

Addressing Ambiguities in One of Life’s Two Certainties:¹ The New Jersey Law Revision Commission’s Examination of Selected Tax Statutes

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I. INTRODUCTION

Titles 54 and 54A of the New Jersey statutes deal with taxation, including provisions pertaining to: the individuals and entities responsible for the review of, assessment of, and collection of taxes; taxation of real and personal property; income taxes; taxes on business

¹ NCC Staff, *Benjamin Franklin’s Last Great Quote and the Constitution*, NAT’L CONST. CTR. BLOG

(Nov. 13, 2022), <https://constitutioncenter.org/blog/benjamin-franklins-last-great-quote-and-the-constitution> (referencing quotation by Benjamin Franklin: “Our new Constitution is now established, everything seems to promise it will be durable; but, in this world, nothing is certain except death and taxes[.]”).

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entities; sales and use taxes; inheritance and estate taxes; and taxes on a variety of other specific items.²

Given the breadth of the tax titles, it is not surprising that certain provisions periodically come to the attention of the New Jersey Law Revision Commission (“Commission”) during the course of its work. The statutory mandate of the Commission is to “promote and encourage the clarification and simplification of the law of New Jersey and its better adaptation to present social needs, secure the better administration of justice and carry on scholarly legal research and work.”³

The Commission considers “the general and permanent statutory law of this State and the judicial decisions construing it” to discover “defects and anachronisms,” and prepares and submits bills to the Legislature designed to remedy defects, reconcile conflicts, clarify confusing language, and eliminate redundancies.⁴ The Commission engages in “a continuous revision of the general and permanent” statutes to maintain them “in [a] revised, consolidated and simplified form.”⁵

In recent years, the Commission worked on multiple projects concerning various aspects of taxation. The Commission considered N.J.S. 54:50-38, pertaining to bulk sale tax notification (Final Report released October 20, 2016⁶, later enacted as L.2017, c.307), and the mandatory nature of property tax refunds pursuant to N.J.S. 54:4-54 (Final Report Released December 19, 2019,⁷ AB 1314 and SB 1225 introduced in January and February of 2022, respectively).⁸ In addition, the Commission twice considered the area of property taxation.⁹

The Commission also worked on the Farmland Assessment Act of 1964, tax jurisdiction and forum, misrepresentation in the taxation context, the taxation of autobuses, and issues concerning audit adjustments. The discussion of that work in the following section focuses on issues that the Commission deemed appropriate to bring to

² N.J. STAT. ANN. §§ 54:54A (West 2022).

³ N.J. STAT. ANN. § 1:12A-8 (West 2022).

⁴ *Id.*

⁵ *Id.*

⁶ N.J. L. REVISION COMM’N, FINAL REP. RELATING TO N.J.S. 54:50-18: BULK SALE TAX NOTIFICATION (Oct. 20, 2016).

⁷ N.J. L. REVISION COMM’N, FINAL REP. RELATING TO MANDATORY PROPERTY TAX REFUNDS (Dec. 19, 2019).

⁸ N.J. LEG., BILL SEARCH, <https://www.njleg.state.nj.us/bill-search/2022/A1314> (last visited Oct. 6, 2023); N.J. LEG., BILL SEARCH, <https://www.njleg.state.nj.us/bill-search/2022/S1225> (last visited Oct. 6, 2023).

⁹ N.J. L. REVISION COMM’N, THIRTY-FIFTH ANN. REP. – 2021, at 59 (2021).

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the attention of the Legislature and offers some insight into the Commission's process.

II. COMMISSION EXAMINATION OF SELECTED TAX STATUTES

A. *The Farmland Assessment Act of 1964*

The Farmland Assessment Act of 1964¹⁰ ("Act") grants preferential tax treatment to eligible owners of land of a certain size that is actively devoted to agricultural¹¹ or horticultural use¹² and has been for at least two successive years immediately preceding the tax year at issue.¹³ To be considered "actively devoted to agriculture or horticulture," the gross sales of either product must have "averaged at least \$1,000 per year" for "the two-year period immediately preceding the tax year in issue."¹⁴

N.J.S. 54:4-23.8 provides that "[w]hen land which is in agricultural or horticultural use . . . is applied to a use other than agricultural or horticultural, it shall be subject to . . . roll-back taxes . . ."¹⁵ A County Board of Taxation is vested with the authority to recoup these roll-back taxes.¹⁶ The phrase "*is applied to a use other than agricultural*" does not clearly indicate the conditions that subject the owner to roll-back taxes. While the Act should "be understood in terms of its evident intent and purpose" of easing the tax burden on farmlands, in the absence of explanatory language regarding a "change in use," common law has filled the void.¹⁷

1. Cessation of Farming Activity

In *Jackson Township v. Paolin*, the County Board of Taxation imposed roll-back taxes on several parcels of a farmer's land because

¹⁰ N.J. STAT. ANN. §§ 54:4-23.1–54:4-34 (West 2022).

¹¹ N.J. STAT. ANN. § 54:4-23.3 (West 2022) (noting that in order to be deemed to be an agricultural use, the land must be "devoted to the production for sale of plants and animals useful to man.").

¹² N.J. STAT. ANN. § 54:4-23.4 (West 2022) (noting that a horticultural use requires land that is "devoted to the production for sale of fruits of all kinds" and "vegetables; nursery; floral, ornamental and greenhouse products[.]").

¹³ N.J. STAT. ANN. § 54:4-23.2 (West 2022); *Balmer v. Twp. of Holmdel*, 2019 WL 6716716, at *7 (N.J. Tax Ct. Dec. 6, 2019) (citing *Brunswick Twp. v. Bellemead Dev. Corp.*, 8 N.J. Tax 616, 620 (Tax Ct. 1987)).

¹⁴ N.J. STAT. ANN. § 54:4-23.5(a) (West 2022).

¹⁵ N.J. STAT. ANN. § 54:4-23.8 (West 2022) (emphasis added).

¹⁶ *See id.*

¹⁷ *City of E. Orange v. Livingston Twp.*, 102 N.J. Super. 512, 535 (N.J. Super. Ct. Law Div. 1968), *aff'd*, 54 N.J. 96 (N.J. 1969).

the County Board determined there had been “a cessation of farming activity on the properties.”¹⁸ The taxpayer appealed.¹⁹

When Patsy Paolin was in his seventies, his health began to decline, and he conceded that, as a result, “everything was lost’ insofar as his farming was concerned[.]”²⁰ The tax assessor “characterized Paolin’s activity on the property in 1978 as ‘non-use’” and indicated that the property was “not ‘actively devoted to agricultural use’ within the intendment of the Farmland Assessment Act” and “should not have received [the] assessment for that year.”²¹

In a case of first impression, the *Paolin* court construed the rollback section of the Farmland Assessment Act.²² The court noted that “the issue is squarely presented whether loss of farmland assessment automatically triggers the imposition of rollback taxes.”²³ The court considered “whether a finding that a property is not ‘actively devoted to agricultural . . . use’ in any year requires a finding that the property ‘is applied to a use other than agricultural or horticultural’ . . . so as to trigger the [imposition] of rollback taxes.”²⁴

The court focused on the dictionary definitions of “apply” and “change.”²⁵ The definitions of these terms suggested “that the Legislature intended an active conversion from one positive type of land use to another.”²⁶ The court’s analysis of the synonyms for these terms suggested “rather cogently that the Legislature intended that the use of a property had to be fundamentally different from active devotion to agricultural use before rollback taxes would be assessable.”²⁷ “[I]nstead of providing that cessation of the qualifying activity would trigger a rollback, the Legislature chose to use words that connote more than a mere

¹⁸ Jackson Twp. v. Paolin, 181 N.J. Super. 293, 295 (N.J. Super. Ct. App. Div. 1981) (mentioning the taxpayer also appealed from the county tax board judgment that denied him a farmland assessment. However, that issue exceeded the scope of the Commission’s work.).

¹⁹ *Id.*

²⁰ *Id.* at 298.

²¹ *Id.* at 299–300.

²² *Id.* at 302.

²³ *Id.* at 301.

²⁴ *Paolin*, 181 N.J. Super. at 301.

²⁵ *Id.* at 303 (noting the American Heritage Dictionary definitions of “apply” and “change” as follows: “apply: . . . 2. To put to or adapt for a special use. . . . 4. To devote (oneself or one’s efforts) to something; change: . . . 1.a. The process or condition of changing; alteration or modification; transformation. b. The replacing of one thing for another; substitution. 2. A transition from one state, condition, or phrase to another; the change of seasons. 3. Something different; variety”).

²⁶ *Id.* at 303.

²⁷ *Id.* (quoting the American Heritage Dictionary: “Synonyms: change, alter, vary, modify, transform, convert, transmute”).

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cessation or lapse of use, and even more than an alteration or modification of a qualified use.”²⁸

The court also examined the legislative history of the Act.²⁹ It stated that “[t]here is no suggestion in the available history of the 1963 amendment to the State Constitution or the enactment of the Farmland Assessment Act that the rollback tax feature was intended to apply automatically upon termination of the active devotion of a property to agricultural use.”³⁰ The court concluded that the imposition of roll-back taxes was intended to “[prevent] abuse of the anticipated farmland assessment system by those who would be involved in ‘pure [land] speculation.’”³¹

The *Paolin* court considered the “experience of other states” in dealing with agricultural assessments and roll-back taxes.³² It described the “approach taken by all the states” as “so generally consistent that it is instructive to study their approaches to the problem[.]”³³ After an examination of scholarly works in this area of the law, the court opined that “[t]hese authorities corroborate the conclusion of the court that rollback tax provisions in farmland assessment legislation were almost never intended to apply automatically when a farm-qualified property lost its farm qualification.”³⁴ “[T]he severity of some rollback provisions would tend by itself to indicate that they were not designed for imposition on property that becomes under-utilized . . . but rather only on property that has been applied to a more intensive and presumably more profitable use.”³⁵ The court found it “difficult to imagine that the intent of any rollback provision was to impose an extra tax burden on a landowner who simply grew old or became disabled and no longer could actively devote . . . [the] property to agriculture.”³⁶

Ultimately, the court reversed the judgment of the County Board of Taxation, which had imposed roll-back taxes against the landowner.³⁷ The court reasoned that the imposition of roll-back taxes “merely because the owner ceased to devote the property to agriculture on an active basis” would subvert the intent of the Act.³⁸ The failure of a

²⁸ *Id.* at 303–04.

²⁹ *See Paolin*, 181 N.J. Super. at 304–06.

³⁰ *Id.* at 305; *see also* N.J. CONST. art. VIII, § 1 para. 1(b).

³¹ *See Paolin*, 181 N.J. Super. at 305.

³² *Id.* at 306–08.

³³ *Id.* at 306.

³⁴ *Id.* at 307.

³⁵ *Id.* at 308.

³⁶ *Id.*

³⁷ *Paolin*, 181 N.J. Super. at 309.

³⁸ *Id.* at 308.

landowner to devote the property actively to agriculture during a given year “was not an ‘application of the property to a use other than agriculture’ and was not a ‘change in use’ of the property within the intent of [the Act] so as to trigger the imposition of rollback taxes upon the property.”³⁹ Roll-back taxes, according to the *Paolin* court, “are not triggered until the land is applied to a more intensive use than that for which it received farmland assessment.”⁴⁰

2. *Balmer v. Township of Holmdel*

In 2019, almost four decades after the *Paolin* decision, the New Jersey Tax Court (“Tax Court”) was called upon to consider whether a landowner’s cessation of farming “absent using . . . [the land] for another purpose,” constituted “a change in use” that is “sufficient to trigger the farmland rollback assessment provisions of N.J.S.A. 54:4-23.8.”⁴¹

In *Balmer v. Township of Holmdel*, Ms. Balmer owned approximately twelve acres of land that was assessed as farmland up to and including tax year 2013.⁴² In 2013, Ms. Balmer became ill, her farmer also retired, and she was unable to replace him, so she was forced to cease farming.⁴³ Consequently, Ms. Balmer did not seek the statutory farmland assessment for the tax year 2014 because she recognized that her land was not “actively devoted” to agriculture or horticulture.⁴⁴

In 2013, the tax assessor visited Ms. Balmer’s property and determined that all agricultural activity had ceased.⁴⁵ The inspection revealed that the property was covered in tall grass and devoid of farming equipment.⁴⁶ In 2015, the Township of Holmdel sought roll-back taxes by way of a complaint filed with the County Board of Taxation alleging that Ms. Balmer had abandoned farming her land.⁴⁷ The Board granted the imposition of roll-back taxes.⁴⁸

Ms. Balmer appealed and argued that the imposition of roll-back taxes was improper because she had not changed the use of the land,

³⁹ *Id.* at 309 (quoting N.J.S.A. 54:4-23.8).

⁴⁰ *Id.* at 308–09.

⁴¹ *Balmer v. Twp. of Holmdel*, 2019 WL 6716716, at *1 (N.J. Tax Ct. Dec. 9, 2019).

⁴² *Id.* (noting that plaintiff’s primary residence was situated on the subject land).

⁴³ *Id.*

⁴⁴ *See id.* at *1, *3 (observing that plaintiff did not seek farmland assessment any time thereafter).

⁴⁵ *Id.* at *1.

⁴⁶ *Id.*

⁴⁷ *Balmer*, 2019 WL 6716716, at *2.

⁴⁸ *Id.* (granting \$12,426.07 for tax year 2013 and \$11,357.06 for tax year 2012).

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which remained vacant and available for farming.⁴⁹ Ms. Balmer advanced three arguments.⁵⁰ First, she argued that the property was vacant but was available for farming.⁵¹ Next, much like the farmer in *Paolin*, Ms. Balmer argued that she had not changed the “use” of her land, she had merely stopped farming.⁵² Finally, she argued that the imposition of roll-back taxes violated the Act’s legislative intent.⁵³ Based on these arguments, she urged the court to find that she had not changed the agricultural use of her land.⁵⁴

The court acknowledged that “while illness was a factor in both cases, the use of the land is the critical distinguishing element.”⁵⁵ The *Balmer* court stated that in *Paolin*, “there was a modicum of farming activity” and that the *Paolin* court had described Paolin’s property as “under-utilized.”⁵⁶ The court then found that in *Balmer*, unlike in *Paolin*, “farming was abandoned” and that because the land was not actively used for farming “the use of [Ms. Balmer’s] land was no longer agricultural.”⁵⁷

The *Balmer* court also examined what it considered to be the “plain meaning” of N.J.S.A. 54:4-23.8.⁵⁸ Much like the *Paolin* court, the *Balmer* court used a dictionary to discern the plain meaning of a key term: the word “change.”⁵⁹ The *Balmer* court determined “that doing something different would constitute change” and that “[n]ot farming is different from farming and constitutes a change [for roll-back taxes].”⁶⁰ The court also noted that “both the New Jersey Constitution and N.J.S.A. 54:4-23.8 clearly and unambiguously state that a previously qualified land not

⁴⁹ *Id.* at *2, *3 (stating the court applied a “present use” requirement, noting that “[t]he fact that the land was available for farming at that time or sometime in the future is immaterial; it is present use that is critical.”).

⁵⁰ *Id.* at *3–5.

⁵¹ *Id.* at *3.

⁵² *Id.*

⁵³ *Balmer*, 2019 WL 6716716, at *5.

⁵⁴ *Id.* at *3.

⁵⁵ *Id.*

⁵⁶ *Id.* *Contra* Jackson Twp. v. Paolin, 3 N.J. Tax 39, 54 (Tax Ct. 1981) (noting “a consideration of the severity of some roll-back provisions would tend by itself to indicate that they were not designed for imposition on property that becomes under-utilized, as has Paolin’s property in the present case, but rather only on property that has been applied to a more intensive and presumably more profitable use.”).

⁵⁷ *Balmer v. Twp. of Holmdel*, 2019 WL 6716716, at *3 (N.J. Tax Ct. Dec. 9, 2019).

⁵⁸ *Id.* at *4.

⁵⁹ *Id.*; *see also* Jackson Twp. v. Paolin, 181 N.J. Super. 293, 303 (N.J. Super. Ct. App. Div. 1981).

⁶⁰ *Id.* (quoting *Angelini v. Upper Freehold Twp.*, 8 N.J. Tax 644, 651 (Tax Ct. 1987)).

being used for agricultural use will be subject to roll-back taxes.”⁶¹ Ultimately, the court denied Ms. Balmer’s motion for summary judgment, concluded that the imposition of roll-back taxes was appropriate, and granted summary judgment in favor of the municipality.⁶²

A property may fall short of the Act’s the minimum gross sales requirement for a given year and no longer be considered “actively devoted” to agriculture or horticulture. Under such circumstances, the property will forfeit its preferential farmland assessment. There is nothing in the statute to suggest that the Legislature intended the roll-back tax provision to apply automatically when a farm-qualified property loses its preferential treatment.⁶³

In April 2022, the Commission released a Final Report proposing additional language to N.J.S. 54:4-23.8 to provide consistency in roll-back tax imposition.⁶⁴ The Report recommended amending the statute to add language clarifying that the cessation of agricultural or horticultural activity is not, by itself, considered a change in land use sufficient to impose roll-back taxes against the landowner.⁶⁵ This recommendation is consistent with the legislative history of the Act and the Tax Court’s decision in *Paolin*.⁶⁶

B. Taxation of Autobuses

New Jersey’s Petroleum Products Gross Receipts Tax Act and the Motor Fuel Tax Act both contain provisions to exempt specific bus services from the tax on fuel.⁶⁷ Both acts also contain the term

⁶¹ *Balmer*, 2019 WL 6716716, at *5 (citing N.J. CONST. art. VIII, § 1, para. 1(b); N.J. STAT. ANN. § 54:4-23.8a. (West 2022)). To be clear, neither the New Jersey Constitution nor the enacting statute uses the language “not being used for.” Rather, N.J. STAT. ANN. § 54:4-23.8a imposes roll-back taxes when previously qualified farmland “is applied to a use other than for agriculture.”

⁶² *Balmer*, 2019 WL 6716716, at *6.

⁶³ *Jackson Twp. v. Paolin*, 3 N.J. Tax 39, 47–53 (Tax Ct. 1981).

⁶⁴ See N.J. L. REVISION COMM’N, FINAL REPORT REGARDING MODIFICATIONS TO ROLL-BACK TAXES PROVISION IN THE FARMLAND ASSESSMENT ACT OF 1964 – N.J.S. 54:4-23.8, at 13 (2022), <https://static1.squarespace.com/static/596f60f4ebbd1a322db09e45/t/6274308e78236011ecbf9dac/1651781774302/farmlandFR042122r.pdf> [hereinafter “NJLRC APR. 2022 FINAL REPORT”] (stating prior to the release of a Final Report, it is the practice of the Commission to distribute its work to, and seek comments from, knowledgeable individuals and organizations).

⁶⁵ *Id.* at 14.

⁶⁶ *Id.* at 2, 7.

⁶⁷ N.J. STAT. ANN. § 54:15B-2.1 (West 2022); N.J. STAT. ANN. § 54:39-112 (West 2022).

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“autobus,” but neither provides a definition. Instead, the term is defined in the State’s Public Utilities statutes.⁶⁸

In *Senior Citizens United Community Services, Inc. v. Director, Division of Taxation*, the Tax Court considered whether the Public Utilities’ definition of “autobus” contained in Title 48 was incorporated into Title 54 for purposes of taxation.⁶⁹ If incorporated, non-profit corporations would be excluded from operating “special paratransit vehicles” under the exemptions set forth in the Motor Fuel Tax and Petroleum Products Gross Receipts Acts.⁷⁰

The *Senior Citizens United* court described the Motor Fuel Tax statute, N.J.S. 54:39–112, as confusing and noted it was compelled to examine a half-century of legislative history to ascertain the Legislature’s intent.⁷¹ After examining the intersection of taxation and public utilities regulation the case raised, the court concluded that “special and rural transportation services . . . are eligible for the Motor Fuel Tax and the Petroleum Products Gross Receipts Tax exemption.”⁷²

Senior Citizens United Community Services, Inc. (“SCUCS”) is a non-profit corporation that provides “special and rural transportation services” for senior citizens and individuals with disabilities through contracts with New Jersey Transit and county governments.⁷³ To provide these transportation services, SCUCS entered into contracts to purchase fuel from two local gas stations at retail rates.⁷⁴ SCUCS then sought a refund for its fuel purchases via the Motor Fuel Tax and the

⁶⁸ N.J. STAT. ANN § 48:4-1 (West 2022) (defining “autobus” as “any motor vehicle or motorbus operated over public highways or public places in this State for the transportation of passengers for hire in intrastate business, whether used in regular route, casino, charter or special bus operations, notwithstanding such motor vehicle or motorbus may be used in interstate commerce.”); N.J. STAT. ANN § 48:4-2.20 (West 2022) (defining “autobus” as “any motor vehicle or motorbus operated over public highways or public places in this State for the transportation of passengers for hire in intrastate business which is regulated by and subject to the provisions of Title 48 of the Revised Statutes.”); N.J. STAT. ANN § 48:16-23 (West 2022) (defining “autobus” to include “any automobile or motor bus, commonly called jitney, with a carrying capacity of not more than 13 passengers, operated under municipal consent upon a route established wholly within the limits of a single municipality[.]”).

⁶⁹ *Senior Citizens United Cmty. Servs., Inc. v. Dir., Div. of Taxation*, 32 N.J. Tax 381, 385 (Tax Ct. 2021).

⁷⁰ *Id.* at 385.

⁷¹ *Id.* at 386.

⁷² *Id.* at 406.

⁷³ *Id.* at 383 (noting that transportation is provided for employment, mall shopping, non-emergency medical, nutrition site, personal business, sheltered workshop, shopping, and special events).

⁷⁴ *Id.* at 384.

Petroleum Products Gross Receipts Tax.⁷⁵ The Director of the Division of Taxation (“Director”) denied the request, and SCUCS appealed.⁷⁶

The Director’s position was that SCUCS had not operated an autobus as defined by N.J.S. 48:4-1.⁷⁷ The Director also argued that the term autobus excludes “special paratransit vehicles,” which, by definition, includes “vehicles used by a county special or rural bus service transporting senior citizens and the disabled.”⁷⁸ SCUCS argued Title 48’s definition of “autobus” is not incorporated into Title 54 and the “purpose of the paratransit amendment” was not “to increase the costs of providing special and rural bus services which would result from the denial of the exemption.”⁷⁹

The court explained that the issue raised by the parties involved the intersection of complicated areas of taxation and public utilities regulation that could only be understood after reviewing the history of the legislative enactments beginning in 1927.⁸⁰ The first sentences of both N.J.S. 54:39-112(a)(1) and N.J.S. 54:15B-2.1(b)(1) are identical, 112 words long, and contain ten conjunctions. The court stated that “[o]n its face and without the valuable context provided by the legislative history, the statute is confusing and not a model of clarity.”⁸¹

Ultimately, the court rejected the Director’s arguments, stating that it was not clear the term “autobus,” as found in the “regular route service exemption,” was incorporated into the rural transportation services exemption.⁸² Even if it was, the court said that the “emphasis of the statute is on the *service, not the vehicle*.”⁸³ The court further noted that Title 48 contains three definitions of “autobus,” and the Director did not offer any explanation for selecting one statutory definition over the others.⁸⁴ “When the Legislature sought to include a Title 48 exemption provision [in the Motor Fuel Tax Act] it did so explicitly”⁸⁵ and the

⁷⁵ *Senior Citizens United*, 32 N.J. Tax 381 at 384.

⁷⁶ *Id.*

⁷⁷ *Id.* at 385.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 381, 386, 405–06.

⁸¹ *Senior Citizens United*, 32 N.J. Tax at 386.

⁸² *Id.* at 394.

⁸³ *Id.* at 395 (emphasis added) (noting that the history of the statute, dating back to 1935, does not define autobus, rather it defines the service provided and whether the bus paid the franchise tax).

⁸⁴ *Id.* at 396.

⁸⁵ *Id.* at 397 (observing that in 1987, N.J.S. 54:39-112(a)(1) was amended explicitly reference N.J.S. 48:4-1’s definition of regular route bus operation).

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definitions contained in N.J.S. 48:4-1 begin with the language “as used in this chapter,” which limits their application to Chapter 4 of Title 48.⁸⁶

“[N]either the express words of the 1992 enactment, nor anything in the legislative history, indicated” to the court that the definition of autobus in N.J.S. 48:4-1 was intended to apply to the motor fuel tax exemption or Title 54.⁸⁷ Since the court recognized that “the clear legislative purpose . . . is to relieve the counties and third-party providers of the financial expense”⁸⁸ the court declined to incorporate a statutory definition of “autobus” from Title 48 into Title 54 that would limit the special or rural transportation bus service exemption found in N.J.S. 54:39-112 (a)(1).⁸⁹

The Commission, in a Final Report released in December of 2022, recommended clarification of the motor fuel tax exemptions in both the Motor Fuel Tax and the Petroleum Products Gross Receipts Tax Acts.⁹⁰ The recommendation received the support of the New Jersey Department of the Treasury, Division of Taxation.⁹¹

C. *Misrepresentation*

In New Jersey, when a taxpayer receives an erroneous refund, the refund is considered an underpayment of the tax due pursuant to N.J.S. 54A:9-4(c)(4).⁹² The New Jersey Department of the Treasury, Division of Taxation (Division), is entitled to issue an assessment for the deficiency arising from the erroneous refund.⁹³ A deficiency assessment must be made within three years from the issuance of the erroneous refund, or within five years, if “it appears that any part of the refund was induced by fraud or misrepresentation of a material fact.”⁹⁴ The statute does not define “misrepresentation.”

In *Malhotra v. Director, Division of Taxation*, the Tax Court considered the meaning of the term “misrepresentation” as used in N.J.S.

⁸⁶ *Senior Citizens United*, 32 N.J. Tax at 386.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 400.

⁹⁰ N.J. L. REVISION COMM’N, FINAL REPORT ADDRESSING THE USE OF THE TERM “AUTOBUS” IN NEW JERSEY’S MOTOR FUEL TAX ACT AND THE PETROLEUM PRODUCTS GROSS RECEIPTS TAX ACT, at 2, 8 (Dec. 15, 2022), <https://static1.squarespace.com/static/596f60f4ebbd1a322db09e45/t/638e36ac89498523820e3063/1670264492549/autobusDFR120522r.pdf> (last visited Oct. 6, 2023).

⁹¹ *Id.* at 7.

⁹² N.J. STAT. ANN. § 54A:9-4(c)(4) (West 2022).

⁹³ *Id.*

⁹⁴ *Id.*

54A:9-4.⁹⁵ Following an examination of the legal contexts in which the term is employed, the Tax Court held that to invoke the five-year statute of limitations, “a misrepresentation of material fact must be more than an innocent mistake.”⁹⁶

The *Malhotra* case involved a married couple (collectively, “the Taxpayer”) who erroneously reported the amount of New Jersey income tax withholding on their New Jersey state income tax return for the 2013 tax year.⁹⁷ The Division issued the Taxpayer a refund on March 11, 2014.⁹⁸ On May 9, 2018, the Director of the Division of Taxation issued the Taxpayer an underpayment billing notice covering the erroneous refund plus penalty and interest charges.⁹⁹

Before the Tax Court, the Director argued that the deficiency assessment was timely because the five-year statute of limitations applied.¹⁰⁰ The Director, however, did not allege, and the record did not suggest, that the refund had been induced by fraud or any intentional act to evade tax.¹⁰¹ Rather, the Director maintained that “any mistake or omission, even an unintentional one,” constituted a misrepresentation triggering the five-year statute of limitations in N.J.S.A 54A:9-4(c)(4).¹⁰² The Taxpayer argued that a misrepresentation requires intent.¹⁰³

The *Malhotra* court noted the plain language of the statute did not clearly convey the requisite level of intent necessary to make such a finding, nor did the legislative history provide any guidance regarding the definition of the term.¹⁰⁴ The court then turned to an examination of extrinsic sources, including other legal contexts¹⁰⁵ and the Black’s

⁹⁵ *Malhotra v. Dir., Div. of Tax’n*, 32 N.J. Tax 443 (Tax Ct. 2021).

⁹⁶ *Id.* at 456, 459.

⁹⁷ *Id.* at 445 (“[this] amount was actually New York State income tax withholding, paid by Taxpayer’s employer towards New York State income tax.”).

⁹⁸ *Id.* at 446.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 447.

¹⁰¹ *Malhotra*, 32 N.J. Tax at 454 (“[T]axpayer asserts that the error in claiming a credit for \$5,522 on the New Jersey return was purely an innocent mistake, which was uncontroverted by the Director.”).

¹⁰² *Id.* at 454.

¹⁰³ *Id.* at 448.

¹⁰⁴ *Id.* at 455.

¹⁰⁵ *Id.* (“... in contract law[,] ‘legal fraud or misrepresentation consists of [1] a material misrepresentation of a presently existing or past fact, [2] made with knowledge of its falsity, [3] with the intention that the other party rely thereon, and [4] that [they do] so rely to [their] damage.’” (quoting *Berman v. Gurwicz*, 189 N.J. Super. 89, 92 (Ch. Div. 1981)); *Malhotra*, 32 N.J. Tax at 455 (noting in the context of insurance contracts, coverage under an insurance policy may be voided by the insurer because of a post-loss misrepresentation made by the insured only if the misrepresentation is “knowing and

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Law Dictionary definitions of “misrepresentation” and “material misrepresentation.”¹⁰⁶ The court noted that the case law and dictionary definition of misrepresentation employed words and phrases¹⁰⁷ indicating that “misrepresentation requires a level of intent that does not rise to the level of fraud, but cannot be done accidentally.”¹⁰⁸

Distinguishing fraud from misrepresentation, the *Malhotra* court concluded that “[f]raud requires a high level of intent to defraud, but ‘misrepresentation must include some level of intent that is above a mistake.’”¹⁰⁹ To maintain “the distinction between the five-year and three-year statutes of limitations,” the court concluded that a “misrepresentation of material fact must be more than an innocent mistake.”¹¹⁰ Therefore, the court held that the three-year statute of limitations applied and the Director was “not entitled to the refund recovery because the statute of limitations had simply run out.”¹¹¹

Considering the holding in *Malhotra* and the lack of a statutory definition of “misrepresentation,” the Commission authorized staff to conduct research and outreach to determine whether N.J.S. 54A:9-4(c)(4) would benefit from modification to clarify the level of intent necessary to trigger the five-year statute of limitations.¹¹²

Commission staff focused first on the definition of “misrepresentation.”¹¹³ Although the New Jersey statutes do not provide a definition of this term in the tax context,¹¹⁴ the New Jersey

material.” (quoting *Longbardi v. Chubb Ins. Co.*, 582 A.2d 1257, 1262 (N.J. 1990) (citing N.J. STAT. ANN. § 17:33A-4a(1))).

¹⁰⁶ *Malhotra*, 32 N.J. Tax at 457 (defining “material misrepresentation” as a “deliberate hiding or falsification of a material fact” which, “[i]f known to the other party,” could “abort[] or significantly alter[]” an agreement or transaction, and providing that “misrepresentation is colloquially . . . understood to mean a statement made to deceive or mislead” (quoting BLACK’S LAW DICTIONARY, 881 & 903 (5th ed. 1979))).

¹⁰⁷ *Malhotra*, 32 N.J. Tax at 457 (“‘knowing,’ ‘intent that others rely,’ ‘lying,’ ‘deliberate,’ and ‘concealment’”).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 457.

¹¹⁰ *Id.* at 458–59.

¹¹¹ *Id.* at 459.

¹¹² N.J. L. REVISION COMM’N, *Minutes of NJLRC Meeting*, 6 (Jul. 21, 2022), <https://www.njlrc.org/minutes-and-agendas> (last visited Oct. 6, 2023).

¹¹³ N.J. L. REVISION COMM’N, *Draft Tentative Report Regarding the Use of the Phrase “Misrepresentation of a Material Fact” in the New Jersey Gross Income Tax Act (N.J.S. 54A:9-4)*, 7 (Oct. 10, 2022), <https://www.njlrc.org/projects/2022/7/10/misrepresentation-definition-of> (last visited Oct. 6, 2023) [hereinafter “NJLRC Oct. 2022 Draft Tentative Report”].

¹¹⁴ See N.J. STAT. ANN. §§ 51:4-23 & 51:11-1 (West 2023) (defining the term misrepresentation in two New Jersey statutes including Title 51 - Standards, Weights, Measures and Containers, as “any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in

Administrative Code (NJAC) states that “civil fraud is characterized by a taxpayer’s intent to evade or avoid the payment of taxes . . . by conduct intended to conceal, mislead, or otherwise prevent the administration and collection of the taxes imposed by the laws of this State.”¹¹⁵ To determine whether to impose a penalty, the NJAC enumerates thirteen behaviors indicative of a taxpayer’s intent to commit civil fraud, including “[m]aking misrepresentations of material facts.”¹¹⁶ Similarly, although the Internal Revenue Code does not define fraud or misrepresentation, the Internal Revenue Manual provides that “[f]raud is deception by misrepresentation of material facts . . . which results in material damage to one who relies on it and has the right to rely on it.”¹¹⁷

Commission staff also undertook a survey of federal and state statutes of limitation for imposing tax assessments both generally and when a return is false or fraudulent.¹¹⁸ Further examination was conducted of statutes, like New Jersey’s, which contain a fraud exception as well as a separate provision for dealing with refunds induced by a taxpayer’s fraudulent return.¹¹⁹

In a Draft Tentative Report, Commission staff proposed modifications to N.J.S. 54A:9-4, which removed the five-year statute of limitations on assessments for erroneous refunds induced by fraud and eliminated the phrase “misrepresentation of material fact” from N.J.S. 54A:9-4(c)(4).¹²⁰ The first modification was intended to resolve the

accordance with the facts”); *see also* NJLRC Oct. 2022 Draft Tentative Report, *supra* note 113, at 7 (analyzing the utility of the Title 51 definition).

¹¹⁵ N.J. ADMIN. CODE § 18:2-2.9(b) (2023).

¹¹⁶ N.J. ADMIN. CODE § 18:2-2.9(e) (2023) (distinguishing between fraudulent intent and errors that result from other types of behavior, explaining that a taxpayer’s “[i]ntent [to commit fraud] is distinguished from inadvertence, reliance on incorrect technical advice, honest difference of opinion, negligence, or carelessness.”).

¹¹⁷ 25.1.1.3(1) (noting the IRS prepares and utilizes the IRM manual); *see also* IRM 25.1.6.4(1) (“Fraud generally involves one or more of the following elements: [(1)] Deception; [(2)] Misrepresentation of material facts; [(3)] False or altered documents; and [(4)] Evasion (i.e., diversion or omission)[.]”).

¹¹⁸ NJLRC Oct. 2022 Draft Tentative Report, *supra* note 113, at 10–12 (“In New Jersey, and forty-seven other states, an assessment may be made *at any time* where the taxpayer has filed a false or fraudulent tax return.”).

¹¹⁹ NJLRC Oct. 2022 Draft Tentative Report, *supra* note 113, at 12–13 (stating that (1) the IRC and fifteen state statutes, including New Jersey’s, provide a statute of limitations for recovering an erroneous refund; (2) the federal government and nine statutes impose a five-year statute of limitations “to recover a refund issued as a result of the taxpayer’s fraud or misrepresentation of fact[.]” and (3) “there are four states that permit the government to make an assessment *at any time* if the erroneous refund was induced by fraud or misrepresentation of a material fact.”).

¹²⁰ NJLRC Oct. 2022 Draft Tentative Report, *supra* note 113, at 13–14 (proposing also that the statute “be modified to incorporate gender neutral language and contemporary statutory drafting practices to make the statute more accessible”).

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apparent conflict between the two fraud exceptions, while the second modification hoped to remove the ambiguity created by the undefined term “misrepresentation.”¹²¹ An additional proposed modification added subsection (c)(6), incorporating the examples of non-fraudulent behavior contained in the NJAC.¹²²

Additional statutory modifications were suggested during the October 2022 Commission meeting,¹²³ and the Commission agreed that language proposing an unlimited statute of limitations must be clearly defined by the statute. A Revised Tentative Report (“Revised Report”) was released in December 2022.¹²⁴ The Revised Report proposed several modifications to N.J.S. 54A:9-4, including two options for proposed language to address the recovery of erroneous refunds.¹²⁵ The first option permits an assessment within three years of a refund and replaces the current five-year statute of limitations with language indicating that an assessment may be made “at any time if it appears that any part of the refund was induced by the filing of a false or fraudulent return.”¹²⁶ The second option eliminates “as seeming surplusage, the reference to fraud,” and adds a cross-reference to

¹²¹ NJLRC Oct. 2022 Draft Tentative Report, *supra* note 113, at 13–14; *see also* NJLRC Oct. 2022 Draft Tentative Report, *supra* note 113, at 16; 19 (providing two options for modifying subsection (c)(4), which sets forth the statutes of limitation on recovering erroneous refunds. The first option (Option #1) eliminated the reference to a five-year statute of limitations and “the language relative to the ‘misrepresentation of a material fact.’” The language was “replaced with language consistent with the language set forth in (c)(1)(B)[.]” The second option (Option #2) eliminated the reference to fraud in subsection (c)(4). The modifications in Option #2 also added a reference to subsection (c)(1)(B), which contains the statute of limitations when a false or fraudulent return is filed. Finally, the modifications add language from the NJAC to subsection (c)(6) to clarify that certain behaviors “do not constitute an intent to commit fraud[.]”

¹²² *Compare* NJLRC Oct. 2022 Draft Tentative Report, *supra* note 113, at 19 (stating that “inadvertence, reliance on incorrect technical advice, honest difference of opinion, negligence, or carelessness do not constitute as intent to commit fraud” with N.J. ADMIN. CODE § 18:2-2.9(d) (2023) (same)).

¹²³ N.J. L. REVISION COMM’N, *Minutes of NJLRC Meeting*, 8, 9 (Oct. 20, 2022), <https://www.njlrc.org/minutes-and-agendas> (“Commissioner Bunn pointed out that subsection (c)(6) refers to fraudulent *conduct*, but the prior subsection refers to a false or fraudulent *return*, and that subsection (c)(6) should match the earlier language in the statute” and Commissioner Bunn agreed “that the circumstances allowing for an unlimited statute of limitations must be clearly defined by the statute.”).

¹²⁴ *Revised Tentative Report Regarding the Use of the Phrase “Misrepresentation of a Material Fact” in the New Jersey Gross Income Tax Act (N.J.S. 54A:9-4)*, N.J. L. REVISION COMM’N (Dec. 15, 2022), <https://static1.squarespace.com/static/596f60f4ebbd1a322db09e45/t/63bc7d970907111816ae2cb2/1673297304250/misrepresentationRTR121522.o.pdf> [hereinafter “NJLRC Dec. 2022 Revised Tentative Report”].

¹²⁵ NJLRC Dec. 2022 Revised Tentative Report, *supra* note 124, at 15.

¹²⁶ NJLRC Dec. 2022 Revised Tentative Report, *supra* note 124, at 15 (emphasis added).

subsection (c)(1), which addresses the concept of fraud.¹²⁷ The proposed modifications also add subsection (c)(6), which sets forth examples of conduct that “do not constitute an intent to commit fraud.”¹²⁸

Consistent with its usual practice, efforts to obtain comments from knowledgeable individuals and organizations to further develop and revise the drafting as necessary before the preparation and anticipated release of a final report will follow the release of the Revised Report.

D. Audit Adjustments Involving Returns for Closed Years

After a tax return is filed in New Jersey, the Director of the Division of Taxation has a statutory responsibility to examine the filing and make any further audit or investigation as may be necessary.¹²⁹ The Director may assess additional taxes, penalties, and interest against the taxpayer if the amount paid in taxes was deficient.¹³⁰

The State Tax Uniform Procedure Law contained in the Taxpayer Bill of Rights governs deficiency assessments for corporate business taxes.¹³¹ The Director has broad discretion to adjust and redetermine tax returns to make a fair and reasonable determination of the amount of tax payable under the Act.¹³² The Director may not, however, assess additional tax “after the expiration of more than four years from the date of filing of a return.”¹³³

The tax statutes do not address circumstances in which the Director adjusts an “open filing” and, in doing so, eliminates a net operating loss carryover from earlier tax years that was accepted as filed and not audited. In *R.O.P. Aviation, Inc. v. Director, Division of Taxation*, the Tax Court determined that the Director may not perform an audit adjustment to current filings that eliminates a plaintiff’s carried forward net operating losses from closed filings.¹³⁴ The Plaintiff in that case, R.O.P., was in the business of aircraft leasing to an affiliate.¹³⁵ R.O.P. reported net operating losses carried forward of more than \$18 million

¹²⁷ NJLRC Dec. 2022 Revised Tentative Report, *supra* note 124, at 15.

¹²⁸ See N.J. ADMIN. CODE § 18:2-2.9(d); NJLRC Dec. 2022 Revised Tentative Report, *supra* note 124, at 17; see also N.J. L. REVISION COMM’N, *Minutes of NJLRC Meeting*, 8 (Oct. 20, 2022), <https://www.njlrc.org/minutes-and-agendas> (last visited Oct. 6, 2023).

¹²⁹ N.J. STAT. ANN. § 54:49-6a (West 2022).

¹³⁰ *Id.*

¹³¹ N.J. STAT. ANN. §§ 54:48-1 to 54-6; see N.J. STAT. ANN. § 54:48-7 (West 2022).

¹³² N.J. STAT. ANN. § 54:10A-10a (2022). See generally N.J. STAT. ANN. § 54:10A-1 (2022) (Corporation Business Tax Act (1945)).

¹³³ N.J. STAT. ANN. § 54:49-6b (2022).

¹³⁴ *R.O.P. Aviation, Inc. v. Dir., Div. of Tax’n*, 32 N.J. Tax 346, 349 (Tax Ct. 2021).

¹³⁵ *Id.*

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for the tax years 2007-2011.¹³⁶ R.O.P.'s corporate business returns for those tax years were not audited and were accepted as filed.¹³⁷ In tax year 2014, R.O.P.'s net operating losses were carried forward and used to offset its taxable income.¹³⁸ R.O.P.'s corporate business returns for the tax years 2012-2015 were the subject of an audit by the New Jersey Division of Taxation in 2017.¹³⁹ R.O.P.'s income was adjusted as a result of allegations of "underreport[ing] income from the lease rentals."¹⁴⁰ The auditor also disallowed the use of any net operating losses ("NOLs") for 2014 and "of carried forward [losses] from tax years 2007-2011 against the audited (increased) income for tax years 2012, 2013 and 2015, by reducing the NOLS to zero."¹⁴¹ This "resulted in the audited income as being the net taxable income . . . which plus interest totaled \$8,498,890.11."¹⁴² R.O.P. appealed from the Notice of Final Audit adjustment.¹⁴³

The sole issue considered on appeal by the Tax Court was whether the Division's "elimination of R.O.P.'s [net operating losses] generated in closed years (2007-2011) and carried forward to the open years (2012-2015), [was] valid as an audit adjustment of the open tax years."¹⁴⁴ Although the Director has the authority to examine, audit, or investigate a filed return and assess penalties against a taxpayer as necessary,¹⁴⁵ "no assessment of additional tax shall be made after the expiration of more than **four years** from the date of the filing" of a commercial business tax return.¹⁴⁶ The court in *R.O.P. Aviation* explained that N.J.S.A. 54:49-6 subsections (a) and (b) must be read together,¹⁴⁷ since:

[s]ubsection (a) requires Taxation to examine a filed return and provides it the ability to "audit or investigate" the filed return. If the audit is conducted, and a deficiency is determined, Taxation must assess the additional tax. However, although Subsection (b) separately requires that assessment of any additional tax shall be made within four years of the return's filed date, it does not mean that the return's audit/investigation can be made at any time, and

¹³⁶ *Id.* at 349-50.

¹³⁷ *Id.* at 350.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *R.O.P. Aviation*, 32 N.J. Tax at 350.

¹⁴¹ *Id.* at 350-51.

¹⁴² *Id.* at 351.

¹⁴³ *Id.* at 352.

¹⁴⁴ *Id.* at 353.

¹⁴⁵ N.J. STAT. ANN. § 54:49-6a (West 2022).

¹⁴⁶ N.J. STAT. ANN. § 54:49-6b (West 2022) (emphasis added).

¹⁴⁷ *R.O.P. Aviation*, 32 N.J. Tax at 355.

outside the four-year period. The tax assessment flows from the audit made under Subsection (a), therefore, the audit and resultant tax assessment should be subject to the same four-year period.¹⁴⁸

The *R.O.P.* court stated that “auditing a closed year and applying the revisions from that closed year in the open year of audit is doing indirectly what the statute does not permit directly: bypassing the four-year statute of limitations.”¹⁴⁹ The court recognized the scope of the Division’s powers pursuant to N.J.S.A 54:10A-10(a) and the “repose and finality underlying the basis of a statute of limitations.”¹⁵⁰ It declined to “construe [N.J.S.A 54:10A-10a] to defeat the statute of limitations for an audit under N.J.S.A 54:49-6.”¹⁵¹

The Internal Revenue Service (“IRS”) “routinely revises the amount of the [net operating loss] carryforwards by revising the [net operating loss] of the source year, even if that year is closed.”¹⁵² In *R.O.P. Aviation*, the court stated that it was “not bound by the IRS’ construction of a federal income tax statute for purposes of the CBT as to statute of limitations or audit procedures.”¹⁵³

During preliminary outreach, staff engaged with the Division of Taxation, which was also working in this area, and requested any specific recommendations that the Commission had prepared.¹⁵⁴ The Division of Taxation also shared some drafting with the Commission. When it last considered this issue, the Commission expressed hesitation about codifying a decision that might be an outlier, expressed support for the Division’s drafting, and sought supplemental information before taking further action.¹⁵⁵

E. Tax Jurisdiction and Forum

Pursuant to N.J.S. 54:3-21, when a taxpayer or taxing district disputes the assessed valuation of a taxpayer’s property, and the valuation exceeds one million dollars, a challenge may be filed with

¹⁴⁸ *Id.* at 355–56.

¹⁴⁹ *Id.* at 357.

¹⁵⁰ *Id.* at 358–59.

¹⁵¹ *Id.* at 358.

¹⁵² *Id.* at 361.

¹⁵³ *R.O.P. Aviation*, 32 N.J. Tax at 361.

¹⁵⁴ N.J. L. REVISION COMM’N, DRAFT TENTATIVE REPORT ADDRESSING AUDIT ADJUSTMENTS INVOLVING RETURNS FOR CLOSED YEARS, at 7 (June 6, 2022), <https://static1.squarespace.com/static/596f60f4ebbd1a322db09e45/t/629e24a39f071535766eb4af/1654531235990/auditDTR060622r.pdf> (last visited Oct. 6, 2023) [hereinafter “NJLRC JUNE 2022 DRAFT TENTATIVE REPORT”].

¹⁵⁵ *Id.* at 7–9.

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either a County Board of Taxation (“County Board”) or the New Jersey Tax Court.¹⁵⁶ The statute also directs that “[a]n appeal to the Tax Court by one party in a case in which the Tax Court has jurisdiction shall establish jurisdiction over the entire matter in the Tax Court.”¹⁵⁷ N.J.S. 54:3-21, however, does not provide any guidance on how to accomplish a transfer of jurisdiction to the Tax Court if opposing parties challenging the same property assessment select different forums.

The Tax Court addressed the “proper procedural resolution of a dual filing” in *30 Journal Square Partners, LLC v. City of Jersey City*.¹⁵⁸ In that case, the Tax Court held that the County Board’s common practice of dismissing a petition of appeal without prejudice was the proper procedure for providing the Tax Court with jurisdiction over the entire matter.¹⁵⁹ In *30 Journal Square*, Jersey City (“City”) filed a timely petition of appeal challenging assessments for eleven properties owned by 30 Journal Square Partners, LLC (“Owner”) with the Hudson County Board of Taxation.¹⁶⁰ About a month later, the Owner filed a timely complaint challenging the same assessments in the Tax Court.¹⁶¹ The Tax Court determined that, pursuant to N.J.S. 54:3-21a.(1), the Owner’s filing vested the “the Tax Court . . . [with] exclusive jurisdiction over the tax appeals,” including the City’s filing with the County Board.¹⁶² Although the parties did not dispute the Tax Court’s jurisdiction, they disagreed on the appropriate procedure for resolving the City’s filing with the County Board.¹⁶³

The City argued that the County Board must “either dismiss or affirm [the City’s] pending petitions without prejudice, thereby allowing [the City] to file a timely appeal therefrom to the Tax Court.”¹⁶⁴ The Owner contended that the County Board must dismiss the City’s filing *with* prejudice for lack of jurisdiction because the Owner’s Tax Court filing had “immediately divest[ed the] county board of jurisdiction.”¹⁶⁵

¹⁵⁶ N.J. STAT. ANN. § 54:3-21(a)(1) (West 2022) (“[A] taxpayer . . . or a taxing district . . . may . . . appeal to the county board of taxation by filing with it a petition of appeal; provided, however, that any such taxpayer or taxing district may . . . file a complaint directly with the Tax Court, if the assessed valuation of the property subject to the appeal exceeds \$1,000,000.”).

¹⁵⁷ *Id.*

¹⁵⁸ 30 J. Square Partners, LLC v. City of Jersey City, 32 N.J. Tax 91 (Tax. Ct. 2020).

¹⁵⁹ *Id.* at 102.

¹⁶⁰ *Id.* at 93.

¹⁶¹ *Id.*

¹⁶² *Id.* at 95.

¹⁶³ *Id.*

¹⁶⁴ 30 J. Square, 32 N.J. Tax at 95.

¹⁶⁵ *Id.* at 98.

The Owner also asserted that the City's only recourse was to file a counterclaim to the Owner's pending direct appeal in the Tax Court.¹⁶⁶

The Tax Court considered the jurisdictional mandate and choice of forum clause in N.J.S. 54:3-21, as well as each party's right to maintain an independent cause of action to challenge property valuation assessments.¹⁶⁷ The Tax Court adopted the reasoning of *Township of South Brunswick v. Princeton Orchards Assocs. L.L.C.*, an unpublished opinion, which addressed the same issue.¹⁶⁸

In *Princeton Orchards*, the Tax Court determined that N.J.S. 54:3-21 "clearly and unequivocally accords both the taxpayer and the taxing district an independent right to appeal from a property tax assessment."¹⁶⁹ The *Princeton Orchards* court held that "while a direct appeal deprives the county board from *continuing to retain* subject matter jurisdiction and thereafter deciding the case on its merits, it does not retroactively nullify a timely filed cause of action in the county board to preclude its litigation in another forum."¹⁷⁰

To preserve each party's right of appeal and comply with the statutory grant of jurisdiction, the *30 Journal Square* court approved the County Board's practice of issuing a "Memorandum of Judgment with Code #6B – Dismissal Without Prejudice – Hearing Waived" because it "is not an adjudication on the merits and [is not] considered a nullity."¹⁷¹ The Tax Court noted "the absence of a clear and concise procedural mechanism to effectuate the transfer of a Board petition to the Tax Court pursuant to N.J.S.A. 54:3-21(a)," and said that:

the Legislature should clarify that the filing of a direct appeal in the Tax Court does not vitiate the county board's jurisdiction to dismiss the pending petitions without

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 99 ("... the court adopts the approach thoughtfully described by my colleague Judge Sundar in *Twp. of South Brunswick v. Princeton Orchards Assocs. L.L.C.*, 2013 WL 1787160 (N.J. Tax Ct. Apr. 22, 2013), which this court now incorporates herein and adopts as its own[.]").

¹⁶⁹ *Twp. of South Brunswick v. Princeton Orchards Assocs. L.L.C.*, 2013 WL 1787160, at *8 (N.J. Tax Ct. 2013) (quoting *F.M.C. Stores Co. v. Boro of Morris Plains*, 479 A.2d 435, 439 (N.J. Super. Ct. App. Div. 1984)), *aff'd sub nom.*, *F.M.C. Stores Co. v. Borough of Morris Plains*, 495 A.2d 1313 (1985).

¹⁷⁰ *Twp. of South Brunswick v. Princeton Orchards Assocs. L.L.C.*, 2013 WL 1787160, at *9 (N.J. Tax Ct. 2013).

¹⁷¹ *30 J. Square Partners*, 32 N.J. Tax at 101-02 (rejecting the Owner's argument that the City's only recourse was to file a counterclaim in the Tax Court because under such a theory "a party that correctly and timely files a petition with a county board faces an immediate second filing deadline to preserve its independent right to an appeal ... which could be as short as twenty days [and] such a result would be patently unfair to any party caught in this situation.").

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prejudice, and provide the procedural mechanisms to be followed by the parties and the county boards of taxation. This would then preserve the petitioner's ability to continue the litigation in the Tax Court.¹⁷²

As part of its work in this area, the Commission sought additional information related to the legislative history of N.J.S. 54:3-21, particularly with respect to the choice of forum clause.¹⁷³ The Commission also authorized outreach to the Administrative Office of the Courts to ascertain the position of the Judiciary with respect to the Commission's continued work in this area.¹⁷⁴

Supplemental research revealed that the choice of forum clause was added to the statute in 1979, soon after the New Jersey Tax Court was established.¹⁷⁵ The introduction of the Tax Court and the procedural statutes enacted relative to it were the result of research, data collection, and public hearings conducted by the Senate Special Committee on Tax Appeals Procedure ("Tax Committee").¹⁷⁶ Two public hearings were held in March 1977,¹⁷⁷ and the Tax Committee issued a report noting that "[o]ne of the most consistent criticisms of the tax appeals procedure in the State . . . was that the county boards of taxation did not possess the time or the facilities to objectively review and adjudicate the tax appeals brought before them."¹⁷⁸ The enactment of the choice of forum clause in N.J.S. 54:3-21 was part of a comprehensive

¹⁷² *Id.*

¹⁷³ N.J. L. REVISION COMM'N, *Minutes of NJLRC Meeting*, 6 (Nov. 18, 2021) <https://www.njlrc.org/minutes-and-agendas> (last visited Oct. 6, 2023) ("Commissioner Long questioned why a person challenging an assessment is given a choice of forums [and] stated that she would be very interested to learn more about the legislative history of this section.").

¹⁷⁴ *Id.*

¹⁷⁵ L.1979, c. 113, § 1, eff. July 1, 1979; L.1978, c. 33, § 1, eff. July 1, 1979, codified as N.J. STAT. ANN. § 2A:3A-1 (West 1993) (repealed by L. 1993, c. 74, 3, eff. March 12, 1993, codified as N.J. STAT. ANN. § 2B:13-1 (West 2022)).

¹⁷⁶ Report of the Special Comm. on Tax Appeal Procedures of the Senate of New Jersey, *Tax Appeals in New Jersey: A Critique and a Program for Legis. Action*, 129th S., 2nd Sess., at 3-4 (June 26, 1977) [hereinafter "Report of the Special Comm."]; see also S.R. 30, 129th S., 1st Sess. (N.J. 1976) (forming the Tax Committee with the stated goal of making "recommendations to the Senate for the professionalization, modernization and improvement of the [state tax appeal] procedure").

¹⁷⁷ Public Hearing Before the S. Special Comm. on Tax Appeal Procedures, Vol. I, 129th S., 2nd Sess. (Mar. 15, 1977); Public Hearing Before the S. Special Comm. on Tax Appeal Procedures, Vol. II, 129th S., 2nd Sess. (Mar. 30, 1977).

¹⁷⁸ Report of the Special Comm. *supra*, note 176, at 72-74 ("strongly recommend[ing]" that the proposal to permit direct appeals to the Tax Court "not be implemented at [that] time and recommending consideration of the direct appeal proposal be delayed "until such time as the backlog of appeals pending before the tax court is significantly decreased.").

restructuring of the tax appeal system in New Jersey, prompted in large part by the substantial backlog in the Division of Tax Appeals.¹⁷⁹

In response to Commission outreach, the Legislative Liaison to the New Jersey Judiciary at the Administrative Office of the Courts advised that “[t]he Judiciary . . . welcome[s] the opportunity to review any proposed language and strongly support[s] the Commission’s efforts to address this issue.”¹⁸⁰ Additional research and outreach are ongoing to determine how to best incorporate the procedural mechanism accepted by *30 Journal Square* into N.J.S. 54:3-21 and to collect supplemental information regarding the rate at which non-taxpayers appeal property assessments to either the County Board or the Tax Court.¹⁸¹

III. CONCLUSION

The New Jersey Law Revision Commission, consistent with its statutory mandate, brings to the attention of the New Jersey Legislature sections of New Jersey’s statutes that would benefit from modification to support the Legislature in its ongoing efforts to improve New Jersey’s statutory law for the benefit of the State and its citizens. The Commission will continue to engage with the Legislature to assist with the introduction, consideration, and the enactment of Commission recommendations in the area of taxation.

¹⁷⁹ . See L.1979, c. 113, § 1, eff. July 1, 1979, codified as N.J. STAT. ANN. § 54:3-21 (allowing direct appeals to the Tax Court when an assessment exceeded a \$750,000 threshold as of June 1979, despite the Tax Committee’s recommendation that the Legislature defer implementation of direct appeals to the Tax Court); see also Sidney Glaser, *New Jersey’s Tax Court*, Proceedings of the Annual Conference on Taxation Held under the Auspices of the National Tax Association, Tax Institute of America, Vol. 72, at 80 (1979) (explaining that, with respect to the direct appeal legislation, “some concern has been expressed . . . on the theory that county boards may lose some of their expertise in larger cases, [but] it is believed that the [direct appeal] legislation will save time in disposing of large property tax appeals.”).

¹⁸⁰ E-mail from Andrea N. Johnson, Esq., Legislative Liaison - New Jersey Judiciary to Whitney Schlimbach, Counsel, N.J. L. REVISION COMM’N (Jan. 24, 2022, 10:07 AM EST) (on file with the NJLRC); see also N.J. L. REVISION COMM’N, Update Memorandum Re: Transfer of Jurisdiction in Tax Assessment Challenges Pursuant to N.J.S. 54:3-21 (citing *30 J. Square Partners, LLC v. City of Jersey City*, 32 N.J. Tax 91 (Tax Ct. 2020)), at 3 (Mar. 7, 2022), <https://www.njlrc.org/projects/2021/11/8/transfer-of-jurisdiction-in-tax-assessment-challenges> (last visited Oct. 6, 2023)).

¹⁸¹ N.J. L. REVISION COMM’N, *Minutes of NJLRC Meeting*, 7 (Mar. 17, 2022), <https://www.njlrc.org/minutes-and-agendas> (last visited Oct. 6, 2023) (“Commissioner Bell expressed an interest in proceeding with this project. Commissioner Bertone noted that it is unusual for a municipality to appeal in the first instance. She asked Staff to research how many times such instances occur. Chairman Gagliardi stated that this is an area of law that the Commission should examine.”).