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Real Property Taxation - Construction Law - Corporate Law - Education Law - Labor Relations - Municipal Law - Real Estate Law

Tax Certiorari Newsletter Summer 2016

THE DISTRIBUTION OF LIGHT BY FIBER OPTIC CABLES IS TAXABLE UNDER RPTL 102(12)(f)

Level 3 Communications, LLC v. Chautauqua County, et al. (Supreme Court, County of Chautauqua, Decided August 31, 2015).

The Supreme Court of Chautauqua County ruled on a proceeding in which the Petitioner challenged the assessment and collection of real property taxes on Petitioner's fiber optic cables and enclosures, which were located in various private rights-of-way. The Petitioner paid real property taxes on the fiber optic cables in 2010, 2011, and 2012 and sought a declaration that the fiber optic cables were not real property that is taxable and ordering the Respondents to pay Petitioner a tax refund for those years.

The court ruled that tax exclusions are not to be presumed or preferred and the burden rests with the Petitioner to establish that the property comes within the language of a real property tax exclusion. While the Petitioner relied upon the Appellate Division First Department's decision in *RCN New York Communications, LLC v. Tax Commission of the City of New York*, holding that the fiber optic cables at issue transmitted light impulses and not electricity and thus, were not taxable, the Respondents relied on RPTL 102(12)(f), which allows for taxation of equipment used for the distribution of light. The Supreme Court agreed with Respondents and held that the fiber optic cables were taxable under RPTL 102(12)(f). Here, fiber optic cables transmit signals by way of modulated light—which the Petitioner conceded in its Verified Petition.

The Court held that the distribution of light is covered under RPTL 102(12)(f) and is taxable, therefore making fiber optic cables taxable and ending the Petitioner's proceeding. The appeal of this decision is pending in the Appellate Division, 4th Department.

IN AN ACTION TO ANNUL A TOWN BOARD'S DECISION ON A REFUND APPLICATION, ANNULMENT WILL BE DENIED WITHOUT A BASIS FOR INVALIDATING THE DECISION

Muldoon Housing Development Corp. v. Town of Barton (2015 NY Slip Op 32391 (U)
(Sup. Ct., Tioga County, 2015)

Petitioner sought to annul the determination of Town of Barton Town Board's denial of an application for a refund of real property taxes. Tioga County Director of Real Property Tax Services moved for dismissal. Petitioner previously sought, and received, confirmation the town would follow RPTL §581-a in determining the appropriate assessment for the property—calculated using the net operating income after all operating expenses were deducted from the effective gross income. Petitioner subsequently filed its regulatory agreement with the County Clerk.

As no regulatory agreement or income statement had been filed with the assessing unit, the town assessor used the comparable sales method to determine petitioner's assessment resulting in a value of over $4.5 million, rather than $350,000 that an income method may have yielded. Petitioner did not grieve the assessment, nor institute a tax certiorari proceeding, but waited over a year to file for a refund under RPTL §550 alleging a clerical error. As such, the court noted the assessor assumed the property did not qualify under §581-a, and properly used the alternative method of valuation, increasing the assessed value and tax on the property. As petitioner failed to offer any

basis for invalidating the board's determination, annulment was denied.

A BUSINESS INVESTMENT EXEMPTION NEED NOT BE CHALLENGED EVERY YEAR FOR ENTITLEMENT TO THE EXEMPTION

Highbridge Broadway, LLC v. Assessor of the City of Schenectady, 2016 N.Y. Slip Op. 03544, Court of Appeals, 27 N.Y.3d 450 (2016)

The Court of Appeals overturned the Appellate Division 3d Department and ruled that a petitioner need not challenge a real property assessment every year to be entitled to a business investment exemption. Petitioner was entitled to a refund for each of the years subsequent to the year the assessment and exemption were challenged. Real Property Tax Law § 485, the business investment exemption, provides a partial ten-year exemption in which each of the ten years is calculated using a single assessment roll. However, when there is a computational error that causes a miscalculation of the business investment exemption, the error may be challenged by a single petition at the time the error is discovered. The Court further noted that it would be a waste of resources for all parties involved, including the Courts, to file a petition to challenge the error in each year the exemption is to be applied.

A PETITIONER MUST COMPLY WITH MAILING REQUIREMENTS OF RPTL 708(3) OR RISK DISMISSAL OF PROCEEDING

Westchester Joint Water Works v. Assessor of the City of Rye, 2016 N.Y. Slip Op. 04438, Court of Appeals.

The Court of Appeals held that a tax certiorari proceeding which is dismissed for failure to provide timely notice to a school district may not be restarted with CPLR 205(a). School districts are allowed to reserve funds to satisfy tax certiorari proceeding judgments through RPTL 708(3), but these funds are only reserved to the extent that they may be reasonably necessary to pay an anticipated judgment or claim. Thus, a school district must know of a proceeding to estimate the amount to set aside. By ignoring the mailing requirements provided in RPTL 708(3), a Petitioner denies the school district the opportunity to set aside funds and the Court reasoned that a petitioner cannot recommence a proceeding which was dismissed for failure to comply with mailing requirements, as was the case here. The Court held that to allow the Petitioner to restart the proceeding would undermine fairness and efficiency that go to the very fiber of RPTL 708(3).

NOT-FOR-PROFIT HOSPITALS MAY NOT BE TAX EXEMPT IF INVOLVED IN ACTIVITIES THAT ARE NOT DEMONSTRATABLY CHARITABLE

AHS Hospital Crop., d/b/a Morristown Memorial Hospital v. Town of Morristown, 28 N.J. Tax 456 (2015).

The town levied assessments on MMH's previously exempt real estate claiming that MMH's operation and use of its property was for profit making purposes. MMH challenged these assessments in the New Jersey Tax Court.

The court noted that Atlantic acts as a holding company with respect to MMH's various non-profit and for-profit subsidiaries, and the trustees who serve on MMH's board also constitute Atlantic's board. MMH, through one of its employed physicians, owns 100 percent of the stock of a number of for-profit physician practices and employs the physicians and staff who work at these so-called "captive PCs." Atlantic also owns for-profit AHS Investment Corp. which owns, leases and operates real estate, provides home care and nursing services, and functions as the parent corporation for Atlantic's interest in other for-profit ventures. Atlantic also owns AHS Insurance Co., an offshore for-profit that provides insurance coverage for MMH and the other non-profit and for-profit entities under Atlantic.

The court then focused on the business operations of MMH itself. It noted that MMH's medical staff consisted of employed physicians with incentive compensation provisions in their contracts; voluntary physicians who were in for-profit practice for themselves; and physicians with exclusive contracts to provide radiology, anesthesiology, pathology and

emergency room services to MMH's patients on a for-profit basis. The court noted that all of these physicians practiced medicine throughout MMH's facilities, and that both the voluntary and exclusive contract physicians use MMH's facilities to generate medical revenue for themselves. Citing New Jersey case law, the court explained that tax-exempt organizations are permitted to have both exempt and non-exempt uses occurring on its property as long as the two purposes can be separately described and accounted for, and as long as the non-exempt use is not subject to the tax-exemption.

Accordingly, for-profit activities carried out on tax-exempt property must be "conducted so as to be evident, readily ascertainable, and separately accountable for taxing purposes." [Citation omitted.]

On the other hand, exemption will be denied where there is significant and substantial "comingling of effort and entanglement of activities and operations" on the property. [Citation omitted.] Exemption is properly denied when the court is unable to discern between non-profit activity and "activities in the same location that [are] in furtherance of the interests of various for-profit entities." [Citation omitted.] It does not matter whether the for-profit entities are related or unrelated to the organization claiming exemption.

Applying this standard to MMH, the court found itself unable to discern any separation between the non-profit activities carried out by MMH on its property, and the for-profit activities carried out by the voluntary and contract physicians on that same property. Assuming that non-exempt for-profit hospitals have similar arrangements with for-profit physicians, the court stated that to grant an exemption to a non-profit hospital that has the same relationship with for-profit physicians would result in "an inequitable advantage" to the non-profit.

The operation and use of the subject property was conducted for a for-profit purpose, and advanced the activities of for-profit entities. By entangling and commingling its activities with for-profit entities, the Hospital allowed its property to be used for forbidden for-profit activities. The Hospital, therefore, failed to satisfy the Profit Test, and is thus precluded from exemption.

In a kind of judicial coup de grace, the court then zeroed in on the compensation paid to MMH's senior executives, and employed physicians. The court found that MMH failed to meet its burden of establishing the reasonableness of the compensation paid to its executives. It also found that the contracts with employed physicians included base compensation and an incentive component.

Lastly, the court examined various ancillary operations, and found that MMH's gift shop and cafeteria were both for-profit users of MMH's property, and therefore those premises were not entitled to an exemption. The court found that the auditorium and fitness center qualified for tax-exemption, but that MMH failed to establish that its day care area qualified for such an exemption.

EVEN WHERE A DECLARATORY JUDGMENT IS A PROPER METHOD, AN ARTICLE 11 PROCEEDING MUST BE BROUGHT WITHIN THE LIMITATIONS PERIOD

Turtle Island Trust v. County of Clinton, 125 A.D.3d 1245 (3d Dep't 2015).

Defendants appealed from an order denying a motion to dismiss the complaint. Plaintiff, an unincorporated charitable trust, was established to hold land to create a community for Native Americans wishing to practice a lifestyle in accordance with their ancestral traditions. The trust acquired parcels, 17 located within Town of Altona. The Town found most of the parcels were taxable and after non-payment, gained title by tax deed to 14 of the trust's 17 parcels within town. Plaintiff challenged the assessments. The panel found Supreme Court should have dismissed these challenges noting that the Court of Appeals had expressly rejected plaintiff's argument that the assessment was illegal and void, and may be challenged at any time as it was mandatorily exempt from taxes. This court ruled that while an action for declaratory judgment was a proper method, the statute of limitations barred plaintiffs' challenges to their tax assessments as they were made well after the required 30 days and/or four month limitations period. Also, the panel found County Court had jurisdiction over the RPTL Article 11 proceedings herein, and the statute of limitations barred plaintiff's challenges.

AN ORGANIZATION'S STATUS AS A SECTION 501(C)(3) TAX EXEMPT ENTITY DOES NOT CREATE A PRESUMPTION OF A TAX EXEMPTION UNDER RPTL 420-A.

Greater Jamaica Dev. Corp. v. New York City Tax Commn., 25 N.Y.3d 614 (2015).

Petitioner, Jamaica First Parking, LLC ("Jamaica First") owned and operated five (5) parking facilities to further the goals of its sole member, Greater Jamaica Development Corporation ("Greater Jamaica"), a not-for-profit corporation with the goal of revitalizing downtown Jamaica, Queens. Greater Jamaica was a tax exempt organization under Internal Revenue Code 26 USC §501(c)(3).

In 2007 the New York City Department of Finance ("DOF") granted real property tax exemptions for the parking facilities pursuant to RPTL 420-a; however, four years later the exemptions were revoked as the DOF found the use of the parking facilities did not fall into any enumerated uses under section 420-a.

Greater Jamaica and Jamaica First then commenced a hybrid proceeding under Article 7 and Article 78 against the DOF requesting judgment that the removal of the exemptions was arbitrary and capricious and contrary to law and that Jamaica first was entitled to the exemptions.

The trial court upheld the DOF's revocation of the tax exemption and dismissed the petition. Petitioners appealed and the 2d Department reversed the order and granted the facilities the tax exemption and annulled the DOF's determination.

On the appeal here, the Court of Appeals reversed the 2d Department The Court held that evidence of an organization's section 501(c)(3) status does not create a presumption that the entity is entitled to a tax exemption under section 420-a and is not dispositive as to tax exempt status.

The Court explained that the burden of proof was on the taxing authority to establish that the property is not tax exempt. The burden is met by demonstrating that either the Petitioners were not organized or conducted primarily for an exempt purposes or that the parking facilities were not used exclusively for carrying out thereupon one or more exempt purposes. The DOF met this burden by demonstrating that the use of the parking facilities was not for charitable purposes. The use was for economic development, which was not incidental to another recognized charitable purpose.

The Court explained that the economic benefit of below-market rate parking, which Petitioners provided, inured to the benefit of private enterprise by benefiting local business and prospective customers. While the Court found these benefits laudable, the Court held that public benefit is not the test of qualification for an exemption under section 420-a.

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