STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ELAYNE HERRICK	:	DECISION DTA NO. 822854
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.	:	

Petitioner, Elayne Herrick, filed an exception to the determination of the Administrative Law Judge issued on May 13, 2010. Petitioner appeared by Hiscock and Barclay, LLP (Kevin R. McAuliffe, Esq., of counsel). The Division of Taxation appeared by Mark Volk, Esq. (Margaret T. Neri, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner'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 portions of petitioner's claims for the QEZE real property tax credit on the grounds that certain special assessments did not constitute "eligible real property tax" for purposes of the credit against tax provided for in Tax Law § 15(a).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Elayne Herrick, was the sole shareholder of CNYX Properties, Inc., and XCNY Properties, Inc., (the Companies) in 2004, 2005 and 2006 (years in issue). Both companies were certified as Qualified Empire Zone Enterprises (QEZE) on July 25, 2002 pursuant to Article 18-B of the New York State General Municipal Law.

In 2004, both Companies made an election under Internal Revenue Code (IRC) § 1362 to be taxed pursuant to the provisions of subchapter S of chapter 1 of the IRC. A similar election was made for New York State income tax purposes by filing form CT-6 pursuant to Tax Law § 660(a). Both elections were effective for the three tax years in issue.

Pursuant to IRC § 1366 and Tax Law § 660, the effect of the subchapter S election by the Companies was the pass-through of items of income, loss, deduction and credit to petitioner as the sole shareholder.

The Companies together had a 100 percent beneficial ownership interest in the Towers Realty Statutory Trust (the Trust), a Connecticut statutory trust. The Trust was a grantor trust for both federal and New York State tax purposes. Therefore, for income tax purposes, the beneficiaries of the Trust, the Companies, were the beneficial owners of the Trust's property and were entitled to all of the tax attributes resulting from the ownership and use of the property such as income, loss, deductions and credits.

In 1999, the Trust acquired the commercial property commonly known as MONY Towers. When the Trust acquired MONY Towers, the Trust received an assignment and assumption of the payment in lieu of taxes agreement (the PILOT Agreement), which the previous owners of MONY Towers entered into with the City of Syracuse Industrial Development Agency in 1997.

The Companies made payments pursuant to the PILOT Agreement and also paid the City of Syracuse special assessment and the Onondaga County Sanitary Unit special assessment. The City of Syracuse special assessment is levied to pay for the construction, operation and maintenance of improvements in the special assessment district.

The City of Syracuse 1988 General Ordinance #53 created the special assessment district within the City of Syracuse and provided that the properties in the district may be assessed according to a formula that reflected the benefits accruing to the various properties in the district by reason of the improvements.

The funds received from the Onondaga County Sanitary Unit special assessment are used to pay for the maintenance of, and improvements to, the sewer system. The actual bills for the special assessments were not placed in evidence or provided to the Division. Instead, petitioner provided spreadsheets that listed due dates for taxes and receipts for amounts paid to the City of Syracuse PILOT Billing. The spreadsheets broke out specific amounts for "City Special Assessments," "City - Downtown Charge," and "County Special Assessments."

Resolution 260 of the Onondaga County Legislature created the Onondaga County Sanitary District in 1978, which provided for its funding by sewer rents and taxes levied on an *ad valorem* basis (i.e., against assessed valuation of the real property). Resolution 260 refers to Article 11-A of the Onondaga County Administrative Code, which provided that the Legislature

was empowered to establish how the costs of maintenance and operation of the sewers would be borne - including assessing parcels that were especially benefited by an improvement in accordance with a proportionate benefit formula.

Petitioner timely filed her New York personal income tax returns for the years in issue.

For the year 2004, petitioner claimed the refundable QEZE real property tax credit in the sum of $1,364,208.00, as well as the Empire Zone Wage Tax in the amount of $2,317.00. The Division of Taxation (Division) issued a refund to petitioner in the amount of $1,366,525.00, the full amount of the refundable credits claimed.

For the year 2005, petitioner claimed the refundable QEZE real property tax credit in the amount of $1,124,004.00 on her personal income tax return. The Division issued a refund to petitioner in the amount of $1,124,004.00, representing the full amount of the refundable credit claimed.

Although the Division performed an audit of petitioner's 2004 personal income tax return at that time, which included the Empire Zone real property tax credits, no changes were made to the return. However, in 2007, when the Division reviewed petitioner's personal income tax return for the year 2005, it found that the portion of QEZE real property tax credit attributable to special assessments was not eligible for the credit. On September 7, 2007, the Division issued to petitioner a Statement of Proposed Audit Changes for the year 2005 and required petitioner to repay $85,310.00 plus interest. Petitioner paid the total amount of $92,701.00 under protest on September 28, 2007.

On petitioner's 2006 return, she claimed the refundable QEZE real property tax credit in the amount of $1,145,055.00. The Division disallowed $88,991.00, the portion of the credit

associated with special assessments and issued a refund of $1,056,063.26. The refund was sent with a letter to petitioner on March 3, 2008 and explained that the refund had been reduced by the amount attributable to special assessments, which were not considered taxes eligible for the claimed credit.

On March 10, 2008, after another audit of petitioner's income tax returns, the Division issued to petitioner a Statement of Proposed Audit Changes for the 2004 tax year, explaining that the special assessment charges in the amount of $127,445.36 were erroneously included in the computation of the QEZE real property tax credit previously refunded to petitioner. On May 5, 2008, a Notice of Deficiency was issued to petitioner asserting additional tax of $127,445.36 plus interest, which was paid under protest on May 16, 2008.

Petitioner filed a Claim for Credit or Refund for the years 2005 and 2006 on July 28, 2008. The claim for 2005 sought a refund of $92,700.82 and the claim for 2006 sought a refund in the amount of $88,991.38.

On February 9, 2009, petitioner filed the petition herein seeking a refund of the taxes paid under protest for each of the years in issue, which included those covered by the claims for refund for the years 2005 and 2006 and the tax assessed pursuant to the Notice of Deficiency issued for the year 2004.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that former Tax Law § 15(e) defines "eligible real property tax[es]" as a tax imposed on real property which is owned by the QEZE and is located in an empire zone with respect to which the QEZE is certified, provided such taxes become a lien on the real property during the 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 QEZE. The Administrative Law Judge further noted, however, that the Tax Law does not define what constitutes a "tax on real property."

The Administrative Law Judge rejected the Division's reliance on IRC § 164, finding that it pertains to deductions from tax for real estate taxes paid, while the issue here is what constitutes a tax on real property for purposes of the definition of "eligible taxes on real property" as applied to the QEZE real property tax credit. The Administrative Law Judge determined that the two areas are not comparable contexts as required by Tax Law § 607, and as such, the meaning of terms for purposes of the IRC do not provide the basis for excluding special assessments from the meaning of tax on real property as used in former Tax Law § 15(e).

The Administrative Law Judge referred to the Real Property Tax Law for guidance on the meaning of the real property term used in former Tax Law § 15(e), and noted that the term tax as defined in § 102(20) does not include a special *ad valorem* levy or a special assessment. The Administrative Law Judge determined that the Onondaga County Sanitary District and the Downtown Syracuse Special Assessment District were special assessments, and concluded that since special assessments are excluded from the definition of tax on real property pursuant to the definitions, they are not eligible real property taxes for purposes of the QEZE credit, and the Division properly disallowed them as a credit against tax.

ARGUMENTS ON EXCEPTION

Petitioner argues that the determination of the Administrative Law Judge is erroneous, contending that the charges associated with the Downtown Special Assessment District (the Special Assessment District) and those associated with the Onondaga County Sanitary District

(the Sanitary District) are not special assessments or special *ad valorem* levies because the benefits of the districts benefit more than the properties being assessed and the charges are not levied in proportion to the benefit received by the property owner. Petitioner further argues that even if the Special Assessment District and Sanitary District charges are determined to be special assessments or special *ad valorem* levies, they still qualify as "eligible real property taxes" as that term is defined in former Tax Law § 15(e). Petitioner contends that the legislative history of the Empire Zones Program makes it clear that the Legislature intended that the charges at issue constitute "eligible real property taxes" includable in the Empire Zones real property tax credit.

Petitioner further contends that the Administrative Law Judge erred in referring to the definitions contained in the Real Property Tax Law, arguing that if the Legislature intended the definition of "eligible real property taxes" to be tied directly to the definitions used in the Real Property Tax Law, former Tax Law § 15(e) would have contained a direct reference to those definitions. Petitioner asserts that the Legislature enacted various amendments to Tax Law § 15(e) subsequent to its original enactment, and had the Legislature intended to rely on pre-existing definitions of terms contained in the Real Property Tax Law for purposes of understanding Section 15(e), the legislature had ample opportunity to reference them.

Petitioner also argues that she does not bear the burden of establishing entitlement to Empire Zones Program benefits. Petitioner asserts that the burden of proof associated with a taxpayer challenging the denial of a tax exemption or credit is not relevant here because Empire Zones Program benefits are consideration pursuant to a contract between a QEZE and the State.

The Division notes that subsequent to the Administrative Law Judge's determination, the definition of "eligible real property taxes" found in former Tax Law § 15(e) was amended. The

Division argues that the plain words of the amendment indicate that the credit only applies to taxes levied for the general public welfare and charges for special assessment districts are clearly excluded for the definition of "eligible real property taxes." The Division further argues that this amendment applies retroactively to all taxable years for which the statute of limitations for seeking a refund or assessing additional tax are still open. The Division contends that the amendment applies to the instant case because the statute of limitations is suspended until a decision of the Tribunal becomes final (Tax Law § § 681[c] and 683[e]).

The Division further argues that the Administrative Law Judge properly determined that the charges for the Sanitary District and Special Assessment District were special assessments. The Division maintains that the municipal resolution creating the Sanitary District provided for funding by sewer rents and charges levied on an *ad valorem* basis (i.e. against assessed valuation of real property), and the municipal resolution creating the Special Assessment District contained specific language that required that the costs of improvements, operations, and maintenance be borne by the properties within the district in accordance with a formula that reflected the benefits accruing to each property. As such, they were special assessments, and not a real property tax for purposes of Tax Law § 15.

In response to petitioner's argument that the benefits of the Special Assessment District and Sanitary District extend beyond the boundaries of the special districts and therefore the charges for the district services are not special assessments, the Division contends that the evidence reflects that the special district charges are levied only against the properties in the particular district in accordance with a benefit formula established by the local municipal government.

The Division also asserts that the Administrative Law Judge was correct in looking to the Real Property Tax Law for the meaning of a real property term used in the Tax Law. The Division notes that the definitions codified in the "reflect the long-recognized differences between a tax and a special assessment found not only in New York statues and case law but in the Internal Revenue Code as well."

The Division argues that under the plain reading of Tax Law § 15, it is clear that the credit only applies to real property tax, and if the Legislature intended it to include special assessments or special *ad valorem* levies, the language of that statute would have specifically provided for such. According to the Division, the terms "tax" and "special assessment" have never been used interchangeably and the term "tax" has never been interpreted to include "special assessments" without specific reference to that effect.

Lastly, the Division argues that the Administrative Law Judge correctly applied the burden of proof on petitioner, noting that pursuant to the Tax Law and case law, petitioner bears the burden of showing entitlement to the statutory benefit. The Division argues that its interpretation and application of former Tax Law § 15(e) is reasonable and consistent with the language and intent of the governing statutes, and that petitioner has not demonstrated that the charges at issue clearly fall within the statute creating the QEZE real property tax credit.

OPINION

We affirm the determination of the Administrative Law Judge.

Chapter 63 of the Laws of 2000 amended the Tax Law to provide benefits under the Empire Zones Program Act, amending articles 9-A, 22, 32 and 33 of the Tax Law to provide new tax credits, which applied to taxable 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 period factor, the employment increase factor and the eligible real property taxes paid or incurred by the QEZE during the taxable year. At issue here is whether charges assessed for the Sanitary District and the Special Assessment District were "eligible real property tax[es]" as used and defined in Tax Law § 15.

The phrase "eligible real property taxes" is defined in former Tax Law § 15(e) as a tax imposed on real property that is owned by the QEZE and is located in an empire zone with respect to which the QEZE is certified, provided said taxes become a lien on the real property during the 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 QEZE. The question presented is what constitutes a "tax on real property," as that phrase was not specifically defined in Tax Law § 15 for the years at issue.

The Division points out that Tax Law § 15(e) was amended by chapter 57 of the Laws of 2010, and that such amendment clarifies the definition of "eligible real property taxes." Tax Law § 15(e), as amended, contains the following additional language, in 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]).

The Division argues that the added language clearly excludes special assessment districts from the definition of "eligible real property taxes." The Division further argues that the amendment applies retroactively to petitioner for the years at issue.

The amendment's effective date was set forth in the Laws of 2010 (ch 57, pt R, § 18), which provides, in part, 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 matter herein. The City of Syracuse General Ordinance Number 53 specifically provided for maintenance as part of the special assessment. Similarly, the funds received from the Onondaga County Sanitary Unit special assessment are used to pay for the maintenance of, and improvements to, the sewer system. Since maintenance charges are specifically included in the charges associated with the Special Assessment District and the Sanitary District, the retroactive effective date provided for in the Laws of 2010 (ch 57, pt R, § 18) does not apply and the amendment is not applicable to this matter.

Next, we address petitioner's argument that she does not bear the burden of establishing entitlement to Empire Zones Program benefits. We note that a tax credit is a particularized species of exemption from tax (***Matter of New York Fuel Terminal Corp.***, Tax Appeals Tribunal, August 27, 1998). Statutes creating exemptions from tax are to be strictly construed (***see 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 addition, it is well established that the interpretation given a statute by the agency authorized with its enforcement should generally be given weight and judicial deference if the interpretation is not irrational, unreasonable or inconsistent with the statute (***Matter of Trump-Equitable Fifth Ave. Co. v. Gliedman***, 62 NY2d 539 [1984]). However, in addition, the statutory language providing the exemption must be construed in a practical fashion with deference to the legislative intent behind the exemption (***see Majewski v. Broadalbin-Perth Cent. School Dist***., 91 NY2d 577 [1998]***; Matter of Qualex, Inc***., Tax Appeals Tribunal, February 23, 1995). When construing a statute, the primary focus is on the intent of the Legislature in enacting the statute (McKinney's Cons Laws of NY, Book 1, Statutes § 92[a]; ***see Matter of Sutka v. Connors***, 73 NY2d 395 [1989]; ***Matter of American Communications Tech. v. Tax Appeals Trib.***, 185 AD2d 79 [1993], ***affd*** 83 NY2d 773 [1994]). When that intent is clear from the wording of the statute itself, the inquiry ends (McKinney's Cons Laws of NY, Book 1, Statutes § 76; ***see Matter of American Communications Tech. v. Tax Appeals Trib., supra***). However, when there is an ambiguity in the words of the statute, the inquiry extends to other methods of ascertaining legislative intent (***see*** McKinney's Cons Laws of NY, Book 1, Statutes §§ 76, 92; ***Matter of Guardian Life Ins. Co. v. Chapman***, 302 NY 226 [1951]; ***Matter of American Communications Tech. v. Tax Appeals Trib., supra***).

We reject petitioner's assertion that the burden of proof associated with a taxpayer challenging the denial of a tax exemption or credit is not relevant here because Empire Zones Program benefits are consideration pursuant to a contract between a QEZE and the State. Petitioner's argument that this is a contract issue between a QEZE and the State is without merit.

The credit at issue is provided for in Tax Law § 15, and as such, the requirements of proving entitlement to tax credits and exemptions clearly apply. Were this a contract issue as petitioner alleges, rather than an issue of entitlement to a tax credit, the Tax Appeals Tribunal would lack jurisdiction.

We also reject petitioner's argument that the Administrative Law Judge erred in seeking guidance from the Real Property Tax Law to determine the meaning of the term "taxes imposed on real property." As the Administrative Law Judge correctly noted:

> It is a general rule of statutory construction that earlier statutes are properly considered as illuminating the intent of the legislature in passing later acts, especially where there is doubt as to how the later act should be construed, since when enacting a statute the Legislature is presumed to act with deliberation and with knowledge of the existing statutes on the same subject (McKinney's Cons Laws of NY, Book 1, Statutes § 222).[1]

In 1958, the Legislature codified into the Real Property Tax Law all the provisions of the Tax Law, the Education Law, the Village Law and other laws relating to the assessment and taxation of real property. As that statute was enacted prior to the QEZE provisions, under the rules of statutory construction, it is proper to consider the definitions contained therein in interpreting the meaning of a term used in the Tax Law.

Section 102(20) of the Real Property Tax Law defines the term tax as:

> [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.

The term special assessment, in turn, is defined in the § 102(15) as:

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[1] It is noted that various particular statutes, i.e., the Tax Law and the Real Property Tax Law, may be considered *in pari materia* when they reference the same subject matter (McKinney's Cons Laws of NY, Book 1, Statutes § 221[c]).

> [A] charge imposed upon benefitted real property in proportion to the benefit received by such property to defray the cost, including operation and maintenance, of a special district improvement or service or of a special improvement or service, but does not include a special ad valorem levy.

The term special ad valorem levy is defined in § 102(14) as:

> [A] charge imposed upon benefited real property in the same manner and at the same time as taxes for municipal purposes to defray the cost, including operation and maintenance, of a special district improvement or service, but not including any charge imposed by or on behalf of a city or village.

Reviewing the charges at issue with the guidance of the provisions stated above, it is clear that the charges attributable to the Special Assessment District and Sanitary District were special assessments. As noted in the Findings of Fact, the City of Syracuse 1988 General Ordinance #53 created the special assessment district within the City of Syracuse and provided that the properties in the district may be assessed according to a formula that reflected the benefits accruing to the various properties in the district by reason of the improvements. This formula falls squarely within the proportional benefit formula described in Real Property Tax Law § 102(15) for special assessments.

Similarly, the Onondaga County Sanitary District provided for its funding by sewer rents imposted by a proportionate benefit formula. As stated in Resolution 260 of the Onondaga county Legislature:

> all costs of operation and maintenance in the Onondaga County Sanitary District shall be paid from revenues derived from sewer use rates (sewer rents) imposed for the use of the sewer system of said District by proceedings in accordance with Article 11-A of the Onondaga County Administrative Code. To the extent not paid from such sewer use rates (sewer rents) and other available funds, all other costs in said District, including improvements and amounts required to pay all indebtedness and other obligations of the existing districts assumed by said District, shall be assessed, levied and collected from the several lots and parcels of

> land in said District in the same manner and at the same time as other County charges on an ad valorem basis.[2]

The language of the resolution clearly reflects the intention of the County Legislature to establish a special district to benefit a specific area and to charge the various properties in that district in accordance with a proportionate benefit formula. As such, we can find no error with the Administrative Law Judge's determination that the charges at issue were special assessments.

Petitioner argues that the charges at issue are not special assessments, contending that the charges imposed upon the properties within the Special Assessment District are not proportional to the benefits received, and the benefits of the Sanitary District extend beyond the boundaries of that district.[3] Similar arguments as this have been rejected by the courts. For example, in ***Watergate II Apts. v. Buffalo Sewer Auth.*** (46 NY2d 52 [1978]), the Court of Appeals rejected the plaintiff's argument that sewer rents imposed by the Buffalo Sewer Authority (Authority) were in fact a tax imposed beyond the Authority's power. The plaintiff contended that the charges bore no relationship to the quantity of water used or the amount of flow therefrom and therefore constituted a tax that was beyond the power of the Authority to impose. The Court noted that "[u]nlike taxes, which go to the support of government without any necessity to relate them to particular benefits received by the taxpayer . . . the charges that the authority was

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[2] To the extent that the costs are assessed on an *ad valorem* basis, rather than as a special assessment, such charge would still be excluded from the definition of "tax" pursuant to Real Property Tax Law § 102(20). We note that in the determination below, at footnote 2, the Administrative Law Judge states that "[t]o the extent that any part of the sewer tax is an *ad valorem* tax and not a special assessment, it would still be a tax by definition." We can only assume that the referenced footnote contains a typographical error, as later in the determination, the Administrative Law Judge finds that even if the Sanitary District charge was "a special ad valorem tax, it would only be included in the term 'tax' for purposes of § 102(20) where used in articles five, nine, ten and eleven of the chapter" and "[i]n all other instances, the term 'tax' would not include special *ad valorem* levies."

[3] We note that during the proceedings below, petitioner never denied that the charges were special assessments.

empowered to collect were in the nature of fees which had to bear a direct relationship to the cost of furnishing the water services" (***Watergate II Apts. v. Buffalo Sewer Auth., supra*** at 58). Matching the Authority's costs with the services rendered, the Court viewed two broad categories of services: the first relating to the providing of water for current and predictable use, and the second supplying an essential service to the people of Buffalo, including construction and maintenance of effluent and storm sewer lines, sewage collection and treatment facilities, removal of industrial wastes, seeing to the availability of water distribution networks for use in firefighting, and ensuring that reserves for future development of the system keep pace with projected societal change and growth. The Court opined that while the cost of these activities bears only limited direct relationship to the volume of water utilized by a particular consumer and there may not be a complete correlation between consumption and cost, "[e]xact congruence between the cost of the services provided and the rates charged to particular customers is not required." The Court concluded that the charges were not a tax (***Id.*** at 59).

Similarly, in ***Town of Cheektowaga v. Niagara Frontier Transp. Auth.*** (82 AD2d 175 [1981]), the Transportation Authority, which was exempt from real property tax and special *ad valorem* levies pursuant to the Real Property Tax Law, challenged its responsibility for a special assessment levy on the grounds that it was not a special assessment because a portion of the charge was based on assessed value and land area, which it claimed was not proportional to the benefit received. The Court rejected the Transportation Authority's argument and found that the charge constituted a special assessment.

We thus conclude that the charges at issue were special assessments. Since special assessments are excluded from the definition of tax on real property pursuant to the Real

Property Tax Law definitions, it is concluded that they are not eligible real property taxes and the Division properly disallowed them as a credit against tax.

We next address petitioner's argument that even if the charges are special assessments, they are includable as "eligible real property taxes" as set forth in former Tax Law § 15(e). Petitioner argues that disallowing special assessments is contrary to the legislative intent, and asserts that had the Legislature intended to disallow such charges, it would have stated so in the various amendments to Section 15(e) enacted subsequent to its original enactment. However, contrary to petitioner's argument, the Legislature did, in fact, subsequently amend Section 15(e) by chapter 57 of the Laws of 2010, as noted above, to clarify the definition of "eligible real property taxes." In particular, special assessments are definitively excluded from the term "tax."[4] The clarifying language demonstrates the Legislature's intention to not include such charges within the meaning of "eligible real property taxes."

Based on the foregoing, we affirm the determination of the Administrative Law Judge. Petitioner offered no evidence below nor arguments on exception that would justify our modifying the determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Elayne Herrick is denied;

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

3. The petition of Elayne Herrick is denied; and

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[4] As noted above, the amended language provides that 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]).

4. The Division of Taxation's denials of petitioner's claims for refund for the years 2005 and 2006 are sustained and the Notice of Deficiency dated May 5, 2008 is 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