

<b>Matter of Donovan v Hauben</b>
2012 NY Slip Op 31077(U)
April 16, 2012
Supreme Court, New York County
Docket Number: 111865/2011
Judge: Doris Ling-Cohan
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

Index Number : 111865/2011

DONOVAN, MARGARET

vs

JUDGE WARREN P. HAUBEN

Sequence Number : 001

ARTICLE 78

PART 36

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1, 2

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this ~~motion is~~ *Article 78 proceeding is consolidated*  
*for decision with motion seq. no. 002 in accordance with the attached*  
*memorandum decision.*

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: *[Signature]*

**DORIS LING-CONE**  
*[Signature]*  
J.S.C.  
\_\_\_\_\_, J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

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In the Matter of the Application of  
Margaret L. Donovan The Twin Towers  
Alliance,

Petitioner,

Index No.:  
111865/2011

-against-

Motion Seq. No.:  
001 & 002

Judge Warren P. Hauben Chief Administrative  
Law Judge NYC Tax Appeals Tribunal,

Respondent.

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**DORIS LING-COHAN, J. :**

Petitioner, acting pro se, brings this Article 78 petition after respondent Warren P. Hauben, Chief Administrative Law Judge and the FOIL Appeals Officer of the New York City Tax Appeals Tribunal (Tax Appeals Tribunal), denied her Freedom of Information Law (FOIL) request.<sup>1</sup> Respondent moves, pursuant to CPLR 3211 (a) (7) and 7804 (f), for an order dismissing the petition.

**BACKGROUND AND FACTUAL ALLEGATIONS**

Petitioner is the co-founder and co-director of The Twin Towers Alliance, an entity formed in 2006 "to advance the public interest at the World Trade Center site." Petition, at 1.

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<sup>1</sup>Respondent notes that petitioner mistakenly named him as respondent, when he was acting on behalf of the Tax Appeals Tribunal, and that the Tax Appeals Tribunal, as the agency, is the appropriate respondent for this proceeding.

Petitioner claims that she is trying to uncover how the public is allegedly being forced to pay for the building of the Freedom Tower. In 2009, petitioner sent a FOIL request to the Port Authority seeking the "2001 Silverstein Leases and the 2006 Master Development Agreement." *Id.* Apparently, petitioner did not receive this information.

For some inexplicable reason, petitioner did not bring any proceeding against the Port Authority, to obtain such records. Instead, petitioner brings this Article 78 proceeding against respondent Tax Appeals Tribunal, as explained below.

Petitioner read a 2009 determination issued from the Tax Appeals Tribunal in which the information she sought was part of that determination and attached as exhibits. According to respondent, this 2009 determination concerned the tax returns and petitions filed by World Trade Center LLCs 1, 2, 3 and 4 (WTC entities). These petitions "protested the Commissioner of Finance's assertion of deficiencies of Commercial Rent Tax against the Petitioners." Petitioner's Exhibit 1, at 1. The documents submitted by the WTC entities included leases and other supporting materials which the Tax Appeals Tribunal deemed necessary to determine whether the WTC entities were paying the correct amount of Commercial Rent Tax owed to the City of New York.

On May 16, 2011, petitioner submitted a FOIL request to the Tax Appeals Tribunal seeking the documents attached as exhibits

to the 2009 determination, including the petition and the leases. Petitioner was not a party to such original 2009 determination. Petitioner's request was denied. On June 3, 2011, petitioner appealed this denial.

On June 13, 2011, respondent denied the appeal. In his letter to petitioner, respondent explained how the Tax Appeals Tribunal is prohibited from distributing the materials to petitioner under the tax secrecy provisions. The documents requested by petitioner relate to tax returns which were submitted pursuant to the Commercial Rent Tax Law. According to respondent, the law with respect to the Commercial Rent and Occupancy Tax is contained in Chapter Seven of Title Eleven of the Administrative Code of the City of New York. Under the tax secrecy provisions, contained in Administrative Code § 11-716 (a), the Tax Appeals Tribunal is prohibited from divulging "any information relating to the business of a taxpayer contained in any return required under [Chapter Seven]."

Respondent also cited to New York Public Officers Law § 87 (2) (a), which allows agencies, such as the Tax Appeals Tribunal, to "deny access to records or portions thereof that: (a) are specifically exempted from disclosure by state or federal statute." Section 11-716 of the Administrative Code is deemed a State statute for purposes of New York Public Officers Law § 87. See Administrative Code § 11-716 (c).

Respondent acknowledged that, while petitioner sought

materials other than tax returns, the additional documentation she sought could not be disclosed since the documentation was compiled by the WTC entity taxpayers in support of their returns.

In his determination, respondent cited to *Matter of Tartan Oil Corporation v State of New York Department of Taxation & Finance* (239 AD2d 36 [3d Dept 1998]), in which the petitioner's FOIL request was denied. In *Matter of Tartan Oil Corporation, supra*, the petitioner Tartan Oil Corporation's ("Tartan"), a landlord and gasoline distributor, was seeking records concerning two tax audits of its commercial tenant and gasoline retailer; petitioner Tartan's FOIL request included documents, files, hearing transcripts, and purchase invoices, among other things. The respondent Record Appeals Officer denied the request, citing New York Public Officers Law § 87 (2) (a), and Tax Law § 1146 (a).<sup>2</sup> Tartan then commenced an Article 78 proceeding, in which it claimed that "inasmuch as the statute relates solely to returns and reports, it does not preclude the disclosure of the records it sought." *Id.* at 38. The Appellate Division, Third Department, has stated that while Tartan's literal reading of the statutory language is correct, "a statute must be read in a manner which furthers its object, spirit and purpose." *Id.* The Court continued that a literal view of the statutory language would defeat the purpose of the tax secrecy statute. It

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<sup>2</sup> Tax Law § 1146 (a) mirrors Administrative Code § 11-716.

concluded, "[c]learly this purpose would be thwarted if materials and records compiled by taxpayers in support of their returns and reports were subject to disclosure to those who are not statutorily deemed to have a legitimate interest in such information." *Id.* at 38-39. The Court concluded that the records sought by Tartan were included in the interpretation of Tax Law § 1146 (a), and that the respondent correctly denied the FOIL request.

In the present situation, after receiving respondent's determination, petitioner requested an advisory opinion on the matter from the Committee on Open Government (Committee). The Committee, who forwarded its opinion to the Tax Appeals Tribunal, as well as to three other agencies, did not believe *Matter of Tartan Oil Corporation* was applicable, since, among other reasons, the contracts/leases that were requested were between private entities and public ones such as the Port Authority. The Tax Appeals Tribunal responded to the opinion by reiterating the fact that the Tax Appeals Tribunal "is subject to tax secrecy provisions ... which strictly limit the information and documents that the Tribunal may release to the public." Petitioner's Exhibit 7, at 2. The Tax Appeals Tribunal also explained that any of its members would be subject to dismissal and criminal penalties if they divulged information relating to the business of a taxpayer.

Petitioner then commenced this Article 78 proceeding. Petitioner argues that respondent improperly denied her request since she was seeking "contracts that belong in the public domain and represent billions of public dollars." Petition, at 4. She continues that the tax secrecy provisions do not apply to her request, nor is the decision in *Matter of Tartan Oil Corporation* applicable to the present situation. She also claims that "[p]ublic documents are not magically transformed into private documents merely by inserting them into a hearing before an Administrative Law Judge." *Id.* Petitioner concludes that the respondent should follow the advice of the Committee.

Respondent contends that he properly denied petitioner's FOIL request pursuant to the tax secrecy provisions, which were established to "encourage a full and frank disclosure of the tax status of a particular entity." Davidson Affirmation, ¶ 21. These materials, after being submitted to the Tax Appeals Tribunal, are protected from being released to the public. Moreover, respondent argues that whether or not the documents are with another agency, such as the Port Authority, or whether they were at some point public information is irrelevant, given that, "[a]t the Tax Appeals Tribunal, which is where the FOIL request was made, the documents were never made public." Davidson Reply Affirmation, ¶ 4.

#### DISCUSSION

In the context of an Article 78 proceeding, courts have held that "a reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious." *Matter of Soho Alliance v New York State Liquor Authority*, 32 AD3d 363, 363 (1<sup>st</sup> Dept 2006), citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222 (1974); see CPLR 7803 (3). An agency's decision is considered arbitrary if it is "without sound basis in reason and is generally taken without regard to the facts." *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d at 231. "It is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion [internal quotation marks and citations omitted]." *Matter of Arrocha v Board of Education of City of New York*, 93 NY2d 361, 363 (1999).

Administrative Code § 11-716 and Matter of Tartan Oil Corporation:

Petitioner argues that respondent improperly determined that the tax secrecy provision applied to her FOIL request. Petitioner believes that the contracts/leases that were a part of

a 2009 determination are not private tax returns and have, in some way, been available to the public for years before being submitted to the Tax Appeals Tribunal. She does not explain why she did not pursue any other available remedies such as following-up on her alleged FOIL request made to the Port Authority.

As explained by respondent, the Tax Appeals Tribunal relied on Administrative Code § 11-716 and New York Public Officers Law § 87 when issuing its determination to deny petitioner's FOIL request. The records sought by petitioner included documents used by the Tax Appeals Tribunal to determine whether the WTC entities were paying an accurate amount of Commercial Rent Tax. As previously explained, Administrative Code § 11-716 prohibits the Tax Appeals Tribunal from divulging any information relating to the business of a taxpayer from a return subject to Chapter Seven. As such, providing these records to the public, such as petitioner who was not even a party with respect to the 2009 determination, would impair the confidentiality and privacy of litigants who appear before the Tax Appeals Tribunal.

*Matter of Tartan Oil Corporation*, contrary to petitioner's belief, is controlling in this situation. The Appellate Division, First Department, has not spoken on the issue. As such, the "doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate

Division of another department until the Court of Appeals or this court pronounces a contrary rule." *Mountain View Coach Lines v Storms*, 102 AD2d 663, 664 (2d Dept 1984).

In *Matter of Tartan Oil Corporation*, the petitioner, similar to the present situation, sought hearing exhibits which were part of a tax audit. The Court concluded that, not only tax returns, but all materials compiled by taxpayers in support of their returns, are shielded from public disclosure. Such court made no distinction based on whether the records requested were between private or public entities, as argued by petitioner.

Likewise, here, petitioner cannot rely on the Committee's advisory opinion as a basis for why this court should disturb the findings of the Tax Appeals Tribunal. As respondent correctly maintains, advisory opinions issued by the Committee are not binding authority. See *Matter of TJS of New York, Inc. v New York State Department of Taxation & Finance*, 89 AD3d 239, footnote 1 (3d Dept 2011).

Moreover, contrary to petitioner's argument, *King v. Dillon*, an unreported Nassau County Supreme Court case (November 30, 1984), is not controlling herein. While neither side has submitted a copy of such decision to this court, based upon the parties' submissions and arguments, it appears that the facts of *King v. Dillon* are distinguishable, in that, unlike in this case, the documents at issue there involved minutes of public meetings,

which were otherwise available to the public, prior to being in the possession of the District Attorney. Further, such decision was not rendered by an appellate court.

As set forth above, by applying relevant statutes and case law, respondent has provided a reasonable and rational explanation for why it denied petitioner's FOIL request. Accordingly, respondent's denial of petitioner's FOIL request will not be disturbed and the petition is dismissed.

The court has considered petitioner's other contentions and finds them to be without merit.

#### CONCLUSION

Accordingly, it is hereby

ORDERED that the respondent's motion is granted; and it is further

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that within 30 days of entry of this order, respondent shall serve a copy upon petitioner, with notice of entry.

Dated: April 16, 2012

#### **UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

  
Doris Ling-Cohan, J.S.C.

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