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 WESTCHESTER

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In the Matter of the Application of PANORAMA FLIGHT SERVICE, INC., as Lessee/ Assignor Obligated to Pay Taxes,

Petitioner,

-against -

THE TOWN/VILLAGE OF HARRISON, a Municipal Corporation, its Assessor and Board of Review,

Respondents.

-and-

HARRISON CENTRAL SCHOOL DISTRICT,

Intervenor-Respondent.

For a review under Article 7 of the Real Property Tax Law of the State of New York of the 2008 Assessment of certain real property situated in Respondent Municipal Corporation, located in the County of Westchester, State of New York.

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DECISION/ORDER/ JUDGMENT

Index No: 23128/08

Motion Date: 6/17/09

LaCAVA, J.

The following papers numbered 1 to 5 were considered in connection with this motion by petitioner Panorama Flight Services, Inc., (Panorama) seeking summary judgment from respondent Town of Harrison (Harrison), and Harrison's cross-motion seeking the same relief:

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIDAVIT/EXHIBITS	1
MEMORANDUM OF LAW	2
CROSS MOTION/AFFIRMATION/AFFIDAVIT	3
REPLY AFFIRMATION/EXHIBITS	4
REPLY MEMORANDUM OF LAW	5

Petitioner is a full-service provider of light general Aviation Fixed Base Operations, providing services including indoor hangar storage, aircraft rentals, flight training, deicing, and ground services such as towing and baggage, car rental services, and lounges, and other services, to the general public. The services are provided at the subject premises, two parcels known as and located at 67 Tower Road, Hanger T, Westchester County Airport, Harrison, New York (the Airport), and designated on the Tax Map of the Town as Block 971, Lots 8.7 and 8.8. The premises is owned by the County of Westchester (County), and leased by them to the Westchester County Industrial Development Agency (IDA), who in turn lease the premises to Panorama under a Master Lease.

For many years, and during the period immediately prior to the tax year at issue, petitioner conducted its business on the subject parcels, which were in possession of tax exemptions from the Town. During 2008, and prior to the taxable status date for that year, petitioner was notified by the County that the Town had revoked, without explanation, the previously-enjoyed exemption, and sought to impose an assessment on the premises. Petitioner appealed to the Assessor and the Town Board of Assessment Review, and upon failing to regain their exempt status, commenced the instant action, seeking a determination that the assessment was unlawful and the revocation was improper.

Petitioner now moves for summary judgment, alleging that there are no triable issues of fact with respect to the public use of the premises, and its continued eligibility for tax-exempt status. Respondent cross-moves for the same relief, asserting that there are no triable issues of fact regarding the private, for-profit use of the premises by Panorama.

Petitioner's Motion for Summary Judgment

The Burden of Proof

Municipal corporations, like business entities organized under Section 402 of the Not-For-Profit Corporation Law, are organizations eligible for tax exemptions (*Cf. Waltz v. Tax Commission of City of New York*, 24 N.Y.2d 30 [1969]). It appears undisputed that the County and the IDA are such organizations.

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]). Neither party disputes this. Thus, even within the context of a summary judgment motion, which has its own issues regarding respective burdens, here the burden of proof is on the Town to establish that the revocation of the exemption previously granted to petitioner was proper.

The Municipal Exemption

RPTL § 406 (1) provides that:

> Real property owned by a municipal corporation within its corporate limits held for a public use shall be exempt from taxation and exempt from special ad valorem levies and special assessments to the extent provided in section four hundred ninety of this chapter.

Respondent has not seriously contested that the parcels are owned by the County, or that they are held within its corporate limits.

Public Use

It is not seriously contested by respondent that Westchester County Airport is operated by the County as a municipal airport open to the general public. Petitioner asserts that all of its operations are governed by its lease (the Master Lease) which it originally entered into with the County, and subsequently, when the County leased the property to the IDA, with the IDA. Included among the lease's requirements is that Panorama provide its services to the general public. The County's intent, as stated in the lease, is the offering of airport services for the accommodation, convenience, and welfare of the public. As set forth above, these services include indoor hangar storage of aircraft; rental of aircraft by licensed pilots; flight training for prospective licensees; aircraft deicing; and ground services such as towing and baggage handling, car rental services to all members of the public; and lounges and waiting space. As Panorama properly points out, pursuant to the lease, all of these services are listed openly and

are variously offered to the public as a whole, pilots, airlines and their passengers.

Respondent counters that Panorama does not in fact provide services to the public as a whole but rather caters nearly exclusively to a narrow portion of the community -- the privately licensed flying public. While the public in general may benefit from some of the airport's ground services such as automobile rental, lounge areas, and baggage handling, it is licensed pilots and light aircraft owners, and they alone, for whom the vast majority of Panorama's services are intended and provided. Thus, respondent argues, there is no public purpose being served by providing airport services to the very few private individuals and corporations that can afford such services, while no commercial aircraft or public carrier airlines utilize petitioner's facilities.

Both parties cite to *Harrison v. County of Westchester*, 13 N.Y.2d 258(1963) on the issue of public use. Respondent, in opposition to petitioner's motion and in support of their own, argue that *Harrison* found that the private use of airport facilities by a for-profit entity is generally taxable. *Harrison*, in fact, at page 263, holds:

> [i]t follows, therefore, that those portions of the land owned by a municipality which are employed in the actual operation of an airport for the general use of its inhabitants must be deemed to be "held for a public use" and, accordingly, exempted from taxation...such exempt property would normally include not only the land which is used for runways, ticket offices, waiting rooms and the like but also the land upon which are erected hangars to house and maintain the aircraft serving the public....

Panorama, notes that the contract vendors in *Harrison*, unlike the case at bar, had **exclusive** use of the hangers D and E at the leased premises, and in essence operated there as if it were a private use, not a public service. Petitioners also point out that, while the issue of the essentially identical services (to those offered in the instant matter) provided at Hanger B of the Airport was not before the Court of Appeals in *Harrison*, because the Second Department (at 18 A.D.2d 1136 [1963]), had affirmed without opinion the holding of this Court (at 34 Misc. 2d 1020, 1032 [1962]), on that issue, this Court found that:

> [w]ith respect to Hangar "B", the tenant agreed with the Operator to use the facilities demised to it for the operation of a flying school, the servicing and maintenance of aircraft, the operation of a charter service, to provide storage and parking of aircraft within the hangar, and to provide tie-down space outside the hangar. There is no evidence to indicate that any exclusive rights have been granted to any firm or individuals for the use or enjoyment of these facilities. It is, thus, proper to assume that these facilities are available to the public and used by the public. It is not difficult to distinguish between Hangars "E" and "D" on the one hand, and Hangar "B" on the other hand. The facilities of Hangar "B" are enjoyed by and are available to the public. The public may avail itself of flying instructions, charter service and parking and maintenance of aircraft. No arrangements have been made with select firms, individuals or corporations, to give them any exclusive rights to these facilities. The use of Hangar "B" is determined to be public and it is thus exempt from tax.

Panorama has also submitted to the Court a July 30, 1985 opinion letter from the New York State Division of Equalization and Assessment (now Office of Real Property Services [ORPS]) issued in response to an inquiry from the assessor of the Town of Rye on the issue of public use at the Airport, which refers to a May 25, 1983 letter from the New York State Board of Real Property Service (predecessor to the Division of Equalization and Assessment) to the Schenectady County Attorney on that issue. The 1983 letter cites *Harrison* and several other cases, and concludes that, while typically the lease by a county airport to a private ground operation corporation includes the exclusive use of a premises thereon, for the providing of such services as aircraft rental, storage and repair; flight instruction; and charter trips and short flights; the leases generally also provide that those services must be offered to the general public without discrimination or excessive fees. Under those circumstances, the Division's letter concluded, such use is deemed a public one.

5 Op Counsel SBEA (ORPS) 20 also deals with the issue of the lease of airport property to a private corporation to supply services which are arguably public. Citing to *Harrison*, the opinion

stated

> ...the Court of Appeals noted that such exempt property would normally include not only the land which is used for runways but also ticket offices, waiting rooms and hangars used to house and maintain the aircraft serving the public. This principle, in our opinion, requires that parking concessions, restaurants, airline ticket facilities and hangars, and car rental services which are necessary to the operation of the airport and which are available to the general public are entitled to an exemption from taxation.

The Opinion also cites to *Dubbs v. Board of Assessment Review of the County of Nassau*, 81 Misc.2d 591 (Supreme Court, Nassau County, 1975), finding, in particular, that *Harrison* looks to the access afforded the general public in determining whether facilities are being operated for a public use.

Clearly, as the party bearing the burden to explain its revocation of the exemption previously enjoyed by petitioner, respondent Town has failed to demonstrate the reason for that revocation, or, more specifically, that the aforementioned services, including indoor hangar storage of aircraft; aircraft rental; flight training; aircraft deicing; and ground services such as towing and baggage handling, and car rental services, are not offered to the public, or that access to Panorama's facilities is limited to some small section of the general public. To support its argument, without any support from case law, the Town proffers that the aviation users of the services offered by Panorama, which include private use airplanes and small private charter planes owned by a few individuals and corporations, are somehow not part of the general public, and thus that the use is a private one. Some of the services, including car rental, baggage handling, flight lessons, and deicing, for example, are obviously offered to whoever requires those services including the public as a whole.

Moreover, respondent has failed to offer any proof that arrangements have been made with select firms, individuals, or corporations to grant them exclusive rights to Panorama's facilities (as was required to be demonstrated in *Harris*, supra), or establish that those services were **not** at all times offered to the general public without discrimination or excessive fees (as advised in the July 30, 1985 Opinion Letter referenced above at page 5).

That Panorama serves the public is further supported by the

Terms of the Master Lease itself, which provides:

> Section 3.0. Tenant shall occupy and use the Premises for the following purposes and for no other purpose whatsoever:
>
> > (a) For the operation of full service Light General Aviation Fixed Base Operation. Tenant shall provide, at a minimum, the following:
> >
> > > I. Storage and parking of aircraft including T-hangar and hangar accommodations and tiedown operation.
> > >
> > > II. Aircraft maintenance including repairing, overhauling and modification of aircraft.
> > >
> > > III. Aircraft engine maintenance including the repair of engines, assemblies, accessories, aircraft radios and electronic equipment and any component thereof.
> > >
> > > IV. Rental, lease, charter and management of aircraft.
> > >
> > > V. Flight instruction including ground school and flight simulation.
> > >
> > > VI. Pilot shop operation.
> > >
> > > VII. Sale of aircraft AvGas and lubricants.
> > >
> > > VIII. Sale of aircraft and aircraft parts.
> > >
> > > (emphasis added).

These services, which Panorama provides at the subject property, reflect the very services that the Airport holds out as available to the public in its promotional and informational materials (Condreras Reply Aff. Ex. 1).

While respondent relies on a number of cases to support its arguments, those cases are all inapposite. Respondent argues, for example, that this Court's *Congregation Rabbinical College Of Tartikov, Inc., v. Town of Ramapo, et al.*, 23 Misc.3d 1117 (A)

(Supreme Court, Rockland County, 2009) is similar, as both involve leases to private enterprises (here, Panorama) by a tax exempt institution (here, the County). However, while superficially similar factually, *Tartikov* is governed by the vastly-different RPTL § 402-a (which specifies the conditions under which leaseholders may retain the tax-exempt status of a parcel owned by a charitable corporation). In addition, respondent suggests that *Pace College v. Boyland*, 4 N.Y.2d 528 (1958), dictates the taxable nature of the lease to petitioners herein. However, like *Tartikov*, *Pace* involves a non-municipal charitable institution, not a governmental entity such as the County herein. Respondent also relies primarily on *Harrison*, which, as noted above, partly involved the clearly private use of a premises for profit-making endeavors, which use, in essence, shut out the general public. The uses here, as set forth in detail above, are simply not of this character.

Upon a summary judgment motion, the movant bears the initial burden of presenting evidence, in competent form, establishing entitlement to judgment as a matter of law, and tendering sufficient evidence to eliminate any material issues of fact from the case" (*Way v. George Grantling Chemung Contracting Corp.*, 289 A.D.2d 790, 793 [3rd Dept., 2001].) Unless and until that initial burden is met, there is no need for the non-movant to come forward with "evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*id.*; *see also Rodriguez v Goldstein*, 182 A.D.2d 396, 397 [1st Dept., 1992]). In a proceeding pursuant to Article 7 of the Real Property Tax Law, summary judgment is properly granted when there is no genuine issue of material fact and the petitioner is entitled to judgment as a matter of law on the issue of their entitlement to an reduction in the challenged assessment. (*Cf. See Sailors' Snug Harbor in City of New York v. Tax Commission of City of New York*, 26 N.Y.2d 444, 449 [1970]).

In *Celardo v. Bell* (222 A.D.2d 547 [2d Dept., 1995]), the Court stated:

> It is axiomatic that summary judgment is a drastic remedy which should only be granted if it is clear that no material issues of fact have been presented. Issue finding, rather than issue determination, is the court's function (*Sillman v Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957) . If there is any doubt about the existence of a triable issue of fact or if a material issue of fact is arguable, summary judgment should be denied (*Museums at Stony Brook v Village of Pachogue Fire Dept.*, 146 A.D.2d 572 (1989) …

Here, the Court finds, regarding petitioner's motion, that, at the outset, petitioner has met the initial burden, by demonstrating that, without explanation, the Town's assessor revoked the previously-held tax exemption for the property; that, pursuant to the Master Lease, petitioner is bound to offer full service light general aviation fixed base operations to the general public; that their services are all currently being offered to the general public; and thus have shown their entitlement to judgment as a matter of law. When viewing respondent's properly submitted proof in a light most favorable to them, and upon bestowing the benefit of every reasonable inference to them (*Boyce v. Vasquez*, 249 A.D.2d 724, 726 [3d Dept., 1998]), material issues of fact do not exist as to whether or not the subject parcel is currently being held for a public use.

Respondent's Motion for Summary Judgment

The Court also finds, regarding respondent's motion, that, at the outset, respondent has not met the initial burden, by failing to show entitlement to judgment as a matter of law. As correctly argued by petitioner, the Town has failed to demonstrate the absence of material facts regarding the public use of the premises by Panorama. In any event, had respondent met its initial burden, petitioner has come forward with triable issues of fact, including, *inter alia*, whether the services which it offers are indeed available to the general public.

Upon the foregoing papers, it is hereby

ORDERED, that the petition by petitioner for an Order granting their petition seeking the grant of a municipal exemption pursuant to RPTL §§ 406, for the tax year 2008, is hereby granted; and it is further

ORDERED, that respondent Town shall grant the tax exemption sought by petitioner pursuant to RPTL § 406, for the parcels designated on the Town tax map as Block 971, Lots 8.7 and 8.8, and known as and located at 67 Tower Road, Hanger T, Westchester County Airport, Harrison, New York, for the tax assessment year at issue in the instant petition, namely 2008; and it is further

ORDERED, that the assessment rolls are to be corrected accordingly, and overpayments of taxes, if any, are to be refunded with interest; and it is further

ORDERED, that the cross-motion by respondent for summary judgment against petitioner is denied in all respects.

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

Dated: White Plains, New York
September 17, 2009

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

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