

**COURT OF APPEALS
STATE OF NEW YORK**

In re BROOKDALE PHYSICIANS' DIALYSIS ASSOCIATES,
INC. f/k/a CHURCH AVENUE ASSOCIATES, INC

Petitioner-Respondent,

SAMUEL AND BERTHA SCHULMAN INSTITUTE FOR
NURSING AND REHABILITATION FUND, INC. f/k/a
SAMUEL SCHULMAN INSTITUTE FOR NURSING AND
REHABILITATION FUND, INC.,

Petitioner,

-against-

THE DEPARTMENT OF FINANCE OF THE CITY OF NEW
YORK,

Respondent-Appellant.

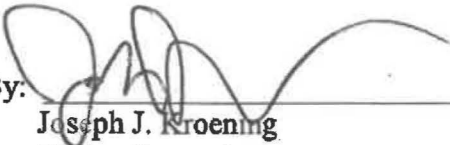
**NOTICE OF
MOTION FOR
LEAVE TO APPEAL**

New York County
Supreme Court
Index No.
156074/17

PLEASE TAKE NOTICE that upon the annexed affirmation of **JOSEPH J. KROENING**, dated November 25, 2020, the exhibits annexed thereto, the Briefs and Record on appeal to the Appellate Division, First Department, and all other papers and proceedings heretofore had herein, respondent-appellant the Department of Finance of the City of New York will move this Court, at Court of Appeals Hall, 20 Eagle Street, Albany, New York 12207, on December 14, 2020, or as soon thereafter as counsel may be heard, for an order pursuant to CPLR 5602(a)(1)(i) and 22 NYCRR §§500.21 and 500.22, granting respondent-appellant leave to appeal to this Court from the Decision and Order (one paper) of the Appellate Division, First Department, entered on December 3, 2019, and granting such other and further relief as the Court deems just and proper.

**Dated: New York, New York
November 25, 2020**

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COURT OF APPEALS
STATE OF NEW YORK

In re BROOKDALE PHYSICIANS' DIALYSIS
ASSOCIATES, INC. f/k/a CHURCH AVENUE
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Petitioner-Respondent,

SAMUEL AND BERTHA SCHULMAN INSTITUTE
FOR NURSING AND REHABILITATION FUND, INC.
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Petitioner,

-against-

THE DEPARTMENT OF FINANCE OF THE CITY OF
NEW YORK,

Respondent-Appellant.

**AFFIRMATION IN
SUPPORT OF
MOTION FOR
LEAVE TO
APPEAL**

New York County
Supreme Court
Index No.
156074/17

JOSEPH J. KROENING, an attorney admitted to practice before the courts of the State of New York, affirms the truth of the following under the penalties of perjury pursuant to CPLR 2106:

1. I am an Assistant Corporation Counsel in the office of JAMES E. JOHNSON, Corporation Counsel of the City of New York, attorney for

respondent-appellant The Department of Finance of the City of New York (the “City” or “appellant”).

2. I am fully familiar with the facts and circumstances surrounding this proceeding, having represented appellant in this case on its appeal to the Appellate Division, First Department (the “Appellate Division”), and based upon my review of the files maintained by this office.

3. This affirmation is submitted in support of appellant’s motion pursuant to CPLR 5602(a)(1)(i) for an order granting leave to appeal to the Court of Appeals from the Appellate Division’s Decision and Order (one paper), entered by the Appellate Division on December 3, 2019 (the “Decision and Order”). Thereafter, the City moved for leave to appeal to this Court in the Appellate Division, First Department. On March 19, 2020, the Appellate Division denied the City’s motion for leave to appeal.

PROCEDURAL HISTORY AND TIMELINESS OF THE MOTION

4. On or about July 6, 2017, Petitioners commenced a Civil Practice Law and Rules (“CPLR”) Article 78 proceeding to challenge the revocation of its real property tax exemption pursuant to Real Property Tax Law (“RPTL”) 420-a (the “Petition”) (R 14).

5. On September 15, 2017, the City cross-moved to dismiss the Petition (R 357).

6. By Decision and Order dated August 2, 2018 and entered August 3, 2018, 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 the Department of Finance determination to revoke the RPTL 420-a tax exemption was arbitrary and capricious. A copy of the Supreme Court Decision and Order, with Notice of Entry via the New York State Courts Electronic Filing system, is annexed hereto as Exhibit "A".

7. The City appealed to the Appellate Division, First Department by Notice of Appeal dated August 31, 2018 (R 6). Thereafter, the City timely perfected its appeal on August 2, 2019.¹

8. On December 3, 2019, the Appellate Division issued a Decision and Order affirming the decision of the lower court. Petitioner-Respondent served Notice of Entry on December 3, 2019. A copy of the Appellate Division's Decision and Order, with Notice of Entry via first class mail, is annexed hereto as Exhibit "B".

9. Thereafter, on January 7, 2020, the City served upon Petitioners a motion for leave to appeal to this Court in the Appellate Division, First

¹ The appeal was automatically dismissed pursuant to the Practice Rules of the Appellate Division, Part 1250.10(a). On March 29, 2019, the City filed a Motion to Vacate the Automatic Dismissal, And Upon Vacatur, For An Enlargement of Time to Perfect the Appeal. On June 11, 2019, the First Department granted the City's motion, thereby vacating the dismissal of the appeal and enlarging the time to perfect to the October 2019 term. A copy of the Appellate Division's Order is annexed hereto as Exhibit "D".

Department. Said motion was denied on March 19, 2020. Petitioner-Respondent served Notice of Entry, dated March 19, 2020, via first class mail. A copy of the Appellate Division's Order, with Notice of Entry, is annexed hereto as Exhibit "C".

10. On March 20, 2020, the Governor of the State of New York signed Executive Order 202.8, which, inter alia, tolled "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding" from the "date of this executive order until April 19, 2020." The Governor extended the tolling of the time to commence motions, including motions for leave to appeal, by various subsequent Executive Orders (e.g., 202.14, 202.28, 202.38, 202.48, 202.55, 202.60, 202.67). On October 4, 2020, the Governor signed Executive Order 202.67, which, inter alia, extended the tolling provisions of Executive Order 202.8 through November 3, 2020. From March 20, 2020 to November 3, 2020, the time limit to commence a motion was tolled.

11. Prior to the start of the tolling, one day had elapsed since service of the notice of entry by first class mail in this matter. At the conclusion of the tolling, the time to commence a motion resumed. This motion has been timely commenced.

JURISDICTION OF THIS COURT

12. This Court has jurisdiction to determine this motion and the proposed appeal pursuant to CPLR § 5602(a)(1)(i) because this proceeding originated in the Supreme Court and because the Decision and Order of the Appellate Division finally determines this proceeding, which is not appealable as of right.

QUESTION PRESENTED FOR REVIEW

13. The question presented for this Court's review is:

Did the Appellate Division erroneously uphold the granting of a mandatory real property tax exemption, pursuant to RPTL § 420-a, where the nonprofit owner leased the entirety of the subject property to a for-profit entity, and where the owner received rental income greater than its carrying expenses?

14. This matter merits review 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 that denies the exemption when an exempt entity leases its property to a for-profit entity and receives rental income greater than its carrying costs on the property. While it is well-established that property tax exemption statutes are to be construed narrowly, the Appellate Division applied

a lax and lenient standard that effectively creates a loophole permitting a non-exempt use of real property to nonetheless enjoy tax-exempt treatment. This 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 statewide impacts if adopted by other Departments.

15. Appellant first raised the question of whether the real property at issue was entitled to tax exemption before the Supreme Court in its cross-motion to dismiss the Petition (R 688). The Appellant then raised the issue of whether the property was entitled to tax exemption on appeal to the Appellate Division (Resp Br at 18).

THE RELEVANT STATUTE

16. Real Property Tax Law § 420-a provides the statutory basis for the real property tax exemption sought by Petitioners. In relevant part, RPTL § 420-a provides:

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.

(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.

* * * *

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).

17. An exemption pursuant to RPTL § 420-a requires that the property not only be owned by a qualified entity, but it must also be used for carrying out one or more of the enumerated statutory exempt purposes. While the statute requires that the property be used “exclusively” for exempt purposes, the Courts have interpreted the statute to allow minor non-exempt usage if it is “reasonably incidental” and supportive of the predominant exempt use. Furthermore, where an exempt owner leases the property, or a portion thereof, the exemption is contingent not only upon the exempt use of the property, but also requires that the owner not receive income greater than the carrying costs of the property.

STATEMENT OF THE CASE

18. Petitioner-Respondent Brookdale Physicians' Dialysis Associates, Inc, f/k/a Church Avenue Associates, Inc. ("Brookdale Dialysis") leases the entirety of the real property located at 9701 Church Avenue, Brooklyn, New York (hereinafter the "Building"), which is the subject of these proceedings (R 19). Brookdale Dialysis is a for-profit corporation and uses the Building to provide, *inter alia*, dialysis services.

19. 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"). The Schulman Fund is organized as an IRS 501(c)(3) corporation and is therefore exempt from payment of federal income taxes. The Schulman Fund provides funds and manages assets in support of the healthcare purposes of non-parties Schulman and Schachne Institute for Nursing and Rehabilitation, Inc. (the "Nursing Institute") and Brookdale Hospital Medical Center ("Brookdale Hospital") (R 20-21).²

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., also a Section 501(c)(3) tax-exempt New York not-for-profit corporation (R 21). Neither Brookdale Health System, Inc., the Nursing Institute, nor Brookdale Hospital are parties to this litigation.

20. 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 (R60, 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 (R 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 (R251), utilities (R 253), and, should they become **due, property taxes (R 249).**

21. 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, 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. By letter dated March 22, 2013, DOF advised that the tax exempt status of the Building would be revoked. (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). By Decision and Order, dated February 10, 2014, the Supreme Court granted the

Petition, on the grounds that the factual record needed further development prior to revocation. (R 39).

22. DOF subsequently requested further documentation that included, inter alia, income and expense documentation for the Building. The income and expense documentation 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 the basis that the rental income on the building exceeded the owners expenses (R408). Indeed, the income exceeded the “carrying, maintenance and depreciation charges of the property,” in direct contravention of RPTL 420-a(2).

23. 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 368). By Decision and Order dated August 2, 2018, Supreme Court, New York County, granted the Petition and annulled DOF’s determination revoking the exemption. The City appealed the decision to the Appellate Division, First Department.

24. The Appellate Division, First Department, by Decision and Order dated December 3, 2019, upheld the lower court decision. The court held that Brookdale Dialysis’ for-profit use of the entire property was “reasonably incident to” the exempt activities of the Schulman Fund. Furthermore, the court excused

the violation of RPTL 420-a(2) by stating that the Schulman Fund placed the profit from the lease back into its healthcare-provider affiliates.

ARGUMENT

LEAVE TO APPEAL SHOULD BE GRANTED

I. THE APPELLATE DIVISION'S DECISION DIRECTLY CONFLICTS WITH PRIOR DECISIONS OF THIS COURT

A. In Order to Qualify for a Tax Exemption under RPTL § 420-a, the Exempt Use Must Actually Take Place on the Property.

25. The First Department's decision in this matter directly conflicts with the Court of Appeals' holding in *Matter of Lackawanna*, 12 NY3d 578 [2009].

26. As stated by this Court, “[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” (*Matter of Lackawanna* at 581 citing RPTL 420-a(1)(a) [emphasis added by court]).

27. In *Lackawanna*, this Court squarely rejected petitioner's argument that by leasing its property to a manufacturing company it was “using” the property to further its charitable purpose of spurring economic development. Although the Court recognized that the existence of the manufacturing company would certainly, by extension, “[encourage] the development of, or retention of, an industry in the

community...” for example, 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 Matter of Lackawanna* at 582). The actual use was, in reality, a for-profit manufacturing business (*Id.* at 580).

28. Thus, the Court of Appeals not only examines the use that is claimed to qualify for exemption, but equally important, ascertains that the claimed exempt use is actually occurring at the property, as mandated by statute.

29. Here, the Appellate Division ignores completely this requirement and sanctions the very same argument that this Court rejected in *Lackawanna*. In this matter, just as in *Lackawanna*, the building in question is leased to, and used exclusively by, a for-profit entity – Brookdale Dialysis. The actual and physical use of the property is a dialysis center owned by a private entity.

30. The operation is completely run on a for-profit basis. There is no claim by Petitioners that services are provided for free to the community or in any way rendered on a discount basis. Indeed, Petitioners make no distinction between Brookdale Dialysis and any other for-profit dialysis center.

31. Yet, the Appellate Division opined that “[t]he provision of dialysis services... qualifies the building for tax-exempt status, because it is ‘reasonably incident’ to Schulman’s purpose of funding and supporting its healthcare affiliates (*See Ex. B, Decision and Order* at 124).

32. Attempting to make the same tenuous connection as did petitioners in *Lackawanna*, The Schulman Fund maintains that because the dialysis center furthers its very broad mission of “promoting the general health of the community,” that this is sufficient to warrant a full real property tax exemption (Pet’r Br at 30).

33. However, the Court of Appeals has repeatedly rejected such a far reach of RPTL § 420-a. And with good reason. If this type of arrangement is tolerated as an exempt use by the courts, it will utterly eviscerate the statute. The Schulman Fund could, in essence, lease its properties to any number of businesses that, despite operating at a profit, provided some sort of medical or health-related service.

34. Here, there is absolutely no use of the subject property by the not-for-profit owner. The Schulman Fund does not operate its headquarters on the property nor does it run any of its charitable initiatives or programs in the building. It simply leases out the building and brings in rent from the lease, claiming that, by extension, its lease to Brooklyn Dialysis furthers its charitable purpose.

35. Even more disconcerting, there is no indication by the Appellate Division where the line would be drawn. The Schulman Fund could conceivably 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.

36. Should this 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. More importantly, 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.

B. The Profits Earned by Brookdale Dialysis Inure to the Benefit of a Commercial Enterprise.

37. The sole occupant of the subject building is Brooklyn Dialysis, a private enterprise whose profits inure solely to the benefit of itself.

38. The Appellate Division has now condoned this use as worthy of a full real property tax exemption despite the fact that the Court of Appeals has consistently rejected the granting of an RPTL 420-a 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; *see also Matter of Greater Jamaica v New York City Tax Commission*, 25 NY3d 614 [2015]).

39. Only five years ago, in *Greater Jamaica*, this very same issue came before the Court of Appeals. There, this Court reversed the Appellate Division’s holding by finding that the New York City Department of Finance had properly

revoked the RPTL § 420-a tax exemption of all five parking facilities owned by the Greater Jamaica Development Corporation because the properties were being used for a commercial purpose and not a charitable use.

40. In *Greater Jamaica*, petitioners contended that the operation of its parking facilities, which offered “below-market, reasonably-priced parking” for workers and visitors to downtown Jamaica, furthered Greater Jamaica Development Corporation’s charitable purpose and overall goal to create and maintain a viable downtown Jamaica and promote economic development (*see Greater Jamaica* at 621-623).

41. While this Court acknowledged that the commercial 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, inure[d] to the benefit of private enterprise and cannot be said to further any charitable purpose” (*Id.* at 629).

42. This Court went further to note that even though the parking facilities both “lessen[ed] the burden of local business” and “provide[d] an incentive for the public to patronize those businesses,” the use of the property still did not warrant the granting of an RPTL § 420-a tax exemption, stating unequivocally that: “While these goals may be laudable, they are not charitable” (*Id.* at 629).

43. Thus, it is not sufficient that a service, as commendable as it may be, is being offered on a property that may in some manner be beneficial to the community. The use of the property must be for an exempt purpose and a property that is receiving the enormous benefit of not having to pay its share of real property taxes must not be for a commercial enterprise where the profits inure to the benefit of the corporation.

44. Here, the same reasoning applies. Despite what Petitioners attest, the use of the subject property is for a privately-run dialysis center wherein the profits go directly to Brookdale Dialysis. Under the Court's reasoning in *Greater Jamaica*, it cannot reasonably be argued that merely because dialysis is a useful service that is being offered to the community, similar to the offering of accessible parking, that this should readily equate to a charitable use.

45. It is also notable that this Court denied a RPTL § 420-a tax exemption in *Greater Jamaica* even where the parking services were being offered at below market rates. Here, Brookdale Dialysis does not even attempt to claim that they offer any type of discount or cost savings to the community. It is undeniably a for-profit business being operated on property enjoying tax exemption status.

46. Thus, it was wholly improper for the Appellate Division to permit the 420-a tax exemption to stand.

C. It is of No Import that the Profits Earned by The Schulman Fund from the Lease are Placed Back into Its Healthcare Affiliates.

47. The Appellate Division's decision directly contravenes Court of Appeals' precedent by justifying the profitable lease on the basis that the Schulman Fund funnels the leasing profits into its healthcare affiliates.

48. This Court has repeatedly rejected the notion that profits earned on a property receiving an RPTL § 420-a tax exemption are acceptable simply because the profits are put back into the charity (*see Greater Jamaica; see also Stuyvesant Thrift Shop v. Tax Commission*, 76 AD2d 461 [1980]).

49. In *Greater Jamaica*, the petitioners acknowledged that "any monies in excess of the operating costs of the parking lots are utilized by Greater Jamaica in furtherance of charitable uses," implying such use of the profits should not defeat the exemption. However, this Court held firmly that this "does not detract from the fact that the parking lots' primary use is to generate profits..." (*Greater Jamaica* at 631).

50. Affirming the First Department decision in *Stuyvesant Thrift Shop v. Tax Commission*, 76 AD2d 461 [1st Dep't 1980] (even where it was undisputed that a thrift shop distributed all of its profits to charitable organizations, the Court found that the primary purpose was still a "profit-making venture engaged in by these [charitable organizations] to assist them in supporting themselves" and

“[w]hen such operations are undertaken ‘in the hope, often delusive, of expanding the charity’ or to assist it in supporting itself, the exemption is lost”), this Court reiterated its long-standing position: “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 [distributor thrift shop] in the charitable activities of the distributee organization... within the meaning of this narrowly construed exemption” (*Stuyvesant Thrift Shop v. Tax Commission*, 54 NY2d 735, 737 [1981]).

51. Here, the Appellate Division completely disregards this precedent, even after acknowledging that the Schulman Fund receives a financial benefit from the lease: “[a]lthough the non-profit entities received an ostensible financial benefit, and Schulman’s rent receipts exceed its building maintenance expenses, no benefit exists because Schulman placed the profit back into its healthcare-provider affiliates” (*See Ex. B, Decision and Order at 124*).

52. This holding by the First Department completely contradicts the decisions issued by this Court in *Greater Jamaica* and *Stuyvesant Thrift Shop*, and must be reviewed by the Court of Appeals in order to maintain consistency and impart clarity upon the lower courts and taxing jurisdictions throughout this State.

II. THE APPELLATE DIVISION HAS SIGNIFICANTLY RELAXED THE STANDARD ON WHAT SHOULD BE A NARROWLY CONSTRUED TAX EXEMPTION

53. By permitting a not-for-profit entity to lease its property to a for profit corporation and yet continue to receive a full tax exemption on its property, the Appellate Division has relaxed the standard of what has historically been a narrowly construed tax exemption under RPTL § 420-a.

54. Specifically, the First Department has improperly broadened the “incidental use” standard, such that an exempt owner of a property may now lease out space to a for-profit corporation so long as the owner can proffer any argument as to how the for-profit corporation’s business is “reasonably incident” to its charitable purpose, no matter how loose or far removed the nexus may be (*See Ex. B, Decision and Order*).

55. While RPTL § 420-a makes exemption contingent upon real property being used “exclusively” for exempt purposes, courts have, in certain instances, permitted minor non-exempt usage or nominal profit-making on the property, if, and only if, the use or profit-making is “reasonably incidental” to the primary exempt purpose of the owner (*See e.g., Pace College v Boyland*, 4 NY2d 528 [1958] (the operation of a cafeteria on tax-exempt school property was necessarily incident to the academic functions taking place on the same property); *People ex rel. Watchtower Bible & Tract Soc., Inc. v Haring* 8 NY2d 350 [1960] (the sale of

small food surpluses was incidental to the primary purpose of feeding the people of the religious body that owned the farm)).

56. Thus, the “reasonably incidental” analysis is essentially a balancing test employed by the courts to ensure that the primary use of a tax-exempt property remains predominantly exempt.

57. Where an exempt owner has leased out a portion of its property to a non-exempt entity, the courts have typically examined whether such non-exempt use was nonetheless necessary and supportive of – and thus, incidental to – the primary exempt purpose. Acknowledging the reality that at times there may be a small percentage of non-exempt use on the property (for example, a small café in a hospital or a bookstore in a university), the courts have permitted such non-exempt use because it was found so de minimis that it should not defeat the exemption (See e.g. *Matter of St. Lukes Hospital v Boyland*, 12 NY2d 135 [1962] (dwelling space for hospital personnel was reasonably incident to non-profit hospital’s principal exempt usage and thus qualified for tax exemption); *Matter of Southwinds Retirement Home v City of Middletown*, 23 Misc3d 1138[A] 2009 Slip Op 51180[U] [2009], *affd* 74 AD3d 1085 [2d Dept 2010] (a non-profit retirement home, owner of an 84,000 square foot building leased 520 square feet to a for-profit hair salon. The Court upheld the exemption based upon the incidental use and the minor part the salon played in the operation of the premises)).

58. This is not the case here. In this matter, the Appellate Division expands the definition of “incidental” so broadly that now any non-profit organization could lease its space out to a privately run corporation, so long as an argument can be made that the business has a tangential relationship to the charitable organization’s purpose.

59. Here, the First Department held: “The provision of dialysis services for Brookdale Hospital and Nursing Institute patients qualifies the building for tax-exempt status, because it is ‘reasonably incidental’ to Schulman’s purpose of funding and supporting its healthcare affiliates” (*see* Ex. B, Decision and Order at 124 [internal citations omitted]).

60. Under the guise of applying a “reasonably incidental” balancing test, the court ignored the test and based its decision on facts not present in the Record, contending that by nature of their interaction with Brookdale Dialysis, Brookdale Hospital and the Nursing Institute receive an “ostensible” financial benefit. In other words, the court held that Brookdale Hospital and the Nursing Institute “might have” received a financial benefit, and therefore, Brookdale Dialysis’ services are incidental to the Schulman Fund’s mission to provide funding to its

beneficiaries. Such loosely applied reasoning should not be validated as the basis for allowing a tax break worth hundreds of thousands of dollars.³

61. The Appellate Division has opened the door to a limitless number of possibilities to circumvent what has already been established by this Court as a very narrow standard.

62. If a use can be found incidental merely because it *might* provide a benefit, without any clear factual basis in support thereof, there are no limits to what might be found reasonably incidental and therefore entitled to tax exemption. Indeed, a non-profit could claim the property tax exemption by leasing its property to virtually any for-profit entity, and justify the exemption by manufacturing some marginal connection to its exempt purposes.

63. 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]). Notwithstanding that the burden is on the City to prove ineligibility under RPTL § 420-a, the statutory criteria are

³ It is also notable that, should the exemption be revoked and property taxes levied, there will be no impact upon the leasing income profits received by the Schulman Fund, nor its ability to distribute those profits to its beneficiaries. The lease between Brookdale Dialysis and the Schulman Fund requires Brookdale Dialysis to pay property taxes should they become due (R 249). Therefore, the only impact if property taxes are levied will be to the profits realized by Brookdale Dialysis from its for-profit dialysis business.

still to be strictly construed against the party seeking the exemption, regardless of whose burden it is to prove eligibility or ineligibility.

64. To allow Brookdale Dialysis to operate as a for-profit entity while claiming the benefits of an exemption statute specifically targeted for nonprofit organizations (as reflected in the title of the statute), circumvents the very purpose of the exemption statute. Petitioner's dialysis services are exclusively commercial in nature and are the very purpose for which the property is being used.

65. While it is well-established that property tax exemptions are to be construed narrowly, the Appellate Division applied a lax and lenient standard that effectively creates a loophole permitting non-exempt usage of real property to nonetheless enjoy tax-exempt treatment.

III. THE APPELLATE DIVISION'S DECISION THREATENS TO ERODE THE TAX BASE OF MUNICIPALITIES ACROSS THE STATE

66. In issuing this decision, the First Department has ignored the clear mandate of the Legislature to restrict charitable exemptions under RPTL § 420-a.

67. 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 of 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”)).

68. While it is well-established that property tax exemptions are to be construed narrowly, the Appellate Division in this matter has brought to the fore once again the very situation that the Legislature intended to curb in 1971 and has neutralized the legislative imperative that RPTL 420-a tax exemptions be strictly construed.

69. It is no secret that real property taxes generate the predominant source of revenue for local government and afford municipalities the resources to provide its citizens with necessary services and programs, such as health services, police, education and emergency response. During this unprecedented time, when it is expected that the COVID-19 pandemic will trigger the deepest global recession in recent history, it is even more crucial that exemptions from real property taxation be construed narrowly and in the manner the Legislature intended.

70. In essence, the Appellate Division's decision gives a tax exempt entity broad license to spin off components of its activities to a for-profit entity and identify the operations of the for-profit as incidental to its exempt activities, thereby maintaining the tax exemption meant for nonprofit entities while conducting business on a for-profit basis, and additionally, allowing it to make a profit from the lease.

71. Allowing this loophole to exist will only invite further illegitimate erosion of the tax base so important to the operation of government. This 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 statewide impacts if adopted by other Departments.

72. Thus, it is of paramount importance that the Court of Appeals review this issue in order to provide the taxing jurisdictions with clear direction as to the treatment of such properties. Proceeding in such a manner will also bring added certainty to the fiscal affairs of entities claiming they are entitled to tax exempt status. Clearly, all taxing authorities and entities in this State are affected by this issue and should have the benefit of a decision on this matter from the Court of Appeals.

WHEREFORE, respondent-appellant The Department of Finance of the City of New York respectfully requests that the Court grant this motion for leave to appeal to the Court of Appeals from the Decision and Order (one paper) of the Appellate Division, First Department, entered on December 3, 2019, and grant such other and further relief as the Court deems just and proper.

**Dated: New York, New York
November 25, 2020**

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By: 

Joseph J. Kroehing
Assistant Corporation Counsel
Tax & Bankruptcy Litigation Division

EXHIBIT A

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

-----X
In the Matter of the Application of

Index No. 156074/2017

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

**NOTICE OF ENTRY
OF DECISION AND
ORDER**

MOTION SEQ. 001

Petitioners,

For a Judgment Pursuant to Article 78 of the CPLR

-against-

**THE DEPARTMENT OF FINANCE
OF THE CITY OF NEW YORK,**

Respondent.
-----X

PLEASE TAKE NOTICE that the attached is a true and correct copy of the Decision and Order signed by the Hon. Margaret A. Chan, Justice of the Supreme Court of the State of New York, County of New York, dated August 2, 2018, which was entered by the New York County Clerk's Office on August 3, 2018.

Dated: New York, New York
August 6, 2018

COZEN O'CONNOR

By: s/ Menachem J. Kastner

Menachem J. Kastner
Amanda L. Nelson
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New York, New York 10006
(212) 509-9400

*Attorneys for Petitioner BROOKDALE
PHYSICIANS' DIALYSIS ASSOCIATES, INC.
f/k/a CHURCH AVENUE ASSOCIATES, INC*

TO: via NYSCEF – all counsel

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN PART **IAS MOTION 33EFM**

Justice

X

INDEX NO. 156074/2017

MOTION DATE 07/06/2017

MOTION SEQ. NO. 001

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.

Petitioner,

- v -

DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK,

DECISION AND ORDER

Respondent.

X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for

ARTICLE 78

Upon the foregoing documents, the petition is granted, and the cross-motion is denied.

Petitioner Samuel and Bertha Schulman Institute for Nursing and Rehabilitation Fund, Inc. (Schulman Inst.) is the owner of a building at 9701 Church Avenue, Brooklyn, New York, and a not-for-profit corporation that provides funds for charitable healthcare purposes. Petitioner Brookdale Physicians' Dialysis Associates, Inc. (Brookdale Dialysis) is a for-profit corporation that occupies the first floor and basement at 9701 Church Avenue, Brooklyn and pays rent to the Schulman Inst. Respondent Department of Finance of the City of New York (DOF) revoked petitioners' exempt status for the 9701 Church Avenue building for the 2014/15 tax year forward. Petitioners seek to annul the DOF's determination as arbitrary and capricious in this Article 78 petition, and the DOF cross-moves to dismiss the petition, to which petitioners oppose.

This is the second time petitioners seek the same relief before this court, albeit for a different tax period. The prior Article 78 proceeding under index 101244/2013 was adjudicated in favor of petitioners in 2014 (NYSCEF doc. no. 2 - Order and Decision dated February 10, 2014, J. Margaret Chan). The facts in the instant matter are unchanged from those in the 2013 petition except for the tax periods.

Briefly, the facts, as provided in the last proceeding, and remains undisputed in the instant proceeding, are that Schulman Inst. "provides funds in support of charitable healthcare purposes through The Schulman and Schachne Institute for Nursing and Rehabilitation (Nursing Institute) and [The Brookdale Hospital]. Both Nursing Institute and Brookdale Hospital are located at One Brookdale Plaza, Brooklyn, New York - one block from the subject building - and are affiliated with each other under the Brookdale Health System. Brookdale Dialysis services 80% of the patients from Brookdale Hospital; its physicians work at Brookdale Hospital and the Nursing Institute, and its nurses, technicians and staff are Brookdale Hospital staff. Brookdale Hospital relies on Brookdale Dialysis' machines and they are used in providing over 8,000 in-patient treatments a year, about 22,000 treatments are done for out-patients in the subject building" (*id.*).

The February 10, 2014 decision found that the DOF's reliance on the fact that Brookdale Dialysis is a for-profit organization, without considering that the enmeshment of the operations of both Brookdale Dialysis and Brookdale Hospital, failed to meet its burden to show that the property was no longer eligible for the exemption. No appeal was taken.

In the instant proceeding, the DOF's cross-motion focuses on its allegation that "the Schulman Fund is making a profit on its lease to Brookdale Dialysis" (NYSCEF doc. no. 23 - Resp's Memo, p13). The DOF argues that a non-profit's use of an exempt property for profit-making purposes takes it out of the exempt status, regardless of how enmeshed the operations are with a not-for-profit organization (*id.*, p11). According to the DOF, the Shulman Inst. should have no cost since Brookdale Dialysis is responsible for paying for all utility, repair and maintenance of the property; and the cost and maintenance of its machinery (*id.* p13). Thus, as the DOF presents, petitioners are making a profit from the exempt property - the not-for-profit landlord profits through the rental income from its for-profit tenant, which in turn, profits through its operation from an exempt property. The DOF adds that because the Shulman Inst. is not a "free public hospital" or a provider of health care, petitioners are not entitled to an exemption under RPTL § 420-a[5] (*id.*, pp14-15). Finally, the DOF argues that the proper proceeding to challenge an excessive assessment is an Article 7, rather than an Article 78, proceeding (*id.*, pp 15-16).

Petitioners urges denial of the cross-motion based on res judicata grounds since the same arguments concerning the same property, parties, and facts were adjudicated in 2014. And, even if this matter were reviewed again, petitioners argue that the DOF failed to meet its burden again to show that the property is no longer eligible for the exemption. Petitioners also argue that an Article 78 proceeding is proper as they are challenging the DOF's Determination to revoke their exempt status, rather than the valuation of an assessment under RPTL Article 71.

DISCUSSION**Res Judicata**

The DOF does not address res judicata in its cross-motion to dismiss the petition, although Corporation Counsel, representing the DOF, touches on it at oral argument when the issue was raised. Corporation Counsel argues that the prior decision addressed ten tax years prior to 2013; that each year yields a new determination; and, although the concept underlying the DOF's determination remains the same, the fact is that the statutory requirement is not met. Further, based on the DOF's investigation since 2013, new evidence yielded the instant determination to revoke the property's exempt status (tr. 2/14/18, p11). The DOF claims that the new evidence was not previously considered by the court.

While res judicata generally applies to administrative proceedings, it must be determined first "whether application of the doctrine of res judicata would be consistent with the function of the administrative agency involved, "the peculiar necessities of the particular case", and "the nature of the precise power being exercised" (*Venes v Community School Bd. of Dist. 26*, 43 NY2d 520, 525 [1978] quoting *Matter of Evans v Monaghan*, 306 NY, at 324 [1954]). Application of res judicata is more appropriate for administrative proceedings that are quasi-judicial wherein the procedures used follow those in a court of law (*Jason B v Novello*, 12 NY3d 107, 113 [2009]). There is nothing in this record that indicates an adversarial or adjudicatory proceeding (*id.* at 113-114). This is not the type of proceeding where res judicata is appropriate.

Real Property Tax Law § 420-a [1][a]

Real property owned by a corporation or association that is "organized or conducted exclusively for . . . charitable . . . purposes" are exempted from taxation (RPTL § 420-a [1][a]). The Court of Appeals has defined "exclusively" in this context to include 'principal' or 'primary' purposes as opposed to auxiliary or incidental to the exempt purpose (*Greater Jamaica Development Corp. v New York City Tax Com'n*, 25 NY3d 614, 623 [2015] quoting *Yeshivath Shearith Hapletah v Assessor of Town of Fallsburg*, 79 NY2d 244, 249 [1992] [internal quotation omitted]). The DOF claims that because the non-profit is receiving rent and thereby profiting from the exempt property, the exclusive or primary use of the property is irrelevant.

The burden is on the DOF to establish that the property is not exempt because the DOF revoked Brookdale Dialysis' previously-granted § 420-a tax exemption (*Greater Jamaica Development Corp.*, 25 NY3d at 623; *Congregation Rabbinical Coll. Of Tartikov, Inc. v Town of Ramapo*, 17 NY3d 763, 764 [2011]). The DOF, while acknowledging its burden, nonetheless predicates its analysis by placing the burden on petitioner asserting that "[t]he factual allegations as set forth in the petition are insufficient as a matter of law to establish that the Subject Property is entitled to an exemption pursuant to RPTL §420-a." (NYSCEF doc. no. 20 – Kroening aff at ¶ 3).

The DOF's new evidence that the Shulman Inst. profits from the rent it receives from Brookdale Dialysis are the petition and the affidavit by Dr. Warren Shapiro in support of the petition (*id.*; NYSCEF doc. nos. 21-22 – petition and Shapiro aff in support of petition). How the allegations in the petition and supporting affidavit can form the basis of the determination at issue was not explained. The DOF posits that the mere fact that the Shulman Inst. earns a profit from the exempt property removes the property from the exempt status. Thus, the DOF concludes that "if the property is leased, the non-profit owner cannot make a profit on the lease." (Koenig aff *id.* at ¶ 23). This argument is flawed.

The DOF's analysis that the property is not entitled to an exempt status if "an officer, member or employee of the property owner receives a "pecuniary profit" from the activity involved, . . ." (RPTL 420-a[1][b]) is an incomplete analysis. The inquiry does not stop at the mere fact that the Schulman Inst. receives rent from Brookdale Dialysis. The primary use of the exempt property must be examined (*Matter of Adult Home at Erie Sta., Inc. v Assessor & Bd. of Assessment Review of City of Middletown*, 10 NY3d 205, 215 [2008] [discussing respondent's analysis on RECAP, which receives market rent from its exempt property, stating "[t]he issue is not whether RECAP benefits, but whether the property is "used exclusively" for RECAP's charitable purposes"]). By failing to do so, the DOF has not met its burden. Hence, the DOF's determination to revoke petitioners' exempt status for the 9701 Church Avenue building for the 2014/15 tax year forward is arbitrary and capricious.

Finally, an Article 78 proceeding for the relief sought here is appropriate (*see Hewlett Associates v City of New York*, 57 NY2d 356 [1982]).

Accordingly, it is ORDERED that the Article 78 petition is granted to the extent that the Department of Finance's determination revoking the exemption is annulled; and it is further

ORDERED that respondent's cross-motion is denied in its entirety.

8/2/2018
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

ar

-----X
In the Matter of
BROOKDALE PHYSICIANS' DIALYSIS
ASSOCIATES, INC. f/k/a CHURCH
AVENUE ASSOCIATES, INC.

New York Supreme Court
Index No. 156074/17

Appellate Division
Case No. 2019-5793

Petitioner-Respondent

**NOTICE OF ENTRY OF
DECISION AND ORDER**

SAMUEL AND BERTHA SCHULMAN
INSTITUTE FOR NURSING AND
REHABILITATION FUND, INC. f/k/a
SAMUEL SCHULMAN INSTITUTE FOR
NURSING AND REHABILITATION FUND,
INC.;

Petitioner

against

THE DEPARTMENT OF FINANCE OF THE
CITY OF NEW YORK,

Respondent-Appellant.
-----X

PLEASE TAKE NOTICE that the attached is a true and correct copy of the Decision and Order, signed by Susanna Molina Rojas, Clerk of the Court of the Appellate Division First Judicial Department, Supreme Court of the State of New York, dated December 3, 2019, which was entered on December 3, 2019.

Dated: New York, New York
December 3, 2019

COZEN O'CONNOR
Attorneys for Petitioner-Respondent

By: _____

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Rehabilitation Fund, Inc.*

Sheppard Mullin Richter & Hampton LLP
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(212) 653-8700

Friedman, J.P., Oing, Singh, Moulton, JJ.

10471 In re Brookdale Physicians' Dialysis Associates, Inc., formerly known as Church Avenue Associates, Inc.,
Petitioner-Respondent, Index 156074/17

Samuel and Bertha Schulman
Institute for Nursing and
Rehabilitation Fund,
Inc., etc.,
Petitioner,

-against-

The Department of Finance of the
City of New York,
Respondent-Appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Joseph J. Kroening of counsel), for appellant.

Cozen O'Connor, New York (Menachem J. Kastner of counsel), for respondent.

Judgment, Supreme Court, New York County (Margaret A. Chan, J.), entered August 3, 2018, granting the petition brought pursuant to CPLR article 78 to annul a determination of respondent, dated April 4, 2017, which denied petitioners' application for an exemption from real property taxation, and denying respondent's cross motion to dismiss the petition, unanimously affirmed, without costs.

The article 78 court correctly determined that the building owned by petitioner Samuel and Bertha Schulman Institute for

Nursing and Rehabilitation Fund, Inc. (Schulman) and used for the provision of a critical healthcare service qualifies for tax-exempt status, notwithstanding the for-profit status of the provider of the service.

Schulman is a not-for-profit organization established for the purpose of providing funding and support to Brookdale Hospital Medical Center (Brookdale Hospital), a major hospital complex in eastern Brooklyn, and to the Schulman and Shachne Institute for Nursing and Rehabilitation, Inc. (the Nursing Institute), a 446-bed rehabilitation facility located on the Brookdale Hospital campus. Brookdale Hospital and the Nursing Institute, which are non-profit entities devoted to the provision of healthcare, and Schulman are affiliated by virtue of common control by Brookdale Health System, Inc., a charitable organization.

Since 1996, Schulman has leased the first floor and basement of its building, which is located one block away from Brookdale Hospital, to petitioner Brookdale Physicians' Dialysis Associates, Inc. (Brookdale Dialysis), a for-profit corporation. As provided for in the lease, Brookdale Dialysis provides dialysis services in the building. Eighty percent of the patients treated at Brookdale Dialysis are referred there by Brookdale Hospital or the Nursing Institute. Brookdale Dialysis

is staffed exclusively by physicians and other employees of Brookdale Hospital. Brookdale Dialysis pays Brookdale Hospital a fee for the use of its employees, and pays for and provides all dialysis functions for patients at Brookdale Hospital and the Nursing Institute, which have no other dialysis capability. Brookdale Dialysis physicians do not maintain private offices in the building. In sum, Schulman, Brookdale Hospital, and the Nursing Institute, as well as the nephrologists and other healthcare professionals working through Brookdale Dialysis, participate in an arrangement by which Brookdale Dialysis renders a critical healthcare service - hemodialysis and peritoneal dialysis - to Brookdale Hospital and the Nursing Institute at little to no direct cost to the non-profit entities. Although the non-profit entities received an ostensible financial benefit, and Schulman's rent receipts exceed its building maintenance expenses, no benefit exists because Schulman placed the profit back into its healthcare-provider affiliates.

The 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 (see *Matter of St. Luke's Hosp. v Boyland*, 12 NY2d 135, 143 [1962] [internal quotation marks omitted] [hospital-owned property used

as dwelling space for hospital personnel reasonably incident to hospital's major purpose and thus qualified for tax exemption]; *Matter of Pace Coll. v Boyland*, 4 NY2d 528, 532-534 [1958] [use of college cafeteria for provision of meals by for-profit contractor did not warrant revocation of tax exemption]; *Congregation Rabbinical Coll. of Tartikov, Inc. v Town of Ramapo*, 72 AD3d 869, 871 [2d Dept 2010], *affd* 17 NY3d 763 [2011] [operation of for-profit religious summer camp did not warrant revocation of tax exemption]).

The Brookdale Dialysis services are closely analogous to the X-ray services performed on commission in *Matter of Genesee Hosp. v Wagner* (47 AD2d 37 [4th Dept 1975], *affd on op below* 39 NY2d 863 [1976]). Genesee Hospital owned an adjacent professional office building in which it leased suites to physicians for their own private practices and used other spaces for hospital services, such as an ambulatory X-ray unit; the radiologists in the unit received a percentage of the hospital's billings from the X rays taken. The Court of Appeals adopted the Fourth Department's decision holding that the suites leased to the physicians were not entitled to tax exemption but the spaces used

for hospital services were entitled to tax exemption,
notwithstanding that the radiologists received commissions on the
administration of X rays (*id.* at 46-47).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 3, 2019



CLERK

EXHIBIT C

APPELLATE DIVISION OF THE SUPREME COURT
FIRST JUDICIAL DEPARTMENT

In re Brookdale Physicians' Dialysis
Associates, Inc. formerly known as Church
Avenue Associates, Inc.,

Petitioner-Respondent,

Samuel and Bertha Schulman Institute for
Nursing and Rehabilitation Fund, Inc., etc.,

Petitioner,

-against-

The Department of Finance of the City of
New York,

Respondent-Appellant,

Docket No. 2019-5793

Index No. 156074/17

**NOTICE OF ENTRY OF
DECISION AND ORDER
ON MOTION 177**

PLEASE TAKE NOTICE that the attached is a true and correct copy of the Decision and Order, signed by Susanna Molina Rojas, Clerk of the Court of the Appellate Division of the Supreme Court, First Judicial Department, dated March 19, 2020, which was entered by the Clerk's Office on March 19, 2020.

Dated: New York, New York
March 19, 2020

COZEN O'CONNOR
Attorneys for Petitioner-Respondent

By: Menachem Kastner

Menachem J. Kastner
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TO: via First Class Mail

**James E. Johnson
Corporation Counsel of the City of New York
100 Church Street, Room 5-234
New York, New York 10007**

Attorney for Respondent-Appellant

-and-

**SHEPPARD MULLIN RICHTER & HAMPTON LLP
30 Rockefeller Plaza
New York, New York 10112-0015**

***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**

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on March 19, 2020.

PRESENT: Hon. David Friedman, Justice Presiding,
Jeffrey K. Oing
Anil C. Singh
Peter H. Moulton, Justices.

-----X
In re Brookdale Physicians' Dialysis
Associates, Inc., formerly know as
Church Avenue Associates, Inc.,
Petitioner-Respondent,

Samuel and Bertha Schulman Institute
for Nursing and Rehabilitation Fund,
Inc., etc.,
Petitioner,

M-177
Index No. 156074/17

-against-

The Department of Finance of the
City of New York,
Respondent-Appellant.
-----X

Respondent-appellant having moved for leave to appeal to the Court of Appeals from the decision and order of this Court, entered on December 3, 2019 (Appeal No. 10471),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTERED:


CLERK

EXHIBIT D

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on June 11, 2019.

Present - Hon. John W. Sweeny, Jr., Judith J. Gische Troy K. Webber Marcy L. Kahn Peter H. Moulton,	Justice Presiding, Justices.
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-----X

In the Matter of the Application of

Brookdale Physicians' Dialysis Associates, Inc., formerly known as Church Avenue Associates, Inc., and Samuel and Bertha Shulman Institute for Nursing and Rehabilitation Fund, Inc., formerly known as Samuel Shulman 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.

-----X

M-1774
Index No. 156074/17

Respondent-appellant having moved pursuant to 22 NYCRR 1250.10(c) to vacate the dismissal of the appeal taken from an order of the Supreme Court, New York County, entered on or about August 3, 2018, and, upon reinstatement, for an enlargement of time to perfect the appeal,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

(M-1774)

-2-

June 11, 2019

It is ordered that the motion is granted to the extent of vacating the dismissal of the appeal and enlarging the time to perfect same to the October 2019 Term.

ENTERED:


CLERK

COURT OF APPEALS
STATE OF NEW YORK

In re BROOKDALE PHYSICIANS' DIALYSIS
ASSOCIATES, INC. f/k/a CHURCH AVENUE
ASSOCIATES, INC

Petitioner-Respondent,

SAMUEL AND BERTHA SCHULMAN INSTITUTE
FOR NURSING AND REHABILITATION FUND, INC.
f/k/a SAMUEL SCHULMAN INSTITUTE FOR
NURSING AND REHABILITATION FUND, INC.,

Petitioner,

-against-

THE DEPARTMENT OF FINANCE OF THE CITY OF
NEW YORK,

Respondent-Appellant.

The undersigned affirms the truth of the following:

1. I, JOSEPH J. KROENING, an attorney admitted to practice in the State of New York, am not a party to the above action, am over the age of 18 years old and reside in Saugerties, New York.
2. I hereby certify that on the 30th day of November, 2020, I served one copy of the respondent-appellant's **Notice of Motion for Leave to Appeal and Affirmation in Support of Motion for Leave to Appeal** (one document) by mailing the same in sealed envelopes, with postage prepaid thereon, and depositing same in a post office or official depository under the exclusive care and custody of the United States Postal Service within the State of New York, addressed to the last known addresses of the addressees designated for such purpose as indicated as follows:

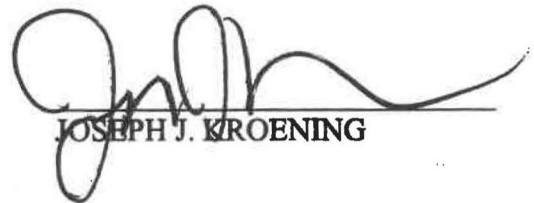
TO: COZEN O'CONNOR
Attorneys for Petitioner
Brookdale Physicians'Dialysis Associates, Inc.
f/k/a Church Avenue Associates, Inc.
45 Broadway, 16th Floor
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**AFFIRMATION OF
SERVICE**

New York County
Supreme Court
Index No.
156074/17

JACOB LAUFER, ESQ.
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SHEPPARD MULLIN RICHTER &
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JOSEPH J. KROENING