APL-2021-00056

To be argued by:
ANDREA M. CHAN
15 minutes requested

COURT OF APPEALS

STATE OF NEW YORK

In the Matter of the Application of

BROOKDALE PHYSICIANS' DIALYSIS ASSOCIATES, INC. f/k/a CHURCH AVENUE ASSOCIATES, INC., SAMUEL and BERTHA SCHULMAN INSTITUTE FOR NURSING AND REHABILITATION FUND, INC. f/k/a SAMUEL SCHULMAN INSTITUTE FOR NURSING AND REHABILITATION FUND, INC.,

Petitioners-Respondents,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

The Department of Finance of The City of New York,

Respondent-Appellant.

BRIEF FOR APPELLANT

GEORGIA M. PESTANA,
Acting Corporation Counsel of the
City of New York,
Attorney for Appellant
71 Smith Avenue
Kingston, New York 12401
(212) 356-2139
(212) 356-1148 facsimile
Jkroenin@law.nyc.gov

Vincent D'Orazio
Andrea M. Chan
Joseph J. Kroening
Of Counsel
July 29, 2021

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF JURISDICTION 4

QUESTIONS PRESENTED 4

THE RELEVANT STATUTE 5

STATEMENT OF FACTS 7

DECISIONS BELOW 10

1) The Trial Court Decision 10

2) The Appellate Division Decision 11

ARGUMENT 13

THE DECISION OF THE APPELLATE DIVISION DIRECTLY CONTRAVENES THE PLAIN LANGUAGE OF REAL PROPERTY TAX LAW 420-A, COURT OF APPEALS PRECEDENT, AND THE MANDATE OF THE LEGISLATURE TO CONSTRUE 420-A TAX EXEMPTIONS STRICTLY AND NARROWLY BECAUSE IT HAS IMPROPERLY GRANTED A TAX EXEMPTION TO A NOT-FOR-PROFIT ENTITY THAT DOES NOT USE OR OCCUPY THE BUILDING, BUT INSTEAD LEASES IT TO A FOR-PROFIT DIALYSIS CENTER WHICH USES THE EXEMPT PROPERTY FOR ITS OWN PECUNIARY GAIN.

CONCLUSION 44

CERTIFICATE OF COMPLIANCE 45

TABLE OF AUTHORITIES

Cases **Pages**

American Bible Soc v Lewisohn,
40 NY2d 78 [1976] 38

Association of the Bar of the City of New York v Lewisohn,
34 NY2d 143, 153 [1974] 14, 17, 20, 38, 40

Matter of Brookdale Physicians' Dialysis Assoc., Inc. v Department of Finance of the City of NY,
178 AD3d 443 [1st Dept 2019] 5, 20, 30, 32, 39

Buffalo City Cemetery v City of Buffalo,
46 NY 506 [1871] 15

Colt Industries v Department of Finance,
66 NY2d 466 [1985] 15

Genesee Hospital v Wagner,
47 AD2d 37 [4th Dept 1975]
affd 39 NY2d 863 [1976] 14, 27, 28, 29, 30, 31, 33, 38

Matter of Gilman v DHCR,
99 NY2d 144 [2002] 14

Gospel Volunteers v Village of Speculator,
33 AD2d 407, affd 29 NY2d 622 ..... 32, 36

Matter of Greater Jamaica Dev. Corp. v New York City Tax Commission,
25 NY3d 614 [2015] 14, 22, 23, 32, 33, 35, 38, 40

Matter of Lackawanna Community Dev Corp. v Krakowski,
12 NY3d 578 [2009] 14, 21, 22, 23, 38, 41, 42

Matter of Miriam Osborn Mem. Home Assn. v Assessor of City of Rye,
275 AD2d 714 [2d Dept 2000] 18

Mobil Oil Corp. v Finance Administrator,
58 NY2d 95 [1983] 15

Cases **Pages**

New York Botanical Garden v Assessors of Town of Washington,
55 NY2d 328 [1982] 17

Matter of Niagara Mohawk Power Corp. v
Town of Potsdam Bd. of Assessors,
216 AD2d 775 [3d Dept 1995],
lv denied 87 NY2d 802 [1995] 17

Pace College v Boyland
4 NY2d 528 [1958] 24, 25

Matter of Peckham v Calogero,
12 NY3d 424 [2009] 15

Matter of Pell v Board of Education,
34 NY2d 222 [1974] 14

Matter of Quail Summit, Inc. v Town of Canandaigua,
55 AD3d 1295, 1297 [4th Dept 2008]),
lv denied 11 NY3d 716 [2009])).....18

Roosevelt Hosp. v Mayor of New York,
84 NY 108 [1881] 15

Matter of Salvation Army v Town of Ellicott Bd of Assessment Review,
100 AD2d 361 [4th Dept 1984] 36

Sisters of St. Joseph v New York,
49 NY2d 429 [1980] 32, 42

Matter of Southwinds Retirement Home v City of Middletown,
(23 Misc 3d 1138 [A] 2009,
affd 74 AD3d 1085 [2d Dept 2010]).....25, 26

Matter of Steiner Educational & Farming Assn. v Brennan,
65 AD2d 868 [3d Dept 1978] 20

Stuyvesant Square Thrift Shop v Tax Com. of New York,
54 NY2d 735 [1980] 14, 32, 34, 35, 36, 37

Cases **Pages**

Stuyvesant Square Thrift Shop v Tax Com. of New York,
76 AD2d 461 [1st Dept 1980] 17, 20, 35, 36

People ex rel. Westchester Fire Ins. Co. v Davenport,
91 NY574, 586 [1883] 15

Statutes

Article 78.....5, 8, 9, 10, 14

CPLR 5602(a)(1)(i).....3

Laws 1971, ch 414 §1 38

Real Property Tax Law § 420-a ..... Passim

Real Property Tax Law § 420-a(1)(a).....5, 23

Real Property Tax Law § 420-a(2) 19

Real Property Tax Law § 420 (1)(b).....5

Real Property Tax Law § 421 .....29, 41

Other Authorities

[https://www.dictionary.cambridge.org/us/dictionary/english/incidental] 24

[https://www.macmillandictionary.com/us/dictionary/american/incidental_1] 24

[https://www.merriam-webster.com/dictionary/incidental] 24

https://www.avantusrenaltherapy.com/location-brooklyn-ny.html
[accessed July 25, 2021] 7, 29

Richard L. Beebe and Stephen J. Harrison, Fordham Urban Law
Journal, Volume 9, Number 3, Article 2 [1981].....16

PRELIMINARY STATEMENT

This is an appeal from a Decision and Order of the Appellate Division, First Department, dated December 3, 2019 (R 724-728), which upheld the Order of the Supreme Court dated August 2, 2018 (R 8-12), granting tax-exempt status to a property pursuant to Real Property Tax Law 420-a notwithstanding the property's use as a profit-making enterprise. The Appellate Division's decision grants the subject property a full exemption from real estate taxes despite the fact that it is leased to a for-profit entity in violation of the plain language of the statute, Court of Appeals precedent, and the mandate of the legislature to construe tax exemptions strictly and narrowly.

Real Property Tax Law ("RPTL") §420-a provides for a mandatory real property tax exemption that was created solely to benefit not-for-profit entities whose properties are used exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes. In order to qualify for this exemption, a party must satisfy three requirements: 1) the property must be owned by a qualified not-for-profit organization 2) the property must be used exclusively to further the exempt purpose of the not-for-profit organization and 3) the property cannot be used for pecuniary gain or as a guise for profit-making. Furthermore, "if any portion of such real property is not

so used exclusively to carry out thereupon one or more of such [exempt] purposes but is leased or otherwise used for other purposes, such portion shall be subject to taxation" (RPTL 420-a(2)).

Here, Petitioners only meet one of the three basic requirements mandated by the statute, solely that of ownership, and yet the Appellate Division has chosen to overlook this failure and grant the exemption regardless. In this appeal, the building in question is owned by the Schulman Fund, a charitable organization that would otherwise qualify for exemption from property taxes under the statute. However, rather than utilize the building for its own exempt purposes, the building is leased to, and used exclusively by, a for-profit entity, Brookdale Dialysis, that would not qualify for property tax exemption if it were the owner of the property. Brookdale Dialysis is the sole occupant of the property and uses the building for its own profit-making purposes – the operation of a private dialysis center.

This case raises a fundamental question under Real Property Tax Law 420-a as to whether a not-for-profit organization should be allowed to enjoy a full exemption from real property taxes on a property it does not use or occupy, but instead leases to a for-profit entity that indisputably uses the property for its own pecuniary gain. This question arises because the Appellate Division, First

Department has permitted a tax exemption to exist and continue on the subject property despite the fact that this type of leasing "arrangement" directly violates the plain language of RPTL 420-a.

This matter merits reversal by the Court of Appeals because the Appellate Division's Decision and Order strayed from the established legal framework developed by this Court and other Appellate Division Departments for determining entitlement to mandatory real property tax exemptions. The Appellate Division ignored the eligibility standard set forth explicitly in RPTL 420-a that denies the exemption when an exempt entity leases its property to a for-profit entity. While it is well-established that property tax exemption statutes are to be construed narrowly, the Appellate Division applied instead a lax and lenient standard that effectively creates a tax loophole permitting a non-exempt use of real property to nonetheless enjoy tax-exempt treatment. This Decision and Order has the potential to not only create significant negative impact on the tax base of the City of New York, but could lead to statewide impacts if adopted by other Departments.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to CPLR 5602(a)(1)(i) because this proceeding originated in the Supreme Court and the Court of Appeals granted leave to appeal (R 722) from a final order of the Appellate Division (R 724) that is not appealable as of right.

QUESTIONS PRESENTED

1. Did the Appellate Division err in holding that a property not used by the nonprofit owner, but instead leased to a for-profit company could retain its mandatory tax exemption pursuant to RPTL 420-a, despite the fact that the plain language of the statute explicitly states that "if any portion of such real property is not so used exclusively to carry out thereupon one or more of such [exempt] purposes but is leased or otherwise used for other purposes, such portion shall be subject to taxation?"

2. Was it improper for the Appellate Division to grant a tax exemption on a property where the physical and actual use of the building is for the operation of a private dialysis center whose profits inure to a commercial enterprise?

3. Has the Appellate Division broadened the scope of what may be deemed an "incidental use" so much so that it has now extended the reach of RPTL 420-a in direct contravention to the Legislature's mandate that tax exemptions be construed strictly and narrowly?

The City first raised the question of whether the real property at issue was entitled to tax exemption pursuant to RPTL 420-a before the Supreme Court in its cross-motion to dismiss the Article 78 Petition (R 688). The City then raised the issues on appeal to the Appellate Division, First Department (*see* Brief for Respondent-Appellant in *Matter of Brookdale Physicians' Dialysis Assoc., Inc. v Department of Finance of the City of NY*, 178 AD3d 443, 445 [1st Dept 2019], pp 18-31). Thus, the questions presented have been preserved for this Court's review.

THE RELEVANT STATUTE

Real Property Tax Law § 420-a provides the statutory basis for the real property tax exemption sought here by Petitioners. In pertinent part, RPTL § 420-a(1)(a) provides that:

> 1. (a) [r]eal property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes, or for two or more such purposes, and used

> exclusively for carrying out thereupon… shall be exempt from taxation as provided in this section.

However, pursuant to subsection (1)(b):

> (b) Real property such as specified in paragraph (a) of this subdivision shall not be exempt if any officer, member or employee of the owning corporation or association shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof, . . . ; or if the organization thereof for any such avowed purposes be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association or for any of its members or employees; or if it be not in good faith organized or conducted exclusively for one or more of such purposes.

Moreover, pursuant to RPTL 420-a(2):

> 2. If any portion of such real property is not so used exclusively to carry out thereupon one or more of such purposes but is leased or otherwise used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be exempt . . . . and provided further that such real property shall be exempt from taxation only so long as it or a portion thereof, as the case may be, is devoted to such exempt purposes and so long as any moneys paid for such use do not exceed the amount of the carrying, maintenance and depreciation charges of the property or portion thereof, as the case may be.

(RPTL § 420-a[emphasis added]).

STATEMENT OF FACTS

The property that is the subject of this appeal is owned by a not-for-profit entity, but not used or occupied by it. Instead, the tenant, Petitioner Brookdale Physicians' Dialysis Associates, Inc, f/k/a Church Avenue Associates, Inc. ("Brookdale Dialysis") leases the real property located at 9701 Church Avenue, Brooklyn, New York (hereinafter the "Building") from the owner and operates a for-profit dialysis center upon the Property (R 23). Brookdale Dialysis is a for-profit corporation and uses the Building to provide dialysis services for pecuniary gain.[1]

The owner and landlord of the Building is Petitioner Samuel and Bertha Schulman Institute for Nursing and Rehabilitation Fund, Inc. f/k/a Samuel Schulman Institute for Nursing and Rehabilitation Fund, Inc. (the "Schulman Fund" or "the Fund"). The Schulman Fund raises funds and manages assets in support of the healthcare purposes of non-parties Schulman and Schachne Institute

[1] Interestingly, the website of Brookdale Dialysis reveals that "Brookdale Physicians Dialysis Association" appears to be part of a larger corporate for-profit dialysis business called "Avantus Renal Therapy," that offers private suite dialysis services across the country with numerous locations, including Manhattan (*see* https://www.avantusrenaltherapy.com/location-brooklyn-ny.html [accessed July 25, 2021]). Indeed, there is no mention of Brookdale Hospital, the Nursing Institute, or the Schulman Fund on Brookdale Dialysis' website.

for Nursing and Rehabilitation, Inc. (the "Nursing Institute") and Brookdale Hospital Medical Center ("Brookdale Hospital") (R 20-21). [2]

Pursuant to a lease dated December 1995 (the "Lease") (R 68), the Schulman Fund leased the entire basement and first floor of the Building (the "Leased Premises") to Brookdale Dialysis (R 60, 145, 242). The Lease also granted to Brookdale Dialysis an exclusive and irrevocable option to lease all or a portion of the second floor of the Building, which it has never exercised, and thus that portion of the property remains vacant and unused (R 71, 245). The Lease restricted the use of the Building to medical offices, including the provision of dialysis services (R 250). Brookdale Dialysis pays rent to the Schulman Fund in the amount of $24,217.08 per month, annualized at $290,604.96 per year (R 319). Brookdale Dialysis is responsible to pay for repairs and maintenance (R 253), alterations (R255), fire and risk insurance (R 251), utilities (R 253), and, should they become due, property taxes (R 249).

From 2001 to 2013, the Schulman Fund did not pay real property taxes as it enjoyed tax exempt status for the Building pursuant to RPTL § 420-a,

---

[2] The Schulman Fund, the Nursing Institute, and Brookdale Hospital (but not Brookdale Dialysis) are corporate affiliates by reason of being constituents of an integrated healthcare system comprised of affiliated entities under common control of the same corporate parent, Brookdale Health System, Inc. (R 21). Neither Brookdale Health System, Inc., the Nursing Institute, nor Brookdale Hospital are parties to this litigation.

until the Department of Finance of the City of New York ("DOF") discovered that the Building was being leased to, and used exclusively by, a for-profit entity. As a result of this discovery, DOF advised Petitioners that the tax exempt status of the Building would be revoked via letter dated March 22, 2013 (R 198). Following the issuance of that determination, the Schulman Fund and Brookdale Dialysis commenced an Article 78/Declaratory Judgment proceeding, seeking an order annulling the determination (R 64, 104). By Decision and Order, dated February 10, 2014 (the "2014 Decision"), the Supreme Court granted the Petition, finding generally that "Brookdale Dialysis performs a great deal to further the charitable activities of Brookdale Hospital and the Nursing Institute, and is apparently quite enmeshed with them in terms of staffing" (R 39).

Subsequently, DOF requested further documentation that included, *inter alia*, income and expense documentation for the Building. At that point, DOF discovered that not only was the property still being leased to and used as a for-profit dialysis center, but the income and expense documentation also revealed that the Schulman Fund received income greater than its carrying costs and expenses for the Building. Via email dated April 4, 2017, DOF revoked the exemption for the Building on this basis (R 408).

Following the issuance of this determination, the Schulman Fund and Brookdale Dialysis once again commenced an Article 78/Declaratory Judgment proceeding, seeking an order annulling the determination (R 17, 367). By Decision and Order dated August 2, 2018, Supreme Court, New York County, granted the Petition and annulled DOF's determination revoking the exemption (R 8-12). The City appealed the decision to the Appellate Division, First Department. By Decision and Order dated December 3, 2019, the First Department upheld the lower court decision (R 724-728).

DECISIONS BELOW

1) The Trial Court Decision

By Decision and Order dated August 2, 2018 and entered August 3, 2018 (the "2018 Decision"), Justice Margaret A. Chan, Supreme Court, New York County, granted petitioners' Article 78 Petition, and denied the City's cross-motion to dismiss the Petition, holding that DOF's determination to revoke the RPTL 420-a tax exemption was arbitrary and capricious (R 8-12).

In its decision, the trial court acknowledges multiple undisputed facts that render the subject property ineligible for a tax exemption under RPTL 420-a and yet grants the exemption regardless: 1) the leasing of the property to a for-profit entity (R 12), 2) the actual and physical use of the property as a for-profit

dialysis center (R 10) and 3) the profit-making status of both the owner of the property, the Schulman Fund, and the tenant, Brookdale Dialysis (R 12). Despite the clear violations of the statute, the trial court chose to overlook these salient facts and held instead that DOF's analysis was "an incomplete analysis" (R 12). Oddly, the court rejected the City's arguments that the property was not exempt because the use of the Building was not by the Schulman Fund, but instead was leased to a for-profit entity, and yet in spite of this, the court held that DOF failed to meet its burden because it did not examine the "primary use of the exempt property" and that the decision was arbitrary and capricious (R 12).

2) The Appellate Division Decision

In a Decision and Order dated December 3, 2019 (the "Appellate Division Decision"), the Appellate Division upheld the trial court's 2018 Decision, determining that the subject property is exempt notwithstanding the for-profit status of the tenant, Brookdale Dialysis (R 724). The Appellate Division Decision justified the tax exemption because it deemed a dialysis center to be "a critical healthcare service, notwithstanding the for-profit status of the provider of the service" (R 725-726). Moreover, the court relied on an unsupported assertion that Brookdale Hospital and the Nursing Institute receive an "ostensible financial benefit" from Brookdale Dialysis' use of the property (R 727).

The Decision also acknowledged that "Schulman's rent receipts exceed its building maintenance expenses" (R 727). However, the Appellate Division chose to disregard the excess income and found that "no benefit exists because Schulman placed the profit back into its healthcare-provider affiliates" (R 727), holding in direct contrast to prior decisions of this Court.

Finally, despite the clear use of the property as a for-profit dialysis center, the Appellate Division held that "[t]he provision of dialysis services for Brookdale Hospital and Nursing Institute patients qualifies the building for tax-exempt status, because it is 'reasonably incident' to Schulman's purpose of funding and supporting its healthcare affiliates" (R 727), improperly broadening the scope of what may be reasonably deemed "incidental" in a 420-a analysis.

ARGUMENT

THE DECISION OF THE APPELLATE DIVISION DIRECTLY CONTRAVENES THE PLAIN LANGUAGE OF REAL PROPERTY TAX LAW 420-A, COURT OF APPEALS PRECEDENT, AND THE MANDATE OF THE LEGISLATURE TO CONSTRUE 420-A TAX EXEMPTIONS STRICTLY AND NARROWLY BECAUSE IT HAS IMPROPERLY GRANTED A TAX EXEMPTION TO A NOT-FOR-PROFIT ENTITY THAT DOES NOT USE OR OCCUPY THE BUILDING, BUT INSTEAD LEASES IT TO A FOR-PROFIT DIALYSIS CENTER WHICH USES THE EXEMPT PROPERTY FOR ITS OWN PECUNIARY GAIN.

Real Property Tax Law 420-a provides a mandatory real property tax exemption reserved specifically for not-for-profit entities who satisfy the strict requirements of the statute – mainly, ownership of the property by a nonprofit entity and use of the property for an exempt purpose. The building that is the subject of this appeal is owned by a nonprofit organization that statutorily qualifies for exemption from property taxes, but does not use or occupy the space. Rather than utilize the building for its own exempt purposes, the building is leased to, and exclusively used by, a for-profit entity that would not qualify for a property tax exemption if it were the owner, and yet the Appellate Division has endorsed this arrangement as worthy of a full exemption from real estate taxes.

Giving no weight to the plain language of the statute, the controlling precedent of this Court, nor the mandate of the Legislature to construe tax exemptions under 420-a narrowly, the Appellate Division has gone completely in the opposite direction of the decisional law in this State and permitted the use of a tax-exempt property by a private enterprise for pecuniary gain. Indeed, the Appellate Division's holding in this matter directly contravenes long-standing Court of Appeals precedent (*Matter of Greater Jamaica Dev. Corp. v New York City Tax Commission*, 25 NY3d 614 [2015]); *Matter of Lackawanna Community Dev Corp. v Krakowski*, 12 NY3d 578 [2009]; *Stuyvesant Square Thrift Shop v Tax Com. of New York*, 54 NY2d 735 [1980]; *Genesee Hospital v Wagner,* 47 AD2d 37 [4th Dept 1975] affd 39 NY2d 863 [1976]; *Association of the Bar of the City of New York v Lewisohn* 34 NY2d 143 [1974]), and, as such, the Decision should be reversed.

In an Article 78 proceeding challenging an agency determination, the standard of judicial review is whether the determination is arbitrary and capricious or devoid of a rational basis (*Matter of Pell v Board of Education*, 34 NY2d 222, 231 [1974]; see also *Matter of Gilman v DHCR*, 99 NY2d 144, 149 [2002]). If the reviewing court finds "that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have

reached a different result than the one reached by the agency" (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]).

Moreover, it is well settled in this State that tax exemption statutes are to be strictly construed against the taxpayer seeking the benefit, and in the case of ambiguity, any doubt is to be resolved in favor of the taxing authority (*see Colt Industries v Department of Finance*, 66 NY2d 466, 471 [1985]; *Mobil Oil Corp. v Finance Administrator*, 58 NY2d 95, 99 [1983]). And with good reason:

> Taxation is a burden. It is a common burden, for the common good. The person or the class which is exempted therefrom is a favored one. A statute giving favors at the expense of the public is not to be liberally interpreted. Statutes conferring exemptions from taxation are to be strictly construed.[3]

For many decades, both the courts and the Legislature have recognized that the severe and persistent "problem of the erosion of the tax base due to a proliferation of exemptions and exempt properties has [been of] serious concern," and "many municipalities, particularly several of our largest cities and some of our most rural communities, face excruciating problems as a result of

[3]*Buffalo City Cemetery v City of Buffalo*, 46 NY 506, 508-09 [1871];*see also People ex rel. Westchester Fire Ins. Co. v Davenport*, 91 NY574, 586 [1883] ("The courts have... required an exemption from taxation to be described in clear and unambiguous language, and to appear to be, undisputably, within the intention of the legislature, or they have declined to enforce it."); *Roosevelt Hosp. v Mayor of New York*, 84 NY 108, 115 [1881] ("Taxation is the rule; exemption is the exception, and before anyone can claim exemption from what would otherwise be his just share of a tax or assessment, he must find a plain warrant for such exemption in the law").

dilution of their tax bases" (*A Law in Search of a Policy: A History of New York's Real Property Tax Exemption for Non-Profit Organizations*, Richard L. Beebe and Stephen J. Harrison, Fordham Urban Law Journal, Volume 9, Number 3, Article 2 [1981] at 534). And of these tax exemptions, "one of the most difficult and sensitive subjects of real property tax administration is the exemption available to property owned by non-profit organizations" – that is, Real Property Tax Law 420-a (*id.*).

Rooted in statutory law going back to the 1800s, RPTL 420-a and its predecessors have provided for a tax exemption specifically carved out to benefit properties used exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes. What was once originally intended to provide tax relief to a town's local schoolhouse, alms house, or place of public worship (*Beebe and Harrison* at 537), this exemption has now expanded beyond recognition and become vulnerable to dangerously far-reaching interpretations of what should be deemed exempt property. Recognizing the attractiveness of this exemption, the Court of Appeals has taken great care to ensure that only those entities and properties which meet the strict requirements of the statute are granted this tax advantage.

(1)

A party seeking to qualify under RPTL 420-a must demonstrate that the owner-entity seeking the exemption is organized primarily or principally for tax exempt purposes and that the subject property is used primarily and principally for exempt purposes (*see* RPTL 420-a(1); *see also Association of the Bar of the City of New York v Lewisohn*, 34 NY2d 143, 153 [1974]). In other words, owners seeking to qualify for a 420-a exemption must satisfy a two-pronged test: ownership and use. It is not enough that an exempt entity own the property, but the property must also be used for an exempt purpose. In addition, the courts have mandated a third requirement, which is that the property must also not be used for pecuniary gain (*Stuyvesant Square Thrift Shop v Tax Com. of New York*, 76 AD2d 461, 464 [1st Dept 1980]).

Here, where the City seeks to "withdraw a previously granted tax exemption, the municipality bears the burden of proving that the real property is subject to taxation" (*Lackawanna at 581; New York Botanical Garden v Assessors of Town of Washington*, 55 NY2d 328, 334 [1982]). This burden may be met by proving, for example, a change in the law governing the applicable exemption (*see e.g. Matter of Niagara Mohawk Power Corp. v Town of Potsdam Bd. of Assessors*, 216 AD2d 775, 776 [3d Dept 1995], lv denied 87 NY2d 802 [1995]), a change in

the use of the property (*see e.g. Matter of Miriam Osborn Mem. Home Assn. v Assessor of City of Rye*, 275 AD2d 714, 715 [2d Dept 2000]), or that the tax exemption "was erroneously awarded in the first instance" (*Matter of Quail Summit, Inc. v Town of Canandaigua*, 55 AD3d 1295, 1297 [4th Dept 2008]), lv denied 11 NY3d 716 [2009])). Here, it is the City's contention that the Schulman Fund was leasing the property for a profit to a commercial enterprise, a statutorily prohibited factor, thus rendering the Building ineligible for tax exempt status.

As will be demonstrated herein, the New York City Department of Finance undoubtedly met its burden of proof as it discovered that the nonprofit owner was leasing its property for a profit to a commercial entity, and, as such, properly revoked the property tax exemption in strict accordance with the applicable statutes and case law surrounding RPTL 420-a. Consequently, the Department of Finance's determination to revoke the real property tax exemption was made with a reasonable basis and was neither arbitrary nor capricious.

(2)

To begin with, it must be emphasized that the building in question is owned by the Samuel Schulman Fund ("the Schulman Fund" or "the Fund"), not the Schulman Nursing Institute nor Brookdale Hospital (R 204). As stated by Petitioner, "Samuel Schulman supports and provides funds to Brookdale Hospital

and The Nursing Institute," and is organized and operated "for the charitable purposes of promoting the health of the community by providing funds and managing assets in support of the charitable healthcare purposes of [the Nursing Institute and Brookdale Hospital]" (R 20-21). While it is not in dispute that the Schulman Fund is organized for a charitable purpose as recognized by RPTL 420-a, it should be made clear that the Fund, and not Brookdale Hospital nor the Nursing Institute, is the owner.

The property at issue is occupied solely by a for-profit dialysis center. The not-for-profit owner does not occupy or use the Building. The Schulman Fund does not operate its headquarters on the property nor does it run any of its charitable initiatives or fundraising programs at the location. Instead, it leases the property to Brookdale Dialysis Physicians Associates, who, in turn, uses it to operate a for-profit dialysis center.

This leasing arrangement directly violates the plain language of RPTL 420-a. Pursuant to subsection 420-a(2), "if any portion of such real property is not so used exclusively to carry out thereupon one or more of such [exempt] purposes but is leased or otherwise used for other purposes, such portion shall be subject to taxation" (RPTL 420-a[2]). Thus, right from the outset, it is clear from this Record that Petitioners fail to satisfy the strict requirements for a tax exemption under

RPTL 420-a as the not-for-profit owner of the property does not use the Building for any exempt purpose, but instead leases it to a for-profit commercial enterprise.

(3)

Yet, the Appellate Division has entirely disregarded the express wording of the statute, holding instead that the for-profit dialysis center "qualifies the building for tax-exempt status, because it is 'reasonably incident' to Schulman's purpose of funding and supporting its healthcare affiliates" (*Matter of Brookdale Physicians' Dialysis Assoc., Inc. v Department of Finance of the City of NY*, 178 AD3d 443, 445 [1st Dept 2019]).

This is simply wrong. According to the decisional law surrounding RPTL 420-a, even if an owner of a property seeking exemption is found to be organized for a permissible exempt purpose under the statute, "the property involved must be used for carrying on one or more of the designated purposes (*Stuyvesant Square Thrift Shop v Tax Com. of New York*, 76 AD2d 461, 463 [1st Dept 1980] citing *Matter of Association*, 34 NY2d 143 and *Matter of Steiner Educational & Farming Assn. v Brennan*, 65 AD2d 868 [3d Dept 1978]). The Schulman Fund is a charitable fundraiser and an asset manager – not a hospital – and the operation of a private dialysis center is not in any way incidental to the Fund's primary purpose.

As the Court of Appeals has emphasized, "[i]t is the actual or physical use of the property that the Real Property Tax Law is concerned with when it exempts from taxation property '*used* exclusively for carrying out *thereupon* one or more' exempt purposes" (*Lackawanna* at 581 citing RPTL 420-a[1][a] [emphasis added by the Court]). Thus, RPTL 420-a provides for a tax exemption that is critically dependent on the use of the property, and New York jurisprudence has made it abundantly clear that this requirement must be assiduously followed.

For example, in *Matter of Lackawanna*, a not-for-profit local development corporation had leased its building to a company that was carrying out for-profit manufacturing activities (*Lackawanna* at 580). Unable to assert that the nonprofit was actually using the property itself, the development corporation instead argued that by leasing its space to a manufacturer, it was still "using" the property to further its charitable purpose of spurring economic development in the community.

The Court of Appeals found this argument to be utterly unpersuasive and held "that the property was taxable" (*id*.). Even though the Court recognized that the existence of the manufacturing company would certainly, by extension, "encourage[e] the development of, or retention of, an industry in the community…," as would any other new business, the Court readily distinguished

that this was not the actual use that was physically taking place upon the property (*see Lackawanna* at 582). The actual use was, in reality, a for-profit manufacturing business (*Lackawanna* at 580).

Additionally, the Court noted that the property was truly being "'used' within the meaning of RPTL 420-a(1)(a) by the for-profit lessee for manufacturing activities, and not by [the local development corporation] LCDC for an exempt purpose" (*Lackawanna* at 580 [emphasis added]). Therefore, the Court examines not only what is physically taking place upon the property, but also ascertains that the not-for-profit is actually the one using it.

The Court confronted a similar issue only six years later when it decided *Greater Jamaica* in 2015 (25 NY3d 614 [2015]). There, the not-for-profit petitioner had asserted that the operation of their parking facilities, which offered "below-market, reasonably-priced parking" for residents, workers and visitors to downtown Jamaica, furthered the non-profit's charitable purpose and "overall goal to create and maintain a viable downtown Jamaica" and promote economic development (*see Greater Jamaica* at 621-23). However, the Court rejected this argument and in reversing the Appellate Division's decision, held that the Department of Finance had properly revoked the RPTL 420-a tax exemption due to

the fact that the properties were being used for a commercial purpose, not a charitable one.

Turning once more to the plain language of the statute, the Court reiterated that "the second prong of section 420-a(1)(a) requires a court to review "the actual or physical use of the property… when it exempts from taxation property 'used exclusively for carrying out thereupon one or more' exempt purposes" (*Greater Jamaica* citing *Lackawanna* at 581, quoting RPTL 420-a(1)(a), and "[w]hile Greater Jamaica's overall goal to create and maintain a viable downtown Jamaica is commendable… that does not mean that the facilitation of parking for such purposes constitutes a charitable use of the property under section 420-a(1)(a)" (*Greater Jamaica* at 653). Thus, even when the nonprofit organization owns and uses the property for which it seeks an exemption, the Court of Appeals will still take the utmost care to ensure that the actual and physical use is an exempt one.

(4)

Indeed, it is only under very limited circumstances that courts will allow a profit-making use to be considered "reasonably incidental" to the primary exempt purpose of the nonprofit owner and, in turn, permissible as an exempt use. This is because the most generally accepted meaning of "incidental" is something

that is of relatively little significance in relation to the primary object, and in the context of an RPTL 420-a exemption, where the incidental use being examined is invariably a commercial one, it is typically a use that is so de minimis that it will not serve to defeat the exemption.

According to Merriam Webster Dictionary, the term "incidental" means "being likely to ensue as a chance or minor consequence" or "minor: inferior in importance, size or degree: comparatively unimportant."[4] Cambridge Dictionary defines "incidental" as "less important than the thing something is connected with or part of,"[5] While Macmillan Dictionary expresses it similarly: "incidental – related to something but considered less important"[6].

In line with these definitions, New York courts have only permitted commercial uses on tax exempt property when the use is a natural consequence of, and minor in comparison to, the primary purpose of the not-for-profit organization, and not when it is the primary use of the property. For example, in *Pace College v Boyland*, where a college leased its cafeteria facilities to a for-profit vendor, the

---

[4] Merriam-Webster Online Dictionary, incidental [https://www.merriam-webster.com/dictionary/incidental][Note: online free version]
[5] Cambridge Online Dictionary, incidental [https://www.dictionary.cambridge.org/us/dictionary/english/incidental][Note: online free version]
[6] MacMillan Online Dictionary, incidental [https://www.macmillandictionary.com/us/dictionary/american/incidental_1][Note: online free version]

Court upheld the exemption because it recognized the cafeteria as only incidental to the operation of the college (4 NY2d 528 [1958]). There, the college had set aside a small portion of a 16-story building for a cafeteria, and the Court found that

> the cafeteria is not used as a source of income and the equipment which the college owns is put to its own use. This cafeteria is part of the operation of Pace College. Furnishing meals to students, faculty and staff on college premises is recognized as entering into their use for educational purposes, nor does it customarily disturb full tax exemption

Pace College at 532-33 [internal citations omitted]). The Court expounded further, "[t]his is not renting space to some disassociated enterprise, it is part of the conventional operation of a private school, college, hospital or other benevolent institution" (*Pace College* at 533). Moreover, "[t]he college retains general supervision and control over the operation, which is directed exclusively to the accomplishment of its educational purposes" (*Pace College* at 534).

Equally instructive is the decision in *Matter of Southwinds Retirement Home v City of Middletown*, where the Appellate Division found that the operation of a small, 520 square foot hair salon placed in an 84,000 square foot senior residence was "completely in accord with" the charitable purposes of a non-profit retirement home (23 Misc 3d 1138 [A] 2009, affd 74 AD3d 1085 [2d Dept 2010]). Citing to this Court's decision in *Pace College*, the court in *Southwinds* held that a

"for-profit contractor such as [a hair salon] may operate a concession for a non-profit institution, and the non-profit may still be entitled to an exemption, so long as the concession is "reasonably incident" to the non-profit's primary activities," based on "the minor part it plays in the operation of the premises" (23 Misc 3d 1138 at 16).

Clearly, providing dialysis services is not reasonably incidental to the charitable fundraising activities of the Schulman Fund. Rather, it is Brookdale Dialysis' use as a profit-making dialysis center that is the primary and, in fact, the only use of the property. Here, however, the First Department has stretched the outer limits of the "incidental use" analysis under RPTL 420-a, such that an exempt property owner may now lease its space out completely to a non-exempt entity and yet retain its tax exemption, so long as the owner can proffer any connection, no matter how tenuous or far removed from its primary purpose the use may be. To permit this to continue flies squarely in the face of the tax exemption statute and the precedents of this Court.

In order to escape the fact that they do not come anywhere within reach of the "reasonably incidental" standard set forth by the courts, Petitioners have oft-cited a phrase from the 2014 Decision that stated that the activities of Brookdale Dialysis are "apparently quite enmeshed" with the charitable activities

of Brookdale Hospital and the Nursing Institute, who, significantly, are not parties to the present litigation. In fact, Petitioner has gone to great lengths to avoid any description of what the Schulman Fund actually does, but instead has focused predominantly on describing the importance of Brookdale Hospital and the Nursing Institute to the healthcare of the community (R 332-333).

And while Appellant has no doubt that both Brookdale Hospital and the Nursing Institute serve a great need, neither entity is the owner of the Property. The record owner of the Building is the Schulman Fund, and the Schulman Fund is undeniably leasing the property to a for-profit business. The test is not how "enmeshed" or intertwined the property's use is with Brookdale Hospital. Were this true, then the property could be used by virtually any healthcare service, such as a privately operated physical therapy center, and be relieved of all real property taxes through a tax exemption so long as Brookdale patients utilized its services.

This type of "arrangement" was struck down by the Court in *Genesee Hospital v Wagner*, where "[t]he central issue presented… [was] whether the subject professional office building attached to the Genesee Hospital [was] entitled to the same tax-exempt status as the hospital itself pursuant to section [420-a] of the Real Property Tax Law" (47 AD2d 37, 42 [4th Dept 1975] affd 39 NY2d 863 [1976]). In *Genesee*, a three-story medical professional building was constructed

by Genesee Hospital, a teaching institution, in order "to improve medical care in the community and to improve the training and education of doctors" (*Genesee* at 40). The building was owned by Genesee Hospital and was connected to the main hospital on two levels. Office space was only made available to rent by physicians on the staff of Genesee Hospital and the "avowed purpose in constructing the Doctors Office Building was for the dual purpose of upgrading the hospital in terms of patient care and teaching quality" (*Genesee* at 41). Indeed, several physicians testified that "the added versatility and ability to flow back and forth to the hospital for consultation, patient care and emergencies increased the medical care and teaching function of the hospital" (*id.*).

Nonetheless, despite the very connected and close associations, or "enmeshed" relations, between the hospital and the office building presented in *Genesee*, the court found that:

> While it is argued that the hospital and the physician serve the same purpose in the community, that is, to improve the health care of its citizens, and doubtless this is true, for purposes of a tax exemption statute this is too broad a definition in that it fails to take into account the commercial and private practice nature of the physician's operations in the subject office building. The private practice of medicine by a hospital's attending physicians is primarily a commercial enterprise only incidentally related to the hospital's function of providing health care to the community

(*Genesee* at 45-46). In denying the exemption, the court highlighted the profit-making element clearly present on the property:

> Here… there is a commercialization and profit-making which goes well beyond the hospital's traditionally nonprofit functions. The private practice of medicine by the attending physicians in the hospital's professional office building is clearly the kind of profit-making activity intended to be excluded by the legislature when it created the statutory exemption under section 421 of the Real Property Tax Law. The clear distinction between the instant case and other cases dealing with commercial, corporate activity is that here we have third parties receiving pecuniary profit from their own private practice of medicine which is integrally related to the operation of the real property

(*Genesee* at 44-45). Therefore, the Court in *Genesee* firmly held that the property's use as a profit-making medical office was not eligible for a tax exemption pursuant to RPTL 420-a despite the fact that the physicians and their practice were so closely related to the hospital.

Here, Brookdale Dialysis is analogous to the private physicians' offices in *Genesee Hospital*. Brookdale Dialysis is a commercial business that leases the premises for its own practice of hemodialysis and peritoneal dialysis[7] (R

Interestingly, the website of Brookdale Dialysis reveals that "Brookdale Physicians Dialysis Association" appears to be part of a larger corporate for-profit dialysis business called "Avantus Renal Therapy," that offers private suite dialysis services across the country with numerous locations, including Manhattan (*see* https://www.avantusrenaltherapy.com/location-brooklyn-

61-62). Due to the fact that Brookdale Dialysis is a private enterprise, the machinery utilized was all purchased and is owned by Brookdale Dialysis, and Brookdale Dialysis incurs all the costs of repair, inspection and maintenance (R 253). Significantly, the lease also calls for Brookdale Dialysis to pay and be held responsible for the real property taxes, should they become due (R 249). Also, just as in *Genesee Hospital*, all of the individuals working at the dialysis center are Brookdale Hospital employees (R 62).

Despite this stark similarity, the Appellate Division chose to ignore the reasonably incidental analysis applied by the court in *Genesee* and instead, without providing any reasoning or explanation, reached the conclusion that "[t]he Brookdale Dialysis services are closely analogous to the X-ray services performed on commission in *Matter of Genesee Hosp. v Wagner*" (*Brookdale* at 445). However, the Appellate Division completely misses the point. The only issue surrounding the ambulatory x-ray unit in *Genesee* was whether it was permissible for "the radiologists who have charge of the facility [to] receive a percentage fee based upon the hospital billings rather than a flat-rate salary from the hospital" (*Genesee* at 39). And since it was found that "[i]t is a common practice in

---

ny.html [accessed July 25, 2021]). Indeed, there is no mention of Brookdale Hospital, the Nursing Institute, or the Schulman Fund on Brookdale Dialysis' website.

hospitals today for radiologists to be paid in this manner," the court held that this minor detail would not defeat the exemption for the x-ray unit portion of the property (*id*.).

It is also significant to underscore the fact that the x-ray unit in *Genesee* was considered "a hospital purpose." The hospital owned the property in question and the radiologists were paid by the hospital. Thus, the court there was examining whether the operation of an ambulatory x-ray unit was reasonably incidental to a hospital purpose. Here, this type of analysis would undoubtedly fail. Brookdale Hospital does not own the property; the Schulman Fund does. Therefore, the question in this appeal is whether the dialysis center is reasonably incidental to the Schulman Fund's primary purpose of raising funds and managing assets. It clearly is not. Indeed, Petitioners fail to describe any association between Brookdale Dialysis and the Schulman Fund other than the leasing agreement, resulting in a nexus that is far removed from, and in no way analogous to, that of the x-ray ambulatory unit in *Genesee*.

(5)

Furthermore, "since these tax exemption matters arise, almost invariably, in the context of a profit-making venture, the courts have added a third condition" to the legislature's two-part test: "[t]his condition requires that where

profits are the result of an incidental use, the profits must be devoted to the charitable purpose" (*Stuyvesant* at 464). That is, "[n]o part of the pecuniary benefit 'may inure to the benefit of any of its officers, members or employees, nor may it simply be used as a guise for profit-making operations" (*Stuyvesant* at 464 citing *Gospel Volunteers v Village of Speculator*, 33 AD2d 407, affd 29 NY2d 622).

Yet here, there exist two entities receiving a pecuniary benefit. The first being Brookdale Dialysis, whom the Appellate Division fully concedes is operating on a for-profit basis (*Brookdale* at 444). The second is the Schulman Fund which is earning a profit on its lease and bringing in income that exceeds its carrying and maintenance costs[8] (*Brookdale* at 445). Accordingly, we have two entities earning a profit on an exempt property, one of whose profits inure to the benefit of a private enterprise.

Shockingly, the Appellate Division has excused this arrangement despite the fact that 420-a(1)(b) prohibits the tax exemption when the "avowed purpose" and use of a property is really "a guise or pretense for directly or indirectly making… [a] pecuniary profit" (RPTL 420-a[1][b]). For instance, in

[8] "The limitation requiring the owning corporation not to receive more than its carrying, maintenance and depreciation charges is intended to assure that the statue cannot in any way be used to provide a profit even for tax exempt corporations" (*Sisters of St. Joseph v New York*, 49 NY2d 429, 438 [1980] citing NY Legis Ann, 1948, p.293). Though, it is significant to note that Brookdale Dialysis is not a tax exempt corporation.

Greater Jamaica, while the Court acknowledged that the parking lots did in fact "exist to promote economic development in downtown Jamaica, [by] providing easy access to local retail stores and government buildings," it ultimately held that "[t]he economic benefit conveyed by below-market rate parking, however, inures to the benefit of private enterprise and cannot be said to further any charitable purpose" (*Greater Jamaica* at 629).

It should be noted as well that the Court in *Greater Jamaica* denied the 420-a tax exemption even though the parking services were being offered at below market rates. Contrary to that case, no such benefit even exists here. There is no claim by Petitioner-Respondents that the dialysis services are provided for free to the community or in any way rendered on a discount basis. In fact, Petitioners make no distinction whatsoever between Brookdale Dialysis Center and any other for-profit dialysis center. The only distinguishing feature is that Brookdale Dialysis is permitted to operate on a property that is wholly free from real property taxes, and by allowing this, the Appellate Division has granted the dialysis center an unfair advantage in the commercial marketplace (*see Genesee Hospital* at 46 ("The concept and development of a professional office building adjoining a hospital facility is an admirable addition to the community and doubtless will improve the teaching and health functions of the hospital. However,

it is also a facility which is in direct competition with privately developed professional buildings in an area which serves the identical function as far as the private practice of medicine is concerned")).

Brookdale Dialysis operates its profitable business free and clear of property taxes, no doubt in contrast to and in competition with various other dialysis centers in the City. The Schulman Fund enjoys the benefits of price appreciation on its property, while profiting over $290,000 per year in lease payments (R 24), all without the burden of paying property taxes. The fact that neither party contributes to the public fisc in the manner borne by the vast majority of property owners, and even disputes its duty to share such a burden, in contravention to the clear mandate of the legislature, is nothing short of outrageous. And neither the legislature nor this Court will tolerate the claimed pretext of "charity" when in fact "the primary objective of the enterprise is to generate profits" (*see* RPTL 420-a(1)(b); *see also Stuyvesant Square Thrift Shop* at 737).

(6)

Nor is Petitioner's profit-earning mitigated by the fact that the Schulman Fund claims to use the profits earned from the lease for other healthcare purposes (*see* R 341 (where Petitioner contends that "the Building is entitled to tax

exempt status as Brookdale and Samuel Shulman use the rental income to support their non-profit activities")). In fact, this Court has repeatedly rejected the notion that profits be deemed acceptable merely because the funds are put back into the charity (*see Greater Jamaica* at 631 (where petitioners argued that "any monies in excess of the operating costs of the parking lots are utilized by *Greater Jamaica* in furtherance of charitable uses," this Court held firmly that this "does not detract from the fact that the parking lots' primary use is to generate profits…")).

Even in a matter where it was undisputed that the not-for-profit owner was distributing all of its profits to charitable organizations and no profits inured to the benefit of the charity's members, the Appellate Division still found that the primary purpose was still "a profit-making venture" (*see Stuyvesant Square Thrift Shop v Tax Com. Of New York*, 76 AD2d 461 [1st Dept 1980]). In *Stuyvesant Square Thrift Shop*, a not-for-profit entity operated a thrift shop in order to support its eight member organizations: two hospital auxiliaries, three neighborhood and settlement houses, one women's church group, the Youth Counseling League, and Goodwill Industries, Inc. (*Stuyvesant* at 462). Despite the fact that the thrift shop paid over all of the profits realized to its member organizations, the court held that:

> …the Thrift Shop had a single and sole purpose – to make a profit, a purpose neither exclusively nor incidentally the purpose of any of its members. While it

> is true that the profit is thereafter to be distributed to the charitable organization members of Thrift Shop, the primary purpose is not altered… It is a profit-making venture engaged in by these eleemosynary institutions to assist them in supporting themselves. In sum, it is the 'guise for profit-making operations' found impermissible in *Gospel Volunteers v Village of Speculator* (33 AD2d 407, 410, affd 29 NY2d 622). When such operations are undertaken 'in the hope, often delusive, of expanding the charity or to assist it in supporting itself, the exemption is lost

(*id*. at 464-465 [internal citations omitted]).

In affirming this decision, the Court of Appeals added that "the fact that the net cash profits are ultimately distributed to various institutions organized for charitable purposes does not in and of itself directly involve the (thrift store) in the charitable activities of the distribute organization… within the meaning of this narrowly construed exemption" (*Stuyvesant* at 737; *cf. Matter of Salvation Army v Town of Ellicott Bd of Assessment Review*, 100 AD2d 361 [4th Dept 1984] (where the Salvation Army's thrift store was deemed "charitable" under RPTL 420-a not because its net proceeds were put directly back into the charity, but because the court found that the primary purpose of the thrift store lay in the work therapy and rehabilitation opportunities for homeless men)). Thus, it is of no import that the profits earned by the Schulman Fund from the lease claim to be placed back into its charitable beneficiaries.

However, here too, the Appellate Division wholly disregards Court of Appeals precedent, finding to the contrary, that "[a]lthough… Schulman's rent receipts exceed its building maintenance expenses, no benefit exists because Schulman placed the profit back into its healthcare-provider affiliates" (*See* Appellate Division Decision (R 727)), thus clearly ignoring the unambiguous instruction provided by the Court in *Stuyvesant Square Thrift Shop*.

(7)

Notwithstanding that the burden of proof is upon the City to prove ineligibility under RPTL 420-a, the statute still remains one which grants an exemption. The legislative history of RPTL 420-a clearly establishes the imperative that tax exemptions be narrowly construed and neither the legislature nor the courts will extend charitable status to an entity whose primary purposes is to generate profits. Therefore, Section 420-a must be strictly construed against the party seeking the exemption regardless of whose burden it is to prove eligibility or ineligibility. Yet, in issuing this decision, the Appellate Division has ignored the clear mandate of the Legislature to construe tax exemptions narrowly and has failed to restrict charitable exemptions under RPTL 420-a.

The legislative history behind the amendment of RPTL 420-a is illuminating. When the legislature amended RPTL § 420-a nearly fifty years ago,

it was spurred to action to halt the erosion of municipal tax bases throughout the state. As indicated by the legislative history,

> [i]n 1971, the Legislature found that 30% of the total assessed valuation of real property in the State and one third in the City of New York was then exempt from taxation, and that the continuous removal from the tax rolls of taxable real property was imposing a particular hardship on local governments of this state and upon the citizens of this state, who are increasingly burdened by additional taxes, whenever such tax exemptions reduce the tax base…

(Laws 1971, ch 414 §1; *see also American Bible Soc v Lewisohn*, 40 NY2d 78, 86 [1976] (noting "the Legislature's articulated desire to stem and to reverse the severe erosion of the local municipal tax base, accompanied by its recognition of the corollary serious predicament of local municipal finances*"*); *see also Genesee v Wagner at 45* citing *Association of Bar v Lewisohn*, 34 NY2d 143("The trend of the statutory exemption law has been to restrict real property tax exemptions… and the Court of Appeals has pointed out that in pursuance of this manifest intent of recent legislation tax exemptions should be construed strictly against the taxpayer").

Here, the Appellate Division has brought to the fore once again the legislature's intent to curb the proliferation of real property tax exemptions, which poses a palpable and serious threat to the real property tax base and its ability to

fund necessary and critical services. Attempting to make the same strained connection as that made by petitioners in *Greater Jamaica* and *Lackawanna*, the Appellate Division has sanctioned an argument that is much too tenuous to withstand the strict construction of this statute, and in doing so, has undermined the legislative imperative to restrict exemptions under RPTL 420-a.

It is axiomatic that real property taxes generate the predominant source of revenue for local governments and afford municipalities the resources to provide its citizens with necessary services and programs, such as health services, police, education and emergency response. And during this unprecedented time, with budgets stretched to their greatest extent due to the global pandemic, it is even more crucial that exemptions from real property taxation be construed narrowly and in the manner the Legislature intended.

(8)

Nonetheless, the Appellate Division has distanced itself from the legislature's intention and held that "the building owned by petitioner Samuel and Bertha Schulman Institute for Nursing and Rehabilitation Fund, Inc. (Schulman)… qualifies for tax-exempt status," simply because it was being used "for the provision of a critical healthcare service… notwithstanding the for-profit status of the provider of the service" (*Brookdale* at 444).

This reasoning is simply impermissible under a proper 420-a analysis. One cannot argue that merely because dialysis treatment is a life extending and important service, that it should readily equate to a charitable use. Appellants do not deny that dialysis centers serve a crucial need. Indeed, it can be a life-saving medical procedure for many. However, under the Real Property Tax Law, the fact that a court identifies dialysis treatment as a "critical healthcare service," does not mean that such substantial profit-making should be overlooked under a 420-a analysis. There are countless services in numerous fields and industries that could be considered beneficial to communities – private physicians' offices, legal services, private security companies – just to name a few. For instance, in *Greater Jamaica*, even though the Court found that the discounted parking facilities "lessen[ed] the burden of local business" and the "below-market rates that the facilities charge provide[d] an incentive for the public to patronize those businesses," it was concluded that the use of the property still did not warrant the granting of an RPTL 420-a tax exemption, because as the Court stressed, "While these goals may be laudable, they are not charitable" (*Greater Jamaica* at 629).

Laudable, but not charitable. This long-standing principle has been expressed time and time again by the Court of Appeals in determining whether a property should be deemed eligible for a tax exemption under RPTL 420-a (*see*

Association of the Bar at 154 ("To be sure, the Association confers a public benefit, and a great one, through its laudable activities in the screening of judicial candidates, rooting out the unauthorized practice of law, processing of grievances against lawyers, and timely commenting on issues of broad public concern, to name but a few. But public benefit is not the test of qualification for exemption, as the legislative history of section 421, discussed hereinafter, makes so abundantly clear")).

And for good reason. While the Court appreciates that there can exist many uses of a property that could be characterized, in some manner, as admirable or commendable, the Court of Appeals has consistently held that "[n]ot all laudable activities… entitle the actor to a property tax exemption" (*Lackawanna* at 582).

Otherwise, the number of ways an organization could circumvent the statute would be endless. If the leasing of a property to a for-profit corporation is accepted as an exempt use by the courts, it will utterly eviscerate the tax exemption. The Schulman Fund could, in essence, lease its properties to any number of businesses that provided some sort of medical or "critical healthcare service" to the area, who, despite operating at a profit, would be allowed a full exemption from taxation on the property merely because they were "promoting the general health of the community."

This type of arrangement would create a tax loophole whereby a not-for-profit that is receiving the enormous benefit of not having to pay its share of real property taxes could lease its space to any commercial enterprise so long as any tangential relationship to the not-for-profit owner could be invented. Even more disconcerting, there is no indication by the Appellate Division where the line would be drawn. Undeniably, The Schulman Fund could lease its properties to any private treatment center, diagnostic lab, rehabilitation program, medical supply shop, therapy facility, imaging center, or any outpatient health service, for that matter, and assert that the business furthers its charitable purpose of promoting the health and well-being of the community.

Should the Appellate Division Decision stand, the Schulman Fund will continue to earn a profit on the lease and yet pay no taxes on the real property that it owns. The Appellate Division has opened the door to a limitless number of possibilities to circumvent the statute and essentially created a loophole where one had not existed before. And the Court of Appeals has consistently "decline[d] to read the Real Property Tax Law… in such a manner as to establish a 'tax loophole' where one would not otherwise exist" (*Lackawanna* at 582 citing *Sisters of St. Joseph*, 49 NY2d 429, 441 [1980]).

Affirming such a departure from the well settled precedents of this Court will only embolden further forays into lessening and diluting the requirements of RPTL 420-a. The Appellate Division has severely relaxed the standard of what has historically been a narrowly construed tax exemption and has ignored completely this Court's directive that the physical use of a property receiving exemption must actually be for an exempt purpose. Allowing this type of tax loophole to exist and continue will only invite further illegitimate erosion of the tax base so important to the operation of government. Indeed, the Appellate Division Decision has the potential to not only create a significant negative impact on the tax base of the City of New York, but could lead to devastating statewide impacts if adopted by other Departments of the Appellate Division, and should, thusly, be reversed.

CONCLUSION

Accordingly, and for all reasons stated above, the Order appealed from should be reversed and the petition should be dismissed.

Dated: Kingston, New York
July 29, 2021

GEORGIA M. PESTANA
Acting Corporation Counsel of the
City of New York
Attorney for Respondents
71 Smith Avenue
Kingston, New York 12401
(212) 356-2139
E-mail: jkroenin@law.nyc.gov

By: _____
Joseph J. Kroening
Assistant Corporation Counsel
Tax & Bankruptcy Litigation Division

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2016, and according to that software, it contains 8982 words, not including the table of contents, the table of cases and authorities, the statement of questions presented, this certificate, and the cover.

JOSEPH J. KROENING

COURT OF APPEALS
STATE OF NEW YORK

----------X

In the Matter of the Application of

BROOKDALE PHYSICIANS' DIALYSIS ASSOCIATES, INC. f/k/a CHURCH AVENUE ASSOCIATES, INC., SAMUEL and BERTHA SCHULMAN INSTITUTE FOR NURSING AND REHABILITATION FUND, INC. f/k/a SAMUEL SCHULMAN INSTITUTE FOR NURSING ANDREHABILITATION FUND, INC.,

Petitioners-Respondents,

For a Judgement Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

THE DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK,

Respondent-Appellant.

----------X

APL-2021-00056

AFFIDAVIT OF SERVICE BY OVERNIGHT MAIL

STATE OF NEW YORK)
S.S.:
COUNTY OF ULSTER)

The undersigned, being duly sworn, deposes and says:

1. I, PAMELA J. LONGLEY, am not a party to the above action, am over the age of 18 years old and reside in High Falls, New York.

2. On the **29th day of July, 2021,** I served **three (3) true and accurate copies of the *Appellant's Brief and the Record on Appeal, Volumes 1 and 2***, in the above matter by depositing same in a postpaid properly addressed packages, via first class, overnight express mail, in a post office or official depository under the exclusive care and custody of the United States Postal Service addressed to said parties below at the addresses designated for such purpose as follows:

Cozen O'Connor
Attn: Menachem J. Kastner, Esq.
Attorneys for Petitioner, Brookdale Physicians Dialysis Associates, Inc. f/k/a Church Avenue Associates Inc.
3 World Trade Center,
175 Greenwich Street, 55th Floor
New York, New York 10007

Jacob Laufer, Esq.
Co-Counsel for Petitioner, Brookdale Physicians Dialysis Associates, Inc. f/k/a Church Avenue Associates Inc.
65 Broadway, Suite 1005
New York, New York 10006-2553

Sheppard, Mullin, Richter & Hampton, LLP
Attn: Eric Altman, Esq.
Attorneys for Petitioner, Samuel and Bertha Schulman Institute for Nursing and Rehabilitation Fund, Inc. f/k/a Samuel Schulman Institute for Nursing and Rehabilitation Fund, Inc.
30 Rockefeller Plaza
New York, New York 10012-0015

Pamela J. Longley
PAMELA J. LONGLEY

Sworn to before me this
29th day of July, 2021.

Tania Blahitka
Notary Public

TANIA M. BLAHITKA
NOTARY PUBLIC-STATE OF NEW YORK
No. 01BL6068866
Qualified in Ulster County
My Commission Expires January 13, 2022