THE 2009 ROBERTS CASE APPLIES RETROACTIVELY TO RENT OVERCHARGES STEMMING FROM THE RENTAL OF DEREGULATED APARTMENTS BY LANDLORDS RECEIVING J-51 TAX BENEFITS; THE OVERCHARGES HERE MUST BE RE-CALCULATED IN ACCORDANCE WITH A RECENT RULING BY THE COURT OF APPEALS; THE CLASS OF TENANTS IN THIS RENT OVERCHARGE ACTION SHOULD NOT HAVE BEEN EXPANDED BY SUPREME COURT (FIRST DEPT).

The First Department, modifying Supreme Court, in a full-fledged opinion by Justice Richter, determined: (1) Roberts v Thishman, 13 NY3d 270 applies retroactively to landlords who rent deregulated apartments while receiving J-51 tax benefits; (2) the class of tenants bringing the rent-overcharge action should not have been expanded by Supreme Court; and (3) Supreme Court must re-calculate the rent overcharges in accordance with the recent Court of Appeals ruling in Matter of Regina, 2020 NYSlipOp 02127:

> In Gersten v 56 7th Ave. LLC (88 AD3d 189, 198 [1st Dept 2011]), this Court held that Roberts should be applied retroactively because the decision simply interpreted a statute that had been in effect for a number of years, and did not establish a new principle of law. * * *
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> In Matter of Regina ... , the Court of Appeals determined that "the overcharge calculation amendments [in the HSTPA (HousiNg Stability and Tenant Protection Act)] cannot be applied retroactively to overcharges that occurred prior to their enactment." The Court also resolved a split in this Department as to what rent records can be reviewed to determine rents and overcharges in Roberts cases ... . Regina concluded that "under pre-HSTPA law, the four-year lookback rule and standard method of calculating legal regulated rent govern in Roberts overcharge cases, absent fraud" ... .Accordingly, we ... remand the matter for the court to set forth a methodology consistent with the Rent Stabilization Law as interpreted by the Court of Appeals in Regina. ...
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> ... [T]he motion court improvidently exercised its discretion in expanding the class. The court's order failed to analyze whether class action status was warranted based on the criteria set forth in CPLR 901 and CPLR 902. Conducting that analysis ourselves, we find that the redefined class represents such a fundamental change in the theory of plaintiffs' case that expansion of the class would be improper. Dugan v London Terrace Gardens, L.P., 2020 NY Slip Op 04239, First Dept 7-23-20

ALTHOUGH DISFAVORED, DISCLOSURE OF REDACTED TAX RETURNS WAS WARRANTED IN THIS CASE (FIRST DEPT).

The First Department noted that the disclosure of tax returns is disfavored, but agreed with Supreme Court that disclosure of the redacted returns in this Labor-Law/employment-law dispute was warranted:

> Plaintiffs claim that between 2010 and 2016 defendant employed them as a caretaker for her ailing aunt and that defendant violated, inter alia, several sections of the Department of Labor Regulations (12 NYCRR) requiring overtime pay, a minimum wage, and additional pay for split shifts. Defendant denies that she was plaintiffs' employer for purposes of the regulations and provisions of the Labor Law, but admits that she paid plaintiffs by check from 2014 to 2016, albeit on her aunt's behalf. Plaintiffs claim they were paid in cash by defendant between 2010 and 2013. Defendant, who denies that she was the source of the cash payments, seeks plaintiffs' federal and state tax returns for 2010 to 2013, claiming she needs the returns to verify the cash amounts, as well as plaintiffs' assertion that they were employees, and not independent contractors.
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> ... [D]efendant demonstrated both that the specific information ordered disclosed was necessary to defend the action, and unavailable from other sources ... . Since plaintiffs were paid in cash between 2010 and 2013 and there is no other evidence in the record establishing who paid their wages and how much they were paid during those years, defendant showed a specific need for the production of the three years of tax returns, which might show the amounts claimed by plaintiffs as income from the caretaker work, as well as whether they claimed the income as wages or as money earned through self-employment. Defendant demonstrated that investigating plaintiffs' bank accounts would be inconclusive, since pay deposited in the accounts could have been commingled with other amounts, and because one of the plaintiffs claimed that she used several banking institutions and did not make deposits on a predictable basis. We note that the court already inspected the tax returns in camera and deemed them relevant. Currid v Valea, 2020 NY Slip Op 03590, First Dept 6-25-20

DEFENDANT'S MOTION TO COMPEL THE PRODUCTION OF TAX RETURNS AFTER THE PARTIES' FAILURE TO RESPOND TO THE DEMAND FOR PRODUCTION SHOULD HAVE BEEN DENIED; THE FAILURE TO RESPOND TO A PALPABLY IMPROPER DEMAND FOR PRODUCTION, I.E. A DEMAND FOR TAX RETURNS, DOES NOT WAIVE THE ABILITY TO OBJECT TO THE DEMAND ON APPEAL; DEFENDANT MAY RENEW THE MOTION TO COMPEL PRODUCTION OF THE TAX RETURNS IF THE REQUIRED SHOWINGS ARE MADE (FIRST DEPT).

The First Department noted that the failure to respond to defendant-Mazal's demands for production waived any objections to the demands. Mazal's motion to compel discovery therefore was properly granted. However objections to demands which are palpably improper are not waived by a failure to respond and Mazal's demand for tax returns may be in the palpably-improper category. Mazal's motion to compel the production of tax returns should therefore have been denied. But the First Department denied that portion of the motion to compel without prejudice and granted leave to renew if Mazal can make the required showing of need:

> The motion court providently deemed the appealing parties' objections waived under CPLR 3122 as a result of their failure to respond timely to Mazal's demands for production ... . We modify, however, with respect to Mazal's demands for the appealing parties' tax returns, as objections to "palpably improper" demands are not waived ... .
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> A demand for the production of tax returns is disfavored and requires "a strong showing of necessity," and the inability to obtain the information from other sources ... . Here, the failure "to identify the particular information the tax returns . . . will contain and its relevance to the claims made" ... should have been sufficient to deny Mazal's motion to compel. Indeed, the tax returns were not necessary to determine whether plaintiffs acquired an interest in the properties in 1994 or retained it thereafter — the reason the motion court gave for granting the motion. However, Mazal argues that the tax returns could be relevant to its affirmative defenses of laches, estoppel, waiver, ratification, and consent, and the motion court did not pass on this issue. As a result, although Mazal did not sufficiently show the inability to obtain the information sought from other sources or, indeed, what specific information the appealing parties' tax returns will show, we grant leave to renew upon a proper showing ... . Demurjian v Demurjian, 2020 NY Slip Op 03479, First Dept 6-18-20

THE DOCTRINE OF 'TAX ESTOPPEL' PROHIBITED DEFENDANT FROM TAKING A POSITION ON OWNERSHIP OF A CORPORATION WHICH IS CONTRARY TO STATEMENTS MADE IN CORPORATE TAX RETURNS (FIRST DEPT).

The First Department, reversing Supreme Court and clarifying a prior ruling. determined the doctrine of "tax estoppel" applied to preclude defendant Elayan from taking a position contrary to the factual statements in corporate tax returns re: an ownership interest in the corporation, Edgewater:

> The court improvidently exercised its discretion in failing to apply the doctrine of "tax estoppel." Under that doctrine, defendants' acts in filing corporate tax returns for the years 2010 through 2014, signed by defendant Elayan, which contained factual statements that plaintiff Jaber had a 75% ownership interest in Edgewater during that time period, and precludes defendants from taking a position contrary to that in this litigation ... . To the extent our decision in Matter of Bhanji v Baluch (99 AD3d 587 [1st Dept 2012]) has been interpreted as making the doctrine generally inapplicable with respect to factual statements of ownership in tax returns, we clarify that the doctrine applies where, as here, the party seeking to contradict the factual statements as to ownership in the tax returns signed the tax returns, and has failed to assert any basis for not crediting the statements ... . PH-105 Realty Corp v Elayaan, 2020 NY Slip Op 02971, First Dept 5-21-20

ALTHOUGH A HEAT PUMP SYSTEM DRAWS HEAT FROM SOLAR ENERGY STORED IN THE GROUND, IT IS NOT A QUALIFIED SOLAR ENERGY SYSTEM WITHIN THE MEANING OF THE TAX LAW FOR PURPOSES OF ELIGIBILITY FOR A $5000 TAX CREDIT (THIRD DEPT).

The Third Department determined that a heat pump system, although it draws heat from solar energy stored in the ground, is not a qualified solar energy system within the meaning of Tax Law 606 (g-1). Therefore, as the Tax Tribunal found, petitioners were not entitled

to a $5000 tax credit for the heat pump system:

> … [S]olar energy system equipment is defined as "an arrangement or combination of components utilizing solar radiation, which, when installed in a residence, produces energy designed to provide heating, cooling, hot water or electricity for use in such residence" … . Here, the Tribunal limited the applicability of the tax credit to those systems that "directly" utilize solar radiation, an interpretation which petitioners assert is too narrow, …
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> … [W]e do not agree with petitioners' assertion that the plain language of the statute unambiguously includes ground source heat pump systems simply because they utilize solar energy … . As the record reveals, heat harvested by a ground source heat pump system is not, strictly speaking, "solar radiation" since it is being radiated from the ground after being absorbed by the crust. Thus, although a broad reading of the phrase "utilize[es] solar radiation" could certainly include the system at issue, an interpretation excluding indirect utilization of solar energy is not unreasonable. Further, we find that the fact that the system removes heat from indoor air during the warm summer months and moves it to the ground, thereby not utilizing solar radiation, presents another reason to exclude the system from the purview of the tax credit … . Matter of Suozzi v Tax Appeals Trib. of the State of N.Y., 2020 NY Slip Op 00193, Third Dept 1-9-20

CHANGE IN TAX LAW RESULTING IN THE REMOVAL OF PETITIONER LAW FIRM'S CERTIFICATION AS A QUALIFIED EMPIRE ZONE ENTERPRISE ENTITLED TO TAX CREDITS SHOULD NOT HAVE BEEN APPLIED RETROACTIVELY (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the amendments to the Economic Development Zones Act of 2009 should not have been applied retroactively to petitioners, MSLMSH (a law firm and related parties), to remove petitioners' certification as a qualified empire zone enterprise (QEZE) entitled to tax credits based upon the location of the business in Syracuse:

> … [R]esolution of this issue hinges upon examining the three factors articulated by the Court of Appeals in Matter of Replan Dev. v Department of Hous. Preserv. & Dev. of City of N.Y. (70 NY2d 451, 456 [1987] …) — specifically, a taxpayer's forewarning of the change in law and the reasonableness of his or her reliance on the old law, the length of the retroactive period and the public purpose of the retroactive application.
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> … [T]he record reflects that MSLMSH was considering various places to relocate, but ultimately executed the 15-year lease in 2001 to remain in downtown Syracuse. MSLMSH also invested approximately $800,000 in equipment and furnishings. Around that time, MSLMSH was undergoing a corporate restructuring and reorganization, which led to the formation of Mackenzie Hughes in 2002. Mackenzie Hughes assumed many assets of MSLMSH, including the lease, and became QEZE certified in 2003. The testimony from the hearing further reflects that the expenditures and investments were made in reliance on receiving QEZE credits, and Mackenzie Hughes continued to operate its business with the QEZE certification until it was decertified in 2009. Based on the foregoing, we conclude that the partner petitioners' reliance on the old law was reasonable. Nor do we find merit in the Commissioner's assertion that the actions taken by MSLMSH prior to Mackenzie Hughes obtaining its QEZE certification were too attenuated to constitute justifiable reliance by the partner petitioners. Inasmuch as this factor weighs in favor of petitioners … and viewing all factors holistically, we conclude that the retroactive application of the 2009 amendments in this case was improper … . Matter of Mackenzie Hughes LLP v New York State Tax Appeals Trib., 2019 NY Slip Op 09337, Third Dept 12-26-19

COURT OF APPEALS 2009 RULING THAT LANDLORDS RECEIVING J-51 TAX BENEFITS CANNOT DEREGULATE NEW YORK CITY APARTMENTS APPLIES RETROACTIVELY IN THIS CLASS ACTION FOR RENT OVERCHARGES BROUGHT BY TENANTS; THE CLASS, HOWEVER, SHOULD NOT HAVE BEEN EXPANDED AFTER THE ACTION WAS COMMENCED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Richter too comprehensive to fairly summarize here, modifying Supreme Court, determined that the class action by tenants in defendant's large housing complex properly sought repayment of rent overcharges. The complaint alleged the landlord, under New York City rent control and stabilization law, and pursuant to a 2009 Court of Appeals case (Roberts v Tishman, 13 NY3d 270), could not deregulate apartments while receiving so-called "J-51" tax benefits. The landlord argued unsuccessfully that the Roberts decision did not apply retroactively. The First Department remanded the case for recalculation of the overcharges and further held that Supreme Court should not have expanded the class. With regard to the expansion of the class, the court

wrote:

> CPLR 902 provides that a class action "may be altered or amended before the decision on the merits." However, that provision also states that "[an] action may be maintained as a class action only if the court finds that the prerequisites under [CPLR] 901 have been satisfied." Those requirements are generally referred to as "numerosity, commonality, typicality, adequacy of representation and superiority" (City of New York v Maul, 14 NY3d 499, 508 [2010]). CPLR 902 further requires the court to consider a range of factors before certifying a class.
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> Here, the motion court improvidently exercised its discretion in expanding the class. The court's order failed to analyze whether class action status was warranted based on the criteria set forth in CPLR 901 and CPLR 902. Conducting that analysis ourselves, we find that the redefined class represents such a fundamental change in the theory of plaintiffs' case that expansion of the class would be improper. When the class was originally certified, plaintiffs maintained, and the court agreed, that its members were tenants who received deregulated leases while the complex was receiving J-51 benefits. The expanded class, however, would include tenants who never lived in the complex during defendant's receipt of J-51 benefits, and who received regulated leases for their tenancies. Thus, the legal issues for this group of tenants are separate and distinct from those of the original class. Dugan v London Terrace Gardens, L.P., 2019 NY Slip Op 06578, First Dept 9-17-19

FAILURE TO PAY TAXES UNDER PROTEST PRECLUDES AN ACTION TO RECOVER THE PAYMENTS WHEN THE RELEVANT TAX RULE IS INVALIDATED (SECOND DEPT).

The Second Department determined plaintiff's putative class action to have Nassau County disgorge fees collected pursuant to the Nassau County Administrative Code for tax map certification letters issued by the County Clerk for real estate closings was properly dismissed. It is not explicitly stated, but apparently the taxing rule under which the fees were collected had been invalidated at some point:

> "The settled law is that the payment of a tax or fee cannot be recovered subsequent to the invalidation of the taxing statute or rule, unless the taxpayer can demonstrate that the payment was involuntary" ... . Where the payment is "necessary to avoid threatened interference with present liberty of person or immediate possession of property, the failure to formally protest will be excused" ... . "Further, where the payment of a tax or fee is based on a material mistake of fact, the payment may be recovered even if it was made without protest" ... .
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> Here, it is undisputed that the plaintiff did not pay the fees under protest. Falk v Nassau County, 2019 NY Slip Op 06202, Second Dept 8-21-19

INFORMATION PROVIDED TO A SUPERMARKET CHAIN ABOUT COMPETITORS' PRICES IS NOT "PERSONAL AND INDIVIDUAL" WITHIN THE MEANING OF TAX LAW 1105, THEREFORE THE REPORTS OF THAT INFORMATION ARE SUBJECT TO SALES TAX (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a concurrence and two dissenting opinions, reversing the Appellate Division, determined that a supermarket chain, Wegmans, which pays an outfit, RetailData, for information about competitors' prices, must pay sales tax for that information. Wegmans argued the information was "personal and individual" and therefore not taxable under Tax Law 1105:

> Tax Law § 1105 (c) (1) imposes a sales tax on certain information services, "but exclud[es] the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons." * *
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> The information that RetailData compiled and the reports it furnished to Wegmans derived from a non-confidential and widely-accessible source, the supermarket shelves of Wegmans's competitors. There is nothing about the information itself that is personal or individual in nature. RetailData simply collected the prices of products at grocery stores and compiled that information into reports which it furnished to Wegmans. The Tribunal rationally concluded that the information RetailData furnished to Wegmans was not personal or individual in nature because it was collected from prices on supermarket shelves, which are publicly available, widely-accessible, and not confidential. Moreover, in these circumstances, it was rational for the Tribunal to determine that RetailData's customization of the publicly-available information it collected from supermarket shelves into a report format did not render the furnished information personal or individual in nature ... . Matter of Wegmans Food Mkts., Inc. v Tax Appeals Trib. of the

State of N.Y., 2019 NY Slip Op 05184, CtApp 6-27-19

CLASSIFICATION OF THE PROPERTY AS COMMERCIAL IN TAX FILINGS DID NOT PRECLUDE THE APPLICABILITY OF THE ONE-OR-TWO-FAMILY HOME EXEMPTION TO LABOR LAW 240 (1) (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined that defendant's (Artifact's) motion for summary judgment on the Labor Law 240 (1) cause of action should have been granted. The one-or-two-family home exemption applied, even though the property was classified as commercial in tax filings:

> Contrary to plaintiff's contention, Artifact's classification of the property as commercial in certain tax filings does not estop it from relying upon the exemption in this action ... . The Internal Revenue Code's definition of a residential property is considerably narrower than the scope of the one- or two-family home exemption to liability under section 240 (1) ... , and, as such, Artifact's tax declarations are not " logically incompatible' " with its current reliance upon that exemption ... . Wood v Artifact Props., LLC, 2019 NY Slip Op 01030, Fourth Dept 2-8-19