

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**BOMBARDIER MASS TRANSIT** : **DECISION**  
**CORPORATION** : **DTA NO. 822999**

for Redetermination of a Deficiency or for Refund :  
of Corporation Franchise Tax under Article 9-A of :  
the Tax Law for the Period Ended December 18, :  
2003 and Fiscal Years Ended January 31, 2005 :  
through January 31, 2008. :

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The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on March 24, 2011. The Division of Taxation appeared by Mark Volk, Esq. (Clifford M. Peterson, Esq., of counsel). Petitioner appeared by Ernst & Young, LLP (Kenneth T. Zemsky, CPA).

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 held in Troy, New York on December 14, 2011.

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

***ISSUE***

Whether the Division of Taxation properly disallowed claimed Qualified Empire Zone Enterprise (QEZE) credits for real property taxes for the years in issue because petitioner was not a party to a qualifying written agreement.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for findings of fact “6” and “9,” which have been modified. The modified findings of fact and findings of the Administrative Law Judge appear below.

On April 21, 1995, Bombardier Corporation reorganized and spun off its Plattsburgh, New York, Mass Transit Division into a separate newly-formed corporation called Bombardier Transit Corporation.

Corporate tax returns show that Bombardier Corporation owned more than 50 percent of Bombardier Transit Corporation.

On January 31, 1997, Bombardier Transit Corporation changed its name to Bombardier Mass Transit Corporation (BMTC or petitioner). During the period in issue, BMTC was a subsidiary of Bombardier Corporation.

The BMTC site in Plattsburgh, New York is situated at the same location, and has maintained the same operation, as Bombardier Corporation’s New York Mass Transit divisional operation.

BMTC is a subsidiary of the Bombardier Corporation & Subsidiaries consolidated group.

We modify finding of fact “6” in the Administrative Law Judge’s determination to read as follows:

On February 1, 1996, the County of Clinton Industrial Development Agency (Clinton IDA),<sup>1</sup> Plattsburgh City Local Development Corporation, Inc. (Plattsburgh LDC), and the County Treasurer of Clinton County (Clinton County Treasurer) entered into a payment in lieu of taxes agreement, also known as a

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<sup>1</sup> The evidence in the record and the parties refer to the County of Clinton Industrial Development Agency as COCIDA. We adopt the Administrative Law Judge’s phrasing in order to be consistent with the determination.

PILOT agreement (PILOT 1). At all relevant times, the Plattsburgh LDC was a local development corporation incorporated under Not-For-Profit Corporation Law § 1411, and the Clinton IDA was a valid industrial development agency chartered under Article 18-A of the General Municipal Law.

The Plattsburgh LDC owned the land and buildings at 71 Wall Street in Plattsburgh, New York, and sold them to the Clinton IDA. The agreement contemplated that Bombardier Corporation would acquire an interest as a tenant in a 15-acre parcel of land located at 71 Wall Street, Plattsburgh, New York, in order for Bombardier Corporation to build a facility to manufacture rail cars and related products. Throughout the agreement, Bombardier Corporation was referred to as the tenant and the facility and the equipment to build the rail cars and related products were called the Project Facility. The recitals of this agreement clearly indicate that the purpose of PILOT 1 was to induce Bombardier Corporation to engage in the Project, which was the creation of a facility to manufacture railcars in Plattsburgh.

According to PILOT 1, the Plattsburgh LDC was responsible for the PILOT payments and agreed to make said payments to the Clinton County Treasurer. The agreement was signed by individuals on behalf of the Clinton IDA, the Clinton County Treasurer and the Plattsburgh LDC. Neither BMTC nor Bombardier Corporation was a signatory to the agreement.<sup>2</sup>

Also on February 1, 1996, the Plattsburgh LDC entered into a lease agreement with Bombardier Corporation whereby Bombardier Corporation agreed to rent a certain “Project Facility” from the Plattsburgh LDC. The agreement provided at Section 5.2 (D) that “the Agency and the PLDC have entered into the Series Pilot Agreement which provides for certain in-lieu payments” and that if Bombardier Corporation,

“fails to . . . make any payments in lieu of taxes due under Section 5.2(D) hereof, the [Plattsburgh LDC] may pay or cause to be paid such items [sic] or items after giving notice to the [Bombardier Corporation] of an intention to pay such item or items. The [Bombardier Corporation] shall reimburse the [Plattsburgh LDC] for any amount paid under this Section together with interest thereon from the date of payment at the Default Interest Rate.”

On May 1, 1998, the Clinton IDA, the Plattsburgh LDC and the Clinton County Treasurer

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<sup>2</sup> We modify this finding of fact to accurately reflect the record.

entered into a PILOT agreement (PILOT 2) regarding the acquisition of land located at 69 Main Mill Street and 77 Main Mill Street in Plattsburgh, New York, and the construction of buildings and the installation of machinery and equipment. The agreement contemplated that the financing of the project would be accomplished through the issuance of bonds and the granting of other financial assistance. In the agreement, the Plattsburgh LDC agreed to make payments in lieu of taxes to the County Treasurer. Bombardier Corporation was referred to as the original tenant and BMTC was referred to as the tenant. This agreement was signed by individuals representing the Clinton IDA, the Plattsburgh LDC and the Clinton County Treasurer.

We modify finding of fact “9” in the Administrative Law Judge’s determination to read as follows:

Also on May 1, 1998, the Clinton IDA, Bombardier Corporation, BMTC Bankers Trust Company, and Marine Midland Bank entered into an “Assignment and Assumption Agreement” (PILOT 3), in which Bombardier Corporation assigned, and BMTC assumed, all rights and obligations that Bombardier Corporation had to 71 Wall Street, 69 Main Mill Street and 77 Main Mill Street, Plattsburgh, New York (collectively the Plattsburgh properties). Section 1 (B) of this agreement provides the following:

“[T]he Company [BMTC] hereby agrees, that so long as it or the Original Company has any interest in the Project Facility, the Company will perform all of the covenant and obligations of the Original Company, as vendee under the Original Installment Sale Agreement, to the,[sic] Issuer pursuant to the ‘Unassigned Rights’ (as defined in the Original Installment Sale Agreement), including but not limited to all past, present and future rights to defense and indemnity owed to the Issuer by the vendee under the Original Installment Sale Agreement, as well as payment in lieu of taxes and expenses owed to the Issuer by the vendee under the Original Installment Sale Agreement and the Original Payment in Lieu of Tax Agreement. The Obligation, of the Company under this Subsection extend [sic] to the Original Installment Sale Agreement and the Original Payment in Lieu of Tax Agreement as each of said documents exists today, as well as any future amendments thereto which shall be consented to in writing by the Company.”

This agreement was consented to and signed by authorized representatives of the Clinton IDA, Marine Midland Bank, Bankers Trust Company, Bombardier Corporation, the City of the Plattsburgh, the Plattsburgh LDC, and petitioner. In addition, the Clinton County Treasurer also signed this agreement.

The description of the land in the Assignment and Assumption Agreement corresponds with the description of the land in PILOT 1.

Pursuant to a Certificate of Eligibility issued on November 1, 2007, but effective as of July 23, 2004, BMTC became certified as eligible to access Empire Zone Benefits, effective July 23, 2004 for 71 Wall Street, 69 Main Mill Street and 77 Main Mill Street, Plattsburgh, as well as other properties that are not involved in this proceeding.

BMTC filed general business corporation combined franchise tax returns for the fiscal years in issue, wherein it claimed the following QEZE real property taxes credits (RPTC):

Tax Year Ending	Amount of Credit Claimed
December 18, 2003	\$ 88,413.00
January 31, 2005	145,586.00
January 31, 2006	201,965.00
January 31, 2007	142,076.00
January 31, 2008	272,458.00
Total	\$850,498.00

In a letter dated February 6, 2008, the Division of Taxation (Division) denied BMTC's claim for a QEZE credit for real property taxes for the fiscal year ending January 31, 2006. The letter explained the reason for the disallowance of the credit as follows:

“[a]s Bombardier Mass Transit Corporation is neither the owner of the real property nor a party to the original agreements with the County of Clinton Industrial Development Agency, payments in lieu of taxes made by Bombardier

Mass Transit Corporation do not constitute eligible real property taxes.”

In a letter dated January 9, 2009, petitioner’s claims for QEZE credit for real property taxes for the periods ending December 18, 2003, January 31, 2005, January 31, 2007 and January 31, 2008 were denied. The letter explained the reason for the denials as follows:

“[a]s Bombardier Mass Transit Corporation is not a party to either of the provided PILOT agreements, nor have we received written evidence that Bombardier Mass Transit Corporation assumed the obligations of Plattsburgh City LDC, Inc. as set forth in the original PILOT’s, it is the Department’s position that your payments to the Clinton County Treasurer do not constitute ‘eligible real property taxes’ as defined in Section 15(e) of the New York State Tax Law.”

BMTC was a tenant of the Plattsburgh properties for all of the years in issue.

BMTC remitted all of the PILOT payments in issue to the Clinton County Treasurer.

Clinton County sent the PILOT invoices to Bombardier Corporation at 71 Wall Street, Plattsburgh, New York. This was a common mistake and Bombardier Corporation was no longer at this address. The Clinton County authorities were notified of the change in the entity that was responsible for the payments. BMTC was the only entity that was located at this address. BMTC made the payments and the payments were accepted.

#### ***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge found that resolving this matter required determining whether the record contained a written agreement between petitioner and a valid government entity or agent, as defined under Tax Law former § 15 (e). The Administrative Law Judge noted that petitioner’s payments qualified as “eligible real property taxes” only if this provision was met.

The Administrative Law Judge found that petitioner relied primarily on PILOT 3 and, therefore, reviewed the record to determine whether this document met the written agreement

requirement. The Administrative Law Judge found that PILOT 3 incorporated the provisions of the previous PILOT agreements by reference and transferred Bombardier Corporation's rights and obligations concerning the "Project Facility" to petitioner. The Administrative Law Judge found that, by reference, these properties were the facilities located at 71 Wall Street, 69 and 77 Main Mill Street, all within the City of Plattsburgh. As such, the Administrative Law Judge held that petitioner met the burden of proving that PILOT 3 met the written agreement requirement under Tax Law former § 15 (e).

In so holding, the Administrative Law Judge rejected the Division's challenges to the validity of PILOT 3. The Administrative Law Judge rejected the majority of the Division's arguments because they were premised upon the interpretation that PILOT 3 was not a valid written agreement under Tax Law former § 15 (e). To the contrary, the Administrative Law Judge found that the agreement transferred all obligations under PILOT 1 and PILOT 2 to petitioner, including the obligation to remit payments in lieu of taxes. The Administrative Law Judge also rejected the Division's argument that petitioner's witness testimony was not credible. The Administrative Law Judge also rejected the Division's complaint that it was provided with PILOT 3 late in the audit period, finding that the time of an offering is irrelevant so long as it concerns the relevant time frame and meets the requirements of Tax Law § 15 (e).

#### ***ARGUMENTS ON EXCEPTION***

In its exception, the Division raises the same arguments presented before the Administrative Law Judge. It contends that the Administrative Law Judge erroneously rejected its arguments challenging the validity of PILOT 3.

The Division raises various arguments in support of its position. The Division contends

that PILOT 3 is not valid because it does not sufficiently specify the properties referred to the by parties. It further contends that PILOT 3 is not an “agreement” because the Clinton IDA merely accedes to the assignment and assumption. The Division next argues that there was nothing to be assigned or assumed by petitioner because PILOT 1 and PILOT 2 obligated the Plattsburgh LDC, not Bombardier Corporation, to make payments in lieu of taxes. Further, the Division argues that the Administrative Law Judge erroneously deemed petitioner’s witness as credible. As such, the Division contends that petitioner has not established clear entitlement to the sought tax exemptions and that the determination should be reversed.

Petitioner argues that the determination should be affirmed. It contends that this matter presents only issues of fact, and that the Administrative Law Judge properly resolved the issues in its favor. In response to the Division’s argument that PILOT 3 lacks sufficient specificity, petitioner argues that the Administrative Law Judge properly dismissed this argument because PILOT 3 clearly and unambiguously incorporated the terms and conditions of the prior PILOT agreements. Petitioner contends that the Division’s argument that PILOT 3 did not include the requisite parties has no merit because all of the relevant parties, including the Clinton IDA, the Plattsburgh LDC, Bombardier Corporation, the lending institutions, and petitioner each signed the agreement. Petitioner also argues that the Division has not presented any new grounds for overturning the credibility findings of the Administrative Law Judge. Accordingly, petitioner contends that the determination should be affirmed.

### ***OPINION***

This matter presents the question of whether petitioner is entitled to claim the QEZE real property tax credit under Tax Law § 15 (a) for PILOT payments. To resolve this matter, we must

decide whether the subject payments constitute “eligible real property taxes” under Tax Law former § 15 (e).

We note, initially, that petitioner bears the burden of proof because it seeks to claim a tax credit (*see e.g. Matter of Golub Serv. Sta. v Tax Appeals Trib. of State of N.Y.*, 181 AD2d 216 [1992]). Tax credits, such as those at issue, are a particularized species of exemption from taxation (*Matter of Marriott Family Rests. v Tax Appeals Trib. of State of N.Y.*, 174 AD2d 805, *lv denied* 78 NY2d 863 [1991]). “Statutes creating exemptions from taxation must be construed against the taxpayer” (*Matter of Federal Deposit Ins. Corp. v Commissioner of Taxation & Fin.*, 83 N.Y.2d 44, 49 [1993] [internal quotation marks and citation omitted]; *Matter of Grace v New York State Tax Commn.*, 37 NY2d 193 [1975]).

In order to meet its burden, the taxpayer must demonstrate through clear and convincing evidence that the exemption applies and that it is entitled to it (*see Matter of Lake Grove Entertainment, LLC v Megna*, 81 AD3d 1191 [2011]; *Matter of Blue Spruce Farms v New York State Tax Commn.*, 99 AD2d 867 [1984], *affd* 64 NY2d 682 [1984]). We note that in matters of statutory interpretation, our cardinal function is to effectuate the intent of the Legislature (*see Matter of Yellow Book of N.Y., Inc. v Commissioner of Taxation & Fin.*, 75 AD3d 931, 932 [2011]). The statutory language is the clearest indicator of legislative intent (*Matter of Lewis Family Farm, Inc. v New York State Adirondack Park Agency*, 64 AD3d 1009, 1013 [2009] [internal quotation marks and citations omitted]).

Having reviewed the relevant general principles of law, we now turn to the specific question of whether the subject PILOT payments are “eligible real property taxes” under Tax Law former § 15 (e).

In effect during the years at issue, Tax Law former § 15 (e) provides the following:

“Eligible real property taxes. The term ‘eligible real property taxes’ means taxes imposed on real property which is owned by the QEZE and located in an empire zone with respect to which the QEZE is certified pursuant to article eighteen-B of the general municipal law, provided such taxes are paid by the QEZE which is the owner of the real property or are paid by a tenant which either (i) does not meet the eligibility requirements under section fourteen of this article to be a QEZE or (ii) cannot treat such payment as eligible real property taxes pursuant to this paragraph and 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 eighteen-B of the general municipal law and a qualified empire zone enterprise. In addition, ‘eligible real property taxes’ shall include taxes paid by a QEZE which is a lessee of real property if the following conditions are satisfied: (1) the taxes must be paid by the lessee pursuant to explicit requirements in a written lease executed or amended on or after June first, two thousand five, (2) such taxes become a lien on the real property during a taxable year in which the lessee of the real property is both certified pursuant to article eighteen-B of the general municipal law and a qualified empire zone enterprise, and (3) the lessee has made direct payment of such taxes to the taxing authority and has received a receipt for such payment of taxes from the taxing authority. In addition, the term ‘eligible real property taxes’ includes payments in lieu of taxes made by the QEZE to the state, a municipal corporation or a public benefit corporation pursuant to a written agreement entered into between the QEZE and the state, municipal corporation, or public benefit corporation.”

As we summarized in *Matter of the Golub Corp.* (Tax Appeals Tribunal, May 31, 2012), this statute provides three scenarios under which a levy becomes “eligible real property taxes” for the purposes of the QEZE real property tax credit:

- 1) *taxes* paid by a certified and qualified QEZE *owner* of property;
- 2) *payments in lieu of taxes* by a certified and qualified QEZE when made directly to the state, a municipal corporation or a public benefit corporation “pursuant to a written agreement entered into between the QEZE and the state, municipal corporation or public benefit corporation”; or
- 3) *taxes* paid by a certified and qualified QEZE *lessee* (Tax Law former § 15 [e]).

Herein, we need only consider the second circumstance because petitioner seeks credits only for its payments in lieu of taxes.

In order to be “eligible real property taxes” under Tax Law former § 15 (e), a taxpayer must prove that it is an eligible and certified QEZE and that its payments in lieu of taxes were made pursuant to a written agreement with an eligible entity. Petitioner was a QEZE during the relevant periods. Under the relevant provisions of Tax Law former § 15(e), the Clinton IDA is an eligible entity because it was, and remains, a public benefit corporation chartered under Article 18-A of the General Municipal Law. Petitioner did make payments in lieu of taxes to the Clinton County Treasurer. These facts are not in dispute. Rather, this controversy revolves around whether PILOT 3 constitutes a written agreement that obligated petitioner to make the payments at issue.

We conclude that petitioner’s payments in lieu of taxes were made pursuant to the written terms of PILOT 3. By reference, this document incorporates the prior agreements contained in PILOT 1 and PILOT 2 regarding 71 Wall Street, and 69 and 77 Main Mill Street. All of the obligors and obligees of the prior agreements consented to and signed PILOT 3, including the Clinton IDA, the Plattsburgh LDC, Bombardier Corporation, and petitioner. In our view, this meets the written agreement requirement of Tax Law former § 15 (e) (*accord Matter of Golub Corp.*, Tax Appeals Tribunal, May 31, 2012 [claim for QEZE credits rejected because PILOT payments were not made pursuant to a written agreement]). Further, the clear terms of PILOT 3 provided that petitioner was obligated to make the payments in lieu of taxes and all relevant parties, including the Plattsburgh LDC, acceded to these terms. Petitioner did, in fact, make payments in lieu of taxes pursuant to PILOT 3, as the parties understood those terms. Accordingly, we conclude that petitioner’s payments were “eligible real property taxes” because they were made pursuant to PILOT 3, which is a written agreement between a QEZE and a public

benefit corporation, as required by Tax Law former § 15 (e).

We also find that the Administrative Law Judge properly rejected the Division's arguments. In so doing, we note that, while statutory exemptions from taxation must be construed against the taxpayer, the interpretation may not be so "narrow and literal as to defeat [the] settled purpose" of the exemption (*Matter of Grace v New York State Tax Commn.*, 37 NY2d 193, 196 [1975]). The record shows that the subject agreements between the parties affected the stated intent of the Empire Zones Program. Through the subject written PILOT agreements, the Clinton IDA induced Bombardier Corporation and petitioner to invest in New York State by opening up their railcar manufacturing plant in the City of Plattsburgh. The record shows that this project attracted jobs and business to the area, which are the stated purposes of the Empire Zones Program (General Municipal Law § 956). This close relationship between the subject written agreements and legislative intent further supports our conclusions.

In reviewing the Division's arguments, we find that their challenges are premised on an overly narrow interpretation of Tax Law former § 15 (e). We disagree with the Division's contention that PILOT 3 does not constitute an agreement because it is an assignment and assumption of obligations. We can find absolutely no basis for the argument that PILOT 3 does not constitute an agreement as meant within the statute. The Division's position relies upon an impermissible interpretation of Tax Law former § 15 (e) because it would substantially reduce the latitude afforded to QEZEs and eligible entities in structuring their written PILOT agreements. Accordingly, we reject the Division's arguments.

We find that no other argument raised on exception by either party compels any further modification to the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Bombardier Mass Transit Corporation is granted;
4. The Division of Taxation is hereby ordered to grant the credits in issue.

DATED: Albany, New York  
June 7, 2012

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

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