

# TAX CERTIORARI NEWSLETTER

SUMMER 2007

*Compliments of*

***LEWIS & GREER, P.C.***

510 Haight Avenue, Suite 202  
Poughkeepsie, New York 12603

Tel: (845) 454-1200

Fax: (845) 454-3315

www.lewisgreer.com

## **HYDRO PETITIONS DISMISSED FOR SECOND TIME\***

*Erie Hydropower/Niagara Mohawk v. Town of Moreau et al.*

After 24 days of trial former Supreme Court Judge William Keniry, sitting as a referee to hear and report, dismissed four years of petitions claiming over \$9 million in refunds, brought by both the former and current owners of three hydroelectric generating plants in the Town of Moreau. Keniry's findings were subsequently upheld by the Hon. Frank Williams.

Both Judges criticized major aspects of the Petitioner's valuation methodology including, depreciation of equipment still in use to 5%, failure to use appropriate service lives and the speculative nature of electric price forecasts based on a limited sample.

Petitioners have appealed to the Appellate Division, Second Department.

*\*Lewis and Greer PC represented the Town of Moreau in these matters.*

---

## **ARMS LENGTH SALE BEST EVIDENCE OF VALUE\***

*Curtis/Palmer Hydroelectric v. Town of Corinth et al*

Respondents Town and School District moved for summary judgment based on recent sales of the subject properties for \$285 million and then \$273 million. Petitioner argued that the sale prices were reflective of business value and included non-assessable intangible property – including contract rights.

The court found that a recent arm's length sale of a property is the best evidence of its value and that a taxpayer is bound by

the manner in which it structures its transaction. The taxpayer may not escape the tax consequences of the election. Although the court found the record to be replete with valuations showing the purchase price to exceed the assessments, it was noted that there was no apportionment of the price to each tax parcel. The motions were therefore denied with leave to renew should any documents be submitted showing that the petitioner has made such an allocation of the sale prices.

*\*Editors Note: Lewis and Greer PC represented the Town of Corinth in these matters. The case was thereafter settled on terms very favorable to the Town.*

---

## **DISMISSAL OF TAX CERTIORARI PETITION DENIED FOR LACK OF PREJUDICE**

*275 N. Middletown Rd. LLP v. Kenney*

Intervenor, Pearl River Union Free School District sought an order dismissing the tax certiorari proceedings filed by petitioner, because the "petitioner failed to timely file proof of service of the petition on the Pearl River Union Free School District or the Commissioner of Finance of Rockland County and/or the Superintendent of Schools."

Petitioner argued it mailed the Notice of Petition to the correct address and the receipt of the certified mailing showed, in fact, that it was received by the secretary of the Superintendent of Schools- the proper party. Petitioner admitted however that the Affidavit of Service was accidentally filed sixteen days later than required.

The court found that as the School District has not suffered any prejudice, nor had it alleged such. The Petitioner's delay in filing the proof of service was excusable. The court noted that

the lack of prejudice relates to the failure to comply with the method of service, but not to the failure to serve the proper person, since the former is purely ministerial while the latter is clearly jurisdictional. The District's motion to dismiss the tax certiorari proceedings was denied.

---

---

**VALUE OF ELECTRIC GENERATING STATIONS  
CANNOT BE REDUCED BY SUBTRACTING  
DEPRECIATED EQUIPMENT**

*Mirant New York Inc. v. Town of Stony Point*

Petitioner challenged the tax assessments imposed by the Town of Stony Point for the tax years 2000-2003.

The court found Petitioner had made an "accurate observation" that "based on Respondent's own admission, as contained in their appraisal report, for each year in question, Respondents grossly over-assessed Lovett." In the context of a proceeding to challenge a tax assessment, substantial evidence requires a detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser. The court rejected Respondent's appraiser's cost methodology and accepted that of the Petitioner's appraiser's as the only reasonable method of establishing the true value of Lovett. Petitioner's Appraiser compared Lovett to a modern gas-turbine facility and deducted extensive functional obsolescence.

Petitioner also deducted the costs of certain "power generating apparatus" as not includable in the value of the real property. The courts that have considered the issue have held that, pursuant to Real Property Tax Law Section 102, power generating apparatus and equipment for distribution of heat, power, gases and liquids are taxable property regardless of whether such equipment and distribution machinery is moveable, used in manufacture or owned by an entity conducting business under Tax Law Article 9. On this issue, the court denied Petitioner's motion for further reduction of Lovett's full market value.

---

---

**COURT APPROVES EXEMPTION OF PROPERTY AS  
NON-PROFIT FACILITY, NOT PRIVATE FOR-PROFIT  
FACILITY**

*Miriam Osborn Memorial Home Association v. Assessor of the City of Rye*

Tax assessor revoked Petitioner's 100 percent tax exemption status, and raised the property's taxes for the years 1997 through 2003. Petitioner Memorial Home subsequently protested the revocation of tax exemption status and challenged the tax assessments imposed upon the property- seeking a reduction in assessed value and appropriate refund of taxes paid.

*Lewis & Greer, P.C.*

Respondent's appraiser valued the property as a for-profit multi-family housing complex. Appraiser for Petitioner conceded that the property operated like a for-profit but was in fact a not-for-profit Type B corporation. The court used the evidence submitted by Petitioner's appraiser in concluding that the property was a not for profit home for adults.

The court therefore granted Petitioner's petition and ordered any overpayment of taxes to be refunded with interest.

---

---

**MOTION DENIED FOR FAILURE TO PRESENT  
CREDIBLE EVIDENCE TO WARRANT TAX  
EXEMPTION**

*Khas Bais Shmiel v. Town of Ramapo*

Plaintiff Congregation alleged it was a religious corporation entitled to a complete and total exemption from real property taxes under Real Property Tax Law Section 420 for the tax year 2005 through the date of judgment. Section 420-a states that a property used exclusively for religious purposes was entitled to exemption where no member receives any pecuniary profit nor does the organization make a profit from the property. The fact that rent may be charged for occupying the property will not necessarily violate the 'exclusive use' provision if it can be shown that the amount of rent collected does not constitute revenue. However, the court noted plaintiff may be making a profit by renting the top floor of the subject property.

The plaintiff failed to provide credible evidence, such as a detailed accounting of the expenses and revenues in operating the property, which demonstrated that a profit was not being made by renting the upper level of the property. The court therefore found plaintiff's motion seeking a complete and total exemption from real property taxes to be devoid of merit so as to warrant a tax exemption.

---

---

**PETITIONER HAS STANDING TO CHALLENGE CITY  
ASSESSMENT OF YESHIVA UNIVERSITY BUILDING**

*Matter of Greenburger v. Tax Commission, City of New York*

Petitioner tenant rented space in a building complex which additionally housed a tax exempt educational institution. The City contends, that under the lease, only Yeshiva University could contest or review any property assessments and Greenburger could at best only direct Yeshiva to commence such proceedings. Greenburger argues that since Yeshiva is a tax-exempt institution, he is actually responsible for payment of almost, if not all of the taxes and therefore is the real aggrieved person.

Respondent Tax Commission moved to dismiss petitioner tenant's application to challenge property tax assessments alleging he lacked standing under Real Property Tax Law Section 704. However, Yeshiva confirmed that Greenburger,

*Summer 2007*

pursuant to the Lease agreement, was always authorized to contest the real estate tax assessments and was entitled to receive compensation for any refund resulting from such challenges. Rather than prevent any such proceedings, the Lease intended only to ensure that Yeshiva would be indemnified or otherwise be assured that it would not incur expenses or be subject to any kind of tax obligation as a result of such proceedings. Since, as a tax-exempt institution, Yeshiva has no real pecuniary incentive in pursuing the matter, unless Greenburger has standing as an aggrieved person, the City is essentially given the inequitable advantage of having carte blanche to assess and tax the subject property.

The court found petitioner had valid standing to challenge the tax assessments and denied the City's motion to dismiss the proceedings.

---

---

### **TAX ASSESSMENT ON PROPERTY CORRECTED TO REFLECT PURCHASE PRICE**

#### *JB Park Place Realty LLC v. Assessor, Village of Bronxville*

Petitioner JB Realty challenged the 2006 tax assessment on a recently acquired piece of property. The buyer, JB and the seller commenced. After lengthy negotiations, the buyer, JB and the seller, had come to an agreement on the purchase price that was mutually acceptable to both parties. The owner of JB testified that the sale price was not affected by undue stimulus or outside influences but rather from extensive and free negotiations between the buyer and the seller.

In 2005, the assessor of the Town of Eastchester had entered into a written agreement to reduce the property's 2006 assessment to reflect market value. Under such agreement, JB agreed not to challenge the 2006 tax assessment. The reduced tax assessment was later challenged by the new Town Assessor. JB now asserts that the Village's 2006 assessment "reflects an inaccurate market value as opposed to the fair market value demonstrated through the purchase price. The court adopted the sale price as the value on which the assessment had to be based. The tax assessment was reduced to reflect the arm's length sale price of the property.

---

---

### **MOTION TO AMEND TAX ASSESSMENT ROLLS DENIED; RESPONDENT BARRED BY APPLICABLE STATUTES**

#### *Central Hudson Gas and Electric Corporation v. The Town of Newburgh et al.*

Petitioner Central Hudson Gas and Electric (CHGE) challenged tax assessments by the Town of Newburgh tax assessor upon certain parcels of CHGE's real property, and improvements thereon, for the tax years 2001 through and including 2004.

The assessment of the real estate during the tax years in question had been set by the Town Assessor at zero. At trial, the Town's appraiser asserted that certain easements and rights of way over the land had value that enhanced the value of the improvements. Petitioner argued that the Town was trying to amend its final assessment roll and moved to strike Newburgh's appraisal, to the extent it set forth land values for the parcels.

The court found Respondent had not followed the procedures set forth in Title 3 of the Real Property Tax Law regarding the amendment of final assessment rolls. The court also found that Respondent would be barred by the doctrine of equitable estoppel from now asserting land values for the affected parcels and, that, in any event, easements in gross are not separately assessable interests in real property.\*

\*Editor's note: A 1942 opinion of Counsel SBRPS supports Judge La Cava's position here. However, there are no court decisions on point.

---

---

### **TAXPAYER NOT REQUIRED TO CONSENT TO INTERIOR INSPECTION OF PREMISES BY TOWN APPRAISER**

#### *Schlesinger v. Town of Ramapo*

Petitioner challenged the 1999 tax assessment of the subject property, and requested a review and reduction of the alleged over-assessment. However, despite numerous requests, petitioner refused to allow the Town's appraiser to enter the premises in 2005 and conduct an interior inspection. The inspection was claimed by the Town Assessor as necessary to create an accurate appraisal of the property.

The court here sought to determine the right of an appraiser to seek entrance to the real property of a taxpayer and perform an interior inspection without the taxpayer's consent. The State Office of Real Property Services has noted that the actions of an assessor, while on the property of a taxpayer must be guided by a "standard of reasonableness" to protect against any intrusions upon privacy interests protected by the Fourteenth Amendment's prohibition against unreasonable searches.

In a similar case, ORPS had determined that an inspection by an assessor was unreasonable where other more accurate methods existed to appraise the property. The court therefore found an interior inspection of the property in 2005 would not disclose the conditions for 1999 and denied the Respondent's motion in its entirety.

### **APARTMENT COMPLEX FAILS TO MEET REQUIREMENTS FOR "INSTITUTIONAL GRADE" PROPERTY**

#### *Earla Associates v. City of Middletown*

Petitioner landlord challenged the 2005 real property tax assessment imposed on an apartment complex, arguing a

difference in the fair market value of the subject property of \$5 million dollars.

At issue was the difference in value created by the use of two different capitalization rates and equalization rates, in addition to whether the property can be considered “institutional grade.” This requires that the apartment conform to certain characteristics, including location in a major-market, appearance, size, modern amenities and quality construction. Non-institutional grade properties often present a higher risk to investors, and are valued at a higher capitalization rate. Petitioner argued that, based on its age, the property was not institutional grade and that the capitalization rate determination

should be made using figures for non-institutional grade apartment properties. Counsel for the city testified that, in fact, the property satisfies the requirements to be qualified as institutional grade.

The court held for the Petitioner and determined that, while satisfying some of the characteristics of “institutional grade” properties, this apartment fails to meet the necessary requirements, namely age and location. The court applied Petitioner’s capitalization rate to arrive a valuation difference of nearly \$1 million dollars and ordered any overpayment of taxes to be refunded with interest.

Representing petitioners, municipalities and school districts, we prosecute and defend real property assessments on large utility, industrial, and commercial facilities. Through a unique involvement in the appraisal of power generating facilities, the firm has close ties with a network of nationally recognized utility appraisers and engineering experts. Our attorneys have made numerous presentations on this specialized area of practice to both attorneys and appraisers.

**Lou Lewis  
J. Scott Greer  
Daniel P. Adams  
Veronica A. McMillan**

-----  
**Joan Quinn  
Darren H. Fairlie**

**(845) 454-1200**

**Copyright © Lewis & Greer, P.C., 2007 All rights reserved**