To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
----------X
CONGREGATION RABBINICAL COLLEGE OF TARTIKOV, INC.,

DECISION/ORDER/ JUDGMENT

Plaintiff,

Index No:

-against -

6573-07

THE TOWN OF RAMAPO, THE ASSESSOR OF THE TOWN OF RAMAPO, ROCKLAND COUNTY, NEW YORK, AND THE BOARD OF ASSESSMENT REVIEW FOR THE TOWN OF RAMAPO,

Defendants.
----------X

LaCAVA, J.

The trial of this Real Property Tax Law (RPTL) Article 4 and Civil Practice Law and rules (CPLR) Article 78 proceeding, challenging the revocation by the Town of Ramapo (Town) of the real property tax exemption enjoyed by petitioner Congregation Rabbinical College of Tartikov, Inc. (Tartikov), for the Tax Assessment Years 2006, through and including 2008, for the premises designated on the Town tax map as Section 32.8, Block 1, Lot 23, and known as and located at 65-67 Route 306, Pomona, Town of Ramapo, New York (the parcel or subject property), took place before the Court pursuant to Stipulated Facts and Exhibits submitted October 17, 2008. In addition the following pre- and post-trial papers numbered 1 to 7 were considered in connection with the trial of this matter:

PAPERS	NUMBERED
PLAINTIFF'S MEMORANDUM OF LAW	1
DEFENDANT'S PRE-TRIAL MEMORANDUM	2
PLAINTIFF'S POST TRIAL MEMORANDUM OF LAW	3
DEFENDANT'S MEMORANDUM OF LAW	4
AGREED STATEMENT OF FACT	5

BACKGROUND

The subject property is a 100 acre parcel purchased by petitioner in August 2004 from the Yeshiva of Spring Valley (Yeshiva SV). From the time it purchased the parcel in 1999 to the time it sold it to petitioner in 2004, Yeshiva SV operated a religious summer camp through a contractor, Congregation Merokdim (Merokdim), on the subject property. During the period 1999 to and including 2004, the parcel was in possession of a tax exemption from the Town; the exemption was continued under petitioner's ownership in 2005 and 2006, during which time petitioner continued to operate a similar summer religious camp by using the same contractor, Merokdim, previously employed by Yeshiva SV.

In or about early 2007, and prior to the taxable status date for that year, petitioner duly filed applications with respondent to continue the total exemption from property taxes on the subject premises pursuant to RPTL 420-a. The only use of the premises continued to be the religious summer camp. At about that same time, Tartikov also filed an application with the Town to construct a religious college and student housing on the subject premises, which application was denied amid significant public opposition[1]. Shortly thereafter, the Town not only revoked the previously-held religious exemption for the parcel for the 2007 tax year, but retroactively revoked the exemption for 2006 as well. Petitioners then commenced the instant action, seeking a declaratory judgment and determination that the revocation was not proper.

As stated above, the matter was tried before the Court on the basis of submitted Stipulated Facts, Exhibits, and pre- and post-trial memoranda.

FINDINGS OF FACT

The Court makes the following Findings of Fact:

Yeshiva SV, a religious corporation incorporated under §402 of the Not-For-Profit Corporation Law, operated a religious summer

[1] Petitioner has subsequently commenced an action in the US District Court for the Southern District of New York, alleging violations of its rights under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which action is currently pending.

day camp on the subject property between 1999, when it purchased the property, and 2004, when it sold the property to petitioner. The camp was operated for Yeshiva SV by a contractor, Merokdim, a for-profit firm regularly in the business of operating day camps. During that time period, 1999 to and including 2004, The parcel enjoyed a tax exemption from the Town pursuant to RPTL §420-a.

Petitioner is likewise a religious corporation incorporated in August 2004 under §402 of the Not-For-Profit Corporation Law. Its purposes include:

> (a) To promote the religious, intellectual, moral, and social welfare among its members and their families.
>
> (c) To promote and increase interest in the teachings and ideals of world renowned scholars of the Jewish orthodox faith.
>
> (d) To establish, maintain, and conduct a school for the *[sic]* of the holy Torah and to maintain classes for the teachings of the customs, traditions, and mode of worship of the Jewish Orthodox faith.
>
> (f) To do all things necessary to the accomplishment of the foregoing purposes and if the Trustees shall so decide, to associate itself with persons and organizations desiring to assist in the effectuation of the purposes hereinabove set forth.
>
> (h) To carry out any other activities and function permitted by the Religious Corporation Law of the State of New York.
>
> (I) notwithstanding any other provision of these articles, the corporation is organized exclusively for one or more of he *[sic]* following purposes: religious, charitable, scientific, testing for public safety, literary, or educational purposes....

Petitioner purchased the subject property from Yeshiva SV in August 2004 for $13,000,000.00. Tartikov intended to build on the premises a religious college for the training of religious judges, and to provide housing accommodations for the faculty and students of the said college. Petitioner applied for, and was granted, RPTL

§ 420-a tax exemptions for the tax years 2005 and 2006.

During early 2005, petitioner Tartikov contracted with Merokdim to operate a similar summer day camp (of approximately the same size and cost as that it had previously operated for Yeshiva SV) on the subject premises. In return for a fee paid to petitioner, escalating from $60,000.00 in the first year to $70,000.00 in the fifth year (which fee is approximately the same fee paid to Yeshiva SV by Merokdim), Merokdim, employing many of the same counselors and teachers, agreed to run a morning session of studies followed by an afternoon session of recreation for young males. During the tax years in question, the number of campers was between 150 and 200 males between the ages of 6 and 13, each paying an average of $1,100.00 for the eight-week camp. None of the campers or their parents are members or students of the petitioner. The income received from the camp exceeds the carrying costs of the subject property. Petitioner, however, and not Merokdim, was responsible for approving the hiring of all camp personnel, for the content of the religious curriculum, and for the Kosher status of the food provided at the camp.

As in the previous two years, in early 2007, petitioner duly filed an application with the Town for a continuation of the RPTL §420-a exemption on the subject premises. While the only use of the premises continued to be the religious summer camp, between the time of purchase and the date of the 2007 application, Tartikov had also begun to expend sums for the development of the religious college it planned for the subject premises. As of March 2008, those sums amounted to nearly $740,000.00, including architectural, environmental, engineering, surveying, and other planning expenses. Petitioner has used the fees paid under the camp contract to defray some of these development costs.

At approximately the same time, petitioner also filed an application with the Town for the development of the religious college. There was considerable public opposition to this development, and the Town denied the application. Soon thereafter, the Town also denied the 2007 tax exemption application, and revoked the exemption which had been granted previously for tax year 2006.

CONCLUSIONS OF LAW

The Court makes the following Conclusions of Law:

The Burden of Proof

Religious corporations incorporated under Section 402 of the

Not-For-Profit Corporation Law are organizations eligible for tax exemption. (*Cf. Waltz v. Tax Commission of City of New York*, 24 N.Y.2d 30 [1969]). It appears undisputed that petitioner Tartikov is such a corporation, and that, in addition, it is similarly recognized by the Internal Revenue Service as a not-for-profit religious corporations by its IRC 501 (c) 3 designation.

This Court has frequently held that, while the burden of proof lies with a petitioner who seeks an initial property tax exemption (*See People ex rel. Watchtower Bible & Tract Soc. v. Haring*, 8 N.Y.2d 350 [1960]), where a petitioner is the subject of a revocation of an existing tax exemption, the burden of proof is on the municipality to justify the revocation. (*See New York Botanical Garden v. Assessors of Washington*, 55 N.Y.2d 328 [1982]; *Watchtower Bible & Tract Soc. v. Lewisohn*, 35 N.Y.2d 92 [1974].)

Thus, here the burden of proof is on the Town to establish that the revocation of the exemption previously granted to petitioner was proper.

The Religious Exemption

RPTL § 420-a (1) 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.

Additionally, RPTL § 420-a (2) provides that

> 2. If any portion of such real property is not so used exclusively to carry out thereupon one or more of such purposes but is leased or otherwise used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be exempt; provided, however, that such real property shall be fully exempt from taxation although it or a portion thereof is used (a) for

> purposes which are exempt pursuant to this section or sections four hundred twenty-b, four hundred twenty-two, four hundred twenty-four, four hundred twenty-six, four hundred twenty-eight, four hundred thirty or four hundred fifty of this chapter by another corporation which owns real property exempt from taxation pursuant to such sections or whose real property if it owned any would be exempt from taxation pursuant to such sections, (b) for purposes which are exempt pursuant to section four hundred six or section four hundred eight of this chapter by a corporation which owns real property exempt from taxation pursuant to such section or if it owned any would be exempt from taxation pursuant to such section, (c) for purposes which are exempt pursuant to section four hundred sixteen of this chapter by an organization which owns real property exempt from taxation pursuant to such section or whose real property if it owned any would be exempt from taxation pursuant to such section or (d) for purposes relating to civil defense pursuant to the New York state defense emergency act, including but not limited to activities in preparation for anticipated attack, during attack, or following attack or false warning thereof, or in connection with drill or test ordered or directed by civil defense authorities; and provided further that such real property shall be exempt from taxation only so long as it or a portion thereof, as the case may be, is devoted to such exempt purposes and so long as any moneys paid for such use do not exceed the amount of the carrying, maintenance and depreciation charges of the property or portion thereof, as the case may be.

The Court holds as a matter of law that Tartikov may not avail itself of the exemption provided-for pursuant to RPTL §420-a (2), since, although the use to which the premises has been put is arguably religious, Merokdim is not a religious or otherwise tax exempt corporation, but one incorporated for profit. In addition, and even if Merokdim had been a religious or otherwise tax-exempt corporation, since the parties have stipulated that the income from the camp exceeds the carrying, maintenance and depreciation charges

of the property, RPTL §420-a (2) would not in any event be available to petitioner.

Further, the burden of proof is upon the Town here to demonstrate, pursuant to RPTL §420-a (1), that:

> 1. The real property at issue here is not 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; or
>
> 2. The owning corporation did not use the real property exclusively for carrying out thereupon one or more of such purposes.

Ownership by the Religious Organization

The Court finds that, since the Town has in essence conceded the ownership of the subject property by Tartikov, and their status as a religious corporation, the Town has failed to establish by a fair preponderance of the evidence that the subject premises was not owned by the religious corporation, namely Tartikov, during the tax assessment years in question.

Exemption Under RPTL §420-a (1)--Religious Use by the Owning Corporation

Besides ownership of the property by a religious organization, in order to demonstrate non-eligibility for the religious exemption under RPTL §420-a (1), respondent must show that the owning corporation did not exclusively use the premises for carrying out thereupon its religious purpose. "In determining whether the real property of a corporation is used exclusively for the exempt purpose, the word 'exclusive' has been held to connote 'principal' or 'primary'." (*Matter of Adult Home at Erie Sta., Inc. v. Assessor, City of Middletown*, 10 N.Y.3d 205, 208 [2008].)

Here, it is alleged by Tartikov, a religious, non-profit corporation, that Merokdim, concededly a for-profit corporation, operated the religious summer day camp solely on Tartikov's behalf, as an extension of its own religious purposes, and thus Tartikov is entitled to an exemption for the property. The Town, conversely, argues (without opposition by Tartikov) that Merokdim is a profit-making enterprise; that thus Tartikov cannot avail itself of the exemption; and that, in any event, the operation of the camp is not

in furtherance of petitioner's religious purposes.

The petitioner relies substantially on *Pace College v. Boyland*, 4 N.Y.2d 528 (1958) to support its argument that a for-profit contractor such as Merokdim may operate a concession for a non-profit institution, and the non-profit may still be entitled to an exemption, so long as the concession is reasonably incident to the non-profit's primary activities. In *Pace*, Pace College had contracted-out operation of its student cafeteria at its New York City campus to a commercial food service. The Court held that

> Here the cafeteria is not used as a source of income and the equipment which the college owns is put to its own use. This cafeteria is part of the operation of Pace College. Furnishing of meals to students, faculty and staff on college premises is recognized as entering into their use for educational purposes, nor does it customarily disturb full tax exemption....The reason on account of which part of appellant's tax exemption has been withdrawn is not that it conducts a cafeteria, but that it does so through Horn & Hardart. We think that Pace College is not the less operating this cafeteria for its own educational purposes within the meaning of the Tax Law for the reason that it is done by a means of a commercial restaurant operator, than was the case when the college farmed out this operation to a professional caterer at a commission of 2% on gross sales of food. This is not renting space to some disassociated enterprise, it is part of the conventional operation of a private school, college, hospital or other benevolent institution.
>
> 4 N.Y.2d, 532-33.

The Court notes that, in *Pace*, the College itself furthered its educational mission and day to day operation on the property therein at issue. Since the property was part of and integral with the school's campus, consisting, *inter alia*, of classrooms and college offices, the operation of a cafeteria on that property, whether by the College itself, or by a private, for-profit contractor for the College, was necessarily incident to the other, academic functions taking place on the same property.

Contrary to petitioner's argument (as summarized on p. 7), here the **sole** activity occurring on the subject property is the operation of a summer religious day camp by a for-profit, non-owning corporation. Put another way, unlike *Pace*, where mainly educational activity conducted by the owner was supplemented by a small amount of profit-making activity on the premises by a contractor, on the subject premises the **only** owner-provided religious or other not-for-profit activities, were those associated with the contractor Merokdim's for-profit camp. In essence, there were no other religious or non-profit activities for the for-profit activities to be incidental to. (*See also Temple Grove Seminary v. Cramer*, 98 N.Y. 121 [1885]--land owner, a non-profit, permitted exemption for lease of premises for boarding during vacation periods, as lease was incidental to educational use during the remainder of the school year; *Harvey School v. Bedford*, 34 A.D.2d 965 [2nd Dept. 1970]--owner permitted exemption for rental of school skating rink, largely to school-related persons, for modest fee covering only expenses, during non-school hours, as use was reasonably incidental to school-related skating at other times; *In the Matter of the Shrine of Our Lady of Martyrs of Auriesville v. Town of Glen*, 40 A.D.2d 75 [3rd Dept 1972], aff'd 33 N.Y.2d 713 [1973]--owner's use of part of premises, for cafeteria and parking lot, was incidental to religious use [shrine and other worship facilities] on remainder of property; *Sephardic Congregation of S. Monsey v. Town of Ramapo*, 47 A.D.3d 915 [2nd Dept 2008]–residential use of premises reasonably incidental to religious purposes carried out therein.)

To be sure, *People ex rel. Watchtower Bible & Tract Soc., Inc. v. Haring, supra*, and *Gospel Volunteers, Inc. v. Speculator*, 33 A.D.2d 407 (3rd Dept. 1970) are both properly cited by petitioner on the issue of whether a non-profit organization's activities may nevertheless generate a profit, so long as they are reasonably incidental to the corporation's religious purposes. However, petitioner fails to note the similar distinction between those cases and the one at bar, namely that in each of those cases, the profit-generating activities were conducted by the religious organization itself, and not by a for-profit corporation engaged as a contractor. In addition, the "profit" *in Watchtower* was truly incidental--less than 8% of its farm produce was sold to the public, while the payments in *Volunteers* were also nominal, and the benefits were provided solely to members of the owning religious corporation. *See also Hapletah v. Assessor of Fallsburg*, 79 N.Y.2d 244 [1992]–benefits provided solely to members of the Yeshiva were reasonably incidental to religious uses of the premises; *Otrada, Inc. v. Assessor, Town of Ramapo,* 41 A.D.3d 678 [2nd Dept 2007]–rental income generated from petitioner's members reasonably

incidental to religious use of the premises.) Each of the above cases is clearly distinguishable since Merokdim is a for-profit corporation, it appears to receive a significant profit from the operation of the camp, and the benefits are offered not to members of Tartikov but to the general public as a whole.

Petitioner only cites one other case in support of this argument--*Scenic Hudson Land Trust v. Sarvis*, 234 A.D.2d 301 (2nd Dept. 1996.) In *Scenic Hudson*, the non-profit land owner entered into a management agreement with the State of New York providing that the State Office of Parks, Recreation, and Historic Preservation (OPRHP)would manage and operate the property for environmental, conservation and recreation purposes for a period of years. The Court held first that, under RPTL 420-a (1) (a), the property **was** being used by a non-profit corporation in furtherance of its non-profit (environmental and conservation) purposes. While it conceded that the agreement for OPHRP management, in return for a nominal sum, might be construed as a lease, the Court further held that the property

> is being "leased" for the purposes of incorporation of the lessor; the property is not being used as an investment, or to generate revenue, or rented at a profit, and Scenic Hudson retains general supervision and control over the property's operation. Thus, here, no less than in *Matter of Pace Coll. v Boyland (supra),* Scenic Hudson is operating the property within the meaning of the Real Property Tax Law. Accordingly, the "lease" between Scenic Hudson and the State of New York does not vitiate the tax exemption for the property to which Scenic Hudson is otherwise entitled.

While superficially the instant matter resembles *Scenic Hudson*, the significant difference between the two cases is two-fold. First, the "lease" in *Scenic Hudson* was again to a State agency, OPHRP, not to a for-profit corporation such as Merokdim. While *Pace* did hold that a lease to a for-profit corporation may be permissible, its holding applies only where the lease is not a source of income, and where the school's educational mission is directly advanced by the activity [i.e. by the limitation in the use of the cafeteria to school faculty, employees, and students.] Second, and of equal significance, the property in *Scenic Hudson*, as noted by the Court, was that the property there was not being used to "...generate revenue or [was not] rented at a profit". Here Tartikov not only garners a significant fee from Merokdim for

the latter's operation of the camp, but Merokdim collects perhaps as much as $200,000 in gross annual receipts from the camp. Indeed, the parties have stipulated that the amount of income generated by the camp exceeds the carrying charges of the property; had Merokdim been a non-profit corporation, generation of a profit in such circumstances would have made Tartikov ineligible for an exemption under RPTL §420-a (2).

The *Scenic Hudson* Court also cited several specific cases as examples of the investment, revenue-generating, and profit-making activities which would support the loss of tax exempt status on property otherwise deserving of an exemption. In *YWCA v. New York* (217 A.D. 406 [1st Dept. 1926], aff'd 245 N.Y. 562 [1927], and cited by respondent), the premises included a cafeteria that was open not just to members, but served a majority of its meals at a profit to the general public. The Court held that the profit-making nature of a restaurant, open not just to members of a charitable organization but to the general public as well, was not incidental to the owner's charitable use and thus a full tax exemption for the premises was not warranted.

Similarly, in *People ex rel. Adelphi College v. Wells*, 97 A.D. 312 (2nd Dept. 1904), a college athletic field, used extensively by students during the school year, was rented for a fee, during school vacations, to public athletic teams unaffiliated with the College. The Court held that rental of the field to outsiders at a profit meant a loss of the tax exemption over that portion of the property.

Thus, neither *Pace* nor *Scenic Hudson* support petitioner's argument that a religious corporation can lease property to, or contract with, a for-profit corporation for the purpose of the operation of a concession on the religious corporation's property, and retain a full tax exemption for the property, particularly when the profit-making concession, while arguably in furtherance of the religious mission, is the **only** activity occurring on the premises, and provides benefits exclusively to the general public, not to its members.

Indeed, the cases cited by the Town, including *YWCA*, argue for the opposite conclusion. *Ellis Hosp. v. Assessor of Schenectady*, 288 A.D.2d 581 (3rd Dept. 2001), for example, involved an exemption denial relating to a portion of a hospital parking garage allocated to the use of a non-exempt medical office building. While the part of the garage used by the hospital for its employees and patients was exempt, as in furtherance of its charitable use, the Court held that the use of the parking lot by the non-exempt office building was also non-exempt, as neither the furnishing of business or parking space for the for-profit operation of medical practices are sufficiently related to the hospital's exempt purposes.

Neither is *Matter of Adult Home at Erie Sta., supra,* inapposite. There, two separate providers of services-- Adult Home at Erie Station (AHESI), a nursing home, and Regional Economic Community Action Program (RECAP), a housing and social service agency--had lost their exemptions since they provided services for a fee. The Court held that

> The issue is not whether RECAP benefits, but whether the property is "used exclusively" for RECAP's charitable purposes. RECAP could lose its exemption under RPTL 420-a (1) (b) if the economic benefit went to its officers or employees personally, but an economic benefit to a charitable organization does not by itself extinguish a tax exemption. The question is how the property is used, not whether it is profitable.

However, both AHESI and RECAP provided those benefits, as the Court noted, **solely** to members, not to the general public, nor was a for-profit corporation receiving a significant amount of income for operating on the premises.

In sum, here petitioner, a non-profit religious corporation, entered into an agreement, whether considered a management contract or a lease, with a for-profit corporation for the purpose of operating a religious summer day camp. In return for an escalating yearly fee to the owner, the contractor was permitted to retain all of the profits of the camp's operation.

A non-profit corporation may, as in *Pace,* contract with a for-profit corporation to operate a concession for profit on a premises, while maintaining the property's tax-exempt status, so long as the concession is reasonably incidental to the owner's religious or otherwise exempt purposes pursued on the premises. Here, however, the only activities taking place on the premises were the for-profit activities of the contractor; the profit-generating camp can not be incidental to other, religious uses of the premises simply because there were no other uses being made of the premises. Thus, neither Tartikov nor its contractor Merokdim primarily used the premises to further Tartikov's religious purposes, and therefore the property was and is not eligible for an exemption.

CONCLUSION

The Court finds that, as a matter of law, respondent did meet its burden of showing by a fair preponderance of the evidence that the owning corporation did not use the real property exclusively for carrying out thereupon one or more of its religious purposes, and that therefore the respondent's revocation of the exemption was

proper.

Upon the foregoing papers, and the trial held before this Court on submitted Stipulated Facts, Exhibits, and pre- and post-trial memoranda, it is hereby

ORDERED, that the petition by petitioner for Orders granting their petition seeking the renewal of a religious exemption pursuant to RPTL §§420-a, for the tax years commencing in 2006 and up until the date of trial, is hereby denied.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
April 15, 2009

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HON. JOHN R. LA CAVA, J.S.C.

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