STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	DECISION DTA NO. 822641
MILTON F. STEVENSON	:	
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2004, 2005 and 2006.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on April 8, 2010. The Division of Taxation appeared by Mark Volk, Esq. (Margaret T. Neri, Esq., of counsel). Petitioner appeared by Hiscock & Barclay, LLP (David G. Burch, Jr., Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition. The Division of Taxation filed a reply brief. Oral argument, at the Division of Taxation's request, was heard on February 16, 2011, in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly disallowed a portion of the QEZE credits for real property taxes claimed as other refundable credits by petitioner and Anna M. Stevenson on their resident income tax returns for the years 2004, 2005 and 2006.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "6," which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioner, Milton F. Stevenson, was the majority shareholder of Anoplate Corporation (Anoplate) during the years 2004, 2005 and 2006.[1] Anoplate was certified as a qualified empire zone enterprise (QEZE) on July 31, 2002, pursuant to Article 18-B of the General Municipal Law.

Anoplate elected to be treated as an S corporation under Internal Revenue Code (IRC) § 1362 on July 19, 2002. It also elected to be treated as a New York State S corporation pursuant to Tax Law § 660. Anoplate's election to be treated as an S corporation for federal and New York State purposes remained effective for the years 2004, 2005 and 2006, with the corporation filing the appropriate tax returns for each of those years. Because Anoplate elected to be treated as an S corporation, its items of income, loss, deduction or credit flowed through to its shareholders pursuant to IRC § 1366 and Tax Law § 660.

Anoplate passed the employment test in 2004, 2005, and 2006 and had a 100% employment increase factor for those same years, and was therefore entitled to QEZE credits for real property taxes equal to the full amount of the eligible real property taxes paid for those years pursuant to Tax Law § 15.

Anoplate pays eligible real property taxes on five parcels of land in Onondaga County,

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[1] Petitoner's stock ownership was 99.415574%, 99.356904% and 99.436143%, respectively for the tax years 2004, 2005 and 2006.

pursuant to statements of taxes issued by the City of Syracuse and Onondaga County. The record includes statements of taxes issued by the City of Syracuse and Onondaga County on each of the five parcels, which were paid by Anoplate for the years 2004, 2005 and 2006. On the statements of city and school taxes issued by the City of Syracuse, the total amount of taxes due included tax amounts levied for city tax, school tax, flushing, sidewalk and water frontage. On the statements of Onondaga County real estate taxes, the total due included tax amounts levied for county tax, county water tax and the county sanitary unit.

Amounts received from payment of the Onondaga County Sanitary Unit tax levy are used to pay for the costs of maintenance, operation and improvements to the Onondaga County Sanitary District's sewer system.

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

> The special assessments levied on Anoplate for each year at issue included sanitary unit charges, flushing charges, water frontage charges and sidewalk charges. These charges were levied on an *ad valorem* basis. Owners of real property in Onondaga County but outside of the Onondaga County Sanitary District are not charged for the sanitary district services.[2]

Petitioner and his wife, Ann M. Stevenson, timely filed joint New York State resident income tax returns for the tax years 2004, 2005, and 2006. On each of those resident income tax returns, petitioner claimed the QEZE credit for real property taxes (QEZE real property tax credit) as an other refundable credit, based upon special assessments and other real property taxes paid by Anoplate for the tax years 2004, 2005, and 2006. Specifically, petitioner claimed a QEZE real property tax credit in the amount $146,779.00, $145,148.00 and $165,363.00,

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[2] We modify this fact to more accurately reflect the record.

respectively, for the years 2004, 2005 and 2006, which amounts were refunded to petitioner and Mrs. Stevenson by the Division.[3]

The Division conducted a desk audit of the resident personal income tax returns filed by petitioner and Mrs. Stevenson for the years 2004, 2005 and 2006. During that audit, the Division reviewed the QEZE real property tax credit claimed by petitioner for the years 2004, 2005, and 2006 and determined that those QEZE real property tax credits included special assessments paid by Anoplate. Thereafter, the Division denied a portion of the QEZE real property tax credit claimed by petitioner in 2004, 2005 and 2006 because it included special assessments paid by Anoplate.

As a result of its audit, on August 18, 2008, the Division issued to petitioner and Mrs. Stevenson Notices of Deficiency (nos. L-030271315-8, L-030271317-6 and L-030271316-7), asserting tax due in the amounts of $68,871.00, $65,857.44 and $82,300.19, respectively, for the years 2004, 2005 and 2006. The tax amount of each assessment corresponded to the amount of special assessments paid by Anoplate and claimed by petitioner as a portion of the QEZE real property tax credit for such year, which credit was previously refunded.

Petitioner timely filed his petition in the Division of Tax Appeals challenging the Division's disallowance of part of the QEZE real property tax credits claimed as other refundable credits on the resident personal income tax returns filed by petitioner and Mrs. Stevenson for the years 2004, 2005 and 2006.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge observed principles of statutory construction and the

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[3] For the year 2004, additional amounts were refunded to petitioner and Mrs. Stevenson.

statutes authorizing the QEZE real property tax exemption, including Tax Law § 15(e). The Administrative Law Judge found that the Onondaga County Sanitary District Charges were special assessment charges for local benefits for properties within the district. The Administrative Law Judge determined that petitioner met his burden of proving that the subject special assessment charges constitute taxes under Tax Law § 15 because, under Real Property Tax Law § 102(21), failure to pay results in a conversion of such charges into tax liens. Accordingly, the Administrative Law Judge granted the petition and cancelled the portions of the Notices relating to the business improvement district charges.

The Administrative Law Judge next addressed the question of whether the Onondaga County Sanitary District Charges constitute a tax imposed upon real property under former Tax Law § 15(e) and found that they constitute a special assessment. The Administrative Law Judge concluded that the Legislature intended to include such special assessments within the definition of "eligible real property taxes" in former Tax Law § 15(e) because, under Real Property Tax Law § 102(21), such levies can become tax liens. Accordingly, the Administrative Judge found that the Onondaga County Sanitary District Charges met the definition of eligible real property taxes.

ARGUMENTS ON EXCEPTION

The Division argues that a recent amendment to Tax Law § 15(e) should apply retroactively to this matter and that the provided definition of "eligible real property tax" requires reversal. In the alternative, the Division argues that the Onondaga County Sanitary District Charges are not a tax, which goes to the general fund, but are a special assessment that supports specific initiatives. The Division supports its theory by citing to the relevant definition provided

in Real Property Tax Law § 102. The Division submits that the Administrative Law Judge erroneously misread the requirement that subject levy "become a lien" in former Tax Law § 15(e) as synonymous with the term "tax lien" in Real Property Tax Law § 102(21) and refers back to the definitions within the same section.

Petitioner argues that the recent amendment to Tax Law § 15(e) should not apply herein because the statute specifically exempts retroactive application with respect to maintenance charges. Petitioner also argues that it is inappropriate to look to the Real Property Tax Law in interpreting the terms within Tax Law § 15(e) because the terms are clear. In the alternative, petitioner argues that excluding local charges, such as the Onondaga County Sanitary District Charges, would run counter to the legislative intent to create tax-free zones.

OPINION

We reverse the determination of the Administrative Law Judge.

In cases of statutory interpretation, our prerogative is to ascertain and give effect to the intent of the Legislature (***Patrolmen's Benevolent Assn. v. City of New York***, 41 NY2d 205 [1976]). The language of the statute is the clearest evidence of such intent (McKinney's Cons Laws of NY, Book 1, Statutes § 51[d]). Where no ambiguity exists, "the court should construe it so as to give effect to the plain meaning of the words used" (***Patrolmen's Benevolent Assn. v. City of New York***, ***supra*** at 208). However, "taxing statutes, when ambiguous and doubtful, should be construed liberally in favor of the taxpayer" (***City of New York v. Procaccino***, 46 AD2d 594, 595 [1975]).

We now turn to the statutes authorizing the subject QEZE real property tax credits. Chapter 63 of the Laws of 2000 amended portions of the Tax Law to provide additional tax

credits under the Empire Zones Program Act. These amendments to Articles 9-A, 22, 32, and 33 of the Tax Law provided new tax credits, applicable to the years beginning on or after January 1, 2001.

Tax Law § 15 allows for a credit against corporate and personal income taxes for a qualified QEZE for eligible real property taxes. Tax Law § 15(b) provides that the amount of the credit shall be the product of the benefit factor, the employment factor, and the eligible real property taxes paid or incurred by the QEZE during the taxable year. Tax Law § 15(e) provides the definition of eligible real property taxes. The parties dispute no issues of fact. What remains is the legal question of whether the term "eligible real property tax" in Tax Law § 15(e) includes special assessment or *ad valorem* charges such as those imposed by the Onondaga County Sanitary District Charges.

We first address the Division's argument that the 2010 amendment to Tax Law § 15 retroactively applies and requires a ruling in its favor. Tax Law § 15(e) was amended by Chapter 57 of the Laws of 2010 and, the Division contends, this amendment merely clarifies the definition of "eligible real property taxes." Tax Law § 15(e), as amended, contains the following additional language, in relevant part:

> For purposes of this subdivision, the term "tax" means a charge imposed upon real property by or on behalf of a county, city, town, village or school district for municipal or school district purposes, provided that the charge is levied for the general public welfare by the proper taxing authorities at a like rate against all property in the territory over which such authorities have jurisdiction . . . . The term "tax" does not include a charge for local benefits, including any portion of that charge that is properly allocated to the costs attributable to maintenance or interest, when (1) the property subject to the charge is limited to the property that benefits from the charge, or (2) the amount of the charge is determined by the benefit to the property assessed, or (3) the improvement for which the charge is assessed tends to increase the property value (Tax Law § 15[e]).

As set forth within the Laws of 2010 (ch 57, pt R, § 18), the amendment's effective date was set forth as follows:

> This act shall take effect immediately, provided that . . . section thirteen of this act [amending Tax Law § 15(e) and clarifying the definition of eligible real property taxes for purposes of the QEZE credit] shall take effect immediately and apply to all taxable years beginning on or after January 1, 2010 and, except with respect to maintenance or interest charges, to all taxable years for which the statute of limitations for seeking a refund or assessing additional tax are still open.

We reject the Division's argument that the amendment applies retroactively to the instant matter. The effective date provides an exception for maintenance charges. As used above, the term "maintenance" is ambiguous because it may refer to debt servicing but also may refer to the "care and work put into property to keep it operating and productive" (Black's Law Dictionary, 9th ed, 1039). Due to this ambiguity, we construe this term in the light most favorable to petitioner. The record reveals, and the Division concedes, that the levies imposed by the Onondaga County Sanitary District support maintenance of the Onondaga County Sewer District, which provides sewer services for properties within the district. As such, the subject charges constitute maintenance and meet the exception provided in the effective date in the Laws of 2010 (ch 57, pt R, § 18). Accordingly, we hold that the 2010 amendment to Tax Law § 15(e) has no bearing on this matter.

We now turn to former Tax Law § 15(e), which was in effect for the tax years at issue. The statute defines eligible real property taxes as "taxes imposed on real property . . . provided such taxes become a lien on the real property during a taxable year in which the owner of the real property is both certified pursuant to Article 18-B of the General Municipal Law and a qualified

empire zone enterprise" (Tax Law § 15[e]). As relevant herein,[4] we interpret the statutory scheme of former Tax Law § 15(e) to provide that a levy or charge constitutes an eligible real property tax upon proving that:

(I) the levy constitutes a tax imposed upon real property; and

(II) if unpaid, such tax becomes a lien upon the real property.

Therefore, the task before this Tribunal is to determine the meaning of the phrase "tax imposed on real property" under former Tax Law § 15(e).

We reject petitioner's contention that the inclusion of "eligible" in the term "eligible real property taxes" changes the meaning of "real property taxes" such that it would be inappropriate to consider the Real Property Tax Law. In our opinion, former Tax Law § 15(e) and the Real Property Tax Law are *in pari materia* and, therefore, should be construed together (McKinney's Cons Laws of NY, Book 1, Statutes § 221[c]; ***Siemens Corp. v. Tax Appeals Trib.***, 217 AD2d 247 [1996], ***lv granted*** 88 NY2d 811 [1996], ***revd*** 89 NY2d 1020 [1997], ***rearg denied*** 90 NY2d 845 [1997]). Both former Tax Law § 15(e) and the Real Property Tax Law deal with taxation, specifically taxes upon real property, and as such, "they must be read together and applied harmoniously" (***Matter of Inter-County Tit. Gura. & Mtge. v. State Tax Commn.***, 33 AD2d 251, 254 [1970], ***affd*** 28 NY2d 179 [1971], ***citing Smith v. People***, 47 NY 330 [1872]). Accordingly, we hold that it is appropriate to consider the Real Property Tax Law in construing the QEZE real property tax credit.

We now look to the Real Property Tax Law for guidance in interpreting the phrase "tax

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[4] Tax Law § 15(e) also imposes the requirement that the recipient of the tax credit be a certified QEZE that owns the subject real property, which must be located within the respective certified empire zone. We need not address these requirements because both parties concede that petitioner meets the foregoing eligibility requirements.

imposed on real property" within former Tax Law § 15(e). Real Property Tax Law § 102 defines those terms used in the Real Property Tax Law. As relevant herein, Real Property Tax Law § 102(20) defines a "tax," for real property tax purposes, as follows:

> [A] charge imposed upon real property by or on behalf of a county, city, town, village, or school district for municipal or school district purposes, but does not include a special ad valorem levy or a special assessment.

Reading this definition into the statutory framework of former Tax Law § 15(e), we hold that a levy or charge constitutes an eligible real property tax upon proving that:

> (I) it is a charge on real property, excluding a special *ad valorem* levy or a special assessment, imposed by or on behalf of a county, city, town, village or school district for municipal or school district purposes; and,
>
> (II) if unpaid, such a charge becomes a lien on the real property.

Having interpreted the relevant statutes, we now turn to the determination of the Administrative Law Judge.

We conclude that the Administrative Law Judge erroneously held that the Onondaga County Sanitary District Charges constitute a tax based upon the Real Property Tax Law definition of a tax lien (Real Property Tax Law § 102[21]). Under the statutory scheme of former Tax Law § 15(e), the threshold inquiry is whether the subject levy constitutes a tax on real property. As such, the trier of fact arrives at the issue of whether a charge or levy becomes a tax lien only after determining that the charge constitutes a tax. The Administrative Law Judge found the Onondaga County Sanitary District Charges to be a special assessment and not a tax. Accordingly, the inquiry should have terminated and the petition denied.

We further disagree with the Administrative Law Judge and hold that a "tax lien" is not synonymous with a tax that becomes a lien because the plain language of former Tax Law

§ 15(e) includes only taxes, which definitively excludes other charges such as special assessments and *ad valorem* levies (Real Property Tax Law §§ 102[20], 102[15] and 102[14]).

We also conclude that the Administrative Law Judge erroneously found that the phrase "eligible real property taxes" under former Tax Law § 15(e) includes special assessment and *ad valorem* charges. It is well-settled that tax credits are a particularized species of exemption from tax (***Matter of New York Fuel Terminal Corp.***, Tax Appeals Tribunal, August 27, 1998), and that statutes authorizing tax exemptions, such as the one at issue, are to be narrowly construed (***Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193 [1975], ***lv denied*** 37 NY2d 708 [1975]; ***Matter of Blue Spruce Farms v. New York State Tax Commn.***, 99 AD2d 867 [1984], ***affd*** 64 NY2d 682 [1984]).

In our review, we can find neither legal support nor evidence to support the Administrative Law Judge's expansive interpretation of the term "tax" within former Tax Law § 15(e). The plain language of former Tax Law § 15(e) indicates that an eligible real property tax must first be a "tax imposed upon real property." The Real Property Tax Law clearly defines a tax as different from both special and *ad valorem* assessments. Courts have also held these distinctions to be significant (***see Watergate II Apts. v. Buffalo Sewer Auth.***, 46 NY2d 52 [1978] [levies imposed by a local sewer authority held not to be a tax]; ***Town of Cheektowaga v. Niagara Frontier Transp. Auth.***, 82 AD2d 175 [1981] [rejecting the argument that a special assessment constitutes a tax when the charge is based on land value and acreage]). Reading the plain language of the statute, we find that the Legislature clearly sought to provide an exemption for real property taxes, not special assessment charges or *ad valorem* levies.

We find that the levies imposed by the Onondaga County Sanitary District do not meet

the definition of eligible real property tax under former Tax Law § 15(e). In order to be a tax, the levy must be imposed by a municipality or school district for municipal or school district purposes. The subject levies are imposed by the Onondaga County Sanitary District, an organization created to charge rents to support the sewer system that benefits properties within the district. The record reveals that the Onondaga County Sanitary District, while it may provide benefits extending beyond the district, is neither a municipality nor a school district, but a special district. As such, we find that the Onondaga County Sanitary District Charges do not constitute a tax under Real Property Tax Law § 102(20) because they were not imposed by or on behalf of a municipality or school district for municipal or school district purposes. Rather than a tax, the Onondaga County Sanitary District Charges are identical to an *ad valorem* levy in both form and function (Real Property Tax Law § 102[15]), an item that is specifically excluded from the definition of a tax (Real Property Tax Law § 102[20]).

Accordingly, we conclude that the Onondaga County Sanitary District Charges fail to meet the definition of eligible real property taxes under former Tax Law § 15(e) and petitioner is not entitled to a QEZE real property tax credit for these charges.

We have considered the remaining arguments raised by petitioner and the Division and find them either without merit or not requiring a different result.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of Milton F. Stevenson is denied;

4. The Notices of Deficiency dated August 18, 2008 are sustained.

DATED:Troy, New York
August 4, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner