NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION

In the Matter of the Petition of STEUBEN DELSHAH, LLC	
In the Matter of the Petition of AFRICAN AMERICAN PARENT COUNCIL, INC.	ORDER & DETERMINATION TAT (H) 12-12 (RP), & TAT (H) 12-23 (RP)

Chu-Fong, A.L.J.:

Petitioner Steuben Delshah, LLC (Steuben), filed a petition with the New York City (City) Tax Appeals Tribunal (Tribunal), protesting a Notice of Determination, dated January 13, 2012. In this Notice, the City Commissioner of Finance (Respondent) assessed Steuben for additional real property transfer tax due for transfers dated March 4, 2008, and July 11, 2008, and imposed a fraud penalty. Steuben was represented by Morrison and Foerster, LLP (Irwin M. Slomka, Esq. and Kara M. Kraman, Esq.), and the Law Office of John W. Mitchell (John W. Mitchell, Esq.). Respondent was represented by Zachary W. Carter, the Corporation Counsel of the City of New York (Andrew G. Lipkin, Esq.).

On May 22, 2013, Respondent moved to consolidate this case with seven similar matters (Tribunal Rules [20 RCNY] § 1-05

[g]).[1] By Order, dated November 27, 2013, the A.L.J. previously assigned to this case consolidated this case with the Matter of the Petition of African American Parent Council, Inc., TAT (H) 12-23(RP), because that taxpayer participated in the March 4, 2008, and July 11, 2008, transfers.

Petitioner African American Parent Council, Inc. (AAPC), filed a petition with the City Tribunal protesting a Notice of Determination, dated January 13, 2012. In this Notice, the Respondent, assessed additional real property transfer tax due for transfers dated March 4, 2008, and July 11, 2008, and imposed a fraud penalty. AAPC was represented by Lorenzo A. DeLuca, Esq.

On May 9, 2014, Steuben, as well as the taxpayers in the above-referenced matters, moved to quash nine *subpoenas duce tecum* issued by Respondent pursuant to Administrative Code § 11-2113. The motion sought to withdraw any outstanding subpoenas, to preclude the introduction of evidence obtained from the subpoenas into any hearings, and to stop Respondent from utilizing its power under Section 11-2113 for discovery in this forum. By Order, dated October 7, 2014, the previous A.L.J. denied Steuben's motion.

On June 22, 2015, Steuben filed a motion for summary determination pursuant to the Tribunal Rules (20 RCNY) § 1-05 (c). It simultaneously filed a motion to dismiss Respondent's Answer to the Petition pursuant to Tribunal Rules (20 RCNY) § 1-

[1] Before the prior A.L.J., Respondent moved to consolidate several matters on the basis the cases bore similar legal issues and parties. The prior A.L.J. consolidated the cases individually. The only matters at issue in this determination are TAT (H) 12-12 (RP) and TAT (H) 12-23 (RP).

05 (a) and Civil Practice and Procedure Rules (CPLR) § 3016 (b). Steuben filed a brief in support of its motions for summary determination and dismissal. Respondent filed a brief in opposition. Steuben filed a reply brief in support of its motions. Respondent filed a sur-reply brief. Steuben filed a response to Respondent's sur-reply brief. Respondent filed a reply to Steuben's response. AAPC filed no briefs on these motions.

On December 21, 2016, the undersigned held oral argument on these motions. Steuben appeared at the oral argument by Morrison and Foerster, LLP (Irwin M. Slomka, Esq. and Kara M. Kraman, Esq.), and the Law Office of John W. Mitchell (John W. Mitchell, Esq.). Respondent appeared at the oral argument by Zachary W. Carter, the Corporation Counsel of the City of New York (Andrew G. Lipkin, Esq. and Kevin R. Harkins, Esq.). AAPC did not appear at the oral argument.

ISSUES

I. Whether summary determination may be granted on the basis that the record presents no material factual questions, and establishes that the subject RPTT returns are not fraudulent, thereby proving the Notices should be cancelled because, when they were issued, they were time-barred?

II. If not, whether the Answer to the Petition should be dismissed pursuant to CPLR 3016 (a)?

FINDINGS OF FACT

The Findings of Fact within the November 27, 2013 and October 7, 2014 Orders are, hereby, incorporated by reference.[2]

Background & the Transfers. During the period at issue, Petitioner Steuben Delshah, LLC (Steuben), was a New York limited liability company. With a 99% interest in Steuben, Michael Shah was the limited liability company's controlling member.[3]

Steuben sought to purchase a property on Staten Island, New York, located at 195 and 231 Steuben Street (the Property). It negotiated the sale with the owner of the Property, Greentree Steuben, LLC (Greentree), and specifically sought to reduce New York City real property transfer tax (RPTT).[4]

The transfers also involved AAPC. Minnie Graham incorporated AAPC in 1992.[5] Mrs. Graham was an active member in her Staten Island community of Parkhill.[6] The mission of AAPC was to improve the quality of life for youths and to give parents tools to advocate for their children's rights.[7] The

[2] In this matter, the parties did not enter into a stipulation of facts.
[3] Mr. Shah attended Harvard Law School, the London School of Economics, and, for a short time, worked in a large New York City law firm (Brief in Opposition, p. 5; the Affirmation of Andrew Lipkin [Lipkin Affirmation], Exhibit 37).
[4] Mr. Shah makes this statement in an email correspondence between himself and his attorneys (Lipkin Affirmation, Exhibit 24).
[5] Affidavit of Minnie Graham (Graham Affidavit), ¶ 3. The Graham Affidavit appears as Exhibit A to Steuben's Reply Brief (Reply Brief),
[6] Graham Affidavit, ¶ 5. Supplemental Affirmation of Andrew G. Lipkin (Lipkin Supplemental Affirmation), Exhibit 3.
[7] Graham Affidavit, ¶ 2.

organization went on to establish many programs for Staten Island youth, including after-school programs and summer day camps.[8]

AAPC pursued its mission with little financial support.[9] In 1993, the Internal Revenue Service (IRS) granted income tax exempt status to AAPC under Internal Revenue Code (26 USC) § 501 (c) (3).[10] AAPC received funding very briefly from the predecessor to the City Office for People with Developmental Disabilities, and from small private contributions.[11] AAPC was generally not required to file informational returns (IRS Form 990) to maintain its exempt status because its annual gross income rarely exceeded $25,000.00.[12] AAPC maintained its income tax exempt status prior to and during the period at issue.

Apart from the instant transfers, AAPC has been involved in other real property transfers with Mr. Shah. The news media has investigated the real estate transfers involving AAPC.[13] Respondent has assessed some of these transfers, and the corresponding protests are pending before this forum.[14]

Transactions Not-at-Issue. Mr. Shah had been attempting to employ strategies to avoid RPTT. One example involved the transfer of 902 and 908 Bedford Avenue in Brooklyn (the Bedford

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[8] Graham Affidavit, ¶ 4, 6, Exhibit A.
[9] Graham Affidavit, ¶ 8.
[10] Affidavit of Michael Shah (Shah Affidavit) (Shah Affidavit, ¶ 3, Exhibit A). The Shah Affidavit appears as Exhibit A to the Steuben's Brief in Support of the Motions (Brief in Support).
[11] Graham Affidavit, ¶ 8.
[12] *Id.*
[13] The affidavit of Maureen Kokeas (Kokeas Affidavit), ¶ 10, 18). She served as the First Deputy Sheriff in the Office of the New York City Sheriff during the relevant time frame (Kokeas Affidavit, ¶ 1).
[14] See footnote 3.

Transaction).[15] 902-908 Bedford Avenue LLC, the grantor (Bedford Grantor), transferred title to AAPC. AAPC then transferred the title to 902-908 Bedford Realty LLC (Bedford Grantee), an entity controlled by Mr. Shah. In reporting the AAPC-Bedford Grantee transfer, the RPTT return indicated that the consideration was "$0."[16]

In 2007, prior to issuing guidance on this strategy,[17] Respondent audited the Bedford Transaction. It applied the "end result" test of the step transaction doctrine,[18] and collapsed the two transfers, i.e., Bedford Grantor-AAPC and AAPC-Bedford Grantee, into a single transaction between Bedford Grantor and Bedford Grantee. On December 19, 2007, Respondent issued a Notice of Determination to Bedford Grantee.[19] On July 23, 2008, Respondent and Bedford Grantee agreed to a Proposed Resolution on the Bedford Transaction, which resulted in full payment of the RPTT with interest.[20]

Respondent also submitted proof regarding other real property transfers that are not at issue. These transactions are not discussed because they are irrelevant to the instant inquiry.

<u>The Subject Transfers</u>. Greentree, AAPC, and Steuben engaged in a series of agreements prior to the Property being transferred. A summarized timeline of events follows:

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[15] For more information, see the Supplemental Affidavit of Michael Shah (Shah Supplemental Affidavit), ¶ 11-16.
[16] Brief in Opposition to the Motions (Brief in Opposition), p. 15-16.
[17] See *infra* at pp. 10-11.
[18] Id.
[19] Lipkin Affirmation, Exhibit 11. This notice did not asses a fraud penalty.
[20] Lipkin Affirmation, Exhibit 30.

July 19, 2007: Greentree, as grantor, and AAPC, as grantee, entered into a Contract of Sale for the Property with a purchase price of $22,000,000.00.[21]

January 25, 2008: AAPC entered into an "Assignment and Assumption" agreement, transferring its rights and obligations under the Greentree-AAPC Contract of Sale to Steuben.[22] AAPC, as grantor, and Steuben, as grantee, entered into a Contract of Sale for the Property with a purchase price of $22,030,000.00.[23]

March 4, 2008: Greentree and AAPC amended the July 19, 2007 Contract of Sale.[24] The modifications primarily concerned the timing of payments, escrow, and setting the closing date as "on or about July 15, 2008." Also, Greentree executed a Bargain and Sale Deed granting the Property to AAPC.[25]

July 10, 2008: Greentree and AAPC executed a "Settlement Agreement" that amends their March 4, 2008 contract.[26] In this document AAPC and its successors agree to indemnify Greentree from any RPTT liability, and to set the closing date of July 11, 2008.

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[21] The record includes two copies of this contract, one in which Ms. Graham signed on behalf of AAPC, and another in which Dr. Darshan Shah, Mr. Shah's father, signed on the AAPC line (Lipkin Affirmation, Exhibit 5). The date on the first page of the contract is July 11, 2007, but the Contract was not signed until July 19, 2007.
[22] Lipkin Affirmation, Exhibit 13.
[23] Lipkin Affirmation, Exhibit 14.
[24] Lipkin Affirmation, Exhibit 18.
[25] Lipkin Affirmation, Exhibit 19; Shah Affidavit, ¶ 4.
[26] Lipkin Affirmation, Exhibit 26.

July 11, 2008: AAPC conveyed the Property to Steuben through a bargain and sale deed.[27]

The RPTT Returns. On July 21, 2008, the Greentree-AAPC Deed was presented to the Office of the Richmond County Clerk for recording. This delay in presentation was due to the deed being held in escrow for financing purposes.[28]

On July 22, 2008, the Office of the Richmond County Clerk (Richmond County Clerk) accepted the Greentree-AAPC Deed for recording.[29] This document was accompanied by a City RPTT return, a State Real Estate Transfer Tax Return (Form TP-584), a City Real Property Transfer Report (NYC Form RP-5217), and a United States Department of Housing and Urban Development (HUD) Affidavit in Lieu of Registration Statement.[30] The Richmond County Clerk recorded the Greentree-AAPC Deed on the same date.

The first page of the Greentree-AAPC return reports information about the transfer. A Richmond County Clerk stamp indicates that the return was accepted on "07/22/2008 09:17:30 A.M." It also indicates payment of New York State Real Estate Transfer Tax (RETT) in the amount of "$88,000.00," RPTT due ".00," and a filing fee of "$217.00." The return lists Greentree as the grantor and AAPC as the grantee, their addresses, as well as the correct street addresses of the Property and their assessed values. Under "date of the transfer to grantee," the Return reports "3/4/2008." On the first page, under the section entitled "CONDITION OF TRANSFER," a checkmark

[27] Lipkin Affirmation, Exhibit 32; Shah Affidavit, ¶ 8.
[28] Shah Supplemental Affidavit, ¶ 1.
[29] Lipkin Affirmation, Exhibit 1.
[30] Shah Affidavit, ¶ 5, Exhibit B.

exists in the line "o" box, reporting that this transaction was a "Transfer by or to a tax exempt organization."

On the second page, the Greentree-AAPC Return reports more detailed information about the transaction. It indicates that the property type is an "apartment building," and that the parties are recording a fee. On "SCHEDULE 1 - DETAILS OF CONSIDERATION," the return provides that the consideration was "$22,000,000.00" on the line that states "cash." The remaining lines were blank.[31] The $22,000,000.00 number appears on the line corresponding to "TOTAL CONSIDERATION." The final section of this page is "SCHEDULE 2 - COMPUTATION OF TAX." On line 12, the Greentree-AAPC Return reports the "Total tax due" as "$0.00" and, on line 14, lists the "total Remittance Due" as "0."

Page 4 of the Greentree-AAPC Return bears signatures from the representatives of both parties, each accompanied by a notary stamp. It also lists the grantor's attorney and the grantee's attorney. The next page, numbered as 8, bears a "SCHEDULE G - TRANSFER BY OR TO A TAX EXEMPT ORGANIZATION." This section also requests that the organization claiming eligibility for the exemption from the transfer tax attach a letter granting a federal, state, or city tax exemption, and an affidavit showing it was in force. Neither document accompanied the Greentree-AAPC return. This section also asks a single question: "Is the grantor or grantee an organization exempt from

[31] The lines for other categories were "Purchase money mortgage," "unpaid principal of pre-existing mortgage(s)," "Accrued interest on pre-existing mortgage(s)," "Accrued real estate taxes," "Amounts of other liens on property," "Value of shares of stock or of partnership interest received," "Value of real or personal property received in exchange," "Amount of Real Property Transfer Tax and/or other taxes or expenses of the grantor which are paid by the grantee," and "Other (describe)."

taxation pursuant to IRS Code Section 501(c) (3)?" The return answered in the affirmative, reporting "yes."

On July 28, 2008, Steuben presented the July 11, 2008 AAPC-Steuben Deed for recording.[32] Among other documents, a RPTT accompanied this instrument, as well as the same corresponding documents for the Greentree-AAPC Return.[33] The Richmond County Clerk began an examination and did not record the AAPC-Steuben Deed until September 19, 2008.[34]

The first page of the AAPC-Steuben Return bears a date/time stamp from the Richmond County Clerk of "09/19/2008 11:15:27 A.M." It also indicates payment of RETT in the amount of "$88,120.00," RPTT due ".00," and a filing fee of "$213.00." The AAPC-Steuben Return lists the Grantor as AAPC and Steuben as the grantee, as well as the street addresses of the Property. It lists the "date of the transfer to grantee" as "7/11/2008." Under the section titled "CONDITION OF TRANSFER," the first page bears a checkmark in the line "o" box, indicating that it is a "Transfer by or to a tax exempt organization."

The second page of the AAPC-Steuben Return reports more detailed information about the transfer. It indicates that the property type as an "apartment building" and that the parties are recording a fee. In the section titled "SCHEDULE 1 - DETAILS OF CONSIDERATION," the return provides that the consideration was $22,030,000.00 on the line named "cash." The remaining lines were left blank.[35] The $22,030,000.00 number

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32 Lipkin Affirmation, Exhibit 2.
33 Shah Affidavit, ¶ 9, Exhibit C.
34 Shah Supplemental Affidavit, ¶ 7.
35 See footnote 31 for a complete listing of the lines.

appears on the line corresponding to "TOTAL CONSIDERATION." The final section on the second page is "SCHEDULE 2 - COMPUTATION OF TAX." The AAPC-Steuben Return reports the "Total tax due," line 12, as "$0.00" and, on Line 14, the "Total Remittance Due" as "0."

On Page 4, the Greentree-AAPC Return bears signatures from the representatives of both parties, each accompanied by a notary stamp. It also lists the grantor's attorney and the grantee's attorney. The next page, numbered as 8, bears a "SCHEDULE G - TRANSFER BY OR TO A TAX EXEMPT ORGANIZATION." This section also requests that the organization claiming eligibility for the exemption from the transfer tax attach a letter granting a federal, state, or city tax exemption, and an affidavit showing it was in force. Neither document accompanied the AAPC/Steuben return. This section also asks a single question: "Is the grantor or grantee an organization exempt from taxation pursuant to IRS Code Section 501(c) (3)?" The return answered in the affirmative, reporting "yes."

<u>Respondent's Audit Procedures</u>. On February 29, 2008, Respondent's Audit Division issued a "Statement of Audit Procedure" RPTT 2008-1 (SAP 2008-1), which addressed "real property transfer tax transfers into and out of charitable organizations."[36] Noting that charitable organizations are exempt from transfer tax (19 RCNY § 23-05 [b] [2]), SAP 2008-1 advises auditors that "potentially abusive situations" may occur where taxpayers misuse the exemption.

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[36] Lipkin Affirmation, Exhibit 17.

SAP 2008-1 provides an example and the procedure to be applied. The illustration is as follows: a corporation transfers property to an exempt charity; the charity then transfers the property back to the corporation. SAP 2008-1 advises auditors to apply "step transaction doctrine" in order to "collapse the steps of a transaction." It provides three tests that may be used, including the "end result test":

> "If the **two transactions** (owner to charity and then charity to new owner) were **merely a means** for the old owner to convey the property to a new owner, the "end result" test would be met. We will look at whether the parties intended to convey the property to a new owner, not whether the parties meant to avoid tax" [emphasis in original]."

In the "Procedure" section, SAP 2008-1 reiterates this point, stating that:

> "This **'step transaction doctrine'** (where the steps of a transaction are linked to determine proper tax treatment) will be applied if: (1) the series of transactions was entered into pursuant to **binding agreements**, or (2) evidence exists that the series of **transactions** was entered into **pursuant to a plan**, even if there is no binding contract" [emphasis in original].

This section goes onto state that if a transaction occurs within six months, Respondent will presume the transactions took place according to a plan; if the transactions occur within six months to a year, Respondent will audit the transactions determine if it will apply the step transaction doctrine; and, if the transactions occur over a period greater than a year, Respondent will consider all the circumstances to determine whether to commence an audit of the transactions.

On April 13, 2008, Respondent's Audit Division issued SAP RPTT-2008-04 (SAP 2008-4),[37] which "provides guidelines and procedures for controlling the statute of limitations . . . so that all audits are completed before the statute expires." This document outlines the file systems to be maintained by RPTT audits in order to timely complete audits. SAP 2008-4 also lists the responsibilities of audit managers and supervisors.

In an affidavit,[38] Respondent's Director of Excise Taxes and Real Property Transfer Tax Audits (Audit Director) explained that SAP 2008-4 applies only to desk audit, and not to fraud investigations handled by the Enforcement Division.[39]

The Audit. The Office of the New York City Sheriff (NYC Sheriff's Office), which falls under the Respondent's purview, bears the responsibility of investigating suspected tax fraud cases.

In September 2009, the First Deputy Sheriff received an email from the Office of the Richmond County District Attorney (RCDA) regarding a criminal investigation of Mr. Shah.[40] The email specifically referenced the transfers of the property at issue in this matter. This email provided the following:

> "I am conducting an investigation regarding a man who has purchased properties in Richmond County and one in the Bronx [C]ounty. This individual sets up numerous

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[37] Brief in Support, Exhibit B.

[38] The record contains the affidavit of Santi Robert Curro, who served as Respondent's Director of Excise and Real Property Transfer Tax Audits during the period at issue (Curro Affidavit, ¶ 1). During the relevant timeframe (i.e. September 1, 2011 to July 1, 2013), he served as a Unit Manager for Commercial Rent Tax, Hotel Room Occupancy Tax and Real Property Transfer Tax Audit (id.).

[39] Curro Affidavit, ¶ 8.

[40] Kokeas Affidavit, ¶ 3.

> corporations to be owners of these properties. My investigation has revealed that at the closing for each of these properties my subject uses two different Not for Profit organizations to purchase the properties first and then these [Not for Profit] organization sell the properties to my subject. It's my belief that he is using the [Not for Profit] organizations as 'straw buyers' so that he can avoid paying New York City Real Property Transfer Taxes."[41]

Complying with the request, the NYC Sheriff's Office provided the RCDA with available documentation.

The First Deputy Sheriff stated that it was Finance's policy not to conduct an investigation parallel to an ongoing criminal investigation. Respondent followed this policy in this instance, and elected to defer to the RCDA. While it did gather limited information on Mr. Shah while this investigation was ongoing, Finance was largely inactive.

"[S]ometime near the end of 2011," the First Deputy Sheriff became aware that RCDA was not going to pursue any criminal action for these transfers.[42] The NYC Sheriff's Office had "many discussions" regarding the statute of limitations and fraud as it related to the transfers at issued and to Mr. Shah. After the First Deputy Sheriff and staff reviewed the facts, the NYC Sheriff's Office concluded that the matter presented all the elements of fraud.[43]

The Audit Director stated that his division did not become involved in this matter until December 2011.[44] He stated that

[41] Kokeas Affidavit, ¶ 4.
[42] Kokeas Affidavit, ¶ 16.
[43] Kokeas Affidavit, ¶ 17, 19. The affidavit contains no other information regarding this review or conclusion, including their opinion as to what facts satisfied the elements of fraud.
[44] Curro Affidavit, ¶ 4.

these transfers came from the Enforcement Division as a fraud case. The Audit Director conceded that, at that point in which his division became involved, "more than three years had already expired since the filing of the returns underlying these cases. Consequently, there was no reason to track the statute of limitations."[45]

On January 13, 2012, Respondent issued two Notices of Determination, to Steuben and to AAPC. In these Notices, Respondent applies SAP 2008-1 and collapses the Greentree-AAPC and AAPC-Steuben transactions into a single transfer from Greentree to Steuben.

The Notices accept the amount of the consideration reported on the AAPC-Steuben Return (i.e., $22,030,000.00) and assess additional RPTT due in the amount of $578,287.50. Together with penalties and interest, calculated to February 29, 2012, the Notices assessed $1,133,885.37 due. The text of the "Explanation of Adjustment(s)" section, in its entirety, is as follows:

> "Consideration is defined as the price actually paid or required to be paid for real property or an economic interest therein, without deduction for mortgages, liens or encumbrances, whether or not paid by money, property, or any other thing of value. The term includes the cancellation or discharge of an indebtedness or obligation. It shall also include the amount of any mortgage, lien or other encumbrance, whether or not the underlying indebtedness is assumed. Where an option to purchase real property or an economic interest therein is exercised, consideration shall include the amount paid or required to be paid to the grantor or his designee for the option per RCNY

[45] Curro Affidavit, ¶ 6.

> 23-02 (formerly Article 9(a) of the Real Property Transfer Tax Regulations).
>
> The claims of exemption from the Real Property Transfer Tax were disallowed because the transfer from the grantor to the African American Parent Council, Inc., and the transfer from the African American Parent Council, Inc., to the grantee did not reflect the substance of the transaction. Therefore, the transaction was deemed to be a transfer of real property directly from Greentree Steuben LLC, as grantor, to Steuben Delshah, LLC, as grantee.
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> Transfer 1 date: 3/4/2008
> Transfer 2 date: 7/11/2008
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> RPTT Return date: 10/1/2008
> RPTT Return date: 11/18/2008
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> Deemed Transfer date: 3/4/2008
> Deemed RPTT return filing date: 10/1/2008
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> Interest is due on the adjusted tax liability.
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> Fraud penalties have been imposed."

Attorneys' Opinions. The record contains the affidavits of two attorneys, Robert Prignoli and William A. Colavito.[46]

Mr. Prignoli served as counsel for AAPC in these transfers. He reviewed the documents and structure of the transactions in the context of AAPC's not-for-profit corporation status, and issued the following letter:

> "Ultimately the reconveyance of the Property produces income to [AAPC], while not requiring it to utilize any of its assets. Thus, the sale does not result in the disposition of all or substantially all of its assets, as is required by §510 and 511 [of the Not-for-Profit Corporation Law], before judicial approval

[46] These attorneys' opinion appear in the record as their affidavits, the Prignoli and Colavito Affidavits, respectively.

is mandated. Instead [AAPC]'s reconveyance of the Property results in income without having to utilize any of its assets. [AAPC] would have had to borrow the funds to close on the Property, resulting in the value of the property being entirely offset by liability, essentially a $0 value asset. [AAPC]'s income will increase from the transaction, and more importantly, its operations will continue without interruption or interference before and after the contemplated sale, the sale properly be characterized as a disposition of substantially all of its assets."

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"On the basis of the foregoing, I hereby confirm that it is my opinion that both the purchase of the Property and the subsequent sale of the Property by the Not-for-Profit Organization will qualify for the exemption from the New York City Real Property Transfer Tax as described in § 11-2106b.2 of the NYC Administrative Code."[47]

In a supplemental affidavit, Mr. Shah stated that Mr. Prignoli's opinion was buttressed by his review of published Finance Letter Rulings (FLR), FLR Nos. 074864-021, dated July 27, 2007; 054840-021, dated November 10, 2005; and, 034808-021, dated November 28, 2003.[48]

Mr. Colavito, an attorney with 45 years of experience in the title insurance industry,[49] reviewed the "documents of conveyance" of the Property from Greentree to AAPC.[50] Mr. Colavito does not state which specific documents, if any, were provided for his review. He described the processes that a title agent would go through to evaluate a transaction like the AAPC-Steuben transfer, including the documents that would need

[47] Lipkin Affirmation, Exhibit 15.
[48] Shah Supplemental Affidavit, ¶ 19.
[49] Colavito Affidavit, ¶ 1.
[50] Colavito Affidavit, ¶ 5.

to be reviewed.[51] Mr. Colavito opined that, given the closeness in time with the Greentree-AAPC transfer, the dollar value, and the involvement of a not-for-profit corporation, the AAPC-Steuben transaction should have been presented to an underwriter for approval.

Mr. Colavito also expressed his disagreement with Mr. Prignoli's opinion letter. He opined that N-PCL § 509 would also apply to AAPC, and would require two-thirds or a majority of the board of directors' approval for the not-for-profit corporation to purchase or sell real property. Mr. Colavito noted that Mr. Prignoli's letter does not discuss whether AAPC complied with this requirement.

HUD. Respondent introduced the affidavit of the Director for Project Management for the New York Multifamily Hub of HUD (HUD Director).[52] The HUD Director identified one of the Properties as being a Section 8 development since June 1, 2007,[53] which was subject to a Housing Assistance Payment (HAP) Contract.[54] On December 11, 2007, the relevant HAP Contract was assigned directly from Greentree to Steuben.[55] The HUD Director

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[51] In order to determine whether a transfer was a bona fide transaction, the title agent would need to review all relevant documents for each organization, including Steuben's Articles of Organization and Operating Agreements, as well as any consents or resolutions regarding the conveyance of the Property, as well as AAPC's certificate of incorporation, bylaws, and all relevant consents from its board of directors. Additionally, a title agent would need to see corporate documents to determine whether the transfer would constitute a conveyance of all or substantially all of its assets because such a transfer would require judicial approval (Colavito Affidavit, ¶ 5-14).

[52] The record contains the affidavit of Stacey Schrager (Schrager Affidavit), who served as the Director for Project Management for the New York Multifamily Hub of HUD since June 2014 (Schrager Affidavit, ¶ 1). However, Ms. Schrager was not the director at the time of the transfers.

[53] Schrager Affidavit, ¶ 3.

[54] Schrager Affidavit, ¶ 4.

[55] Schrager Affidavit, ¶ 5, Exhibit A.

stated that, if there was a transfer to AAPC, then the HAP Contract should have been assigned to that entity; otherwise, the HAP Contract would be subject to cancellation.[56] The HUD Director makes no mention of the AAPC-Steuben Assignment and Assumption Agreement or how it would have impacted her analysis. The HUD Director also makes no mention of fraud.

The Pleadings. Respondent's Answer to the Petition (Answer) pleads several facts regarding AAPC and its tax exempt status. Among the alleged facts are that AAPC or its principal "received a cash consideration solely for the purpose of allowing [Steuben] to avail itself of [AAPC]'s tax-exempt status" (Answer ¶ 32 [i]). It advances the theory that the transfers to and from AAPC should be consolidated because they were done solely to evade the payment of RPTT.

In Respondent's Answer, the word "fraud" appears at only three points. At Paragraph 4, it states:

> "Respondent concluded that [Steuben] filed a willfully false or fraudulent return with intent to evade the Real Property Transfer Tax (the 'RPTT') in connection with the Transaction" (Answer ¶ 4).

The Answer goes on to state that, "Respondent will demonstrate that the RPTT return filed in connection with the Transaction was willfully false or fraudulent with the intent to evade the RPTT" (Answer ¶ 5). At paragraph 9, the Answer provides, "Respondent will demonstrate that the fraud penalties were properly imposed" (Answer ¶ 9). The Answer alleges no specific facts indicating fraud on either of the RPTT returns.

[56] Schrager Affidavit, ¶ 9.

STATEMENT OF THE PARTIES' POSITIONS

Steuben contends that these transfers were properly reported on the RPTT returns, and Respondent failed to issue a notice when the assessment period was open. It argues that the fraud penalty was assessed solely to invoke the exception to the limitations found within Administrative Code § 11-2116 (b).

Steuben moves for summary determination pursuant to Section 1-05 (d) of this Tribunal's rules. It argues that the limitations period was not open on January 13, 2012 because the returns do not meet the Section 11-2116 (b) requirement that they be fraudulent. Steuben argues that the returns are complete and accurate because they report the information requested on the forms. It argues that the returns are not fraudulent, and that the filings are sufficient to have begun the running of the limitations period. Steuben also argues that the intent to evade RPTT cannot be shown because it relied upon a legal opinion in structuring these transfers.

For these reasons, Steuben contends that Respondent does not carry its burden of establishing fraud, which means that the assessment period was closed when the Notices were issued, and that it is entitled to summary determination in its favor.

Steuben moves to dismiss Respondent's Answer to the Petition in addition to moving for summary determination, and as an alternative argument. It contends that Respondent's answer fails to specify the grounds of the fraud claim. It notes that Respondent failed to detail which section or what reported information is fraudulent. As such, Steuben argues that under

CPLR 3016 (b), the answer should be dismissed and the petition granted.[57]

Respondent argues that Steuben's motions should be denied and summary determination should be granted in its favor. Alternatively, it argues the matter should proceed to hearing.[58] Respondent's position is three-fold. First, it argues that the returns are, on their face, fraudulent. Respondent contends that the reported considerations are false because the proof does not establish that funds were transferred to and from AAPC. It also contends that the Greentree-AAPC return is fraudulent because it employs a March 4, 2008 transfer date, when the deed was executed after such date.

Respondent's second contention is that, even if they are complete and accurate, the returns are fraudulent because they reported two transfers when there is actually one transfer.[59] It applies the "end result" test of the "step transaction doctrine."[60] The argument is that the two transfers should be consolidated into a single transfer from Greentree to Steuben because the transfers to and from AAPC were motivated solely to take advantage of its RPTT exemption. Respondent alleges that the filed RPTT returns serve as Steuben's attempts to fraudulently conceal the transaction's "true nature."[61] It cites many of the same documents referenced in its badges-of-fraud

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[57] In its supporting brief, Steuben responds to an argument raised only in Respondent's answer, concerning the parties' failure attach the affidavit requested by "SCHEDULE G" on the RPTTs, which flows from 19 RCNY 23-06 (Answer ¶ 31). Respondent neither addresses nor supports this argument in its briefs.
[58] Oral Argument Transcript, pp. 28-29.
[59] Brief in Opposition, p. 30.
[60] SAP 2008-1 details Respondent's basis for applying the step transaction doctrine in which real property is transferred to and from an exempt entity.
[61] Brief in Opposition, p. 56.

analysis.[62] Therefore, it submits that, even if complete and accurate, the returns must be considered fraudulent because they are part of a scheme to defraud the government.

Respondent's third argument is that a hearing is necessary because the matter presents questions of intent. Respondent submitted proof of the badges of fraud, which goes towards the fraudulent intent inquiry. It cites to the timing of the returns, Mr. Shah's business experience, his other attempts at similar structuring, as well as the issues with the subject returns.[63] These points are also offered as a basis for Respondent's argument that an individual with Mr. Shah's experience and acumen would not rely on the opinion of outside counsel in structuring this transaction. Respondent concludes that the foregoing proves the fraud penalty and supports sustaining the deficiency, and, as such, this Tribunal may grant summary determination in its favor (20 RNCY 1-05 [d] [1]). In the alternative, Respondent argues that the Tribunal may deny the summary determination motion and schedule a hearing.[64]

Regarding the motion to dismiss, Respondent argues that this Tribunal has not enforced strict pleading standards and prefers rulings on the merits. Should dismissal be granted, Respondent argues that it should be done without prejudice or that it be granted leave to amend its answer.

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[62] See infra at pp. 25-26, footnote 77.
[63] Respondent's Brief, p. 55.
[64] In its Answer, Respondent alleges that the AAPC-Steuben Return was "improper" because it did not include a sworn statement (Answer ¶ 31). Steuben replied to this by stating that the Instructions to the RPTT return (Form NYC-RPT) do not instruct or require a nonprofit organization claiming an exemption from RPTT to attach a sworn statement or letter of exemption to the RPTT return. As neither party raised this point after the pleadings, it appears not to be in issue.

CONCLUSIONS OF LAW

New York City imposes a tax upon all transfers of real property (Administrative Code § 11-2102 [a]). A return must be filed for all such transfers (Administrative Code § 11-2105 [a]), which are presumed to be taxable (Administrative Code § 11-2103). However, transfers to and from certain charitable organizations are exempt from the RPTT (Administrative Code § 11-2106 [b] [2]).[65] Respondent may assess additional RPTT (Administrative Code § 11-2107); however the Administrative Code limits the period in which such assessments may be issued.

The open period for assessment is three years from the filing date of the RPTT return (Administrative Code § 11-2116 [b]). The Greentree-AAPC return was filed on July 21, 2008. The AAPC-Steuben return was filed on September 19, 2008. Respondent issued the Notices on January 13, 2012.

It is undisputed that the Notices were not issued prior to the expiration of the three-year limitations period set forth in Administrative Code § 11-2116 (b). Rather, Respondent relies upon this provision's exception to the limitations for "false or fraudulent return[s] with intent to evade the tax."[66] An assessment that successfully asserts a fraud penalty may be

[65] "The tax imposed by this chapter shall not apply to any of the following deeds, instruments or transactions: . . . 2. A deed, instrument or transaction conveying or transferring real property or an economic interest therein by or to any corporation, or association, or trust, or community chest, fund or foundation, organized or operated exclusively for religious, charitable, or educational purposes. . ." (Administrative Code § 11-2106).

[66] This language mirrors the exception to the limitations period for City Commercial Rent Tax (CRT) (Administrative Code § 11-717 [b]). It is also substantially similar to the limitations exception for City General Corporation Tax (GCT) (Administrative Code § 11-674 [3] [a] [2]). This language also mirrors other parts of New York State Tax Law (e.g. Tax Law §§ 1145 [a] [3]; 1147 [b]).

issued beyond the three-year period. Accordingly, whether the assessment period was open on January 13, 2012, turns on whether the Greentree-AAPC and AAPC-Steuben returns were "fraudulent return[s] with intent to evade the tax."

Fraud Standard. Administrative Code § 11-2116 (b) contains the following language, limiting the assessment period and, providing an exception:

> "[E]xcept in the case of a wilfully false or fraudulent return with intent to evade the tax, 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; provided, however, that where no return has been filed as provided by law the tax may be assessed at any time" (Administrative Code § 11-2116 [b]).

In order for the subject Notices to be timely, they must fall into the exception for fraud. Neither RPTT § 11-2116 (b), nor RPTT § 11-2114 (d), define fraud or a fraudulent RPTT return. This Tribunal has addressed fraud in other contexts. However, this is the first case presenting the imposition of fraud penalties in an RPTT matter. This matter is also among the first, in this forum, in which the fraud penalty has been used to support an extension, or re-opening, of the assessment period.[67] This review must be guided by City, New York State (State), and federal jurisprudence addressing tax fraud (New York City Charter § 170 [d]).

[67] This situation has been litigated in other forums, including the former State Tax Commission (Commission) in *Kucherov v Chu* (147 AD2d 877 [3d Dept 1989], *confirming Matter of Nicholas Kucherov d/b/a Nick's Marine*, 1987 WL 60577, State Tax Commission, April 15, 1987 [TSB-H-87(129)S]; *see infra* at p. 38).

In the context of taxation, fraud refers to the intentional commission of acts for the specific purpose of evading tax believed to be due and owing (*Petzoldt v Commissioner*, 92 TC 661, 698 [1989]). "Fraud implies bad faith, intentional wrong doing and a sinister motive" (*Davis v Commissioner*, 184 F2d 86, 87 [10th Cir. 1950]). Where a fraudulent return is filed, the taxing authorities are permitted to assess the tax at any time (*Badaracco v C.I.R.*, 464 US 386, 394, 104 S Ct 756, 762, 78 L Ed 2d 549 [1984]).

It must also be noted that the question of whether fraudulent concealment or misrepresentation occurred exists separately from the analysis regarding the underlying determination (*see e.g. Matter of Ilter Sener d/b/a/ Jimmy's Gas Station,* DTA 800498, 1988 WL 168140, State Trib., May 5, 1998). The courts exercise caution so as to not "bootstrap a finding of fraud upon a taxpayer's failure to prove [a taxing authority's determination] erroneous" (*Parks v C.I.R.*, 94 TC 654, 661).

In *Matter of Sener*, the State Tax Appeals Tribunal (State Tribunal) analyzed the New York fraud penalty.[68] New York patterned its fraud penalties after the federal statutes. Therefore, the State Tribunal looked to federal cases for guidance (*Id.* at *5 *citing Matter of Levin v Gallman*, 42 NY2d 32 [1977]). The taxing authority bears the burden of proving fraud (*Kucherov; Matter of Sener*, 1988 WL 168140 at *6; *see e.g. Olinger v Commissioner*, 234 F2d 823 [5th Cir 1956]; *Valetti v*

[68] Prior to the establishment of the State Tribunal, litigation of the civil tax fraud penalty appears to have been infrequent (*but see e.g. Kucherov v Chu*).

Commissioner, 260 F2d 185 [3rd Cir 1958]).[69] In order to carry this burden, it must establish the following:

> "The standard of proof necessary to support a finding of fraud requires 'clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing' (See, Matter of Walter Shutt and Gertrude Shutt v. State Tax Commn., State Tax Commn., July 13, 1982.)" (*Id.* at *7; *compare Parks v C.I.R.*, 94 TC 654 [1990]).[70]

The key components to establish fraud are a wrongful act and intent to commit such an act.[71] Substantial understatement, standing alone, is insufficient to meet the standard (*Foster v Commissioner*, 391 F2d 727, 733 [1968]). Certainly, consistent and substantial understatements can be considered strong evidence of wrongful acts (*Merrit v Commissioner.*, 301 F2d 484, 487 [5th Cir 1962]); however, other factors must be present (*see e.g. Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Matter of March; Foster*).[72] Intent may be established from the badges of fraud, or facts and circumstances

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[69] See also Administrative Code § 11-529 (e) (1), establishing that Respondent bears the burden of proving the basis for assessing fraud penalties in Unincorporated Business Tax (UBT) matters. The RPTT burdens provision is silent regarding fraud (Administrative Code 11-2103).

[70] This substantively mirrors the two-prong federal fraud test: "(1) an underpayment of tax exists, and (2) the return preparer intended to evade taxes known to be owing by conduct intended to conceal, mislead, or otherwise prevent the collection of tax" (*Erikson v Commissioner*, TCM 2012-194, 103 TCM 46 at 9 [2012] [internal quotations and citations omitted])

[71] Fraud possesses four elements restated, generally, as follows: "misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury" (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 131 AD3d 427, 428 [1st Dept 2015]; *see also Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016], *rearg denied*, 28 NY3d 956 [2016]).

[72] In *Merritt*, which identifies consistent and substantial underreporting as a strong badge of fraud, the court also relied upon the incomplete books and records in sustaining fraud penalties.

that, when taken together, can serve as indicia of fraudulent intent (*id.*).[73]

In accordance with the City Charter § 170-d, the City Tribunal adopted the State Tribunal's case law on fraud penalties. In *Matter of Marquez* (TAT[E] 97-107, 2007 WL 1544506, City Trib., May 16, 2007), citing the State Tribunal cases, this Tribunal recited the above standard, and held that in order to sustain such a penalty, all the aforementioned elements of fraud must be proven (*id* at *17). Further, the imposition of this penalty affects summary determination.

Summary Determination Standard. Summary determination may be granted "if it has been sufficiently established that no triable issue of fact exists" and a party is entitled to judgment as a matter of law (Tribunal Rules [20 RCNY] 1-05 [d]). The movant bears the burden of meeting this standard, and all inferences are to be made in favor of the non-movant (*Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Stonehill Capital Mgt., LLC v Bank of the W.*, 28 NY3d 439, 448 [2016]). This is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Daliendo v Johnson*, 147 A.D.2d 312 [2d Dept 1989]; see also, *Matter of Emigrant Savings Bank*, TAT [E] 94-130 [BT], City Trib., September 18, 1998). If material facts are in dispute, summary

[73] The badges of fraud include: understating income, maintaining inadequate records, implausible or inconsistent explanations of behavior, concealment of income or assets, failing to cooperate with the taxing authorities, engaging in illegal activities, an intent to mislead which may be inferred from a pattern of conduct, lack of credibility of the taxpayer's testimony, filing false documents, failing to file tax returns, dealing in cash, etc. (*In re Wyly*, 552 BR 338, 391-392 [Bankr ND Tex 2016]; *see also Morse v Commissioner*, 419 F3d 829, 832 [8th Cir 2005); *Niedringhaust v Commissioner*, 99 TC 202, 211 [1991]; *Spies v United States*, 317 US 492 499 [1943]).

determination should not be granted because a full hearing is warranted (Rules 1-05 [d] [1]; *see also Gerard v Inglese*, 11 A.D.2d 381 [2d Dept 1960]).

Respondent bears the burden on fraud, which affects the summary determination dynamic. In *Celotex v Catrett* (477 US 317, 322-323 [1986]), addressing the interplay between fraud and summary judgment, the U.S. Supreme Court held that summary judgment could be granted, if:

> "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof..." (*Id.* at 322-333).

In this case, more than adequate time for discovery has passed and it is appropriate to grant the motion if the submitted proof establishes that Respondent cannot prove a requisite element of fraud (*see e.g. Charid Properties, Inc. v Berger*, 37 AD2d 987, 987 [2d Dept 1971], *affd*, 32 NY2d 667 [1973]).

Analysis of the returns. In order to carry its burden, Respondent must establish that the returns contain "wrongful acts or omissions" that resulted in an underpayment (*Matter of Marquez*). This is the equivalent of a fraudulent misrepresentation or omission of a material fact (*Pasternack v Lab. Corp. of Am. Holdings*).

A reporting is considered material if the requested information is necessary to make an assessment of the tax due (*see e.g. John D. Alkire Inv. Co. v Nicholas*, 114 F2d 607, 610 [10th Cir 1940]). On tax returns, perfect accuracy or completeness is not required so long as the reporting "evinces an honest and genuine endeavor to satisfy the law" (*see e.g. Zellerbach Paper Co. v Helvering*, 293 US 172, 180 [1934]).

Compliance with this standard is sufficient to begin the running of a statutory limitations period. Respondent has previously accepted this standard:

> "In considering whether or not a return filed by a taxpayer is sufficient to commence the statute of limitations for assessments, it is generally required that the return, though not meticulously accurate, or perfectly complete, be in substantial compliance with the requirements of the law with respect to disclosing the requisite information essential to the making of assessments (See Commissioner v. Lane-Wells Company, 321 U.S. 225 (1944) and, John D. Alkire Inv. Co. v. Nicholas, 114 F2d 607 (1940))" (Finance Letter Ruling 8, FLR 8-CR-1/88 [Jan. 22, 1988]).[74]

Failing to report the necessary information tolls the running of the limitations period (*John D. Alkire Inv. Co.*),[75]

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[74] This letter ruling held that commercial rent tax (CRT) on a premises could be assessed at any time when a taxpayer does not report that premises on its return. As previously referenced, the CRT and RPTT limitations statutes contain the same "willfully false or fraudulent return[s] with intent to evade the tax" provision (Administrative Code §§ 11-2116 [b]; § 11-11-717 [b]).

[75] In *John D. Alkire Inv. Co.*, the taxpayer disposed of property, and derived gross income; however, its returns failed to report income. The Court held that: "the returns not only failed to disclose requisite information but were misleading and calculated to prevent discovery of material facts. Returns of

and may subject the taxpayer to a fraud penalty. Once a fraudulent return has been filed, filing an amended return cannot begin the limitations period (*Badaracco*).[76]

The Greentree-AAPC and AAPC-Steuben returns reported the core information about the transfers. This includes the parties' names, the parties' addresses, the dates and descriptions of the Property transfers, the Property's address, the consideration, the parties' attorneys' names, and noted the involvement of a tax exempt organization. The return's acceptance by the Richmond County Clerk, particularly after a period of review, underscores the sufficiency of the reporting. Compared against cases in which returns have been found insufficient (*see John D. Alkire Inv. Co.*), this reporting substantially complies with the law (FLR 8-CR-1/88). Both returns provided all information necessary to audit and assess the reported transfers.

The omission of the "SCHEDULE G" affidavits from AAPC did not impact the ability to assess the transfers. On each return, the first page indicates the transfer to or from a tax exempt organization, which is the source of the claimed RPTT exemption (Administrative Code § 11-2106 [b] [2]). Again on both returns, the answers to "Schedule G," question 1, reinforce that a party to the transaction is claiming an exemption granted by a taxing authority. During the time of the transfers, AAPC possessed a tax exemption granted by the IRS.

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that kind are not effective to start the period of limitation running" (*John D. Alkire Inv. Co.*, 114 F2d 607, 610 [1940]).

[76] In *Badaracco*, a taxpayer filed an "amended return" after filing an original return that contained false statements made under penalty of perjury. The Supreme Court held that filing such a document does not fundamentally alter the nature of a tax fraud investigation (*Badaracco*, 464 US 386, 398-399).

The returns reported the Property's address, consideration, the existence of an exemption, as well as the parties' names, addresses, and attorneys, which enabled Respondent to either request more information or audit the transfers. The reported information enables such action, and displays the omitted affidavits' immateriality to Respondent's ability to assess the transfers (*see John D. Alkire Inv. Co.*; FLR 8-CR-1/88). Therefore, although imperfect, the returns' reporting on the claimed exemptions substantially complies with the law.

Construed in a light most favorable to Respondent, the omissions of the "SCHEDULE G" affidavits would be cause to conduct an audit or request additional information. In *Zellerbach Paper Co.*, the Supreme Court held that the statute of limitations begins to run when the taxpayer files a return that substantially complies with the law. In so doing, it rejected the argument that an amended return converts the original filing into a nullity, stating that the provision of additional information would not take the protection of "a term of limitation already running for [its] benefit" (*Zellerbach Paper Co.*, 293 US 172, 180). Herein, given the reported information and the existence of an exemption, the omission of the "SCHEDULE G" affidavit did not reduce the returns to nullities.

The reported consideration does not raise a question of material fact. In the "Details of Consideration" section on the RPTT, the Greentree-AAPC and AAPC-Steuben returns reported $22,000,000.00 and $22,030,000.00, respectively, on the cash line. For the purposes of the RPTT, the Administrative Code defines "consideration" as follows:

"The price actually paid or required to be paid for the real property or economic interest therein, without deduction for mortgages, liens and encumbrances, whether or not expressed in the deed or instrument and where paid or required to be paid by money, property, or any other thing of value. It shall include the cancellation or discharge of an indebtedness or obligation . . ." (Administrative Code § 11-2101 [9]).

The $20,000,000.00 and $22,030,000.00 reported on the returns correlate to the amounts on the respective Contracts of Sale for the Property. Upon entering into the agreements, the parties were "required to be paid" for the Property, an indebtedness that satisfies the definition of consideration provided by Administrative Code § 11-2101 (9). Given the options provided by the RPTT form itself, listing these amounts on the cash line was reasonable.[77] The totality of the disclosures complied with the law, and satisfied the reporting requirement imposed through the RPTT return.[78]

The transfer date reported on the Greentree-AAPC return is not material because it does not impact the ability to assess the transfer. Construed in Respondent's favor,[79] reporting the transfer date of July 11, 2008 (instead of March 4, 2008),[80] the

[77] The returns show other lines that the parties could have chosen to report the consideration (*see* Footnote 33). In this instance, listing such amounts on an incorrect line would not constitute a *material* error or misrepresentation because the material aspects of the transfers were reported, and could not impact the ability to assess the transactions.
[78] Respondent's argument that more proof is required beyond the agreements in the record (i.e., evidence that the debts were satisfied), is not a requirement imposed by the RPTT return. The limited definition of consideration imposed by Respondent runs counter to the statutory definition found in Administrative Code § 11-2101 (9).
[79] The reported transfer date is not baseless because the deed was placed in escrow (Shah Supplemental Affidavit, ¶ 1).
[80] As correctly noted by Respondent, the grantor's delivery to an escrow agent does not transfer title; title does not pass until the conditions of escrow are met and the escrow agent finally delivers the deed to the grantee (*see*

only impact would be under SAP 2008-1, under which Respondent would presumptuously apply the step transaction doctrine to the transfers instead of first conducting an audit. Regardless of the date used, an audit could be conducted based on the reported information. The reported Greentree-AAPC transfer date cannot give rise to a claim of fraud because the information is immaterial to the completeness of the return. As such, the arguments on this point fail to raise a question of material fact.

Based upon this review, the proof establishes the absence of both material factual questions, and the absence of material concealment or misrepresentation. These returns substantially complied with the law because they reported the answers to key questions on the RPTT return, thereby "disclos[ing] the requisite information essential to the making of assessments" (FLR 8-CR-1/88). Accordingly, the Greentree-AAPC and AAPC-Steuben returns are not facially fraudulent.

Analysis of the returns' reporting position as a basis for fraud. Respondent argues that the mere filing of the Greentree-AAPC and AAPC-Steuben returns should be considered a wrongful act constituting a false representation.

This argument appears to be that, if the faces of the returns are peeled back, the underlying structure shows fraud through the step transaction doctrine. This is one of several equitable, common law principles that flows from the seminal decision of *Gregory v Helvering* (293 US 465, 55 S Ct 266, 267, 79 L Ed 595 [1935]). Like its peers, such as the sham

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[cont'd.] *e.g. TDNI Properties, LLC v Saratoga Glen Builders, LLC*, 80 AD3d 852, 854-55 [3d Dept 2011]).

transaction doctrine,[81] the step transaction doctrine permits discarding lawful, legal forms to reach substance (*Id.* at 293 US 469). The "end result" test of step transaction doctrine permits combining a series of separate but related taxable events into a single transaction, if there is evidence that the series was prearranged to achieve a particular result (*GKK 2 Herald LLC v City of New York Tax Appeals Trib.*, 154 AD3d 213, 217-218 [1st Dept 2017]).[82]

Construed in Respondent's favor, the returns report a structure, or scheme, to transfer the Property, while avoiding RPTT, by using the tax-exempt AAPC as a straw man or nominee. The agreements transferred the Property to AAPC, then Steuben, and funds to, ultimately, Greentree and AAPC.[83] The Richmond County Clerk accepted the deeds for recording. The communications among the parties indicate that they contemplated these transactions in order to achieve a particular result (i.e., transferring the Property and funds without incurring an RPTT liability). The Bedford Transaction establishes that Mr. Shah had been exploring ways of structuring transfers so as to avoid incurring RPTT liabilities. Further removed questions also exist, such as whether the HUD HAP Contract should have been revoked,[84] and whether AAPC complied with N-PCL rules.[85]

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[81] Respondent references "economic substance" and "sham transaction" (Respondent's Sur-Reply Brief, p. 33), but expressed no position on the application of the test (*see e.g. Matter of Astoria Fin. Corp. & Affiliates*, TAT (E) 10-35 (BT), 2016 WL 3035635 at *8, City Trib., May 19, 2016; *ACM Partnership v C.I.R.*, 157 F3d 231, 248 [3d Cir 1998]; 26 USC § 7701 [o]).

[82] The step transaction doctrine also includes the "interdependence test," which will not be addressed because it was not raised.

[83] These characteristics evidence a profit motive, and objectively affected the parties' net economic positions (*Matter of Kellwood Co.*, DTA No. 820915. 2011 WL 4537050 at *53, State Trib., September 22, 2011).

[84] See the Schrager Affidavit, generally.

[85] See the Colavito Affidavit, generally. As previously noted, there is no indication as to what documents, if any, Mr. Colavito reviewed with respect to the transfers.

Taken as a whole, the record raises questions as to whether the Greentree-AAPC and AAPC-Steuben transfers should be collapsed into a single transaction.[86] These questions, related to the underlying transactions, lack a clear connection to the inquiry of whether the returns contained either material omissions or intentionally false reporting (*Matter of Sener*).

It is axiomatic that information cannot be concealed if that information is neither asked for, nor required to be reported. Herein, the RPTT return does not ask if the reported transfer is a bona fide transfer. It does not request reporting whether the transfer is to a dummy, straw person, nominee, or agent of another party. The RPTT return does not ask if the transfer is a part of a series of transfers. The RPTT return simply does not require disclosing any information remotely related to these questions. Respondent cited to no authority requiring the disclosure of such information on the RPTT return. Failing to report unrequested information cannot be considered a wrongful act amounting to fraudulent concealment.

The particular questions arising from the transfers' structure create no material questions on the returns' faces because the RPTT return does not require such reporting. The open assessment period was the proper time to challenge those positions. However, Respondent's argument is that even if the returns were legally sufficient, the mere reporting of the alleged scheme can be considered a basis for fraud.

[86] It must also be noted this Tribunal possesses limited subject matter jurisdiction (New York City Charter § 168 [a]). Resolving causes of action sounding in either third-part rescission, or N-PCL violations, appear to be outside the legal authority of this forum.

In New York, no court or Tribunal has considered a tax return to be fraudulent based solely upon its reporting position.[87] Rather, in order to establish the wrongdoing required to sustain fraud penalty, taxing authorities typically rely upon a collateral conviction or a plea agreement. Most cases have relied upon a finding of criminal tax fraud (*see e.g. Matter of Silverstein*, DTA 826824 and 826825, 2017 WL 6762550, State Trib., December 7, 2017).

The criminal litigation decides the fraud issue, which enables invoking issue preclusion under the collateral estoppel doctrine (*Plunkett v C. I. R.*, 465 F2d 299, 305 [7th Cir 1972]). Collateral estoppel exists to "prevent a party from relitigating an [identical] issue decided against that party in a prior adjudication" (*ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 226 [2011], *citing Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 NY2d 147 [1988]).[88] Once a party has pled or been found guilty of the crime of tax fraud, the taxing authority can then use collateral estoppel to prevent that taxpayer from contesting facts related to the fraud (*see e.g. Matter of Aqua-Mania*, DTA 820492, 2008 WL 697696, State Trib., March 6, 2008; *Matter of T.*

[87] In *Energy Research and Generation, Inc. v C.I.R.* (101 TCM (CCH) 1205 [TC 2011]), a federal case cited to by Respondent, the taxpayer substantially underpaid its tax liability. It then supported its position by engaging in facially wrongful acts, including fabricating invoices, concealing assets, and failing to cooperate on the audit (*Id.* at *16).

[88] "Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling" (*Buechel v Bain*, 97 NY2d 295, 303-04 [2001], *citing Gilberg v Barbieri*, 53 NY2d 285, 291 [1981])

Mgmt, Inc., DTA 816662, 2001 WL 408771, State Trib., April 12, 2001).[89]

Crimes apart from tax fraud may also lead to sustaining fraud penalties. In *Matter of Marquez* (TAT [E] 97-107, 2007 WL 1544506, City Trib., May 16, 2007), the Tribunal addressed fraud penalty imposed upon a taxpayer who engaged in an illicit numbers operation.[90] He pleaded guilty to one count of Attempted Enterprise Corruption (Penal Law § 110/460.20), one count of Promoting Gambling in the First Degree (Penal Law § 225.10 [2] [a]), and admitted on the record that:

> "[I] intentionally attempted to conduct, participate, and engage in the affairs of the [criminal enterprise called the] Raymond Marquez Organization by participating in a pattern of criminal activity. . ." (*Matter of Marquez*, 2007 WL 1544506 at *4).

Therein, Respondent reconstructed the taxpayer's business and determined that it should have filed UBT returns for the years at issue.[91] The Tribunal found that the taxpayer engaged in a scheme to evade taxation, as well as intent to defraud. It held that the taxpayer failed to file UBT returns with intent to evade tax, and sustained the fraud penalty.

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[89] In *Matter of T. Management*, the taxpayer's president and sole shareholder plead guilty to filing a false sales tax return, a violation of Tax Law § 1817 (b) (2). In *Matter of Aqua-Mania*, the taxpayer's president and sole [cont'd.] shareholder plead guilty to offering a false instrument (Penal Law § 175.30). In both cases, the record before the State Tribunal included the records in the criminal matters, which permitted the invocation of collateral estoppel.

[90] *Matter of Marquez* held that the proof was insufficient to establish that Alice Marquez, wife and co-petitioner with Raymond Marquez, was involved in the business of the Raymond Marquez Organization. Additionally, *Matter of Merritt*, a federal fraud case, also involved a "numbers" operation.

[91] It must be noted that the Tribunal estopped Respondent from adopting findings from a State audit of the taxpayer because, in a State A.L.J. determination addressing the same matter, the A.L.J. found that the State audit lacked a rational basis.

Though rare, fraud penalties have been sustained in cases without criminal charges (*see e.g.* Matter *of Alvin's Wine & Liquors, Inc.*, DTA 821638 and 821639, State Trib., October 29, 2009, *confirmed sub nom Matter of Rodriguez v Tax Appeals Trib.*, 82 AD3d 1302 [2011], *lv denied* 17 NY3d 702 [2011]).[92] In *Kucherov*, the taxpayer engaged in a scheme to conceal his sales of motorboats.[93] This included, among other acts, using two sets of invoices throughout the audit period, duplicating invoices for the same transaction, failing to report certain sales, and the "disappearance" of boats from the floor plan (*Matter of Nicholas Kucherov d/b/a Nick's Marine*, 1987 WL 60577 at *2-*4). Relying upon the sales and use taxes fraud penalty (Tax Law § 1147 [b]), the State issued an assessment beyond the general three-year limitations period. Based on the foregoing facts, the State Tax Commission, and, later, the Appellate Division, held that the State carried its burden on the fraud penalty. As the fraud penalty was properly imposed, the statutory bar was lifted, and the notice was held to be timely-issued.

These fraud fact patterns and the scheme employed by Steuben materially differ. Unlike matters in which a fraud penalty was sustained (*Kucherov*), the instant plan did not rely upon either falsely reporting or concealing material information. Similarly, unlike other matters (*Matter of Marquez; Matter of Silverstein*), there is neither a plea

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[92] *Matter of Alvin's Wine & Liquors, Inc.* may be distinguished as the State Tribunal decision critically differed with the trial A.L.J.'s determination of the facts, specifically, the taxpayer's sophistication and English language abilities (compare *Matter of Alvin's Wine & Liquors, Inc.*, TA 821638 and 821639, 2008 WL 5062345 at *2, State Div. of Tax Appeals, November 20, 2008, and *Matter of Alvin's Wine & Liquors, Inc.*, 2009 WL 3711626, at *8).

[93] The taxpayer in *Kucherov* was convicted of grand larceny in the second degree (Penal Law § 155.35), which was related to the State's audit. However, in the case before the State Tax Commission, the details of such conviction, and the acts that led to it, were not part of the record (c.f. *Matter of T. Mgmt.; Matter of Aqua-Mania*).

agreement, nor a conviction, because the RCDA declined to prosecute this matter. The scheme herein lacks the characteristic criminal conviction or plea of fraud penalty cases, and the requisite proof of either false representations, or material concealments. The instant scheme relied upon properly reporting the material facts in order to take advantage of the statutory RPTT exemption enjoyed by AAPC (Administrative Code § 11-2106 [b] [2]). Rather than engaging in wrongdoing, Steuben avoided paying the RPTT by passing the Property through an entity that was a legally RPTT-exempt organization.

No authority has been offered that supports imposing a *per se* fraud rule against transfers, involving nominees or straw persons, solely to gain tax preference.[94] Respondent cites to neither statute nor case law establishing that such a scheme, or tax strategy, is facially illegal, or that reporting such transfers can, on its own, serve as a basis for fraud. Rather, at least some real property transfers solely to acquire tax exemptions are legally permissible (*see Wein v Beame*, 43 NY2d 326, 331 [1977]).[95] In those cases, the courts have not delved deeply into intent.[96] As such, Respondent's sought-after *per se* rule against utilizing tax exempt entities solely to acquire an RPTT exemption is rejected.

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[94] See e.g. Answer ¶ 32 [i].
[95] In *Wein*, a landowner, a private developer, the City, and the City Urban Development Corporation (UDC), which was a tax exempt organization, devised a plan to renovate the Commodore Hotel. This plan involved the landowner selling the building to the UDC for $1.00, which then leased it for 99-years to a private developer. Lease payments were to be made to the City, not the UDC. UDC served solely as a straw person, "with no real interest in or connection to the project, which has been brought into the plan solely as a means of providing a tax exemption which the city could not directly grant" (*Wein v Beame*, 43 NY2d 326, 331).
[96] In *Wein*, the Court of Appeals declined to "speculate as to the motive for the UDC's participation" (*id*), and held that the activity was related to its purpose.

Respondent argues that Steuben's structuring may be inconsistent with the spirit of the RPTT exemption. Wrongdoing cannot be imputed solely from a disagreement with a taxpayer's reporting position. Even if repugnant, the nature of Steuben's tax planning, by itself, cannot qualify as an omission or false representation.[97] There must be more. And it is not here.

A timely notice would have permitted a full inquiry into the underlying transfers - including whether the two transfers should be collapsed into one. The returns provided Respondent with adequate information to make such an assessment. Beyond that, Respondent also received notice from the RCDA and the news media. Yet, it declined to issue an assessment when the three-year limitations period was open. Upon these facts, applying the fraud penalty appears to be an attempt to turn back time, and ameliorate the decision not to issue a timely assessment. Prying open a closed limitations period does not serve as a viable basis for assessing a fraud penalty.

As this particular structuring does not rely upon an omission or false representation, the reporting position on the

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[97] See *Morris v New York State Dept. of Taxation and Fin.* (82 NY2d 135 [1993], *reversing* 183 AD2d 5 [1992], *confirming sub nom Matter of Sunshine Developers, Inc., Joseph Morris and Robert Morris*, DTA 802194, 1991 WL 87470, State Trib., May 2, 1991, *reversing* 1990 WL 204869, State. Div. of Tax Appeals, May 3, 1990). Therein, the personal taxpayers used the corporation to purchase a boat, and took possession of it outside of the State. The State argued that the corporate veil should be pierced because the taxpayers used the form to scheme and evade sales and use taxes. The State A.L.J. found that using this scheme to avoid the liability did not show wrong doing, but effective tax planning (1990 WL 204869 at *9). The State Tribunal disagreed and accepted the State's piercing argument. The Appellate Division substantively reviewed the case and confirmed. The Court of Appeals also evaluated the arguments, and unanimously reversed the decision because it agreed with State A.L.J.'s finding that the record contained no proof of wrongful acts. Herein, the arguments differ, but the point remains that no rule exists against using legal forms to avoid tax.

Greentree-AAPC and AAPC-Steuben returns cannot serve as a basis for imposing fraud penalty.

<u>Sufficiency of intent as basis for fraud</u>. Administrative Code § 11-2116 (b) requires a showing that a taxpayer file a false or fraudulent return with "intent to evade the tax." The entire record must be considered in determining fraudulent intent (*see e.g. Matter of Dredin v Tax Appeals Trib.*, 249 AD2d 719 [1998]). Proof of intent may be determined from the surrounding circumstances (*see e.g. Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]), including the badges of fraud (*Matter of Marquez*).[98]

Intent to defraud is critical, such that a guilty plea to a tax crime, without the requisite intent, is insufficient to sustain a fraud penalty. In *Matter of March* (DTA 826057, 2017 WL 2269758, State Trib., May 10, 2017), the taxpayer was convicted by plea of disorderly conduct. As opposed to intent to defraud, this crime may be committed by recklessness. To prove the existence of the taxpayer's intent to defraud, the taxing authority relied solely upon the disorderly conduct conviction. In that case, the record contained insufficient proof regarding other badges of fraud. The State Tribunal held that the conviction alone failed to establish the requisite intent to commit wrongful acts in order to evade taxation. On those grounds, the State Tribunal abated the fraud penalty.

The instant matter presents the inverse situation. The record clearly establishes that Steuben, through Mr. Shah, sought to avoid or eliminate the RPTT liability. However, the

[98] See footnote 73 for a list of the badges of fraud.

manner in which it accomplished this avoidance required no false reporting or concealment on the returns. In the absence of wrongful acts, a desire to avoid taxation falls within: "[t]he legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits" (*Gregory*, 293 US 465, 469). As such, without wrongful acts, Steuben's intent to avoid taxation does not rise to intent to defraud.

Fraud penalties cannot be sustained solely on intent to avoid taxation. It requires more, specifically, the presence of a material concealment or a false reporting. As discussed, the record establishes the unquestionable absence of this element. Granting a hearing, solely based on intent, would serve no purpose because, due to the lack of a wrongful act, the fraud penalty cannot be sustained as a matter of law.[99]

AAPC. The Administrative Code exempts charitable organizations from the RPTT (Administrative Code § 11-2106 [b] [2]). At the time of the transfers, AAPC was a charitable organization, organized under the New York N-PCL. It also enjoyed an exemption from federal taxation, granted by the IRS. Accordingly, AAPC was exempt from RPTT asserted due on these transfers.

Conclusion. The record presents no material questions of fact on whether the Greentree-AAPC and AAPC-Steuben returns were fraudulent. The returns substantially complied with the law by providing all information necessary to assess the transfers. The filing of the returns cannot be construed as wrongful acts

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[99] Respondent's remaining arguments have been considered and are deemed either insufficiently supported or irrelevant.

because they presented no material omission or intentionally false reporting. Further, Respondent's disagreement with the reporting position, alone, does not make filing the returns wrongdoing. As the requisite element of misrepresentation or concealment cannot be established, the fraud penalty cannot be sustained, and the fraud exception to the limit on the assessment period does not apply.

Therefore, the three-year open assessment period, set forth by Administrative Code § 11-2116 (b), began to run on the returns' respective filing dates, July 11, 2008 and September 19, 2008. The subject Notices of Determination were issued on January 13, 2012. As this date falls outside the limited assessment period, it must be determined that these Notices are time-barred. On these grounds, Steuben and AAPC are entitled to judgment as a matter of law.

The foregoing renders Issue II and Steuben's motion to dismiss the Answer moot.

Accordingly, the motion for summary determination is granted. The Petitions of Steuben Delshah, LLC, and African American Parent Council, Inc., are granted. The Notices of Determination, both dated January 13, 2012, are cancelled.

IT IS SO ORDERED.

DATED: January 9, 2018
New York, New York

/s/
Alexander F. Chu-Fong
Administrative Law Judge