Westchester County Clerk's Index No. 23040/2009
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,

Petitioner-Appellant,

- 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.

MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE ON PETITIONER DCH AUTO'S MOTION FOR LEAVE TO APPEAL

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For a Review under Article 7 of the RPTL

NOTICE OF MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE ON PETITIONER-APPELLANT DCH AUTO'S MOTION FOR LEAVE TO APPEAL

WESTCHESTER COUNTY CLERK INDEX NO. 23040/09

Appellate Division, Second Dep't Docket No. 2017-03016

MOTION BY: CVS Albany LLC; United Artists Theatre Circuit, Inc.; and AMF Bowling Centers, Inc.

DATE, TIME AND PLACE OF MOTION: April 5, 2021 at 9:30 a.m. at Court of Appeals Hall, 20 Eagle Street, Albany, New York 12207.

SUPPORTING PAPERS:
(1) Affirmation of Donald F. Leistman, Esq. dated March 18, 2021; and
(2) Proposed Brief of Amici Curiae.

RELIEF REQUESTED: An Order:
(1) granting movants Amici Curiae relief on the motion for permission to appeal by Petitioner-Appellant DCH Auto;

(2) granting the motion of Petitioner-Appellant DCH Auto for permission to appeal; and

(3) for such other and further relief as may be just, necessary and proper.

Dated: Mineola, New York
March 18, 2021

KOEPPEL, MARTONE & LEISTMAN, LLC

By: _____
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Contribution Statement

Pursuant to Court of Appeals Rules of Practice Section 500.23(a)(4)(iii), it is hereby certified that:

(a) no party's counsel contributed content to the proposed brief or participated in the preparation of the proposed brief in any other manner;

(b) no party or party's counsel contributed money that was intended to fund preparation or submission of the proposed brief; and

(c) no person or entity, other than movant or movant's counsel, contributed money that was intended to fund preparation or submission of the proposed brief.

Corporate Disclosure Statement

Pursuant to Court of Appeals Rules of Practice Section 500.1(f), movants state as follows:

(1) CVS Albany LLC is a subsidiary of CVS Pharmacy, Inc., a Rhode Island Corporation. CVS Pharmacy, Inc. is a subsidiary of CVS Health Corporation, a Delaware Corporation.

(2) United Artists Theatre Circuit, Inc. is a subsidiary of Regal Entertainment Group and Cineworld Group PLC.

(3) AMF Bowling Centers Inc. is a subsidiary of Bowlero Corporation and Atairos.

COURT OF APPEALS
STATE OF NEW YORK

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Respondents-Respondents.

For a Review under Article 7 of the RPTL

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE ON PETITIONER-APPELLANT DCH AUTO'S MOTION FOR PERMISSION TO APPEAL

WESTCHESTER COUNTY CLERK INDEX NO. 23040/09

Appellate Division, Second Dep't Docket No. 2017-03016

DONALD F. LEISTMAN, ESQ., an attorney duly admitted to practice law in the State of New York, affirms as true subject to penalty of perjury as follows:

I. Identity and Nature of Matter

1. I am a member of the firm of Koeppel, Martone & Leistman, LLC, attorneys for the proposed Amici Curiae, all of whom operate commercial properties pursuant to net lease agreements under which they are responsible for payment of all real estate taxes, and who are further described herein.

2. By its December 11, 2019 decision, the Appellate Division, Second Department, in one fell swoop, obliterated 100 years of precedent from this Court (see, Matter of Burke, 62 N.Y. 224 [1875]), and all lower Courts that accepted that a net lessee was an "aggrieved party" pursuant to RPTL § 524(3) with the right to file an administrative complaint challenging the assessed value. In so holding, the Court below:

(a) potentially placed in jeopardy thousands of real estate tax assessment appeals filed by commercial net lessees who have relied upon common accepted practice and precedent in filing such appeals;

(b) essentially relied solely upon its 2013 decision in Matter of Circulo v. City of Long Beach, 96 A.D.3d 1053, 947 N.Y.S.2d 559 (2d Dep't 2012), an exemption case involving different circumstances and criteria which it misinterpreted in application herein; and

(c) interposed an "owner" standard where none is present in the plain terms of RPTL § 524(3).

3. Petitioner-Appellant DCH Auto has filed with this Court its Motion for Permission to Appeal to the Court of Appeals from the So Ordered Stipulation and Judgment Dismissing Severed Proceedings entered by the Supreme Court, Westchester

County on January 27, 2021 ("`So Ordered' Stipulation and Judgment").[1] The appeal brings up for review all prior orders, including the December 11, 2019 Decision and Order of the Appellate Division, Second Department. See, DCH Auto v. Town of Mamaroneck, 178 A.D.3d 823, 111 N.Y.S.3d 553 (2d Dep't 2019).[2] Accordingly, I submit this affirmation in support of the motion by proposed Amici Curiae:

(a) for leave to appear as Amici Curiae on Petitioner-Appellant DCH Auto's motion for permission to appeal;

(b) granting Petitioner-Appellant DCH Auto's motion for permission to appeal; and

(c) for such other and further relief as may be just, necessary and proper.

II. Background and Decision of the Court Below

4. At issue is the interpretation of RPTL § 524(3) as it relates to RPTL § 704(1). RPTL § 704(1) provides that "any person claiming to be aggrieved by any assessment of real property" may commence a judicial proceeding pursuant to RPTL Article 7. A tenant with the obligation to pay real estate taxes (i.e., net lessee or net tenant) constitutes an "aggrieved

[1]The motion has a return date of March 22, 2021.

[2]All references to the Decision and Order of the Appellate Division, Second Department dated December 11, 2019 are hereafter the "Appellate Division."

person." See, Waldbaum, Inc. v. Finance Adm'r of New York, 74 N.Y.2d 128, 544 N.Y.S.2d 561 (1989); Matter of Steel Los III/Goya Foods, Inc. v. Board of Assessors of County of Nassau, 10 N.Y.3d 445, 859 N.Y.S.2d 576 (2008); Matter of Long Island Power Auth. v Assessor of the Town of Huntington, 164 A.D.3d 591, 81 N.Y.S.3d 189 (2d Dep't 2018); Ames Dep't Store, Inc. v. Assessor, 261 A.D.2d 835, 689 N.Y.S.2d 791 (4th Dep't 1999); Caldor, Inc. v. Town of Ramapo, 253 A.D.2d 876, 678 N.Y.S.2d 508 (2d Dep't 1998); Big "v" Supermarkets, Store #217 v. Assessor of E. Greenbush, 114 A.D.2d 726, 494 N.Y.S.2d 520 (3d Dep't 1985).

5. A condition precedent to the filing of an RPTL Article 7 petition for review of a real estate tax assessment is that an administrative "complaint was made in due time to the proper offices to correct such assessment" (RPTL § 706(2)).

6. RPTL § 524(3) provides that the administrative complaint shall include a statement specifying the grounds for review, and that "such statement must be made by the person whose property is assessed."

7. Prior to the decision of the Appellate Division herein, it was never disputed that a net lessee was a proper complainant for purposes of filing both an administrative complaint under RPTL § 524(3) and a judicial petition under RPTL

§ 704(1).

8. In the December 11, 2019 decision, the Appellate Division held that the petitioner, a net lessee with the contractual obligation to pay real estate taxes, did not have standing to file an administrative complaint under RPTL § 524(3), as such a complaint could only be filed by the "owner" of the property. In so holding, the Appellate Division relied on its recent prior decision in Matter of Larchmont Pancake House v. Board of Assessors, 153 A.D.3d 521, 61 N.Y.S.3d 45 (2d Dep't 2017), aff'd on other grounds 33 N.Y.3d 228, 100 N.Y.S.3d 680 (2019), which in turn relied solely upon another recent decision in Matter of Circulo Hous. Dev. Fund Corp. v. Assessor of City of Long Beach, supra.

III. Effect of the Appellate Division Decision

9. There are tens of thousands of net leased properties in the State of New York that have a separate independent assessed value that is capable of review under both RPTL § 524(3) and RPTL § 704(1). Such properties include retail (such as Department Stores, "big-box", etc.), office buildings, banks, drug stores, etc. Such net lessees have filed RPTL Article 5 and RPTL Article 7 matters in an effort to correct excessive taxes and thereby mitigate operating costs.

10. Such net lessees, who have pending RPTL Article 7 petitions, now, as a result of the DCH Auto decision by the Appellate Division, may find their appeals placed in jeopardy as the RPTL Article 5 complaints were not filed by the fee owner of the properties, but instead filed by the net lessees.

IV. Identity and Description of Proposed Amici Curiae

11. The following entities seek to appear as Amici on the motion for permission to appeal by DCH Auto, as they all have pending real estate tax assessment appeals that could be jeopardized by the Appellate Division's decision on parcels that they occupy on a contractual net lease basis.

12. CVS Albany LLC is a New York limited liability company that is a subsidiary company of CVS Pharmacy Inc., a Rhode Island Corporation (collectively "CVS"). CVS operates approximately 175 free-standing pharmacy stores that sell prescription drugs and general merchandise. CVS operates its locations on a net lease basis and regularly files real estate tax assessment appeals in its own name challenging the assessed values on such properties.

13. United Artists Theatre Circuit, Inc. is a Maryland Corporation that is the net lessee of a property in Suffolk County, New York, which property is operated as a movie theatre.

It has filed RPTL Article 5 complaints and has pending RPTL Article 7 petitions on the property.

14. AMF Bowling Center, Inc. is a Delaware Corporation and is the net lessee of eight bowling alley properties in Suffolk and Westchester Counties, New York. It has filed appeals challenging the assessed value of such properties in its own name.

V. Leave to Appeal Should Be Granted to DCH Auto

15. Proposed Amici respectfully submit that petitioner DCH Auto's motion for leave to appeal should be granted because:

(a) the issues presented are of public importance. As previously mentioned, there are tens of thousands of net leased properties in New York State, and many of these lessees file RPTL Article 5 (and Article 7) real estate tax assessment challenges. The Appellate Division decision, left unreviewed (and unreversed), will place the viability of these appeals in jeopardy and will lead to further litigation.

(b) The issue presents a conflict with prior decisions of this Court. In Waldbaum, Inc. v. Finance Adm'r of New York, supra, this Court held that:

> " ... the lessee of an undivided assessment unit may challenge the assessment if legally bound by the lease to pay the entire assessment on behalf of the owner at the

> time it is laid (*see, Matter of Burke, 62 N.Y. 224, 227-228; see also, Matter of Gantz, 85 N.Y. 536, 539; Matter of Walter, 75 N.Y. 354, 357; Matter of McLean's Dept. Stores v. Commissioner of City of Binghamton, 2 A.D.2d 98, 101, 153 N.Y.S.2d 342*)." [74 N.Y.2d at 133, 544 N.Y.S.2d at 563]

See also, Steel Los III/Goya Foods, Inc. v. Board of Assessors of County of Nassau, supra, involving net lessee of property owned by Industrial Development Agency – no dispute that net lessee was "person aggrieved" for purposes of assessment review where "pecuniary interests" were affected.

The decision of the Appellate Division in DCH Auto effectively emasculates Waldbaum, Inc. v. Finance Adm'r of New York, supra, in that net lessee may never have standing to file a petition because the condition precedent to the petition – the filing of an RPTL § 524 complaint – can never be filed by the net lessee and only by another party – the owner.

Moreover, the decision of the Appellate Division conflicts with the decisions of this Court that the Real Property Tax Law is remedial in nature and should be interpreted liberally in favor of the taxpayer. See, Miller v. Board of Assessors, 91 N.Y.2d 82, 666 N.Y.S.2d 1012 (1997) (Error, inter alia, naming prior owner of protested property in the petition a technical defect that is correctable); Matter of Great Eastern Mall v.

Condon, 36 N.Y.2d 544, 369 N.Y.S.2d 672 (1975).

(c) There is a conflict amongst the Departments of the Appellate Division. The DCH Auto decision by the Second Department is in conflict with the rulings of the Third Department in McLean's Dep't Stores, Inc. v. Commissioner of Assessment, 2 A.D.2d 98, 153 N.Y.S.2d 342 (3d Dep't 1956) and Big "v" Supermarkets, Store #217 v. Assessor of E. Greenbush, 114 A.D.2d 726, 494 N.Y.S.2d 520 (3d Dep't 1985), as well as the Fourth Department in People ex rel. New York, W. S. & B. R. Co. v. Johnson, 29 A.D. 75, 51 N.Y.S. 388 (4th Dep't 1898).

VI. The Motion of CVS Albany LLC, et al., To Appear as Amici Should Be Granted

16. Proposed Amici CVS Albany LLC, et al. also request their motion to appear as Amici on the DCH Auto motion for leave, be granted, and that this Court accept and consider the arguments herein and in the attached brief submitted by Amici.

17. In particular, Amici submit that their brief will be of assistance to the Court in that:

(a) Amici further elaborate on why Circulo v. City of Long Beach, supra, which is the sole authority for the Appellate Division's decision in Larchmont Pancake House, supra, and, together with Larchmont, are the sole authority for the Appellate Division's DCH Auto decision, is inapplicable and not

relevant here.

(b) Amici further elaborate on why the Appellate Division's decision results in an incongruous and illogical application of RPTL 524(3) vis-à-vis RPTL § 704(1) and § 706(2). It has long been held that the petitioner in an RPTL Article 7 proceeding may not add additional grounds for review or seek greater relief than that specified in the RPTL § 524(3) complaint. See, Sterling Estates, Inc. v. Board of Assessors of Nassau County, 66 N.Y.2d 122, 495 N.Y.S.2d 328 (1985) (petition may not be amended to interpose grounds for review that were not previously protested in administrative complaint); City of Little Falls v. Board of Assessors of Town of Salisbury, 68 A.D.2d 734, 418 N.Y.S.2d 809 (4th Dep't 1979) (RPTL administrative complaint sought review solely on ground of overvaluation and, therefore, petitioner was precluded from interposing additional ground of inequality in petition); Singer Company v. Tax Assessor of Village of Pleasantville, 86 Misc.2d 831, 382 N.Y.S.2d 628 (Sup. Ct., Westchester Co., 1976), aff'd 56 A.D.2d 655, 391 N.Y.S.2d 902 (2d Dep't 1977) (petitioner in RPTL Article 7 petition may not seek greater relief than that sought in complaint before Board of Assessment Review); Pollak v. Board of Assessors of Nassau County; 62 A.D.2d 1019, 403

N.Y.S.2d 762 (2d Dep't 1978). The Appellate Division in DCH Auto has held that an owner must file the RPTL § 524(3) complaint but that the net lessee may file the RPTL § 704 petition. This interpretation may lead to the result that the net lessee is precluded from obtaining full relief and review of its assessed value in an RPTL Article 7 petition if the same requested relief was not plead or requested by a different party, i.e., the owner in the RPTL § 524(3) complaint. The prior decisions of this Court and the Appellate Divisions' contemplate an interpretation of the statutes wherein one party, i.e., the net lessee, files both the RPTL § 524(3) complaint and RPTL § 704 petition.

VII. Prior Application

18. Petitioner-Appellant DCH Auto previously filed a motion with this Court for permission to appeal directly from the December 11, 2019 Decision and Order of the Appellate Division (Motion No. 2020-608).

19. Proposed Amici herein filed a motion for leave to appear as Amici on the DCH Auto motion for permission for leave to appeal (Motion No. 2020-659). The Amici motion was granted on December 17, 2020.

20. The prior DCH Auto motion for leave to appeal was denied on December 17, 2020 on the ground "the order sought to

be appealed from does not finally determine the proceeding within the meaning of the Constitution."

Conclusion

WHEREFORE, for all the foregoing reasons, the motion of CVS Albany LLC, et al.

(a) for leave to appear as Amici on the DCH Auto motion for leave to appeal should be granted;

(b) upon granting of the Amici motion, that DCH Auto's motion for leave to appeal to the Court of Appeals be granted; and

(c) for such other and further relief as may be just, necessary and proper.

Dated: Mineola, New York
March 18, 2021

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BRIEF OF AMICI CURIAE CVS ALBANY LLC, ET AL. ON MOTION FOR PERMISSION TO APPEAL BY PETITIONER-APPELLANT DCH AUTO

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RPTL § 701(5)	9, 11
RPTL § 701(8)	9, 11
RPTL § 701(9)	9, 11
RPTL § 701(9)(a)	6
RPTL § 704	19
RPTL § 704(1)	3, 16, 17
RPTL § 706(1)	7, 8

Preliminary Statement

Proposed Amici Curiae respectfully submit this Brief in support of the motion made by Petitioner-Appellant DCH Auto for permission to appeal from the January 27, 2021 "So Ordered" Stipulation and Judgment Dismissing Severed Proceedings Entered by Supreme Court, Westchester County, which brings up for review the decision of the Appellate Division, Second Department in Matter of DCH Auto v. Town of Mamaroneck, 178 A.D.3d 823, 111 N.Y.S.3d 553 (2d Dept. 2019).

Identity and Interest of The Amici

The Appellate Division, Second Department, in its December 11, 2019 Decision and Order, held that the Petitioner, DCH Auto, a net lessee with the contractual obligation to pay real estate taxes, did not have standing to file an administrative complaint under RPTL § 524(3), as such a complaint can only be filed by the owner of the property.

The Amici are all net lessees of commercial properties, with the contractual obligation to pay real estate taxes, that have filed RPTL Article 5 complaints and RPTL Article 7 petitions challenging the assessed value on their leased properties. The affected properties include retail drug stores, movie theatres and bowling alleys.

Thousands of RPTL Article 5 complaints and RPTL Article 7 petitions are filed each year throughout New York State by net lessees. The net lease agreement is typical for many types of properties, including those owned by the Amici, as well as for big-box retail, industrial buildings and banks.

Accordingly, the issue of a net lessee's standing and ability to file RPTL Article 5 complaints is a matter of statewide importance, as the issue will affect thousands of net lessees that have, or will, appeal their assessed values.

Motion By DCH Auto

Petitioner-Appellant, DCH Auto, by papers dated March 2, 2021, has filed a motion for leave to appeal to this Court from the "So Ordered" Stipulation and Judgment Dismissing Severed Proceedings entered by the Supreme Court, Westchester County on January 27, 2021, which final judgment was necessarily affected by the Appellate Division's December 11, 2019 Decision and Order on a prior appeal in the action.[1]

Proposed Amici respectfully submit that the motion be granted, based upon the following arguments which further

[1]All references to the Decision and Order of the Appellate Division, Second Department dated December 11, 2019 are hereafter the "Appellate Division."

support and amplify the grounds for leave and reversal set forth by DCH Auto in its motion papers.

ARGUMENT

POINT I

THERE IS NO COMPELLING PRECEDENT WHICH SUPPORTS THE INTERPRETATION OF RPTL § 524(3) BY THE APPELLATE DIVISION. CIRCULO v. ASSESSOR OF LONG BEACH IS INAPPOSITE

A. *Circulo's* Rationale Applies Only to Exemption Issues

The Appellate Division, Second Department relied solely on two of its own prior recent precedents in its DCH Auto decision holding that a RPTL § 524(3) complaint can only be filed by an owner, and not a net lessee. In effect, the Appellate Division found the term "person whose property is assessed" under RPTL § 524(3) to be mutually exclusive of the term "aggrieved party" under RPTL § 704(1).

The DCH Auto decision cites Larchmont Pancake House v. Board of Assessors, 153 A.D.3d 521, 61 N.Y.S.3d 45 (2d Dep't 2017), aff'd on other grounds 33 N.Y.3d 228, 100 N.Y.S.3d 680 (2019) and Circulo Hous. Dev. Fund Corp. v. Assessor of City of Long Beach, Nassau County, 96 A.D.3d 1053, 947 N.Y.S.2d 559 (2d Dep't 2012) as the only precedential support. In turn, the Appellate Division in Larchmont cited only to Circulo as support for its Larchmont decision. Therefore, the premise for both DCH

Auto and Larchmont is Circulo. As we demonstrate further, Circulo is completely distinguishable from the situation here and involved different statutory criteria. As Circulo lends no support for the subsequent decisions in Larchmont and DCH Auto involving RPTL § 524(3), the DCH Auto decision is erroneous and compels reversal.

In Circulo, supra, the petitioner sought an exemption pursuant to RPTL § 420-a, which provides that:

> "1. (a) Real 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 one or more of such purposes either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section." (emphasis added)

Therefore, only an owner of real property is statutorily entitled to, and may apply for, an exemption. RPTL § 420-a(11) states:

> "11. An exemption may be granted pursuant to this section upon application by the owner on a form prescribed by the commissioner or any comparable form, which application may be filed with the assessor of the appropriate county, city, town or village on or before the applicable taxable status date. Where the assessor receives no such

> application, the assessor may nevertheless grant the exemption provided the assessor personally inspects the property and certifies in writing that it satisfies all of the requirements for exemption set forth in this section. Where property is not granted an exemption pursuant to this section, the owner may seek judicial review pursuant to article seven of this chapter or article seventy-eight of the civil practice law and rules." (emphasis added)

The criteria of "owner" is utilized throughout RPTL Article 4 (see RPTL § 420-a(5); RPTL § 420-a(6); § 420-a(7); § 420-a(9); § 420-a(10); § 420-b(1)(a), et seq.).

To obtain an exemption under RPTL § 420-a, as a threshold matter, the property must both be owned by the party seeking the exemption and utilized for the exempt purpose. See, Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v. Town of Fallsburg, 78 N.Y.2d 194, 202-203, 573 N.Y.S.2d 43, 46-47 (1991); Association of the Bar v. Lewisohn, 34 N.Y.2d 143, 153, 356 N.Y.S.2d 555, 561 (1974); People ex rel. Watchtower Bible & Tract Soc., Inc. v. Haring, 8 N.Y.2d 350, 207 N.Y.S.2d 673 (1960).

In Circulo, an application was made for an exemption by Circulo Housing Corp., which was not the owner of the subject property. Circulo Housing Corp. filed an RPTL Article 5 complaint seeking review of the denial of the exemption on grounds that such denial was unlawful (see RPTL § 522(10)(a)),

and upon denial of the RPTL Article 5 complaint, filed an RPTL Article 7 petition on the same grounds (see RPTL § 701(9)(a)). The Court granted the respondent City's motion to dismiss the RPTL Article 7 petition on the following basis:

> "... a condition precedent to the commencement of such a proceeding is that the owner must have made a complaint regarding the unlawful assessment to the Board for review pursuant to RPTL article 5 (*see* RPTL 524). Here, the entity which filed the administrative complaint for review of the assessment of the East Hudson Street property was Circulo Housing Development Fund Corporation, which, according to the deed to the East Hudson Street property, is not the owner of that property. There is no evidence that the owner of the East Hudson Street property ever filed an administrative complaint for review of the assessment of that property. As such, the petition did not 'show that a complaint was made in due time to the proper officers to correct such assessment,' as is required (RPTL 706[2];" 947 N.Y.S.2d at 562.

While not expressly stated by the Court, the RPTL Article 5 complaint was defective because it was not filed by the owner of the property, which was the only party statutorily entitled to apply for and receive the exemption (RPTL § 420-a(1)(a); § 420-a(11)). Accordingly, as discussed further below, Circulo is sui generis, based on its own unique facts and the statutory language of RPTL § 420-a involving exemptions being limited to the owner of the property.

B. Further Factors Distinguishing *Circulo*

The Appellate Division erred in extending Circulo beyond matters involving exemptions, and instead applying it in Larchmont and DCH Auto to other statutory grounds for review of assessments. Some statutory background in RPTL Article 5 and Article 7 is instructive.

(i) Assessment Review Proceedings in General

The review of an assessment of real property is a two-stage process. First, a complainant must exhaust the remedies available at the administrative level under RPTL Article 5 by the filing of a grievance complaint pursuant to RPTL § 524. If the complaint is denied, the complainant may seek judicial review of the denial by commencing a special proceeding under RPTL Article 7 by the filing of a petition in court.

At the judicial level, a proceeding for review of assessment upon real property by certiorari is governed by RPTL Article 7 and is a "special proceeding" as that term is defined by CPLR Article 4.

RPTL § 706(1) states a petitioner is limited to challenging the assessment on the grounds that the assessment is illegal, excessive, unequal and/or misclassified, so long as the basis for review was raised in the RPTL § 524(3) administrative

complaint. If a petitioner wishes to assert any other causes of action, for example, challenging the method upon which an assessor relied upon to determine the assessment, the assessor's jurisdiction to impose taxes, or the constitutionality of the assessment, such challenges may be pursued through a CPLR Article 78 proceeding or collaterally attacked in a plenary action. See, Kahal Bnei Emunim, supra, 78 N.Y.2d at 204, 573 N.Y.S.2d at 48; and see, Hewlett Assocs. v. New York, 57 N.Y.2d 356, 456 N.Y.S.2d 704 (1982); Dun & Bradstreet, Inc. v. New York, 276 N.Y. 198, 206 (1937); Troy Towers Redevelopment Co. v. City of Troy, 51 A.D.2d 173, 175, 380 N.Y.S.2d 89, 92 (3d Dep't 1976), aff'd 41 N.Y.2d 816, 393 N.Y.S.2d 397 (1977).

(ii) Statutory Grounds for Review of Assessments

The grounds for assessment review available at both levels are identical under both RPTL § 524(2) and RPTL § 706(1):

RPTL § 524(2)	RPTL § 706(1)
The grounds for review of an assessment shall be that the assessment complained of is excessive, unequal or unlawful, or that real property is misclassified.	The grounds for reviewing an assessment shall be that the assessment complained of is excessive, unequal or unlawful, or that real property is misclassified.

Both sections provide four (4) distinct grounds for review by an aggrieved party, which are further defined, identically, under RPTL § 522 and RPTL § 701:

1. Excessive assessment: the property's assessment exceeds its full market value or is excessive because of the denial of all or a portion of a partial exemption. RPTL § 522(4), § 701(4).

2. Misclassified assessment: the real property is misclassified, e.g. classified as non-homestead when in fact it qualifies for the homestead class. RPTL § 522(6), § 701(5).

3. Unequal assessment: the property is assessed at a higher percentage of its full market value than all other properties (or properties of the same class) on the assessment roll. RPTL § 522(9), § 701(8).

4. Unlawful assessment: a property is wholly exempt, is located entirely outside the boundaries of the taxing unit in which it is designated as being located, property has been assessed and entered on the assessment roll by a person or entity without authority to make the entry, and various other technical grounds. RPTL § 522(10), § 701(9).

A complainant in an RPTL Article 5 administrative review proceeding may raise any combination of the foregoing grounds for review or all of them at once in a RPTL § 524(3) complaint. The standard grievance form promulgated by the New York State Office of Real Property Tax Services ("ORPTS") identified as

"RP-524"[2] sets forth each of the four categories of grounds for review at "Part Three: Grounds for Complaint." Each section contains its own subsection in Part Three, and each subsection defines the various "reasons" for the complainant asserting the ground for review, consistent with the definitions promulgated by RPTL § 522 and § 701. However, the failure to raise any single ground for review in an RPTL Article 5 administrative complaint prevents a complainant from later raising it in an RPTL Article 7 petition for judicial review. See, Sterling Estates, Inc. v. Board of Assessors of Nassau County, 66 N.Y.2d 122, 495 N.Y.S.2d 328 (1985); City of Little Falls v. Board of Assessors of Town of Salisbury, 68 A.D.2d 734, 418 N.Y.S.2d 809 (4th Dep't 1979); Singer Company v. Tax Assessor of Village of Pleasantville, 86 Misc.2d 831, 382 N.Y.S.2d 628 (Sup. Ct., Westchester Co., 1976) aff'd 56 A.D.2d 655, 391 N.Y.S.2d 902 (2d Dep't 1977); Pollak v. Board of Assessors of Nassau County, 62 A.D.2d 1019, 403 N.Y.S.2d 762 (2d Dep't 1978).

As seen from the foregoing, the standard for an "unlawful entry," i.e., the denial of an exemption, under RPTL § 522(10)

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[2]Form RP-524 promulgated by ORPTS can be found at:
New York State Department of Taxation & Finance
Office of Real Property Tax Services
Complaint on Real Property Assessment For ___
https://www.tax.ny.gov/pdf/current_forms/orpts/rp524_fill_in.pdf
(last updated March 2009).

and § 701(9), is different than the standard for an excessive, misclassified or unequal assessment under RPTL § 522(4), (6); and (9), and RPTL § 701(5), (8) and (9). Pursuant to RPTL § 420-a, and other similar exemption statutes in RPTL Article 4, only an owner is statutorily entitled to apply for and receive an exemption, and hence, only the owner may contest the denial of same. There is no similar proscription in cases where the issue involves non-exemption grounds. Hence, the Appellate Division erred in applying Circulo's holding involving the exemption to Larchmont and DCH Auto which involved other general grounds for assessment review, i.e., excessiveness and inequality.

C. The Appellate Division Decision in Larchmont is Predicated on *Circulo* and, Therefore, Does Not Support *DCH Auto*

The Appellate Division in DCH Auto also cited its decision in Larchmont as support for its holding that a net lessee has no standing to file a complaint under RPTL § 524(3). However, the Court in Larchmont relied solely on Circulo as support for its holding:

> " ..., RPTL article 5 requires that the property owner file the complaint or grievance to obtain administrative review of a tax assessment (*see* RPTL 524[3]; *Matter of Circulo Hous. Dev. Fund Corp. v. Assessor of City of Long Beach, Nassau County, N.Y.*, 96 A.D.3d at 1056, 947 N.Y.S.2d 559). The

> petitioner, which filed the complaints with the Board of Assessment Review, never owned the subject property. Therefore, the court lacked subject matter jurisdiction to review the assessments, as the petitioner failed to satisfy a condition precedent to the filing of the petitions pursuant to RPTL article 7. Accordingly, the court should have granted the appellants' motions to dismiss the petition in each proceeding." 153 A.D.3d at 522, 61 N.Y.S.3d at 46.

As Circulo is inapposite to any claim for review other than one involving "exemptions" or "unlawful entry" there is simply no support for the Appellate Division's reasoning involving RPTL § 524(3) in Larchmont. This Court, in Larchmont, affirmed on other grounds, either not reaching the issue of the interpretation of RPTL § 524(3), or declining to accept the reasoning of the Appellate Division. Accordingly, neither Circulo or Larchmont support the interpretation of RPTL § 524(3) by the Appellate Division in DCH Auto, and hence, there is absolutely no precedent which supports the decision.[3]

[3]The Appellate Division in DCH Auto also cited Grecian Garden Apartments, Inc. v. Barlow, 71 Misc.2d 457, 336 N.Y.S.2d 204 (Sup Ct., Monroe Co., 1972). Grecian merely held that it was possible and not improper for one party – the owner, to file the administrative complaint and for another party – the net lessee, to file the RPTL Article 7 petition. The Grecian Court did not say that only the owner can statutorily file the administrative complaint, or that the net lessee is precluded by statute from filing the complaint.

POINT II

THE PLAIN TERMS OF RPTL § 524(3) DO NOT PRECLUDE A NET LESSEE FROM FILING A COMPLAINT

As there is no applicable precedent to support the interpretation of RPTL § 524(3) by the Appellate Division (see Point I), the only support therefore must come from the terms of the statute itself. However, RPTL § 524(3) simply does not say that only an owner can file a complaint thereunder.

RPTL § 524(3) provides that:

> "Notwithstanding the provisions of section five hundred twenty-eight of this title, and except in cities with a population of five million or more, a complaint with respect to an assessment shall be on a form prescribed by the commissioner and shall consist of a statement specifying the respect in which the assessment is excessive, unequal or unlawful, or the respect in which real property is misclassified, and the reduction in assessed valuation or taxable assessed valuation or change in class designation or allocation of assessed valuation sought. Such statement shall also contain an estimate of the value of the real property. Such statement must be made by the person whose property is assessed, or by some person authorized in writing by the complainant or his officer or agent to make such statement who has knowledge of the facts stated therein." (emphasis added)

Absent from the statute is any mention of the word "owner." If the Legislature had wished to restrict RPTL § 524(3)

complaints to only "owners," it could have utilized that language, as it has done in other sections of the Real Property Tax Law [see RPTL § 420-a(1)(a); RPTL § 420-a(5); RPTL § 420-a(6); § 420-a(7); § 420-a(9); § 420-a(10); § 420-b(1)(a), et seq.].

In interpreting a statute, the Court should attempt to effectuate the intent of the Legislature. As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language, giving effect to its plain meaning. See, Majewski v. Broadalbin-Perth Cent. Sch. Dist., 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966, 968 (1998). Simply stated, a court should not add words to a statute to discern intent. American Transit Ins. Co. v. Sartor, 3 N.Y.3d 71, 76, 781 N.Y.S.2d 630, 633 (2004); Chemical Specialities Mfrs. Ass'n v. Jorling, 85 N.Y.2d 382, 626 N.Y.S.2d 1 (1995).

In the absence of any controlling statutory definition, courts must "construe words of ordinary import with their usual and commonly understood meaning, and in that connection [courts] have regarded dictionary definitions as 'useful guideposts' in determining the meaning of a word or phrase". Rosner v. Metro. Prop. & Liab. Ins. Co., 96 N.Y.2d 475, 479, 729 N.Y.S.2d 658,

660 (2001) (quoting Matter of Vill. of Chestnut Ridge v. Howard, 92 N.Y.2d 718, 723, 685 N.Y.S.2d 915, 990 [1999]).

Here, the Appellate Division improperly crafted the word "owner" into RPTL § 524(3) where that term is absent. This is reversible error.

A net lessee certainly falls within the ambit of the term "person whose property is assessed" under RPTL § 524(3). For instance, even where statutory assessment language was more restrictive than the language contained within RPTL § 524 (3), this Court has broadly construed it in order not to thwart the purpose of the statute. This Court has consistently interpreted the phrase "exclusive" use under exemption statutes such as RPTL § 420-a and § 420-b to mean "principal" or "primary." Association of the Bar v. Lewisohn, supra; Matter of Yeshivah Shearith Hapletah v. Assessor of Fallsburg, 79 N.Y.2d 244, 249, 582 N.Y.S.2d 54, 56 (1992); Matter of Brooklyn Assembly Halls of Jehovah's Witnesses, Inc. v. Department of Entl. Protection of the City of New York, 11 N.Y.3d 327, 335, 869 N.Y.S.2d 878, 883 (2008); Matter of Maetreum of Cybele, Magna Mater, Inc. v. McCoy, 24 N.Y.3d 1023, 997 N.Y.S.2d 676 (2014); Matter of Greater Jamaica Dev. Corp. v. New York City Tax Commn., 25 N.Y.3d 614, 623 15 N.Y.S.3d 738, 742 (2015). This statutory

construction standard has also been considered within the context of RPTL Article 7. See, Town of New Castle v. Kaufmann, 72 N.Y.2d 684, 536 N.Y.S.2d 37, 39 (1988).

The standard for exemption statutes is one applied in favor of the taxing authorities (Matter of Yeshivah Shearith Hapletah, supra; Matter of Greater Jamaica Dev. Corp. v. New York City Tax Commn., supra). In contrast, the interpretation of RPTL Article 5 and RPTL Article 7 is liberal and in favor of the taxpayer. Great Eastern Mall Inc. v. Condon, 36 N.Y.2d 544, 548, 369 N.Y.S.2d 672 (1975); W.T. Grant v. Srogi, 52 N.Y.2d 496, 513, 438 N.Y.S.2d 761, 769 (1981); Waldbaum, Inc. v. Finance Adm'r of New York, 74 N.Y.2d 128, 133, 544 N.Y.S.2d 561, 563 (1989); Matter of Garth v. Bd. of Assessment Review for Town of Richmond, 13 N.Y.3d 176, 180, 889 N.Y.S.2d 513, 516 (2009). The Appellate Division, by its DCH Auto decision, has adopted a statutory construction of RPTL § 524(3) that is more restrictive than that adopted by this Court for exemption statutes. This is error.

POINT III

RPTL § 524(3) AND RPTL § 704(1) MUST BE INTERPRETED TOGETHER

The Appellate Division declined to interpret RPTL § 524(3) and RPTL § 704(1) together, instead finding different standing

grounds for the RPTL § 524(3) complaint and the RPTL § 704(1) petition, even though the complaint is the condition precedent for the petition. This was reversible error. When the terms of related statutes are involved, they must be analyzed in context and in a manner that harmonizes the related provisions and makes them compatible. Matter of M.B., 6 N.Y.3d 437, 447, 813 N.Y.S.2d 349, 356 (2006); Tall Trees Constr. Corp. v. Zoning Board of Town of Huntington, 97 N.Y.2d 86, 91, 735 N.Y.S.2d 873, 876-877 (2001).

The Appellate Division should have reviewed the statutes together, and found that absent a specific statutory provision making reference to an "owner" (see RPTL § 420-a(1), etc.; Point I, and Point II, supra), a net lessee is a "person whose property is assessed" with standing to file an RPTL § 524(3) complaint. As such, that person is "aggrieved." See, Waldbaum, Inc. v. Finance Adm'r of New York, 74 N.Y.2d 128, 544 N.Y.S.2d 561 (1989); Matter of Steel Los III/Goya Foods, Inc. v. Board of Assessors of County of Nassau, 10 N.Y.3d 445, 859 N.Y.S.2d 576 (2008); Matter of Long Island Power Auth. v. Assessor of the Town of Huntington, 164 A.D.3d 591, 81 N.Y.S.3d 189 (2d Dep't 2018); Ames Dep't Store, Inc. v. Assessor, 261 A.D.2d 835, 689 N.Y.S.2d 791 (4th Dep't 1999); Caldor, Inc. v. Town of Ramapo,

253 A.D.2d 876, 678 N.Y.S.2d 508 (2d Dep't 1998); K-Mart Corp. v. Board of Assessors, 176 A.D.2d 1034, 575 N.Y.S.2d 185 (3d Dep't 1991); Big "v" Supermarkets, Store #217 v. Assessor of E. Greenbush, 114 A.D.2d 726, 494 N.Y.S.2d 520 (3d Dep't 1985).

An interpretation harmonizing the statutes together will also avoid the inequitable and impractical results that will follow from the construction of RPTL § 524(3) by the Appellate Division. It has long been held that the petitioner in an RPTL Article 7 proceeding may not add additional grounds for review or seek greater relief than that specified in the RPTL § 524(3) complaint. See, Sterling Estates, Inc. v. Board of Assessors of Nassau County, supra, [petition may not be amended to interpose grounds for review that were not previously protested in administrative complaint]; City of Little Falls v. Board of Assessors of Town of Salisbury, supra, (RPTL administrative complaint sought review solely on ground of overvaluation and, therefore, petitioner was precluded from interposing additional ground of inequality in petition); Singer Company v. Tax Assessor of Village of Pleasantville, supra, (petitioner in RPTL Article 7 petition may not seek greater relief than that sought in complaint before Board of Assessment Review); Pollak v. Board of Assessors of Nassau County, supra. The Appellate Division

here in DCH Auto, has held that an owner must file the RPTL § 524(3) complaint but that the net lessee may file the RPTL § 704 petition. This interpretation may lead to the result that the net lessee is precluded from obtaining full relief and review of its assessed value if same was not plead or requested by a different party with possible different interests, i.e., the owner in the RPTL § 524(3) complaint. The prior decisions of this Court and the Appellate Divisions' contemplate an interpretation of the statutes wherein one party, i.e., the net lessee, files both the RPTL § 524(3) complaint and RPTL § 704 petition.

CONCLUSION

For all the foregoing reasons, this Court should:

(a) grant the motion of CVS Albany LLC, et al., to appear as Amici Curiae on the motion by DCH Auto for permission to appeal;

(b) grant the motion of DCH Auto for permission to appeal; and

(c) for such other and further relief as may be just, necessary and proper.

Dated: Mineola, New York
March 18, 2021

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Certificate Of Compliance

Pursuant to 22 NYCRR Section 670.10.3 (f), the within brief was prepared on a computer. A monospaced typeface was used, as follows:

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KOEPPEL, MARTONE & LEISTMAN, LLC

By: _____
DONALD F. LEISTMAN, ESQ.

Westchester County Clerk's Index No. 23040/2009
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,

Petitioner-Appellant,

- 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.

MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE ON PETITIONER DCH AUTO'S MOTION FOR LEAVE TO APPEAL

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