To be submitted

SUPREME COURT: STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

Case No. 521671

THOMAS J. SCHNEIDER,

Petitioner-appellant.

v

SCHUYLER COUNTY,

Respondent.

RESPONDENT'S BRIEF

Schuyler County Index No. 2014-0055

Dated: December 18, 2015

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Preliminary Statement

Appellant, Thomas J. Schneider, appeals from an order of the Supreme Court, State of New York, County of Schuyler (O'Shea, J., presiding), dated September 19, 2014, denying his application, pursuant to CPLR Art. 78, to annul respondent Schuyler County's determination that he is responsible to pay $6,102.96 in taxes under Schuyler County's Local Law No. 2 of 2008, "the Schuyler County Hotel or Motel Room Occupancy Tax Law."

QUESTIONS PRESENTED

I. Whether the Supreme Court properly upheld Schuyler's imposition of its local occupancy tax upon appellant's vacation rental properties?

The lower court answered this question in the affirmative.

II. Was the retroactive application of the local tax against appellant unjust or inappropriate?

The lower court answered this question in the negative.

III. Whether the lower court properly denied appellant's objection to the Treasurer's demand for additional information.

The lower court answered this question in the affirmative.

STATEMENT OF FACTS.

Appellant, Thomas J. Schneider, a resident of New Jersey, owns three real properties located in the County of Schuyler, State of New York (R13, 34).

These properties are located at, respectively, 3459 Route 79 in Burdett, 208 North Madison Street in Watkins Glen, and 3407 Route 30 in Watkins Glen. The properties are known, respectively, as Glen Eastern, Harbor West and Salt Point (*Id*.).

Appellant leases each of these properties as residential vacation homes, under the name "Seneca Lake Vacation Rentals" (R13). Appellant apparently began this activity approximately five years earlier (R12-13, 39).

The vacation properties are fully furnished, with bathroom and bedrooms. They are rented out to guests for various periods of time, ranging from one day to several months (R13). Appellant generally provides towels and linens (such as sheets and pillowcases) to the guests (R19, 102).

The County of Schuyler ("Schuyler County"), the respondent herein, imposes a four percent (4%) local tax upon the rent for every occupancy of a room or rooms in a hotel, motel, bed and breakfast or tourist facility having one or more rooms in the county (R56). The local tax was first imposed as of January 1, 1989 (*Id*.). The current local tax rate was first imposed on January 1, 2006 (*Id*.).

This local tax was instituted under the authority of Tax Law § 1202-i (R20) and Local Law No. 2 of the Year 1988, as amended most recently in 2008[1] (R55-67). This local tax is in addition to the state taxes imposed on such services (R20).

[1] Hereinafter referred to as "Local Law 2008-2."

The local tax is variously referred to by the parties by such terms as the "room occupancy tax," (R34) "occupancy tax," (R52, 65), "hotel room tax," (R164) "hotel/motel tax," (R21) "room tax" (R68) and similar terms, depending on the writer or speaker involved. The formal title of the local tax is "the Schuyler County Hotel or Motel Room Occupancy Tax" (R55).

Under the local tax, a "hotel" is defined as "a building, or portion of it, having one or more rooms which is regularly used and kept open as such for the lodging of guests. The term 'hotel' or 'motel' includes an apartment hotel, motor court or inn, boarding house or club, or similar hotel or motel type of accommodations by whatever name designated, whether or not meals are served and shall include those facilities commonly known as 'bed and breakfast' and 'tourist' facilities" (Local Law 2008-2 § [3][1][c]; R56). Under Local Law 2008-2 § (3) (1) (d), "occupancy" is broadly defined as "the use or possession or right to use or possession of any room," (R56) and the consideration for such occupancy is referred to as "rent" (Local Law 2008-2 § (3) (1) (g); R56).

Local Law 2008-2 § (3) (7) charges the Schuyler County Treasurer with the right and duty to administer and collect the local tax (R57). Pursuant to these official duties, the Treasurer is empowered "to make, adopt and amend rules and regulations appropriate to the carrying out of this local law and the purposes thereof" (Local Law 2008-2 § [3] [17] [a] [1]; R64). The Treasurer has the authority "to prescribe methods for determining the rents for occupancy and to determine the taxable and non-taxable rents" (Local Law 2008-2 § [3] [17] [a] [5]). In furtherance of same, the Treasurer is empowered to require that detailed records be kept by the operators of such properties (Local Law 2008-2 § [3][17][a][6]; R64), to demand the production of books and documents (Local Law 2008-2 § [3][18][a]; R64) and conduct hearings to determine the amount of the local tax due (Local Law 2008-2 § [3][11]; R60).

Local Law 2008-2 § (3)(7)(f) further provides that "it shall be presumed that all rents are subject to tax until the contrary is established, and the burden of providing that a rent for occupancy is not taxable…shall be upon the operator" (R58).

The only exemptions provided for in Local Law 2008-2 are for permanent residents (Local Law 2008-2 § [3] [2] [1]; R56) or certain exempt organizations (Local Law 2008-2 § [3] [2] [2]; R56). "Permanent residents" are defined under the local law as "any occupant…for a period of at least thirty (30) consecutive days" (Local Law 2008-2 § [3] [1] [f]; R56). The "exempt organizations" are generally governmental or charitable entities (Local Law 2008-2 § [3] [4] [a]; R57).

On or about November 28, 2012 Schuyler County Treasurer, Gary Whyman ("the Treasurer"), spoke to appellant on the telephone and advised appellant that it appeared the properties' use subjected appellant to the local tax.

Between November 2012 and April 2013, the parties corresponded back and forth regarding the imposition of the local tax, the amount due and related matters (R39-41, 117-124, 164, 166, 171-186).

During this period, appellant asserted that his properties were exempt from the local tax under a "bungalow exception" (R40-41, 164, 166). According to appellant, the "bungalow exception" was created by the state and applied to the local law (R40). Appellant maintained that the "bungalow exception" applied to him because he did not provide "hotel or hotel like services" (R166).

The Treasurer disagreed, pointing out that the state's "bungalow exception" applied only to New York State-administered sales taxes (R168).

The parties also corresponded about the materials necessary to calculate the taxes due and owing (R46, 171-186). Among other things, the Treasurer requested that appellant provide information regarding what rentals might or might not be exempt as "permanent residents" under the local law (R175-176, 182-183).

In April 2013, the Treasurer notified appellant that he was responsible to pay $12,806.55 in taxes for the years 2010-2012, inclusive, under the local tax (R68).

In response, appellant requested an administrative hearing, as provided for under Local Law 2008-2 § 3 (11) (R15). This hearing was held October 18, 2013 (R34).

At the hearing, evidence was presented that appellant's properties were listed and often rented as "short term" rental units (R51), but that some guests would stay for periods in excess of thirty days (R86-116).

At the hearing, appellant's primary argument continued to be that his use of the properties fell under the "bungalow exemption" to the New York State sales tax (R38). Appellant also objected to the retroactive imposition of the local tax (R39) and the fact that the Treasurer had requested various items of proof deemed necessary to calculate the tax, and which appellant considered irrelevant (R40).

The record does not indicate that appellant ever denied that he let his premises for the lodging of guests or received consideration for same.

On or about March 11, 2014 the Treasurer issued a final determination (R73-76). In his final determination, the Treasurer held that appellant owed $6,102.96. The Treasurer calculated this reduced amount based upon appellant's submitted proof and the testimony at the hearing and ultimately agreed that certain of the rentals were exempt under the "permanent resident" exemption contained in the local law (R38, 74).

Thereafter, appellant commenced a CPLR Article 78 proceeding (R12-17).

In its response, Schuyler County asserted that the state enabling legislation creating the local tax was separate and distinct from the statutes imposing the state-administered sales tax (R128-130). Schuyler County set forth the bases under which appellant's properties were subject to the local law (R131). The county also provided justification for requiring sufficient information to calculate the taxes due (R132-134) and opposed appellant's claim that the retroactive application of the local tax was improper (R135).

As part of the Article 78 proceeding, the parties stipulated that the amount of tax, penalties and interest as determined by the Treasurer, totaling $6,102.96, were the presumptively correct amounts if the court determined that appellant's properties were subject to the local tax, that the law could be applied retroactively and that it was not patently unfair to charge the penalties and interest as assessed (R78-79).

By written decision dated September 19, 2014, the Supreme Court (O'Shea, J., presiding), rejected appellant's arguments. The lower court agreed with Schuyler County that appellant's reliance on the "bungalow exception" was misplaced, in that this exception applied only to the state administered sales tax, not local taxes imposed under a different statute (R6). The court further rejected appellant's arguments that imposition of the retroactive tax was unfair (R6) and that the Treasurer's request for supporting documents from appellant was inappropriate (R7).

By written notice, dated November 25, 2014, appellant appealed (R2).

ARGUMENT.

I. The Supreme Court properly upheld Schuyler County's imposition of its local occupancy tax upon appellant's vacation rental properties.

In reviewing an administrative agency determination in an Article 78 proceeding, the court may not substitute its judgment for that of the agency or second-guess its determination where such a determination is neither irrational nor arbitrary and capricious (CPLR 7803[3]; *Rogers v Baum*, 234 AD2d 685 [1996]). Similarly, an agency's interpretation of the statutes it administers must be upheld absent demonstrated irrationality or unreasonableness (*Lorillard Tobacco Co. v Roth*, 99 NY2d 316 [2003]).

"Arbitrary and capricious" action by an administrative agency means willful and unreasonable action without consideration or in disregard of facts, or without determining principle (*Elwood Investors Co. v Behme*, 79 Misc2d 910 [1974]). Once it has been determined that an agency's conclusion has a sound basis in reason the judicial function is at an end (*Mankarios v New York City Taxi and Limousine Com'n*, 49 AD3d 316 [2008]).

For the reasons set forth below, neither Schuyler County nor the Supreme Court acted irrationally, arbitrarily or capriciously in ruling against appellant herein.

A. Schuyler County properly interpreted its local occupancy tax in accordance with the enabling statutes.

Pursuant to Tax Law § 1202-i (1), the State of New York has authorized Schuyler County "to adopt and amend local laws imposing in such county a tax, in addition to any other tax authorized and imposed pursuant to [Article 29], such as the legislature has or would have the power and authority to impose upon persons occupying hotel or motel rooms in such county."

The state enabling statute defines "hotel" and "motel" expansively, noting that the "term 'hotel' or 'motel' shall mean and include *any* facility providing lodging on an overnight basis and shall include those facilities designated and commonly known as "bed and breakfast" and "tourist" facilities (*Id*.)(*emphasis added*).

The primary exemption contained in the state enabling statute is for a "permanent resident," which is defined as "a person occupying any room or rooms in a hotel or motel for at least thirty consecutive days." The state statute also exempts from the tax various governmental and/or charitable entities (Tax Law § 1202-i [5]).

The state enabling statute further provides that the local tax shall be collected and administered by Schuyler County (Tax Law § 1202-i [2]), and that revenues from the local tax are to be paid into the treasury of the county (Tax Law § 1202-i [9]).

Under Local Law 2008-2 § (3)(1)(c), a "hotel" is defined as "a building, or portion of it, having one or more rooms which is regularly used and kept open as such for the lodging of guests. The term 'hotel' or 'motel' includes an apartment hotel, motor court or inn, boarding house or club, or similar hotel or motel type of accommodations by whatever name designated, whether or not meals are served and shall include those facilities commonly known as 'bed and breakfast' and 'tourist' facilities" (Local Law 2008-2 § [3][1][c]; R56). Under Local Law 2008-2 § (3) (1) (d), "occupancy" is broadly defined as "the use or possession or right to use or possession of any room," (R56) and the consideration for such occupancy is referred to as "rent" (2008-2 § (3) (1) (g); R56).

The only exemptions provided for in Local Law 2008-2 are, like the state enabling statute, for permanent residents (Local Law 2008-2 § [3] [2] [1]; R56) or certain exempt organizations (Local Law 2008-2 § [3] [2] [2]; R56).

Local Law 2008-2 § (3) (7) charges the Schuyler County Treasurer with the right and duty to administer and collect the local tax (R57). Pursuant to these official duties, the Treasurer is empowered "to make, adopt and amend rules and regulations appropriate to the carrying out of this local law and the purposes thereof" (Local Law 2008-2 § [3] [17] [a] [1]; R64). The Treasurer has the authority "to prescribe methods for determining the rents for occupancy and to determine the taxable and non-taxable rents" (Local Law 2008-2 § [3] [17] [a] [5]).

Local Law 2008-2 § (3) (7) (f) further provides that "it is presumed that all rents are subject to tax until the contrary is established, the burden of providing that a rent for occupancy is not taxable…shall be upon the operator" (R58).

In the case at hand, it appears largely without dispute that appellant's properties are facilities providing overnight lodging. Appellant leases each of these properties as residential vacation homes, under the name "Seneca Lake Vacation Rentals" (R13). The vacation properties are fully furnished, with bathroom and bedrooms. They are rented out to guests for various time periods, ranging from one day to several months (R13, R51). Appellant generally provides towels and linens (such as sheets and pillowcases) to the guests (R19, 102). These activities are wholly consistent with the definition of a "hotel" contained in the enabling statutes and, further, with the common understanding of a "tourist facility" (*see, e.g.,* 2 *N.Y. Zoning Law & Prac*. § 13:19; Executive Law § 802 [64]).

In fact, appellant's only objection to whether or not his properties are properly termed "hotels" under the relevant statutes is based upon what appellant has termed the "bungalow exception" (R38, 40-41, 164, 166). According to appellant, the "bungalow exception" was created by the state and it applies to the local law (R40). Appellant maintains that the "bungalow exception" applies to him because he did not provide "hotel or hotel like services" (R166).

B. The so-called "bungalow exception" is irrelevant to appellant's properties and the County's local law.

20 NYCRR 527.9 addresses state "sales taxes" on bungalows and hotels, but has no application to Tax Law § 1202-i or to Local Law 2008-2. It interprets Tax Law § 1105 (e) and applies only to state and local sales taxes "that are administered by the Commissioner of Taxation and Finance" (20 NYCRR 527.9[a] [2] [i]). These are taxes that are collected at the state level by the Commissioner of Taxation and finance (Tax Law § 1148). After collection, "[t]he State Tax Commissioner certifies the amounts that should be distributed to local governments, and those amounts are then paid to the local governments by the State Comptroller" (*New York State Comptroller, Division of Local Government and School Accountability, Local Government Sales Taxes in New York State: 2015 Update,* p. 2 [2015]).

In contrast, the occupancy tax at issue is administered locally. It was created pursuant to Tax Law § 1202-i. That statute falls under the ambit of Article 29, Part I, Subpart A of the Tax Law, and is denoted as the class of local taxes "administered by cities, counties and school districts." Tax Law § 1202-i (2) specifies that the local occupancy tax "may be collected and administered by the Schuyler County legislature, or other fiscal officers of Schuyler County." The statute further empowers the county to "provide for the filing of returns and the payment of the tax" (Tax Law § 1202-i [4]) and to account of the cost of the county's administration in its distribution of the tax (Tax Law § 1202-i [9]). Such local occupancy taxes have been recognized by the Commissioner of Taxation and Finance as taxes that are "administered locally" (*Hotel and Motel Occupancy, Tax Bulletin ST-331* [TB-ST-331] [May 9, 2012]).

Indeed, as appellant concedes in the record, Schuyler County's local tax is "in addition to the state taxes imposed on such services" (R20).

Finally, in interpreting 20 NYCRR 527.9, the Commissioner of Taxation and Finance has stated that its interpretation of the state "bungalow exception" "does not address the taxability of… charges under a hotel occupancy tax imposed and administered by a locality itself" (State of New York, TSB-A-15(38) S, 2015 WL 8680280). The Commissioner has further advised that local occupancy taxes, such as Schuyler County's, are "administered locally" and questions or interpretations regarding same should be referred to the local taxing jurisdiction (*Hotel and Motel Occupancy, Tax Bulletin ST-331* [TB-ST-331][May 9, 2012]). As such, the State has deferred to Schuyler County, and similarly situated counties, the right, power and duty to interpret their own local occupancy taxes.

Accordingly, there is no applicable "bungalow exception" under the applicable laws and Schuyler County properly applied its definition of a hotel to appellant's property. Similarly, insofar as Schuyler County's interpretation of its own laws was wholly rational and reasonable, it cannot be said that the Supreme Court was arbitrary or capricious in its own ruling in this matter.

C. The lower court properly interpreted Schuyler County's local occupancy tax as a form of use tax.

Tax Law § 1101(7) (7) defines "use" as "[t]he exercise of any right or power over tangible personal property or over any of the services which are subject to tax … pursuant to the authority of article twenty-nine of this chapter."

Article Twenty-nine of the Tax Law, as noted above, relates to taxes authorized for cities, counties and school districts, including Schuyler County's local occupancy tax (Tax Law § 1202-i).

It has been held that a tax on use of real estate is not a tax on real estate itself (*Hunter v Warren County Bd. of Supervisors*, 21 AD3d 622 [2005]). Instead, an occupancy tax is a tax "imposed … those who acquire lesser rights to *use* someone else's real estate" (*Ampco Print.-Advertisers' Offset Corp. v City of New York*, 14 NY2d 11 [1964]) (*emphasis added*). Furthermore, "occupancy" may be properly defined under such a tax as "the use …or the right to the use … any room or rooms in a hotel." (*Parker Meridien Assoc. v Grayson*, 159 AD2d 394 [1990]).

Therefore, an occupancy tax may be properly considered a tax on "use" of real estate.

It is true that, for purposes of state-administered sales taxes, Schuyler County's local occupancy tax would not be the sort of "compensating use tax" typically described in the state statutes (*See, e.g.,* Tax Law § 1110; 20 NYCRR 531.1).

However, as noted above, Schuyler County's occupancy tax is a locally administered tax and the county is empowered to issue its own interpretations of same, consistent with Tax Law § 1202-i and Local Law 2008-2.

Schuyler County has interpreted the local occupancy tax as a use tax (R159). Judicial deference should be accorded an agency's interpretation of a statute where that statute employs technical terms within the agency's expertise (*Judd v Constantine*, 153 AD2d 270 [1990]). Accordingly, the lower court cannot be said to have acted arbitrarily or capriciously in upholding the treasurer's interpretation of the term "use."

II. The retroactive application of the local tax against appellant is neither unjust nor inappropriate.

As noted above, Local Law 2008-2 § (3) (7) charges the Schuyler County Treasurer with the right and duty to administer and collect the local tax (R57). Pursuant to these official duties,

the Treasurer is empowered "to make, adopt and amend rules and regulations appropriate to the carrying out of this local law and the purposes thereof" (Local Law 2008-2 § [3] [17] [a] [1]; R64). The Treasurer has the authority "to prescribe methods for determining the rents for occupancy and to determine the taxable and non-taxable rents" (Local Law 2008-2 § [3] [17] [a] [5]).

The state enabling statute (Tax Law § 1202-i [8]) provides that, "where no [local occupancy tax] return has been filed as provided by law the tax may be assessed at any time." In most other circumstances, the tax may be assessed up to three years later (*Id.*). Similar language appears in Schuyler County's local law (Local Law 2008-2 § [3] [22] [b]).

In the case at hand, appellant had been operating his vacation rental business for approximately five years (R19), but had never filed a tax return with the treasurer's office (R39), due to his belief that the "bungalow exception" excused doing so (R164). As no returns were filed for five years, the County Treasurer was justified in assessing the tax for that entire time.

Furthermore, even if the County Treasurer's actions amounted to a change in policy, as appellant concedes, such retroactive change in the interpretation of a tax statute is not per se invalid (*Irish Intl. Airlines v Levine*, 41 NY2d 819 [1977]; *Automobile Club v Commissioner of Internal Revenue*, 353 US 180 [1957]). Taxing statutes, which by their terms are retroactive for short periods, may be held valid, unless carried so far back as to be palpably unjust (*People ex rel. Beck v Graves*, 280 NY 405 [1939]). Similarly, where the change involves "correction of a prior, albeit long-standing, oversight," the policy will be upheld (*Am. Tel. & Tel. Co. v State Tax Com'n*, 61 NY2d 393 [1984]).

It is difficult to see how a change in policy or correction of an oversight going back a mere five years can be considered "palpably unjust." Indeed, in *Am. Tel. & Tel. Co. v State Tax*

Com'n, supra, the court declined to declare "palpably unjust" a retroactive correction of a policy issued approximately eighty years earlier.

Furthermore, even though the statute authorized the County Treasurer to assess the tax for a full five years, the County Treasurer elected to assess only the prior three years' taxes (R75).

As such, appellant's claim in this regard is without merit.

To the extent that appellant argues that Schuyler County's definition of "hotel" is "vague and ambiguous," and must be construed against the county, this claim is unavailing.

The law does not require impossible standards of specificity (*People v Kramer*, 10 Misc2d 473 [1958]). Statutory language is to be read in accordance with its ordinary and accepted meaning (*Sife v Board of Ed. of City of New York*, 65 Misc2d 383[1970], *affd* 39 AD2d 841), unless the legislature by definition or from the rest of the context of the statute provides a special meaning (*Matter of Daniel C.*, 99 AD2d 35 [1984], *affd* 63 NY2d 927).

As noted above, under the local law, a "hotel" is defined as "a building, or portion of it, having one or more rooms which is regularly used and kept open as such for the lodging of guests.... and shall include those facilities commonly known as and 'tourist' facilities" (Local Law 2008-2 § [3][1][c]; R56). The only exemptions provided for are for permanent residents (Local Law 2008-2 § [3] [2] [1]; R56) or certain exempt entities (Local Law 2008-2 § [3] [2] [2]; R56). Such a definition is neither vague nor ambiguous, is sufficiently detailed and is similar to at least one common dictionary definition of the term: "a place that has rooms in which people can stay especially when they are traveling" (Merriam-Webster, Incorporated, *http://www.merriam-webster.com/dictionary/hotel [accessed 12/17/15]*).

In fact, if any ambiguity exists, it was created by appellant in this case. As noted above, appellant has never denied that he regularly let his premises for the lodging of guests and received consideration for same. Instead, appellant assumed, based upon alleged conversations with others, that he enjoyed the benefit of a "bungalow exception" that was not written into the statute (R39). While it is true that appellant allegedly spoke with a prior county treasurer about the exception, the record appears to indicate that this conversation occurred only after he received notice that he was subject to the tax (*Id*.). Finally, as noted more fully above, even if the conversation with the prior treasurer signals a change in policy, such change is allowed by the applicable law.

Accordingly, the Supreme Court properly upheld Schuyler County's application of the law to appellant for a three-year period.

III. The lower court properly denied appellant's objection to the Treasurer's demand for additional information.

A. The challenged action was not a final determination and, further, the issue is now moot.

In order for an administrative decision to be ripe for judicial review in a CPLR Article 78 proceeding, the challenged action must be final (CPLR 7801[1]). An action is considered to be final when it represents a definitive position on an issue which imposes an obligation, denies a right or fixes some legal relationship, resulting in an actual, concrete injury (*Matter of Gordon v Rush*, 100 NY2d 236 [2003]).

Appellant alleges that the Treasurer's demand for various items of proof, in connection with calculating the amount of the local tax due, was arbitrary and capricious. These items were

demanded, appellant maintains, so that Schuyler County could determine which rentals were exempt under the "permanent resident" exception in the local law.

However, the Treasurer ultimately deemed the demanded material unnecessary (R73) and reduced the tax due from appellant (R75). Later, as part of the Article 78 proceeding, the parties stipulated that the amount of tax, penalties and interest as determined by the Treasurer, totaling $6,102.96, were the presumptively correct amounts if the court determined that appellant's properties were subject to the local tax, that the law could be applied retroactively and that it was not patently unfair to charge the penalties and interest as assessed (R78-79).

As such, appellant was no longer "injured" by the Treasurer's demand for these items of proof and the lower court properly dismissed this claim.

Furthermore, inasmuch as appellant is no longer aggrieved regarding this issue, for the reasons stated above, the matter must be dismissed as moot (*see, e.g., Matter of Terry v Goord*, 14 AD3d 766 [2005]).

B. The Treasurer's demand for proof was appropriate under the statute.

Under Schuyler County's local law, the Treasurer has the authority "to prescribe methods for determining the rents for occupancy and to determine the taxable and non-taxable rents" (Local Law 2008-2 § [3] [17] [a] [5]). In furtherance of same, the Treasurer is empowered to require that detailed records be kept by the operators of such properties (Local Law 2008-2 § [3][17][a][6]; R64), to demand the production of books and documents (Local Law 2008-2 § [3][18][a]; R64) and conduct hearings to determine the amount of local tax due (Local Law 2008-2 § [3][11]; R60).

As discovery statutes, these provisions within the local law should be construed liberally, and there should be disclosure of any material that is even arguably relevant (1 Modern New York Discovery § 3:6 [2d ed.])

As noted above, appellant objects to the Treasurer's demand for various items of proof, so that Schuyler County could determine which rentals were exempt under the "permanent resident" exception in the local law. Appellant was requested to provide bank statements, confirming deposits for rental income (R118-119). Appellant maintains this was unnecessary, in that appellant had provided various items to show which revenues which were exempt under the "permanent resident" exemption. These items included a spreadsheet prepared by appellant (R84-85), copies of long-term leases (R86-116), and appellant's Schedule E Tax Form 1040 (R69-72). His bank records, appellant maintains, were "irrelevant" and, therefore, demand for discovery of same was an abuse of discretion.

Evidence is "relevant" if it tends to prove the existence or non-existence of a material fact, that is, a fact directly at issue in case (*Johnson v Ingalls*, 95 AD3d 1398 [2012]). Here, the Treasurer initially demanded this evidence because he believed the bank statements would reflect approximately when the rental funding came in and roughly the valuation therein (R118). This information was related to calculating the correct amount due and determining what exemptions appellant could claim (R53). The Treasurer made this demand because of concerns that the spreadsheet, prepared by appellant, could be inaccurate (R122).

Accordingly, the information sought by the County Treasurer related to the material fact at issue in the case (the amount of tax due) and was wholly relevant.

Finally, it is noted that, on appeal to the Appellate Division, due deference is to be afforded to the lower court's discretionary determinations regarding discovery (*Don Buchwald &*

Associates, Inc. v Marber-Rich, 305 AD2d 338 [2003]). Therefore, a lower court's determination granting or denying disclosure should not be disturbed absent an improvident exercise of that discretion (*MacDonell v PHH Mortg. Corp.*, 93 AD3d 700 [2012]). Given the above, there was no improvident exercise of discretion by the Supreme Court, and its decision should stand.

CONCLUSION.

For all the foregoing reasons, it is respectfully demanded that the appeal herein be denied and dismissed in its entirety and the decision of the Supreme Court upheld.

Dated: December 18, 2015

Respectfully submitted,

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