STATE OF NEW YORK
SUPREME COURT COUNTY OF ONTARIO

CORNELL UNIVERSITY,
Petitioner,

- against -

DECISION
Index No. 114235-2016

BOARD OF ASSESSMENT REVIEW and SHANA JO HILTON, as ASSESSOR of the TOWN OF SENECA, NEW YORK,
Respondents.

APPEARANCES: Cornell University Office of University Counsel and Secretary of the Corporation: Jared M. Pittman, Esq. Shirley K. Egan, Esq. and Valerie Cross Dorn, Esq. of counsel; and Sullivan & Worcester LLP: Merrill L. Kramer, Esq. *(pro hac vice)* of counsel, Attorneys for Petitioner.
Sheila M. Chalifoux, Esq. Attorney for Respondents.

Ark, J.

NATURE OF PROCEEDING.

On July 14, 2016 petitioner, Cornell University ("Cornell"), a RPTL §420-a (1) tax-exempt educational institution, filed a complaint in this court pursuant to New York Real Property Tax Law ("RPTL") §704 and CPLR Article 78 requesting that respondents' Board of Assessment Review and Shana Jo Hilton, as Assessor of the Town of Seneca, New York ("Seneca") action in assessing petitioner for a solar system installed on its property by a third party be overturned and reversed and for other relief.

THE PARTIES.

Cornell is a New York not-for-profit education corporation chartered by New York State under Education Law § 5701 et seq. Non-party Argos Solar, LLC ("Argos") is a Delaware limited liability company in the business of providing electrical energy to customers through solar photovoltaic (PV) electrical systems ("PV system") constructed and owned by Argos.

In February 2015, Cornell contracted with Argos to provide Cornell's campus energy needs for educational purposes. A PV system was installed on Cornell's Hanson Research Farm

of the Geneva Experiment Station located in the Town of Seneca, Ontario County. The Planning Board of the Town of Seneca conditioned its approval of the PV system upon the system's removal when use of the PV system ceases. In addition, Cornell was to provide the Town of Seneca with a financial guarantee that the equipment would be removed and the land restored to its prior condition at the end of the service term.

On May 1, 2016, respondents, without request or application from petitioner or Argos, created a new and separate taxable subdivision consisting solely of non-party Argos's solar energy property and imposed a real property tax assessment upon Cornell, not Argos, based on the value of the solar equipment. Cornell's underlying property has been and continues to be exempt from real property taxes pursuant to petitioner's educational exemption under RPTL§ 420-a.

ISSUES.

Cornell argues that the question presented is whether the PV equipment placed on Cornell University's tax-exempt tax parcel by Argos, a third party service provider, is properly assessable by respondents as real property or is personal property and, as such, not subject to real estate taxes, or alternatively, if it is real property, affixes to the land and is therefore exempt from property taxes under Cornell's educational exemption. Respondents counter that Argos, a for-profit corporation, rather than Cornell, is the owner of the PV equipment. As the private property of Argos constituting a "structure erected upon, under or above the land and affixed thereto"[1], the PV system is subject to real estate taxes, and cannot benefit from Cornell's education exemption from real property taxation (see, *Nat'l Cold Storage v Boyland,* 16 A.D.2d 267 [1st Dep't 1962], *aff'd* 12 N.Y.808 [1962]).

DECISION.

Although respondents assert that the PV system is taxable real property, the following factors need consideration:

1. The Power Purchase Agreement between Cornell and Argos;

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[1] N.Y. Real Prop. Tax Law § 102 (McKinney) (12): " 'Real property', 'property' or 'land' mean and include: (b) Buildings and other articles and structures, substructures and superstructures erected upon, under or above the land, or affixed thereto...."

2. The solar photovoltaic (PV) electrical system;

3. the Seneca Planning Board requiring the solar PV system's future removal;

4. the assessor taxing Cornell, a tax exempt entity;

5. the law of the Fourth Department; and

6. litigation practicality.

1. The Power Purchase Agreement.

The terms of service are set forth in a Power Purchase Agreement ("PPA") dated February 10, 2015. Under the terms of the PPA, Cornell as customer agrees to purchase electrical service from Argos for service on its campuses and for other educational purposes. Cornell is the exclusive purchaser of Argos electricity for a twenty-year term, during which Cornell agrees to pay a fixed-price for the electricity. Cornell paid no funds and contributed no capital to Argos for the installation of the solar energy property. Argos retains ownership and possession of the equipment. Cornell has no right or ownership in the solar property and Argos has no ownership rights in Cornell's realty.

Under the PPA, Cornell granted Argos a limited license to enter the property solely for the purpose of installing, operating and maintaining the PV solar equipment during the term, after which the license terminates and Argos must remove the equipment, subject to an option by Cornell to purchase the equipment. Although not binding on the respondents, the PPA between Cornell and Argos expressly provides that Argos' solar energy property "is not to be regarded as a fixture or otherwise part of the Premises or Solar Premises on which it may be located" and that Cornell shall keep the solar energy property free from all claims, liens, encumbrances and legal processes. The PPA further provides that Argos shall remove the solar energy property at the expiration of the PPA, and can remove the system within thirty days if Cornell fails to pay for the electricity or otherwise defaults under the PPA. Conversely, Cornell can terminate the license and direct Argos to remove the equipment upon an Argos default. The PPA also sets forth various circumstances in which the PV system may be removed. The solar energy property was financed by an Argos affiliate by providing the project lender with a UCC-1 personal property security interest in its assets as collateral security for the loan.

2. The solar photovoltaic (PV) electrical system.

Mr. Francesco Miselli, Argos' lead engineer responsible for the design and construction of the solar PV system, provided testimony per affidavit. He described the solar equipment as a "plug and play" system. Mr. Miselli testified that the system was designed for disassembly and removal at the end of the service contract. Mr. Miselli stated that following the contract term Argos planned to remove and reuse the equipment at other sites. He testified that the equipment was designed to be removed without damage by simply unbolting and unplugging the panels, disassembling the racks, and trucking the equipment away. He stated that panels are routinely removed for maintenance, repair and replacement. Mr. Miselli also testified that the concrete pads, upon which equipment is placed, are removed as a whole block without any concrete dispersion into the soil. Mr. Miselli agreed that concrete was required to anchor some of the ground posts due to subsoil conditions. But he explained that these footings specifically were installed with Sonotubes, cylindrical forms designed to eliminate concrete disbursement and allow for their whole removal through conventional pile extraction, which is a common practice in civil construction. Contrariwise, Mr. Jerry Hoover, Zoning and Code Enforcement Officer for the Town of Seneca, provided testimony per affidavit that the PV equipment was installed using "three hundred thousand pounds of reinforced concrete" to support certain poles at the site and for a concrete pad on which some of the equipment sits.

3. The Seneca Planning Board requiring the PV system's future removal.

Consistent with the removal provisions of the PPA, the Town of Seneca Planning Board conditioned its approval of the PV system upon removal of the PV system and the restoration of the land when use of the PV system ceases (and Cornell's guarantee of same). The removal and restoration requirements underscore the non- permanent nature of the PV system and supports Cornell's assertion that the PV equipment placed on Cornell's tax-exempt land by a third party service provider is removable personal property and, as such, not subject to real estate taxes. The removal and restoration requirements also beget the question in what other circumstances, if any, has the Town of Seneca required the removal of a "structure erected upon, under or above the land and affixed thereto" at the end of its use?

4. The assessor taxing the tax exempt entity.

Respondents' rationale for taxing the PV equipment is that it is real property owned by

Argos, a non-tax exempt entity. However, the tax is assessed to otherwise tax exempt, non-owner Cornell. This unexplained,[2] but lawful,[3] assessment of the taxes to Cornell, when there was no question that the system was owned [4] by Argos, indicates either that the PV system has become affixed to the land and as a result accedes to Cornell's exemption or that Cornell is the beneficial owner.

If the court were to disregard the PPA and instead assume, as respondents contend, that the solar equipment is a permanent accession to the land, it could conclude that Cornell is the beneficial owner of the PV system. As an improvement to the freehold used for educational purposes, the PV system would take on the land's tax-exempt status and be exempt from real property taxes under RPTL 420-a(1). (See, *Colleges of the Seneca v. City of* Geneva, 94 N.Y.2d 713 (2000); *Pace College v. Boyland*, 4 N.Y.2d 528 at 533-534).

Moreover, a non-profit corporation may contract with a for-profit corporation to supply an improvement or operate a concession for profit on a premises, while maintaining the property's tax-exempt status, so long as the operations are within or reasonably incidental to the

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[2] On July 14, 2017, the court inquired of respective counsel "Why was the tax assessed to Cornell...?" Respondents replied that "the assessor may assess the buildings in the name of the landowner....Significantly, there is no requirement in any statute that compels the assessors to trace and follow internal arrangements made between parties as to who [sic] should pay the tax, and the Court of Appeals has determined that it would be an 'unfair burden' to make them do this." In the instant case respondents do not explain how there is an "unfair burden" on them or why otherwise exempt Cornell was taxed.

[3] Most of the cases sanctioning taxing a property to a party other than the actual owner, involve situations where the owner is unknown or difficult to identify. This is certainly not the instant case where there was extensive interaction between the Town of Seneca and Argos before and during the development and approval by the Seneca Planning Board of the PV system.

[4] N.Y. Real Prop. Tax Law § 502 (McKinney) 2: "Provision **shall** (emphasis added) be made with respect to each separately assessed parcel of real property for the entry, in appropriate columns, **of the name of the owner, last known owner or reputed owner** (emphasis added) and a description sufficient to identify the same." This was not done by respondents.

property owner's exempt purposes.[5] *Colleges of Seneca*, *supra* at 718. It also matters not whether an operation on the premises of an educational institution is being fulfilled by direct employees of the college or an independent contractor, so long as the operations are "directed exclusively to the accomplishment of its educational purposes". *Pace College v. Boyland.* Where the contractual terms between the exempt entity and the for-profit entity, taken as a whole, clearly ensure that the improvements or equipment may not be used for purposes other than their intended exempt purposes[6], they support the tax-exempt entity's permissible use and beneficial ownership for purposes of RPTL §420-a(1). See also, *People ex rel. N.Y. Edison v. Feitner*, 99 A.D. 274, 278 (1st Dep't 1904), *aff'd* 181 N.Y. 549 (1905):

5. Classification of taxable real property in the Fourth Depatment.

In *Honeoye Storage Corp. v. Bd. of Assessors of Town of Bristol,* 77 A.D.2d 468, 468–71, the Appellate Division, Fourth Department addressed the real property classification issue. This court's paraphrased application of *Honeoye* to the instant facts reads:

The question presented is whether a certain PV system situated on Cornell's Hanson Research Farm of the Geneva Experiment Station located in the Town of Seneca, Ontario County was properly classified as taxable real property and assessed to Cornell University by the Town of Seneca?

Non-party Argos Solar, LLC ("Argos"), a Delaware limited liability company subject to taxation under article 9-A of the Tax Law[7], is in the business of providing electrical energy to customers through PV systems constructed and owned by Argos. Argos installed a PV system

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[5] In *Congregation Rabbinical Coll. of Tartikov, Inc. v. Town of Ramapo*, 72 A.D.3d 869, 871 (2010), aff'd, 17 N.Y.3d 763 (2011), the Second Department held: " A tax-exempt property will generally retain its tax-exempt status even where a non-exempt, for-profit independent contractor conducts commercial operations on the property, so long as those operations are in furtherance of the property's tax-exempt purposes." In the instant matter, Cornell is the exclusive purchaser of all of the electricity generated by the Argos PV system.

[6] Again, Cornell is the exclusive purchaser of Argos electricity for a twenty-year term for electrical service on its campuses and for other educational purposes.

[7] Per an inquiry from the court, Cornell, in a May 31, 2018 letter, set forth its rational that franchise taxes were paid by the owners of Argos "with respect to Argos' activities, assets, and income"and that "...Argos is treated as a corporation taxable under Article 9-A for purposes of RPTL § 102(12)(f)".

("system") on Cornell's research property exclusively for Cornell's campus energy needs for a twenty-year term, during which Cornell agrees to pay a fixed-price for the electricity.

The PV equipment largely consists of solar panels, wires, a racking system, two inverters, poles or pilings, a control system and a concrete pad on which equipment sits. Argos also inserted concrete footings after construction commenced to reinforce certain poles where resistant subsoil conditions were encountered. Installation of the system was completed in March 2016. Argos can remove the system within thirty days if Cornell fails to pay for the electricity or otherwise defaults under the Agreement. Conversely, Cornell can terminate the license and direct Argos to remove the equipment upon an Argos default. The Planning Board of the Town of Seneca not only conditioned its approval of the PV system upon its removal when use of the PV system ceases, but also required Cornell provide the Town with a financial guarantee that the equipment would be removed and the land restored to its prior condition at the end of the service term.

In part, respondents contend that the PV system is taxable under subdivision 12 (par. (f)) of section 102 of the Real Property Tax Law, which reads:

> 12. "Real property", "property" or "land" mean and include:
> (f) Boilers, ventilating apparatus, elevators, plumbing, heating, lighting and power generating apparatus, shafting other than counter-shafting and equipment for the distribution of heat, light, power, gases and liquids, but shall not include movable machinery or equipment consisting of structures or erections to the operation of which machinery is essential, owned by a corporation taxable under article nine-a of the tax law[8], used for trade or manufacture and not essential for the support of the building, structure or superstructure, and removable without material injury thereto;

The first part of this contention is that Argos' equipment is "power generating apparatus,...and equipment for the distribution of ... power" within the statute and, thus, real property. This portion of the statute including within the definition of real property "equipment for the distribution of heat, light, power, gases and liquids" encompasses only such facilities as would be common to all manufacturing structures, such as the usual plumbing, sewage and heating facilities, and not those present due to the particular manufacturing process involved *(Matter of City of Lackawanna v. State Bd. of Equalization and Assessment of State of N. Y.,* 21 A.D.2d 318, mod. on other grds., 16 N.Y.2d 222)[9]. Inclusion in the definition of real property should depend on whether the equipment is so inextricably attached to real property as to become a part thereof, not on the title of the business it is used in. As the equipment here is present solely for use in Argos' business of electricity generation, and not for general energy consumption to make the "system" functional, it is not encompassed by this definition of real property.

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[8] Although a Delaware corporation, Argos maintains, and submitted documentation and an affidavit, that it is taxable under article nine-a of the Tax Law.

[9] Respondents assert that *Honeoye* misapplies *Lackawanna.*

The second point of this contention is that Argos' equipment is not within the exclusion from real property of "movable machinery ...not essential for the support of the building ... and removable without material injury thereto." The equipment here is not of such tremendous size, and its installation of such a permanent nature, as to make its movement both physically and economically unfeasible (again, *see, Matter of City of Lackawanna*). The equipment encompasses components that are readily removable from the property, as required by the Seneca Planning Board, without material damage to the land. Furthermore, since the solar panels are not contained in a building, the equipment is not essential for the support of a building.[10] Therefore, the PV equipment is not included in the category of real property (see, *Matter of Wood Enterprises v. State Tax Comm.*, 67 A.D.2d 1042; *Matter of Martin v. Gwynn,* 18 A.D.2d 851).

6. Litigation Practicality.

Although the arguments made by respective counsel[11] in this case were thorough and thoughtful, but not compelling, there are sufficient reasons to regard the PV system as personal property (as indicated by Seneca requiring its eventual removal) and not taxable as real property. However, even if the court, *arguendo*, were to accept respondents' assertion that the PV system constitutes real property, this court necessarily concludes that the equipment affixes to the land (as indicated by respondents taxing Cornell and not Argos) and would fall within Cornell's educational exemption and is thereby exempt from real property taxes. Accordingly, unless on appeal there is a contrary final determination of the subject property's tax status, the parties need not incur the expense of litigating value.

CONCLUSION.

The court having reviewed all of the parties' filings and correspondence and having heard several oral arguments, for all of the above stated reasons, grants Cornell's petition, together with

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[10] One appellate case cites *Honeyoye.* In *Wallace v. Tompkins County Bd. of Assessment Review,* 92 A.D.2d 708, 460 N.Y.S.2d 384 (3d Dep't 1983), the petitioners asserted that certain machinery and equipment owned by a scrap-metal processor had been improperly assessed as part of the petitioners' real property. The Third Department stated that the scale and crane in question which were not essential to the support of any building, structure, or superstructure and could be removed without injury to the land or building and were properly excludable pursuant to RPTL § 102(12)(f).

[11] The advocacy in this case was exceptional. Particularly impressive was respondents' counsel, a sole practitioner, countering point by point the legal department of an Ivy League university (and law school) assisted by specialized outside counsel.

costs. The court further grants Cornell's petition (*Cornell University v. Board of Assessment Review and Shana Jo Hilton, as Assessor of the Town of Seneca, New York,* Index No. 115979-2017, Ontario County) challenging respondents' assessment against Cornell for the subsequent tax year pending before this court, which raises the same issues.

Submit order on notice to opposing counsel.

Dated: January 4, 2019
Rochester, New York

John J. Ark, J.S.C.