misleading silences, Petitioner is not estopped from asserting that the Sublease Notice was time-barred.[33]

[33] We have considered all of Respondent's other arguments and find them to be without merit.

Accordingly, the ALJ Determination is reversed and the Sublease Notice is cancelled. Because we concluded that the Sublease Notice was time-barred, we need not address Petitioner's arguments with respect to the substantive issue of whether any portion of the $36,500,000 paid pursuant to the Sublease was subject to RPTT.

Dated: January 4, 2007
New York, New York

_____
GLENN NEWMAN
Commissioner and President

_____
ELLEN E. HOFFMAN
Commissioner