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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF HIGHBRIDGE BROADWAY, LLC,

Appellant,

-against-

No. 49

ASSESSOR OF THE CITY OF
SCHENECTADY,

Respondent.

20 Eagle Street
Albany, New York 12207
March 22, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on the calendar
2 is number 49, Matter of Highbridge against the City
3 of Schenectady.

4 Counsel.

5 MR. MERCY: May it please the court, my
6 name is Brian Mercy and I represent the appellant,
7 Highbridge Broadway, LLC. And Your Honors, I would
8 like to reserve two minutes for rebuttal, if I may.

9 CHIEF JUDGE DIFIORE: Certainly.

10 MR. MERCY: Thank you.

11 May it please the court. This is a case that
12 resolve - - - revolves around an exemption, not, as it's
13 been presented, as an assessment. Section 485-b of the
14 RPTL provides a business exemption which covers a ten-year
15 period for a qualifying business. The RPTL 485 - - -

16 JUDGE STEIN: Isn't the exemption based on
17 the assessment?

18 MR. MERCY: Well, it's an exemption from
19 the assessment, based on improvements.

20 JUDGE STEIN: Right, and that - - - but
21 isn't that what you were challenging, was the
22 assessment upon which the exemption was based?

23 MR. MERCY: Well, we are challenging the
24 amount of money that's ultimately paid. But the
25 assessment is a static - - - is a yearly - - - can

1 change yearly, where the exemption, under the
2 statute, carries a ten-year period.

3 JUDGE ABDUS-SALAAM: But is it the
4 assessment that changes yearly, counsel, on the
5 property improvements or just the property?

6 MR. MERCY: No. The exemption is for the
7 property improvements - - -

8 JUDGE ABDUS-SALAAM: Right.

9 MR. MERCY: - - - whereas the assessment
10 may change year to year on other market values.

11 JUDGE GARCIA: Can I ask on that - - - on
12 that point?

13 MR. MERCY: Yes.

14 JUDGE GARCIA: So if you get this
15 assessment - - - if you get this exemption increased,
16 right, as it happened here, and then the - - - you
17 get the ruling; the next year, the municipality says,
18 you know what, great, you increased it from 10,000 to
19 100,000, we're going to increase your assessment
20 100,000 dollars; can they do that?

21 MR. MERCY: I think they can attach the
22 assessment, but the exemption under 485-b is not
23 challengeable other - - - for the nine years. The
24 exemption base, which is the exemption which is
25 awarded on a 485-b application, becomes the base

1 amount for year 1. And years 2 through 9, the
2 statute governs it, and autocorrects it and self-
3 corrects the exemption coming down.

4 JUDGE FAHEY: Is it - - -

5 JUDGE STEIN: Unless there is a fifteen-
6 percent change, right?

7 MR. MERCY: Of course.

8 JUDGE STEIN: So there are circumstances
9 under which that could change, it's not a -- not an
10 absolute - - -

11 MR. MERCY: Certainly, but that's not what
12 happened in this case here. So the assessment may
13 change, but what 485-b does is it provides some
14 certainty that for the ten-year period, that
15 exemption amount will remain the same. Increasing -
16 - -

17 JUDGE PIGOTT: Are you familiar with - - -
18 there is a similar one for farm equipment - - - not
19 farm equipment, but for silos and things like that; I
20 think it's 481. In that statute, it says, and you
21 need not apply - - - it will apply for ten years and
22 you need not recertify. I couldn't find any similar
23 provision with respect to this one that said you
24 don't have to. Because I get your point, you know,
25 there is veteran's exceptions, there is senior

1 citizens, there's a lot of exemptions that just
2 exist, you know, and you can assume it's always
3 there. When I looked at the one having to do with
4 agriculture and compared it to this one, there seemed
5 to be that difference, that under the agriculture
6 one, they specifically said you don't have to reapply
7 for this on an annual basis, and I didn't find that
8 in this one.

9 MR. MERCY: Well, this statute, I think
10 it's implied that it runs for ten years, because it
11 addresses a firm ten-year period. It's clearly not
12 something that is an annual application.

13 JUDGE PIGOTT: No, that's what I'm saying;
14 the agricultural one is a firm ten-year period, and
15 it says that you don't have to reapply for it on an
16 annual basis. But there's nothing in this one that
17 says, and you don't have to apply for it on an annual
18 basis. And I can understand where if you sold the
19 building, I don't know if that makes a difference,
20 you could see - - - it's almost a policy argument, it
21 seems to me, as to whether or not, you know, you're
22 right that it's a ten-year exemption, period, end of
23 story, or that you have to reapply each year.

24 MR. MERCY: Well, the statute implies it's
25 for ten years. What would be the purpose of applying

1 every year when the statute covers a ten-year period;
2 and that's when you - - -

3 JUDGE PIGOTT: Could you sell the building?

4 MR. MERCY: Well, that's a possibility, but
5 in this particular instance, and especially referring
6 to the Third Department case in Scellen, the
7 argument's there that the school district wasn't put
8 on notice, that they weren't able to prepare it, that
9 they weren't able to plan for the future. A 485-b
10 exemption covers the ten years. The statute does not
11 say that you do not need to reapply every year - - -

12 JUDGE FAHEY: Can I just - - -

13 MR. MERCY: - - - but it doesn't say you
14 need to apply every year.

15 JUDGE FAHEY: Can I just follow up on that;
16 am I correct in characterizing your - - - your
17 argument that 727 and 485-b are irreconcilable; is
18 that - - - do you agree with that?

19 MR. MERCY: I do. I think whether you - -
20 -

21 JUDGE FAHEY: Let me just finish - - - just
22 finish that - - - see if I have it right in my head,
23 then you can tell me where you disagree with this.
24 727 applies to the assessed valuation of a property.
25 So let's say a property is worth a hundred dollars,

1 and once - - - if you go to court and get an order
2 and say it's with a hundred dollars, and 727 says
3 they can't change it for three years; that's the
4 assessed value, that's what the property is worth,
5 and that's what we base our tax rate on.

6 The 485-b tax abatement reduces the va - -
7 - what you have to pay in that assessment as a policy
8 matter by fifty percent with a five-percent increase
9 over ten years' period. The assessment could change,
10 it could go up and down, it's - - - as Judge Garcia
11 pointed out, but - - - but the abatement itself and
12 the incentive will still remain in place; is that how
13 you see it? There are two different things. So the
14 freeze doesn't - - - only applies to the valuation of
15 the property for taxing purposes, but the abatement
16 is an entirely different thing to encourage
17 investment. Is that - - - do I have it right?

18 MR. MERCY: Yes.

19 JUDGE FAHEY: All right.

20 MR. MERCY: A 727 - - -

21 JUDGE FAHEY: So - - -

22 MR. MERCY: 727 is a three-year freeze,
23 which prevents parties from litigating annually.

24 JUDGE FAHEY: So you're not - - - you're
25 not interested in getting to freeze; that's

1 irrelevant here, right?

2 MR. MERCY: Correct.

3 JUDGE FAHEY: Right. So what you are
4 interested in doing is saying, we don't have to apply
5 every year. And the policy response is that the
6 school board has to make a budget and they should be
7 able to know how much they are going to get and they
8 are unable to do this unless you apply on a yearly
9 basis.

10 MR. MERCY: Correct. That is the argument,
11 but they will be able to know because it's clear from
12 the 485-b exemption that it's a ten-year exemption.

13 JUDGE STEIN: Actually, isn't it a more
14 narrow argument, and maybe I should be asking them
15 this, but I don't - - - as I understand it, they're
16 not saying that you need to reapply every year. What
17 they're saying is, is that in order to protect your
18 right to get - - - to get the benefit of that
19 exemption statute in the first place, you have to
20 reapply every year that your initial application is
21 pending, so that once the determination is made, it's
22 essentially retroactive to cover all of those years;
23 isn't that really what the argument is? Once it's
24 established, I don't - - - I don't understand their
25 argument as saying that you still have to go back

1 every year and do this.

2 MR. MERCY: Correct. It's notice upon
3 notice upon notice. The notice is put forth at the
4 485-b application window. They - - - in - - - in
5 this particular case, in the Supreme Court - - -

6 JUDGE FAHEY: But Judge Stein has correctly
7 stated it, I believe. I think that's - - - that's
8 the nub of it, is while the application is pending.
9 I believe that's correct.

10 MR. MERCY: Right. And what happened in
11 this case, there was a 485-b exemption which was
12 granted. Ultimately, it came down to a challenge to
13 the figure of the 485-b exemption, in which case, the
14 school district was put on notice and they were
15 served; they chose not to intervene and they waived
16 their rights.

17 JUDGE ABDUS-SALAAM: So from your
18 perspective, counsel, the - - - it was already
19 resolved, it wasn't pending; what was pending was the
20 amount, is that what you're saying?

21 MR. MERCY: That is correct. The 485-b
22 exemption was granted. The original figure was
23 10,000-some-odd dollars. Upon litigation, it was
24 proven that the assessor did improper math and the
25 calculation came out to be a much higher figure, 176

1 - - - 100,000 (ph.) dollars. So while that was
2 pending, the school district was on notice of the
3 exemption being approved and the challenge to the
4 exemption base. So to argue that they weren't put on
5 notice or need annual notice, when the statute
6 clearly runs for ten years, it's not necessary.

7 JUDGE ABDUS-SALAAM: Wouldn't they need to
8 know the exact amount, though, that the exemption
9 would apply to and then have to calculate for ten
10 years what it is?

11 MR. MERCY: That's correct. That's how the
12 485-b works and here, what's unique about this
13 section, in this case here, is that the 485-b was
14 granted, however, the exemption, the base exemption
15 amount for year 1 was challenged. It is true that
16 when you change the base exemption amount from year
17 1, the statute will autocorrect and self-correct
18 itself for the remaining nine years.

19 JUDGE RIVERA: But am I misunderstanding -
20 - - don't you - - - the school district will never
21 know until you have a judgment anyway, so regardless,
22 it doesn't matter if you're giving notice over three
23 years; all you do is put them on notice that there
24 may be something coming down the pipe. You won't
25 know the amount until the judgment anyway.

1 MR. MERCY: That is correct.

2 CHIEF JUDGE DIFIORE: Counsel, the
3 improvements that were made by Highbridge were
4 completed in 2005, correct?

5 MR. MERCY: Right.

6 CHIEF JUDGE DIFIORE: And the statute
7 provides that the application for the exemption has
8 to be made within one year of completion of the
9 improvement, correct?

10 MR. MERCY: Correct.

11 CHIEF JUDGE DIFIORE: And the Supreme Court
12 decision notes that the application was filed in
13 2008, I believe.

14 MR. MERCY: Well, I think the - - - the
15 485-b exemption was approved in 2008.

16 CHIEF JUDGE DIFIORE: I'm sorry?

17 MR. MERCY: The 485-b exemption was
18 approved in 2008. There were three years of
19 litigation which ultimately, my client did not - - -
20 did not appeal, but they also did not receive the
21 benefit of 485-b for the first three years; they did
22 not receive - - -

23 CHIEF JUDGE DIFIORE: You're saying they
24 applied within the one-year period as provided?

25 MR. MERCY: Yes, they applied within the

1 one-year period, which caused them to receive the
2 485-b exemption which was placed in the tax rolle,
3 and then the subsequent litigation was to affect the
4 number.

5 CHIEF JUDGE DIFIORE: Where is that in the
6 record? Where is that? Where do I find that?

7 MR. MERCY: I - - - I - - - off the top of
8 my head, I think when you look at it - - - when you
9 look at Judge Reilly's decision from Supreme Court,
10 it references the fact that the first three years of
11 the statutory ten-year scheme was not granted to my
12 client based on the litigation of trying to get to
13 the 485-b exemption figure.

14 CHIEF JUDGE DIFIORE: Thank you, counsel.

15 MR. MERCY: Thank you.

16 CHIEF JUDGE DIFIORE: Counsel.

17 MR. NYE: Good afternoon, may it please the
18 court. My name is Jonathan Nye, I represent the
19 Schenectady City school district.

20 As a preliminary matter, Judge DiFiore - - -

21 JUDGE ABDUS-SALAAM: Doesn't your
22 adversary's point make sense that you have to
23 separate assessments from exemptions, and that what
24 we're talking about here is an exemption that you
25 don't - - - you shouldn't have to apply for or do

1 something about every year, but you get it for ten
2 years.

3 MR. NYE: Yes, Your Honor. I agree to a
4 point, but not on the critical point. The district
5 does not contest that once the exemption is applied
6 for and granted, it stays in place; there is no
7 reason, no need to file annually to keep the
8 exemption in place. What there is a need to do is to
9 challenge an assessment that has become final and
10 unchallenged, and had taxes levied on it, and taxes
11 paid with no claim for a refund; that's the issue.

12 The issue is whether the school district is
13 obligated to make a refund on taxes that were paid
14 with respect to an assessment. It was never grieved,
15 never challenged, and the payment of taxes was never
16 made under protest.

17 JUDGE ABDUS-SALAAM: But as - - -

18 JUDGE GARCIA: But don't you want things
19 both ways on that argument? I mean, you don't - - -
20 you want it not to be an assessment at one stage
21 where it applies automatically later, but it - - - so
22 it's not an assessment for purposes of 727, right.
23 It's in an - - -

24 MR. NYE: Your Honor, it's not an
25 assessment for purposes of 727 because 727 expressly

1 states that an exemption, an assessment that involves
2 a partial exemption, is outside the scope of the
3 statute. So I - - -

4 JUDGE GARCIA: Right, but then you want to
5 treat it like an assessment for filing every year so
6 the school district does - - -

7 MR. NYE: Well, I - - - I do, Your Honor,
8 because this was a proceeding brought under Article 7
9 of the real property tax law. By definition, an
10 improperly calculated partial exemption is an
11 excessive assessment within the meaning of that.

12 JUDGE PIGOTT: Did you appear at that - - -
13 during the Article 7?

14 MR. NYE: Did the school district?

15 JUDGE PIGOTT: Yeah.

16 MR. NYE: No, Your Honor.

17 JUDGE PIGOTT: Well, then how do you
18 understand - - -

19 MR. NYE: There are a couple - - - a couple
20 of reasons for that.

21 JUDGE PIGOTT: Well, regardless of the
22 reason, I could remember when the statute was
23 changed, when the school districts got no notice - -
24 -

25 MR. NYE: Correct.

1 JUDGE PIGOTT: - - - that it was just a
2 fight between the taxpayer and the assessor, and the
3 school districts complained, and legitimately so;
4 they're saying, we're getting - - - you know, we're
5 getting notice that taxes have been reduced three
6 years beyond, you know, we've already spent that
7 money. So we want to be put on notice of these
8 things so we can prepare in the event that there is a
9 reduction.

10 So, had you been there on Article 7, you
11 know, at the time, couldn't you have made the
12 arguments that you are now making to us, to the court
13 that made the determinations that you are now
14 arguing?

15 MR. NYE: Actually, Your Honor, we wouldn't
16 have been able to make that argument. We would've
17 made Judge DiFiore's argument which is they shouldn't
18 have had the exemption in the first place because
19 they were untimely.

20 JUDGE PIGOTT: Right.

21 MR. NYE: This exemption should never have
22 been granted.

23 JUDGE PIGOTT: Right, and you didn't make
24 that argument.

25 MR. NYE: The district wasn't there, and we

1 made the judgment that that was an error made by the
2 court; it wasn't a jurisdictional issue, as is the
3 refund question. So the school district runs the
4 risk - - -

5 JUDGE RIVERA: So what is the additional
6 information you're saying is necessary to have with
7 these additional notices that you don't get off that
8 first notice?

9 MR. NYE: The district did not have notice
10 that the taxes that were paid to it for 2009, 2010,
11 and 2011 were subject to refund. And the reason that
12 that is a very critical piece of information to have,
13 is that districts need to be able to prepare, be able
14 to budget - - -

15 JUDGE PIGOTT: Yeah, but that's like - - -

16 JUDGE RIVERA: But what if you got the
17 first notice that's telling you they are seeking the
18 exemption, don't you go back and say, well, we're
19 going to have to see what happens because this - - -
20 this may apply, and we may end up with a situation
21 where - - -

22 MR. NYE: The problem with - - -

23 JUDGE RIVERA: - - - there's going to be
24 an overpayment.

25 MR. NYE: I believe there's a practical

1 response to that, Your Honor.

2 JUDGE RIVERA: Uh-huh.

3 MR. NYE: And that is, in any given year, a
4 school district may get dozens of petitions.

5 JUDGE RIVERA: Uh-huh.

6 MR. NYE: And it looks, it has to make
7 judgments about what to do. School districts have
8 very different, you know, policies about when they
9 intervene and not.

10 JUDGE ABDUS-SALAAM: Counsel, don't - - -

11 MR. NYE: But as a practical matter, what
12 often happens is they wait, because they know that
13 many of these petitions are going nowhere, it means -
14 - -

15 JUDGE PIGOTT: But isn't that too bad? I
16 mean, Mr. and Mrs. Kettle go in and say, by the way,
17 we were - - - yeah, we were entitled to an old age
18 exemption and we didn't get it for the past three
19 years. And you decide you're not going to appear,
20 and then somebody gives them their exemption for the
21 past three years, and you got to give them back 150
22 bucks; you don't care.

23 But if you're not there to say, wait a
24 minute, Mr. Mrs. Kettle are not over the age of
25 sixty-five and are not entitled to this, you can't be

1 heard and then complain that they got that exemption.
2 And you can't make Mr. and Mrs. Kettle apply every
3 year.

4 MR. NYE: And - - - and I wouldn't say that
5 they needed to. And the district isn't making the
6 argument that Highbridge did not earn its entitlement
7 to an exemption. They've been receiving it ever
8 since. What the district's argument is simply, is
9 that the court lacked jurisdiction over the 2009,
10 2010, and 2011 assessments. And therefore, the only
11 statutory mechanism that can be used to compel a
12 refund is Section 726 of the Real Property Tax Law,
13 which - - -

14 JUDGE ABDUS-SALAAM: Counsel, don't the
15 municipalities have the same argument, and in this
16 case, after the exemption was awarded, the
17 municipality gave the refunds.

18 MR. NYE: They - - - they - - -

19 JUDGE ABDUS-SALAAM: So, I'm unclear why
20 the school district should be - - -

21 MR. NYE: The assessor had that argument.
22 And - - -

23 JUDGE ABDUS-SALAAM: Didn't make it.

24 MR. NYE: - - - and didn't make it.

25 JUDGE PIGOTT: And you weren't there to

1 make it.

2 MR. NYE: I wasn't - - - I wasn't
3 representing the - - - the assessor.

4 JUDGE PIGOTT: Not you personally, but I
5 mean, the school board wasn't there to make it
6 either.

7 MR. NYE: They weren't, but there is an
8 even more complicating factor in this case. And that
9 is, the 2008 assessment, for peculiar reasons, was
10 not used by the school district for any purpose. So
11 any petition that the district received in that year
12 challenging the 2008 assessment, they would have
13 said, this is not relevant to us because we didn't -
14 - - we didn't and we will not ever levy taxes on that
15 assessment.

16 JUDGE RIVERA: Understood. But by statute,
17 what they are asking for covers a decade.

18 MR. NYE: They are asking that,
19 potentially.

20 JUDGE RIVERA: Multiple years, right?

21 MR. NYE: And that is actually, I think,
22 the problem with the rule of law they're asking for.
23 They are suggesting that on any 485-b exemption or an
24 equivalent exemption, one that follows there the same
25 ten year or more pattern, challenge can be made in

1 year 1, the taxpayer can sit and do nothing for four
2 years, file a simple note of issue, and then do
3 nothing for six more years; no notice, no challenge,
4 no nothing of any assessment in the interim. And
5 then at the tenth year, they move for summary
6 judgment, and all of a sudden, claim entitlement to
7 refunds for all the preceding years.

8 JUDGE PIGOTT: Well, there's two answers to
9 the - - -

10 JUDGE GARCIA: Why would they ever want to
11 do that? I mean, wouldn't they want their money?

12 MR. NYE: What they - - - would they want
13 to? I can't speculate, but that is a possibility.

14 JUDGE GARCIA: That's not really a valid
15 point.

16 MR. NYE: Your Honor, one of the reasons -
17 - -

18 JUDGE GARCIA: I mean, why would any
19 taxpayer want to do that?

20 MR. NYE: One of the reasons that the law
21 was changed to require notice of issue at the end of
22 at least four years, is that petitioners were very
23 often filing year after year, doing nothing, and then
24 when they had a critical mass of petitions, then they
25 would move and they had a great deal of leverage over

1 the municipality.

2 JUDGE GARCIA: You could do that now; you
3 could file year after year and exhaust your
4 administrative resume - - - remedies year after year
5 and still do this. It's only the filing that you're
6 saying they have to do; they don't have to go for a
7 judgment.

8 MR. NYE: Well, that is correct. But - - -

9 JUDGE GARCIA: You could just do that for
10 ten years and exhaust their administrative remedies,
11 which I'm guessing would be exhausted.

12 MR. NYE: But if they - - - if they had
13 filed, the district has the legal entitlement to put
14 monies in reserve, because - - - because it can key
15 off those petitions - - - in fact I shouldn't say it
16 can, it must. The district cannot money in reserve
17 unless it has identified specific petitions for a
18 specific assessment roll. And this district was
19 deprived of any opportunity to do that.

20 JUDGE GARCIA: But that goes back to the
21 point that's been made already, which is once you see
22 this petition coming, and it has this ten-year
23 lifespan, you can assess the value of it and the
24 value of it over the time that this exemption would
25 apply.

1 MR. NYE: You're - - - you're - - -

2 JUDGE GARCIA: So you're saying we don't
3 have to do that. And that's why we don't have to put
4 anything in escrow or we can't put anything in
5 escrow. But if you look at it the other way and say,
6 well, you should have to do that, then why couldn't
7 you make that same judgment?

8 MR. NYE: Because - - - because under the
9 Education Law, they're not entitled to do that; they
10 are audited every year, and the Commissioner of
11 Education looks to see what has been put in reserve,
12 and for what purposes, and how long has it been
13 there.

14 JUDGE GARCIA: But I don't really
15 understand that. So the commissioner would look at
16 did they file another petition so this thing is still
17 alive?

18 MR. NYE: Districts are supposed to
19 maintain a log of petitions filed and they are
20 supposed to segregate all the monies that they hold
21 in reserve year by year, keyed to petitions. And if
22 they fail to do that, citizen taxpayers can bring a
23 proceeding before the Commissioner of Education.

24 JUDGE PIGOTT: But this is because - - -
25 this is bec - - - I'm over here - - - this is because

1 you got to - - - you got to rely on the assessor.
2 You're kind of an innocent bystander to these things;
3 at least that was the argument that you used.

4 MR. NYE: Uh-huh.

5 JUDGE PIGOTT: Sometimes, town taxes go
6 down a very little bit on one of these things, and a
7 big bit, you know, with respect to - - - you can be
8 the heaviest part of the assessment. But shouldn't
9 that require you then to pay attention, and if - - -
10 and if the town or the city isn't doing what it
11 should, to take some action rather than non-
12 appearance?

13 MR. NYE: Yes. That is a slippery slope,
14 and the problem is that very often school districts
15 do have, you know, the lion's share of the tax
16 burden, and it's easy for a municipality to sort of
17 push the problem onto the district. But - - -

18 JUDGE STEIN: What would be different if
19 you had actually appeared in the action?

20 MR. NYE: If we had actually appeared?

21 JUDGE PIGOTT: Appeared in the action, yes.

22 MR. NYE: I don't know that we could have -
23 - - that we really would have appeared, because we
24 didn't use that assessment in that - - - for any
25 purposes.

1 JUDGE STEIN: But that sounds like that was
2 a little bit of a fluke. Let's say it didn't happen
3 that way, that you did use the 2008 roll.

4 MR. NYE: If a district - - - understood.
5 If the district had appeared, it would not have made
6 any difference up to the point of summary judgment,
7 at which, I hope the district would have said, you
8 are not entitled to summary judgement for years you
9 didn't challenge. You can get the exemption
10 otherwise for the future years.

11 But the critical piece that I - - - that I
12 want to stress is that it is - - - this is a refund
13 question. There's only one statutory mechanism to
14 provide for the refund, and that is Section 726, and
15 that is keyed to refunds that flow from an assessment
16 properly before the court that has been corrected by
17 the court. And these assessments were never before
18 the court.

19 Thank you, Your Honor.

20 CHIEF JUDGE DIFIORE: Thank you.

21 Counsel.

22 MR. MERCY: Thank you, Your Honors.

23 Judge, it is true this is a refund case, and the
24 County of Schenectady issued their refund, and the City of
25 Schenectady issued their refund; however, the school

1 district wants a separate set of standards as it applies
2 to the school district.

3 JUDGE RIVERA: What about the education law
4 argument; they say they are not able to, as a result
5 of the statute, to actually plan for the future,
6 which is the point of this - - - this notice, so that
7 they can adequately determine what's an appropriate
8 budget, forewarned that there may be less money
9 coming.

10 MR. MERCY: Well, they are arguing both
11 sides; they're saying, we need all this notice so we
12 can plan, but we can't plan in any event. So what
13 the solution is to that is a deferral back to
14 legislature.

15 JUDGE RIVERA: Well, they're saying a plan
16 annually. What they can't do is sort of the decade.

17 MR. MERCY: Well, this is true.

18 JUDGE RIVERA: They can't hold money in
19 reserve that way.

20 MR. MERCY: Again, part of this problem
21 would have been resolved if the school district had
22 intervened in the Supreme Court action, where it was
23 most appropriate.

24 This is a case that started off, there was
25 a motion for summary judgment that was granted. The

1 school district ignored the motion and really did not
2 get involved in this matter until a contempt motion
3 was filed. The school district did not engage with
4 these issues until a contempt motion was filed, and
5 then through the Appellate Division, and now here we
6 are in the Court of Appeals.

7 JUDGE PIGOTT: Well, we would still have
8 the same - - -

9 MR. MERCY: These issues should have been
10 settled in Supreme Court.

11 MR. NYE: Well, we would still have the
12 same argument being made, that is, that you're not
13 entitled to a refund for those couple of years in
14 which a petition was not filed. And again, we're
15 talking about refunds, we're not talking about what
16 the tax imposed in any future year is; it's - - -
17 it's having the money to actually pay out - - - not
18 what they're taking in, but what they have to pay out
19 to the taxpayer during the pendency of this
20 proceeding.

21 MR. MERCY: You have to distinguish between
22 an assessment refund and an exemption refund, because
23 it's a different statutory mechanism. I can't tell
24 the school district how to plan for these things
25 because they were put on notice. It's their job to

1 figure out how they want to deal with these, knowing
2 full well that 485-b is a ten-year provision.

3 JUDGE STEIN: Getting back to the - - - the
4 Education Law, as Judge Rivera had brought up again.
5 According to them, the Education Law says, they can't
6 set aside the money during this interim period unless
7 there is a petition filed in each year of the
8 assessment. So what could they do differently?

9 MR. MERCY: Well, they have to acknowledge
10 that one petition for an exemption is over ten years.
11 We can't challenge years 2 through 10 under a
12 485-b exemption. You can only challenge the first
13 year of the granting of the 485-b, which is your base
14 exemption amount, and then everything else
15 statutorily follows through.

16 JUDGE PIGOTT: So this is an anomaly; this
17 whole case is an anomaly.

18 MR. MERCY: No, I think it - - - I don't
19 think it's an anomaly. I think that this could
20 happen on a routine basis, especially - - -

21 JUDGE PIGOTT: No, what I'm saying - - - I
22 think I remember before they could even intervene in
23 these things, that that was the main complaint. All
24 of a sudden, here comes the judgment, that they've
25 got to - - - you know, they've got to pay on a refund

1 basis. Here's one that doesn't fit that mold, where
2 they had the right to intervene, they can if they
3 want, and then they don't. They're saying, we got no
4 notice of this.

5 MR. MERCY: Well, it's not true, the did
6 get notice. They've got - - - they were served in
7 the Supreme Court on the petition, the Article 7
8 petition, to affect the exemption of the basic - - -

9 JUDGE PIGOTT: Isn't that their argument,
10 we want to say it's an Article 7, and we are - - -
11 and therefore it's an assessment case, and therefore
12 you have to do it annually. You want to say, sure,
13 it's an Article 7, but it's in the context of a 485-
14 b. And that's why it seems to me it's rather
15 strange.

16 MR. MERCY: Yes, but of course, it is a
17 485-b, which is a separate mechanism than the Article
18 7 assessment.

19 JUDGE PIGOTT: Okay.

20 CHIEF JUDGE DIFIORE: Thank you, sir.

21 (Court is adjourned)

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I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Highbridge Broadway, LLC v. Assessor of the City of Schenectady, No. 49 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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