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Appellate Division–Second Department Docket No. 2017-03016

Court of Appeals

of the

State of New York

In the Matter of

DCH AUTO, as Tenant Obligated to Pay Taxes and DCH INVESTMENTS INC. (NEW YORK), as Tenant Obligated to Pay Taxes,

Petitioners-Appellants,

– against –

THE TOWN OF MAMARONECK, a Municipal Corporation, its Assessor and Board of Assessment Review and THE VILLAGE OF MAMARONECK, a Municipal Corporation, its Assessor and Board of Assessment Review,

Respondents-Respondents,

For a Review under Article 7 of the RPTL.

BRIEF ON BEHALF OF PETITIONERS-APPELLANTS IN OPPOSITION TO BRIEF OF AMICUS CURIAE NEW YORK STATE SCHOOL BOARDS ASSOCIATION

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DISCLOSURE STATEMENT

Pursuant to 22 NYCRR §500.1(f), Petitioners-Appellants DCH Auto, as Tenant Obligated to Pay Taxes and DCH Investments Inc. (New York), as Tenant Obligated to Pay Taxes, submit the following disclosures of any corporate parent, subsidiary, or affiliate.

DCH Auto a/k/a DCH Auto Group (USA) Inc. is a Delaware Corporation. It is a subsidiary of Lithia Motors, Inc., an Oregon corporation.

DCH Investments Inc. (New York) is a New York corporation. It is a subsidiary of Lithia Motors, Inc., an Oregon corporation.

DCH Auto Group (USA) Inc. and DCH Investments Inc. (New York) are related corporate entities.

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QUESTION PRESENTED

Whether the Appellate Division properly determined that Petitioners-Appellants DCH Auto, as Tenant Obligated to Pay Taxes, and DCH Investments Inc. (New York), as Tenant Obligated to Pay Taxes (hereinafter "DCH" or "Appellants") failed to satisfy the statutory condition precedent to the commencement of Real Property Tax Law ("RPTL") Article 7 proceedings when they filed the predicate administrative complaints under RPTL §524(3) in their own name?

DCH respectfully submits that the answer is no.

STATEMENT OF STATUS OF RELATED LITIGATION

DCH states that there is no related litigation pending as of this date.

PRELIMINARY STATEMENT

The *Amicus Curiae* brief filed by the New York State School Boards Association, Inc. ("NYSSBA"), raises many of the same arguments raised in the brief of Respondent Town of Mamaroneck, which were subsequently answered in DCH's Reply Brief. To the extent NYSSBA raises new issues or places new emphasis on previously raised issues, those arguments are answered herein.

ARGUMENT

POINT I

RPTL §524(3) DOES NOT LIMIT THE FILING OF AN ADMINISTRATIVE COMPLAINT EXCLUSIVELY TO THE PROPERTY OWNER

A. The NYSSBA's argument that the plain meaning of "person whose property is assessed" can only mean "owner' is undermined by its reference to other statutes in RPTL Article 5 that actually use the word "owner"

In support of its assertion that only a property owner may file a grievance pursuant to RPTL §524(3), the NYSSBA cites to the Legislature's repeated use of the word "owner" throughout RPTL Article 5, as evidence for the proposition that the phrase "person whose property is assessed" in section 524(3) refers exclusively to the property owner. *See* NYSSBA Brief, pages 17 – 19.

Recognizing that courts are not empowered to legislate in the guise of interpreting statutes, this Court has observed that the failure of the Legislature to include or define a term in a statute is a significant indication that the exclusion was intended, and that the omitted term should not be injected into the statute by the judiciary. *See People v. Finnegan*, 85 N.Y.2d 53, 58 (1995); *Pajak v. Pajak*, 56 N.Y.2d 394, 397 (1982). The fact that the Legislature declined to use the term "owner" in RPTL §524(3) is strong evidence that it did not mean to restrict administrative review of assessments to owners (or their agents) exclusively. RPTL Article 5 uses the word "owner" over 100 times. Had the Legislature intended this

same construction in RPTL §524(3) specifically, it would have used one word ("owner") instead of five words ("person whose property is assessed"); the latter term, by its very phraseology, is far broader than the former.

As this Court has previously held, when different terms are used in various parts of a statute, it is reasonable to assume that the Legislature specifically intended to create a distinction between them. *See Matter of Orens v. Novello*, 99 N.Y.2d 180, 187 (2002) (citing *Matter of Albano v. Kirby*, 36 N.Y.2d 526, 530 [1975]). The fact that the Legislature used the word "owner" repeatedly throughout RPTL Article 5 but declined to use the word "owner" in RPTL §524(3) undermines NYSSBA's argument. Instead, it supports DCH's argument that the term "person whose property is assessed" is not equivalent to "owner" and includes others' including Net Tenants.[1]

NYSSBA next concludes, without any analysis or support, that the word "whose" implies ownership. The word "whose" is not defined in RPTL §524(3). This Court has held that "[i]n the absence of any controlling statutory definition, [courts] construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as 'useful guideposts' in determining the meaning of a word or phrase." *Rosner v.*

[1] A "Net Tenant" is someone who is contractually obligated to pay all of the real property taxes pursuant to its lease with the property owner, and also authorized by its lease to challenge the real property tax assessment.

Metro. Prop. & Liab. Ins. Co., 96 N.Y.2d 475, 479-80 (2001) (quoting *Matter of Vill. of Chestnut Ridge v. Howard*, 92 N.Y.2d 718, 723 [1999]). This Court has applied this basic rule of statutory construction in countless cases, utilizing the normal dictionary meaning of words not specifically defined in a statute to divine the Legislature's intended meaning of the words used. *See e.g.*, *People v. Andujar*, 30 N.Y.3d 160, 163 (2017); *Matter of Madeiros v. N.Y. State Educ. Dep't*, 30 N.Y.3d 67, 75 (2017); *Matter of Orens*, 99 N.Y.2d at 185-86.

Merriam-Webster Dictionary defines the word *whose* as "of or relating to whom or which especially as possessor or possessors."[2] The word *whose* clearly signifies "possession." In applying the aforementioned rule of statutory construction to the facts of this case, the inescapable conclusion is that a possessory and contractually-bound tenant, like DCH, is included as a "person whose property is assessed," who may file a complaint under RPTL §524(3). This definition also aligns with case law finding that "an assessment truly runs with the land and not with the owner thereof …" *Mack v. Assessor of the Town of Ramapo*, 72 A.D.2d 604, 605 (2d Dep't 1979) (citing *People ex rel. Bingham Operating Corp. v. Eyrich*, 265 A.D. 562, 565 (3d Dep't 1943)).

That "whose" signifies possession and should be given the ordinary everyday import of the words "whose property" can be further illustrated by the following

[2] *See* https://www.merriam-webster.com/dictionary/whose (last verified May 2, 2022).

example that DCH raised in its Reply Brief before the Appellate Division: If a building housing a CVS pharmacy is leased to CVS by the owner/landlord, ABC Realty, anyone walking by the property would refer to the property as "CVS Pharmacy," the legal possessor of the property, and not the owner/landlord ABC Realty.

B. The Appellate Division's construction of RPTL §524(3) is not supported by either *Matter of Circulo Hous. Dev. Fund Corp*. v. *Assessor of City of Long Beach* or *Matter of Larchmont Pancake House v. Bd. of Assessors*

"The precedential value of a judicial opinion is limited to the question presented by the facts of the case before the Court." *J.A. Preston Corp. v. Fabrication Enters., Inc*., 68 N.Y.2d 397, 407 (1986). An opinion, "like a judgment, must be read as applicable only to the facts and is authority only for what was actually decided." *Rolfe v. Hewitt*, 227 N.Y. 486, 494 (1920).

In further support of its argument that RPTL §524(3) only permits a property owner to file an administrative grievance, NYSSBA relies upon the Appellate Division's decisions in *Matter of Circulo Housing Dev. Fund Corp*. v. *Assessor of City of Long Beach*, 96 A.D.3d 1053 (2d Dep't 2012) ("*Circulo*") and *Matter of Larchmont Pancake House v. Bd. of Assessors and/or the Assessor of the Town of Mamaroneck*, 153 A.D.3d 521, 522 (2d Dep't 2017) ("*Larchmont Pancake House I*"), *aff'd on other grounds*, 33 N.Y.3d 228 (2019). NYSSBA's reliance is misplaced because both decisions are readily distinguishable on their facts.

Neither *Circulo* nor *Larchmont Pancake House I* involved a Net Tenant. Both decisions involved fact patterns strikingly different from the facts in this case, *i.e.*, the absence of a legal contractual relationship between the petitioner/taxpayer and the property owner.

Additionally, the question presented in this case – whether "person whose property is assessed" under RPTL §524(3) includes a Net Tenant – was not before the Court in *Circulo* – a real property tax exemption case – because a non-owner is not eligible to apply for or obtain a real property tax exemption under RPTL §420-a. In *Matter of Larchmont Pancake House v. Bd. of Assessors*, 33 N.Y.3d 228, 240 (2019) ("*Larchmont Pancake House II*"), and although addressed by the parties, this Court did not address the Appellate Division's construction of RPTL §524(3); instead, the Court simply concluded that the petitioner was not an aggrieved party because it had no obligation to pay the real property taxes. Consequently, neither *Circulo* nor *Larchmont Pancake House I* support NYSSBA's argument that only a property owner may file an administrative complaint.

Prior to the Appellate Division's Decision and Order in the case at bar[3], the only court to interpret the phrase "whose property is assessed" in the context of an administrative grievance filed by a tenant obligated to pay all of the real property taxes was *McLean's Dep't Stores, Inc. v. Comm'r of Assessment of the City of*

[3] *Matter of DCH Auto v. Town of Mamaroneck*, 178 A.D.3d 823 (2d Dep't 2019) ("Decision").

Binghamton, 2 A.D.2d 98 (3d Dep't 1956) ("*McLean's*").[4] In *McLean's*, the Third Department held that the "petitioner, as a lessee obligated to pay all taxes during the term of the lease, [was] a person aggrieved and thus entitled to the protection of the statute and, in consequence, eligible to undertake the procedure provided by the local law." *Id.* at 100.

NYSSBA's attempt to distinguish *McLean's* on the ground that its decision was reached "without consideration" of the phrase "whose property is assessed" is unpersuasive, as the Third Department specifically interpreted "tenants" as belonging in the category person "whose property is assessed":

> "We consider that the determination at special term must be sustained, also, upon the further and broader ground that petitioner was, under its lease, the owner of such an interest in the property as to constitute it not only a person aggrieved but a person whose property was assessed." *McLean's*, 2 A.D.2d at 100.

[4] *McLean's* is discussed in detail in DCH's Opening Brief, pages 36 – 38, and DCH's Reply Brief, pages 16 – 19.

POINT II

THE APPELLATE DIVISION'S INTERPRETATION OF RPTL §524(3) IS NOT CONSISTENT WITH "BASIC PRINCIPLES OF PROPERTY OWNERSHIP," AND UNDERMINES THE RIGHTS OF A PROPERTY OWNER WHO HAS CONFERRED TO ITS TENANT THE RIGHT TO CHALLENGE THE REAL PROPERTY TAX ASSESSMENT

In its brief NYSSBA opines that "it should be the owner of the property who decides whether to challenge the assessment." NYSSBA Brief, at 27. NYSSBA posits that if this Court reverses the Appellate Division's Decision, doing so would "undercut the basic decision-making authority" given to property owners. *Id.* at 28.

It is indisputable that a property owner/landlord may lease its property to a tenant and impose upon this tenant the obligation to pay all real property taxes, and concomitantly confer the right to challenge the real property tax assessment upon which those taxes are based. That is precisely what occurred in this case. Under these circumstances, allowing DCH to file a grievance would not "undercut the basic decision-making authority" given to property owners. To the contrary, it would acknowledge and uphold that authority where, as here, the property owner, by the terms agreed to in the lease, specifically authorized the tenant to file the administrative grievance. By holding that only a property owner, or someone identifying itself as an agent of the owner, may file an administrative complaint, it is the Appellate Division's Decision below that has "undercut the basic decision-making authority" of all property owners who, in their leases, explicitly confer the

right to challenge the real property tax assessment to their tenant. Unless this Court reverses the Appellate Division's Decision, the rights of the aforesaid owners will be abrogated.[5]

NYSSBA next suggests that in order for DCH to have standing to contest the subject's real property tax assessment, it had to submit a grievance with an authorization signed by the property owner. NYSSBA Brief at 19 – 20 (citing *Matter of DCH Auto,* 178 A.D.3d at 823). NYSSBA is mistaken, as RPTL §524(3) does not use the word owner and contains no such requirement. DCH, through its lease, possessed the property and was authorized by the owner to challenge the real property tax assessment. DCH, in turn, authorized the undersigned's law firm to file the grievances on DCH's behalf.

Even if NYSSBA's claim was accepted, the omission of an authorization form is a technical, not jurisdictional, defect. *See Matter of Rotblit v. Bd. of Assessors of Vil. of Russell Gardens,* 121 A.D.2d 727 (2d Dep't 1986); *Matter of Miller v. Bd. of Assessors of Town of Islip,* 164 Misc.2d 62, 65-66 (Sup. Ct. Suffolk Co. 1995), *aff'd,* 236 A.D.2d 408 (2d Dep't), *aff'd as modified on other grounds,* 91 N.Y.2d 82

[5] The Decision below and Respondents' arguments (which the NYSSBA has adopted) also would place an additional burden on property owners who have leased their property and passed on the obligation to pay all real property taxes and the right to challenge the assessment/file a complaint. In many instances, once the obligation to pay taxes is passed on to the tenant along with the right to challenge the assessment, the property owner is relieved of any responsibility to take any further action of any kind during the term of the lease. The whole purpose of including such language in a lease is to eliminate the property owner's obligation of any matters relating to the imposition and payment of real property taxes during the lease term.

(1997); *Matter of Barron v. Town of Esopus*, 246 A.D.2d 707, 708 (3d Dep't 1998). Moreover, even if this Court finds that the grievances were defective in some way (a point DCH does not concede), Respondents waived any such defect when they addressed the merits of each grievance and denied relief. *See People ex rel. MacCracken v. Miller*, 291 N.Y. 55, 64 (1943); *People ex rel. Brooklyn Paramount Corp. v. Sexton*, 255 A.D. 1011 (2d Dep't 1938); *Skuse v. Town of S. Bristol*, 99 A.D.2d 670 (4th Dep't 1984).

POINT III

A REVERSAL OF THE APPELLATE DIVISION'S DECISION WILL NOT RESULT IN AN EXPANSION OF THE CLASS OF PERSONS WHO CAN FILE AN ADMINISTRATIVE COMPLAINT OR IN INCREASED REFUND LIABILITY

Real property in New York may not be assessed in excess of its full value. N.Y. Const., art XVI, §2. The purpose of assessment review proceedings under the RPTL is "to arrive at a fair and realistic value of the property involved." *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 512-13 (1981) (internal citations omitted). This Court has directed that the law '"relating to review of assessments is remedial in character and should be liberally construed to the end that the taxpayer's right to have his assessment reviewed should not be defeated by a technicality.'" *Matter of Great Eastern Mall, Inc. v. Condon*, 36 N.Y.2d 544, 548 (1975) (quoting *People ex rel. N.Y. City Omnibus Corp. v. Miller*, 282 N.Y. 5, 9 [1939]).

NYSSBA claims that allowing non-owner aggrieved parties like DCH to file a grievance would result in an "increase in the number of RPTL §524(3) proceedings[.]" NYSSBA'S Brief, at 32. NYSSBA's claim is unsupported, unreasonable and groundless, because allowing non-owner aggrieved parties to file an administrative grievance has been the standard in New York for the past half century, and continues to be so outside the Second Judicial Department subsequent to the *Circulo* decision.

For at least fifty years prior to *Circulo*, the unquestioned test for standing to file an administrative grievance seeking review of a real property tax assessment was aggrievement. *See McLean's*, 2 A.D.2d at 100. Other New York courts have exercised subject matter jurisdiction and reached the merits in Article 7 proceedings even when the predicate administrative grievance was filed by a non-owner, aggrieved party. *See Matter of EFCO Prods. v. Cullen*, 161 A.D.2d 44 (2d Dep't 1990); *Matter of Big "V" Supermarkets Inc., Store # 217 v. Assessor of Town of E. Greenbush*, 114 A.D.2d 726 (3d Dep't 1985); *Matter of Onteora Club v. Bd. of Assessors of Town of Hunter*, 29 A.D.2d 251 (3d Dep't 1968); *Matter of Birchwood Village LP v. Assessor of City of Kingston*, 94 A.D.3d 1374 (3d Dep't 2012); *Matter of Hangair, LLC v. Hillock*, 126 A.D.3d 1092 (3d Dep't 2015).

Additionally, the Department of Taxation and Finance, Office of Real Property Tax Services ("ORPTS"), the state agency charged with overseeing local

assessment administration, issued an Opinion of Counsel (7 Opinion of Counsel SBEA No. 123 [ORPTS rev. 1983]) which held, "[a] shopping center lessee who is obligated by lease to pay taxes has the right to administrative and judicial review of the assessment of the property leased." R. 279. This Opinion of Counsel cited *McLean's* as authority for its opinion. *Id*. Consistent with the above Opinion of Counsel is ORPTS Publication 1114, entitled "Contesting Your Assessment In New York State," which provides "[a]ny person who pays property taxes can grieve an assessment, including property owners, purchasers, [and] tenants who are required to pay property taxes pursuant to a lease or written agreement." R. 247 (emphasis added).[6]

Contrary to NYSSBA's professed fear, reversing the Appellate Division's Decision herein would not result in an expansion of the class of persons who can file an administrative grievance.[7] Conversely, it would simply ratify the pre-*Circulo* precedent, administrative guidance and tax certiorari practice that recognized that a tenant obligated to pay all of the real property taxes and authorized by its lease to challenge the real property tax assessment upon which the taxes are based, has standing to file an administrative grievance.

[6] An earlier version of these instructions provided this same guidance. *See* R. 235.

[7] This argument is also a red herring, as tenants, faced with the additional barrier imposed by the Appellate Division's Decision would prospectively require the property owner/landlord to file grievances as a specific term and condition in a lease.

NYSSBA avers that allowing non-owner taxpayers to file administrative grievances will result in more tax refund liability for school districts. NYSSBA Brief, at 34. Permitting tax assessment review to proceed will have no impact on tax collections, because no taxpayer is entitled to a refund unless the taxpayer establishes that the assessment of its property exceeds the property's full value. Any refund represents the return of an overpayment of real property taxes. If a property is fairly assessed, there is no financial impact on the school district or any other taxing jurisdiction involved. An Article 7 tax certiorari proceeding is only filed and the potential for tax refunds is only implicated if the assessment dispute is not resolved at the administrative level upon the filing of the grievance.

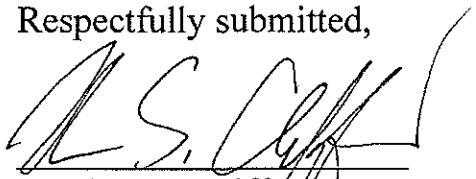
CONCLUSION

The NYSSBA's arguments regarding RPTL §524(3) are contrary to the plain language of the statute and are unsupported by case law precedent, ORPTS' Opinion of Counsel and administrative guidance, and long-standing and well-established tax certiorari practice. Additionally, the NYSSBA's asserted fear of an increase in tax certiorari litigation if non-owner aggrieved parties – like DCH – are permitted to file an administrative grievance is baseless. The RPTL has permitted such taxpayers to seek administrative review of assessments for decades. Consequently, this Court

should reverse the Appellate Division's Decision and uphold the right of Net Tenants and other aggrieved taxpayers to seeks administrative assessment review.

DATED: May 2, 2022
Bronxville, New York

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word 2016.

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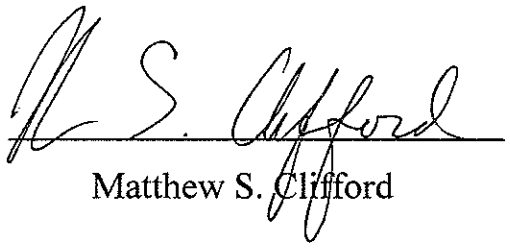
Dated: May 2, 2022



Matthew S. Clifford

STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On May 2, 2022

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the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on May 2, 2022

Mariana Braylovskiy

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Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

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