

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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In the Matter of the Application of
CONSOLIDATED EDISON COMPANY OF NY,
INC.,

Petitioner,

-against -

THE ASSESSOR AND THE BOARD OF ASSESSMENT
REVIEW OF THE TOWN OF STONY POINT,

Respondent.

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LaCAVA, J.

DECISION/ORDER

Index No:
4785/2004
5344/2005
6710/2006
5600/2007

Motion Date:
8/25/08

The following papers numbered 1 to 5 were considered in connection with this motion by petitioner Consolidated Edison Company of New York (Con Ed) for an Order clarifying the Consent Order entered herein with respect to a town fee collected by the respondent Town of Stony Point (Town), constituting 1% of the taxes collected by the Town on the school and library taxes due and owing to the North Rockland Central School District and Rose Memorial Library, respectively, and, pursuant to the Order, directing a refund of the *pro-rata* share of the fee attributable to the stipulated over-assessment herein:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIDAVIT/EXHIBITS	1
AFFIDAVITS IN OPPOSITION/EXHIBITS	2
AFFIDAVIT IN OPPOSITION	3
AFFIDAVIT IN REPLY/EXHIBITS	4
SUR REPLY AFFIDAVIT	5

This is an action, pursuant to RPTL Article 7, seeking to challenge the assessment by the Town for a parcel owned by Con Edison. The matter was concluded on or about January 18, 2008 with

entry of a Consent Judgment stipulating, *inter alia*, to excessive assessments in tax years 2005, 2006, and 2006, and, based on said excessive assessments, mandating refunds to petitioner.

Con Ed complains now that the Town declines to refund the town fee it collected, a "collection fee" of 1% of the amount of the school and library taxes it collected for the School District.

The Town asserts the finality of the Consent Judgment, which no-where specifies refund or return of said fee; that Con Ed may not seek said refund by way of an Article 7 proceeding, but only by way of an Article 78 proceeding ; and that, based on the improper form of proceeding, Con Ed has failed to bring the proper action (an Article 78 proceeding) within the provided limitations period (120 days.)

RPTL § 726 provides

§ 726. Refund of taxes

1. If in a final order in any proceeding under this article it is determined that the assessment reviewed was excessive, unequal or unlawful, or that real property was misclassified, and ordered or directed that the same be corrected or stricken from the roll, and such order is not made in time to enable the assessors or other appropriate officer, board or body to make a new or corrected assessment or to strike such assessment from the roll prior to the imposing of any tax or special ad valorem levy upon the real property the assessment of which has been determined to be excessive, unequal or unlawful, or which has been determined to be misclassified, then any amount at any time collected upon such excessive, unequal or unlawful assessment, or as a result of such misclassification shall be refunded as follows:

(b) When such tax or other levy shall have been imposed by the appropriate board or body of any city, town or village, there shall be audited and paid to the petitioner or other person paying such tax or other levy in the same manner as city, town or village charges, as the case may be, the amount paid by him in excess of the amount which would have been

paid had the assessment been made as determined by such order, together with interest thereon as provided in subdivision two of this section. So much of any tax or other levy, including interest thereon, as shall be refunded which was imposed for city, town, village or special district purposes, shall be charged to such city, town, village or special district. So much of the amount of any tax or other levy, including interest thereon, as shall be refunded which was imposed for other than city, town, village or special district purposes, shall be a general county charge; provided, however, that if the assessment is reduced by such order by an amount not in excess of ten thousand dollars, such portion of the amount refunded shall be charged to the city or town in which the real property is situated. However, with regard to condominium owners, the amount paid by the petitioner or other person paying such tax, in excess of the amount which would have been paid had such assessment been made, as determined by such order, for assessments other than city, town, village or special district purposes, shall not be a city or town charge regardless of the amount of the reduction in the assessment.

Thus, RPTL § 726 (1) clearly provides that "...any amount at any time collected upon such excessive...assessment...shall be refunded...." (Cf. *Linden Hill No. 2 Cooperative Corp. v. Tishelman*, 107 Misc. 2d 799 [Sup. Ct., Queens Co., 1981], *affd.*, 87 A.D.2d 577 [2d Dep't 1982]; see also *Moon v. Bloomer*, 183 Misc 62 [Sup Ct., Broome Co., 1944].)

Further, RPTL 726 (1) (b) provides that "there shall be audited and paid to the petitioner...the amount paid by him in excess of the amount which would have been paid had the assessment been made as determined by such order." Since the town collection fee is based on 1% of the school and library tax then due and owing, the ordered lowering of the tax due and owing would consequently lower the amount subject to the 1% fee, and thus the fee itself. Pursuant to this section, then, the amount paid in excess of the portion of the collection fee ordered to be due and owing as a result of the corrected assessment, must be refunded by the Town.

Based upon the foregoing, it is hereby

ORDERED, that the motion by petitioner for an Order directing a refund of the *pro-rata* share of the 1% town collection fee attributable to the stipulated over-assessment herein, is granted.

Settle order.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
December 1, 2008

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