

**Long Island Power Auth. v Assessor of the Town of
Huntington**

2015 NY Slip Op 31779(U)

September 16, 2015

Supreme Court, Suffolk County

Docket Number: 35298/2010

Judge: John C. Bivona

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO. 35298/2010, 30313/2011, 29845/2012,
26294/2013 & 19309/2014

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 2 - SUFFOLK COUNTY

P R E S E N T :

HON. JOHN C. BIVONA
Justice of the Supreme Court

MOTION DATE: 03/27/2015
SUBMIT DATE: _____
MOTION: 005 MOT D

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LONG ISLAND POWER AUTHORITY,

Petitioner,

-against-

THE ASSESSOR OF THE TOWN OF
HUNTINGTON, THE BOARD OF
ASSESSMENT REVIEW OF THE TOWN OF
HUNTINGTON AND THE TOWN OF
HUNTINGTON,

Respondents.

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The Court in its deliberations has considered:

- 1. Notice of Motion;
- 2. Reply Affirmation;
- 3. Affirmation in Opposition.

Article 7 of the Real Property Tax Law of the State of New York prescribes the procedure for the judicial review of real property assessments and authorizes "any person claiming to be aggrieved by any assessment of real property" to commence such proceeding. **Real Property Tax §704 (1).**

Thus, the Court Appeals has held that a non-owner of real property has the right to maintain a tax certiorari proceeding upon the satisfaction of specific requirements:

- (1) the lease expressly confers the right to maintain such tax certiorari proceeding to assert the lessor's undivided property interest to challenge the assessment; or
- (2) the lessee is required to pay directly the taxes levied against the undivided parcel.
Matter of Waldbaums, Inc. v. Finance Administrator of the City of New York, 74 NY 2d 128 (1989)

Relying principally upon the foregoing holding, the Town of Huntington requests an order dismissing the tax certiorari petitions filed by the Long Island Power Authority, (a non-titled owner), challenging certain real property assessments for the five year period 2010-2014 inclusive upon the ground that such public authority lacks the requisite standing to initiate the proceedings.

National Grid Generation, LLC the owner of the subject property otherwise known as the Northport Power Station has likewise commenced identical proceedings against the Town seeking refunds of real property taxes paid for each of the five years.

Unlike the Petitioner in *Waldbaums, Inc.*, supra, Long Island Power Authority is not a tenant of the subject premises, nor does it have any identifiable equitable interest in the power plant.

Nevertheless, it claims the requisite standing to initiate these tax certiorari proceeding predicated upon a trio of written agreements: The Power Supply Agreement between Long Island Lighting Company and the Long Island Power Authority dated June 26, 1997 and subsequent agreements dated March 22, 2007 and October 10, 2012. The latter agreement is entitled Amended and Restated Power Supply Agreement between Long Island Lighting Company d/b/a LIPA and National Grid Generation, LLC.

Eliding past the status of LIPA as a non-owner and non-lessee of the Northport Power Station, petitioner's overly simplistic analysis hinges upon its contractual obligation to reimburse National Grid the imposed property tax as one of the calculated components of its cost to purchase the generated power at the Northport Power Station which is owned and operated by National Grid Generation, LLC.

The simple fact that LIPA is contractually liable to ultimately pay the charge of the levied property taxes to National Grid and any future increases is clearly insufficient to satisfy the sound policy requirements promulgated by the Court of Appeals in *Waldbaums, Inc.*, supra.

As previously noted, the payment of all property taxes by LIPA to National Grid is part of the cost calculation formula to determine the monthly capacity charge — an amount to compensate National Grid for its fixed costs to generate electricity. (*Power Supply Agreement dated June 26, 1997 paragraph 8.1.1 Respondent Exhibit B*)

The initial agreement (*paragraph 21.16*) authorizes National Grid to challenge any property tax assessment under prescribed circumstances. The agreement does not explicitly authorize LIPA to institute such proceedings and is otherwise silent in that regard.

Neither of the two subsequent agreements expressly confer such right upon LIPA.

Thus, petitioner's right to maintain the proceedings now before the Court cannot be traced to any contractual right found in the collective power purchase agreements.

Nor can it be reasonably concluded that LIPA, as a non-owner, is legally required to pay directly the tax levied upon the subject property.

Instead payment of the imposed property taxes are directly made to the respondent as the taxing authority by National Grid, who then recaptures such payment as part of the computed monthly capacity charge. Even viewed in the light most favorable to Petitioner, its payment of the real property taxes is a reimbursement, rather than a direct payment to the taxing authority.

Petitioner concedes that it is billed the actual amount of the taxes paid by National Grid after they are first paid by National Grid.

Petitioner's circuitous argument that the "actual property tax amount recorded on National Grid Generation's books would be billed to LIPA" does not transform the payment from an

amorphous indirect payment to one which is direct in nature.

Thus, petitioner's effort to assert standing as an aggrieved party within the meaning of **Real Property Tax Lien §704** is entirely unpersuasive.

While in the mind set of the Petitioner, the current tax assessment clearly represents an adverse impact upon its pecuniary interests causing it financial damage if the assessment were to be erroneously overstated, the result is still remote and consequential and certainly does not constitute a direct loss because the property taxes levied upon the Northport Power Station are actually and directly paid by National Grid Generation, LLC. Reimbursement of the taxes paid is but one singular component of several items comprising the energy charge amount paid by LIPA reflecting reimbursement to National Grid of its fixed costs to generate the power purchased by LIPA for the benefit of its consumers.

Therefore, the application by the Respondents to dismiss the tax certiorari proceedings filed by Petitioner, Long Island Power Authority for the years 2010-2014 inclusive under the designated index numbers is GRANTED.

The Court concludes that the Petitioner lacks the requisite standing to prosecute such claims and is not an aggrieved party authorized to initiate such proceedings pursuant to **Real Property Tax Law §704** as construed by case law.

Petitioner's alternative argument that the instant motion is procedurally defective upon the ground that it is "untimely" filed is likewise DENIED.

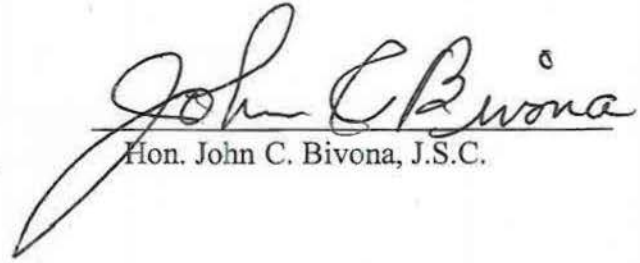
While Petitioner may have been prejudiced by having prosecuted the proceedings for the past several years, it certainly cannot claim belated surprise since the answer of the Respondent filed March 21, 2014 pleads the affirmative defense of lack of standing. (Respondent Reply Exhibit E)

Petitioner had the opportunity to request dismissal of the affirmative defense by motion and elected not to do so similar to Respondent's lack of diligence in filing the instant motion. LIPA's

statutory right to initiate an Article 7 Real Property Tax Law proceeding was never clear cut as a non-owner and non-tenant of the subject property in light of the Waldbaum decision by the Court of Appeals.

Submit Judgment on Notice.

Dated: September 16, 2015


Hon. John C. Bivona, J.S.C.