STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
THE GOLUB CORPORATION	:	DECISION DTA NO. 823095
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Years Ended April 30, 2007 and April 30, 2008.	:	

Petitioner, the Golub Corporation, filed an exception to the determination of the Administrative Law Judge issued on May 26, 2011. Petitioner appeared by Hiscock & Barclay, LLP (David G. Burch, Jr., Esq. and Kevin R. McAuliffe, Esq., of counsel). The Division of Taxation appeared by Mark Volk, Esq. (Robert J. Tompkins, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was held on December 14, 2011, in Troy, New York.

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

ISSUES

I. Whether the Division of Taxation properly disallowed petitioner's claim for a qualified Empire Zone credit, per Tax Law § 15 (a), on the basis that payments in lieu of taxes made by petitioner were not "eligible real property taxes," as defined by Tax Law former § 15 (e), for the purposes of such credit.

II. Whether the Division of Taxation properly disallowed petitioner's claim for a qualified Empire Zone credit, per Tax Law § 15 (a), on the basis that certain business improvement district assessments paid by petitioner were not "eligible real property taxes," as defined by Tax Law former § 15 (e), for the purposes of such credit.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for finding of fact "8," which has been modified. The modified fact and the Administrative Law Judge's facts appear below.[1]

THE PILOT ISSUE

Petitioner, the Golub Corporation, owns or operates more than 100 supermarkets in six states. Petitioner is certified as a Qualified Empire Zone Enterprise (QEZE) pursuant to Article 18-B of the General Municipal Law (GML) in multiple empire zones, including Schenectady County, New York. Its earliest QEZE effective date is October 23, 2001.

In 2004, petitioner determined that it needed a larger, more up-to-date and efficient freezer facility so as to be able to expand its frozen food distribution operations. Petitioner considered multiple locations to lease, upon which it would construct a freezer facility to its specifications.

Rotterdam Ventures (RV) is the owner of the Rotterdam Industrial Park. FM Ventures, Inc. (FM), an affiliate of RV, leases the entire Rotterdam Industrial Park from RV. FM learned

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[1] While this matter concerns petitioner's entitlement to credits provided under the Empire Zones Program based on "eligible real property taxes," there are two separate issues presented based on two different types of payments made. These issues pertain, respectively, to credit availability based on payments in lieu of taxes (the PILOT Issue) and to credit availability based on business improvement district payments (the BID Issue). For clarity, each will be addressed independently.

of petitioner's search for a location on which to site its new freezer facility and approached petitioner with the suggestion that petitioner consider leasing property within the Rotterdam Industrial Park for that purpose. FM proposed to sublease to petitioner 8.22 acres of the Rotterdam Industrial Park (the Property) upon which petitioner's freezer facility (the Facility or the Project) could be sited.

Petitioner agreed to sublease property within the Rotterdam Industrial Park from FM, and the two entities structured a transaction whereby the freezer facility, consisting of some 152,000 square feet of space, was designed, set up and constructed under petitioner's supervision and oversight for exclusive use by petitioner for the purpose of storing frozen foods to be distributed by petitioner to its various supermarkets located within and beyond New York State. One of the bases upon which petitioner chose the Rotterdam site out of several acceptable sites was the availability of Empire Zone benefits to petitioner if it brought investment and jobs to the Rotterdam area.

In March 2005, FM, as landlord, and petitioner, as tenant, signed a sublease agreement (Sublease) for the Property.[2] One of the key components in making the financial part of the transaction viable for petitioner was petitioner's receipt of the Empire Zone real property tax credit (RPTC) relative to the payment of real property taxes associated with the property, and the Sublease had been negotiated based, in part, upon this component. Accordingly, pursuant to the terms of the Sublease with FM, petitioner was obligated to make all tax payments, including any payments in lieu of taxes (PILOT payments) that might arise under a PILOT agreement. In light of this obligation, the Sublease provided petitioner with the right to review and approve any

[2] The Sublease appears in the record as Exhibit 1.

PILOT agreement that FM might seek to enter, and included a prohibition on FM entering into a PILOT agreement absent receipt of such approval from petitioner.

In February 2005, FM submitted an application to the Rotterdam Industrial Development Agency (IDA) seeking financial assistance for the Facility.[3] The application concerned the construction of a frozen food freezer distribution facility to serve petitioner's (then) 107-store Price Chopper supermarket chain. The application identified petitioner as the occupant of the Facility, and all disclosures, including employment information and cost/benefit analysis, were specific to petitioner.

At approximately the same time in February 2005, petitioner submitted to the IDA its own application for financial assistance in connection with the Facility regarding items to be purchased individually by petitioner and used with respect thereto (e.g., warehouse racking, forklift trucks, pallet jacks, battery chargers, and other equipment). This application, similarly, identified petitioner as the occupant of the Facility and contained employment information and the like concerning petitioner.

We modify finding of fact "8" in the Administrative Law Judge's determination to read as follows:

> In the event that an applicant to an IDA seeks a PILOT agreement that differs from the standard PILOT agreement offered by that particular IDA, the applicant must make a written request for a deviation from the standard PILOT agreement, on notice to any impacted taxing jurisdictions. Herein, the jurisdictions were Schenectady County, the Town of Rotterdam, and Schalmont Central School District (together, the Taxing Jurisdictions).[4] FM and petitioner

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[3] The IDA holds title to the land and the Facility, which are then leased back to FM, and in turn, subleased to petitioner.

[4] We note that the PILOT Agreement, as well as other documents in the record, refers to these jurisdictions as the "Taxing Entities."

wanted a PILOT agreement that differed from the standard PILOT agreement, and FM requested this of the IDA by a letter dated February 4, 2005.

In response, the IDA held a series of meetings and proceedings, on notice as required, that were attended by Steven Porter, Senior Vice President and General Counsel to RV, on behalf of both FM and petitioner. His presentations at these meetings and proceedings were made on behalf of both FM and petitioner, and it was known that FM was undertaking the freezer project on behalf of petitioner.[5, 6]

In response to the foregoing applications, the IDA passed resolutions granting financial assistance to FM and to petitioner. This assistance included mortgage recording tax relief, sales tax relief, a PILOT agreement with respect to FM, and sales tax relief with respect to petitioner's "fit up" of the Facility. The PILOT agreement (PILOT Agreement), dated August 1, 2005, was negotiated by Mr. Porter on behalf of both FM and petitioner.

As the development of the Facility progressed, FM and petitioner amended and restated the Sublease to reflect changes in fact, law, and circumstances arising after the execution of the Sublease. As a result, and to reflect such changes in one document, FM and petitioner signed an amended sublease (Amended Sublease) in April 2007.[7] The terms of the Amended Sublease reflected, among other things:

a) petitioner's approval of the August 1, 2005 PILOT Agreement (Exhibit 23 at ¶ 4.9);

b) that the Property was its own separate tax assessment parcel (Exhibit 23 at ¶ 4.2);

c) FM's obligation under its sublease with petitioner to authorize the Taxing Jurisdictions to send tax bills or PILOT Agreement bills directly to petitioner

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[5] Two members of the IDA board recused themselves because they were petitioner's employees.

[6] We modify this finding of fact in order to more accurately reflect the record.

[7] The Amended Sublease appears in the record as Exhibit 23.

(Exhibit 23 at ¶ 4.3 [this provision is phrased in the Sublease as "in order to expedite (petitioner's) payment of taxes (as it is obliged to do under the terms of the Sublease)]"); and,

d) petitioner's obligation under its Sublease with FM to make tax payments, including PILOT payments, per the PILOT Agreement, directly to the Taxing Jurisdictions (Exhibit 23 at ¶ 4.3) subject, however, to petitioner's option to cease making such payments directly to the Taxing Jurisdictions and instead make such payments to FM (Exhibit 23 at ¶ 4.4).

The last two Amended Sublease tax provisions described above, concerning FM's obligation to authorize the Taxing Jurisdictions to send bills directly to petitioner (in order to expedite payments of such bills) and petitioner's obligation to make such payments directly to the Taxing Jurisdictions, differ from the provision concerning payment of taxes as set forth in the initial Sublease for the premises. Under the initial Sublease, petitioner was obligated to pay the amount of any real property taxes on the premises directly to FM (Exhibit 1 at ¶ 4.5). Under the Amended Sublease, petitioner's lease obligation to make direct payments to the Taxing Authorities commenced upon petitioner's receipt of the 2006-07 school tax bill for the fiscal year beginning July 1, 2006.

The Facility was completed in 2005. The bills for the payments due pursuant to the PILOT agreement were issued by the three impacted Taxing Jurisdictions to FM.[8] However, by way of a "care of" (i.e., c/o) designation, both the county and town bills were addressed for delivery to petitioner, as follows:

[8] As previously mentioned, the Taxing Jurisdictions included the Schalmont Central School District, Schenectady County, and the Town of Rotterdam.

County of Schenectady and Town of Rotterdam

FM Ventures, Inc.
c/o Golub Corp. Real Estate Dept.
P.O. Box 1074
Schenectady, New York 12301

In the case of the school district bills, the invoices were addressed for delivery to FM, but by "courtesy copy" (i.e., cc) designation, a copy of the bill was also addressed for delivery to petitioner, as follows:

Schalmont Central School District

FM Ventures
695 Rotterdam Industrial Park
Duanesburg Rd.
Schenectady, NY 12308
Attn: David M. Buiko
[phone number]
[billing information and amount due]

cc: Golub Corp
Attn: RE Dept
PO Box 1074
Schenectady, NY 12301

In turn, the payments necessary to satisfy the PILOT amounts due were made by petitioner directly to the applicable taxing jurisdictions.

THE BID ISSUE

Price Chopper Operating Co., Inc. (Price Chopper), a wholly-owned subsidiary of petitioner, rents property located at 40 Delaware Avenue in Albany, New York, on which Price Chopper operates one of petitioner's supermarkets (the Delaware Avenue Store).[9] The New

[9] The property is owned by Clark Trading Corporation, an affiliate of petitioner, who in turn leases the same to Price Chopper.

York State corporation franchise tax report for Price Chopper was filed, during the relevant years, under the combined report of petitioner.

Price Chopper is responsible for paying the real property taxes for the Delaware Avenue Store. Included on the real property tax bills for the Delaware Avenue Store are line item charges for "COUNTY TAX," "CITY TAX," and "LARK STREET BID," with the latter charge pertaining to the Lark Street Business Improvement District. Petitioner's witness described his understanding of this line item to be that "anybody within a certain geographic area of that street [Lark Street] has to pay on their tax bill a portion to help contribute towards their good will." He was unaware of any specific benefits received in return for this payment, and noted his belief that the charge is not "elective," but rather is a required item, the nonpayment of which would result in a lien against the Delaware Avenue Store for nonpayment of taxes. Petitioner reports the Lark Street BID charge as a deductible real estate tax on its federal (corporate) income tax returns, and this position has not been challenged by the Internal Revenue Service (IRS). As with the line item charges for county tax and city tax, the Lark Street BID charge is calculated based upon the taxable assessed value of the property.

The Lark Street Neighborhood District Management Association, incorporated as a not-for-profit corporation in 1996 and known as the Lark Street BID, is a coalition of over 180 owners of real property located within the Lark Street Business Improvement District, and is governed by a board of 12 elected and 3 appointed directors. The 12 directors are elected from among 4 membership classes, consisting of commercial property owners, residential property owners, commercial property tenants and residential tenants, while the 3 appointed directors represent, respectively, the Mayor of Albany, the Albany City Council, and the Albany City

Controller's Office. As set forth in its 2007 Annual Report, the "Organization and Mission" of the Lark Street BID is as follows:

> The Lark Street Neighborhood District Management Association, Inc. (Lark Street BID) was created to execute the responsibilities of a district management association as set forth in Article 19-A of the New York General Municipal Law and to operate a Business Improvement District program to include, but not be limited to, the administration, marketing, special events, project development, public relations and public improvements in the Lark Street Area Business Improvement District as established by the Common Council of the City of Albany pursuant to Article 19 of the New York General Municipal Law of the State of New York and the Lark Street Area Plan. The Lark Street BID is set up as a not-for-profit corporation as set forth in section 202 of the Not-For-Profit Corporation Law of the State of New York. The Lark Street BID operates under a contract with the City of Albany to provide the above services.

The website for the Lark Street BID further describes the history and mission of the BID as a commitment to "enhance the quality of life" and to "improve and promote" the BID through a "variety of programs and services" so as to "build, sustain and enhance a unique and prosperous living and business community for the residents, visitors and merchants" of the BID. The programs and services focus on the following:

> a) neighborhood safety (e.g., crime deterrence through neighborhood "watch" programs and "walk and watch" programs);
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> b) neighborhood marketing (aimed at continued occupancy of existing businesses and enhancement of the BID, including production of a Lark Street BID merchant member business directory and production and distribution of a quarterly newsletter);
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> c) special events and promotions (seasonal celebrations and community events including Champagne on the Park, Art on Lark, Monday Nights in the Park Concert Series, LarkFEST, A Taste of Lark 'n Art, Lark or Treat, and Winter WonderLARK); and,
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> d) street maintenance and beautification (a year-round maintenance staff of employees who remove and control sidewalk and street litter and autumn leaves, and clear crosswalks in winter).

The costs for the foregoing programs and services are funded through grants, revenues (net of expenses) from special events, rental income, interest income and the City of Albany Assessment, i.e., the "LARK STREET BID" item appearing on the tax bills of those within the BID, including petitioner. This latter item is by far the largest revenue source listed in the Annual Report for the Lark Street BID.

On April 30, 2008, the Division of Taxation (Division) issued to petitioner a Statement of Tax Reduction or Overpayment, pertaining to petitioner's fiscal year ended April 30, 2007, and disallowing petitioner's claim for credit for such fiscal year in the amounts of $682,248.39, pertaining to the PILOT issue, and $7,247.80, pertaining to the BID issue, respectively. On May 21, 2009, the Division issued to petitioner a Statement of Tax Reduction or Overpayment, pertaining to petitioner's fiscal year ended April 30, 2008, and disallowing petitioner's claim for credit for such fiscal year in the amounts of $606,163.27, pertaining to the PILOT issue, and $7,392.06, pertaining to the BID issue, respectively.[10]

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that this matter presented two issues related to the definition of "eligible real property taxes" as defined in Tax Law former § 15 (e)[11] for the purposes of the Qualified Empire Zone Enterprise (QEZE) real property tax credit (RPTC).

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[10] At hearing, the parties agreed that the dollar amounts of credit sought are not in dispute, but rather that the question is whether petitioner has established entitlement to the credits it seeks. The parties further noted that the BID issue presented here is identical to that concerning petitioner's property located in Utica, New York. In recognition of this, the parties have agreed that the result with respect to the BID issue herein will govern the result for the same issue presented for the Utica property and that the Division will adjust its tax credit determination on the Utica property if petitioner prevails on the BID issue presented herein. As a consequence of this agreement the parties did not introduce evidence specific to the Utica property as part of their presentations herein.

[11] In 2010, the Legislature amended this subsection to clarify the definition the word "tax" within the term "eligible real property taxes" (L.2012, c. 56). The relevant language regarding payments in lieu of taxes remains substantially unchanged.

The Administrative Law Judge first addressed the issue of whether payments in lieu of taxes remitted by petitioner qualified as "eligible real property taxes" for the purposes of the QEZE-RPTC. Reviewing the legislative history of this subsection, which defines "eligible real property taxes," the Administrative Law Judge noted that the term expanded over time. The Administrative Law Judge summarized the current provisions of the statute and the conditions that make a levy an eligible real property tax. The Administrative Law Judge determined that payments in lieu of taxes qualify only when such payments are made pursuant to a written agreement between the QEZE and the relevant governmental or taxing entities.

Turning to the instant matter, the Administrative Law Judge reviewed the record to determine whether petitioner remitted the subject payments pursuant to a written obligation. The Administrative Law Judge found that petitioner was a party neither to the subject PILOT Agreement nor any other written agreement with the Rotterdam IDA or any of the taxing entities. In fact, the Administrative Law Judge concluded that petitioner's obligation to pay arose solely from its Sublease with FM. The Administrative Law Judge further found that the Sublease provided petitioner with the ability to discharge its obligation to pay the PILOT payments.

As such, the Administrative Law Judge determined that petitioner's payments were not made pursuant to a written obligation, and therefore, could not be considered "eligible real property taxes" under Tax Law former § 15 (e). Accordingly, the Administrative Law Judge held that petitioner was not entitled to claim the QEZE-RPTC for its payments in lieu of taxes.

The Administrative Law Judge next addressed whether the charges assessed by the Lark Street BID qualified as "eligible real property taxes" under Tax Law former § 15 (e). In reviewing the statutory language, the Administrative Law Judge noted that a levy must first be

considered a "tax" in order to be eligible for the credit. The Administrative Law Judge noted that the term "tax" was not defined in this section; however, the Administrative Law Judge used definitions found in the Real Property Tax Law, because this particular credit deals with real property taxes.

Turning to the instant matter, the Administrative Law Judge found that charges assessed by the Lark Street BID do not meet the definition of a "tax" as defined under the Real Property Tax Law. The Administrative Law Judge noted that the Real Property Tax Law specifically excludes "ad valorem levies" and "special assessments" from levies that are considered "taxes." The Administrative Law Judge reviewed the definitions and noted that special assessments and ad valorem levies are assessed for the benefit of a particular district.

The Administrative Law Judge noted that this BID was formed in accordance with Article 19-A of the General Municipal Law, and was established to benefit properties within the district. The Administrative Law Judge also noted that, although actions taken by the BID may have benefitted the public at large, improving the Lark Street BID remains the primary purpose of the levy. The Administrative Law Judge found that the charges levied by the Lark Street BID were assessed on property values for the benefit of the district. As such, the Administrative Law Judge determined that the Lark Street BID charges were not taxes, but were either ad valorem levies or special assessments. Accordingly, the Administrative Law Judge found that petitioner could not claim the QEZE-RPTC for these charges.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the Administrative Law Judge erroneously rejected its arguments on both the PILOT and BID Issues.

Petitioner argues that the PILOT Issue is one of statutory interpretation and contends that its payments to the Taxing Jurisdictions constitute "eligible real property taxes" under Tax Law former § 15 (e). In support of its argument, petitioner relies on the legislative intent and history of the statute, which has evolved to treat the payment of taxes the same as payments under PILOT agreements under certain circumstances.

Petitioner contends that it is entitled to the QEZE credit despite there being no written agreement with the Rotterdam IDA because it has made the requisite PILOT payments to the Taxing Jurisdictions. It argues that the IDA entered into the PILOT Agreement with FM knowing that the Project was for petitioner's benefit and that petitioner would be making the payments. Petitioner contends that, under these circumstances, no further writing would be expected and that it would be consistent with the legislative intent of the Empire Zones Act to construe Tax Law former § 15 (e) so as to permit its claim of the QEZE-RPTC.

The Division contends that the Administrative Law Judge properly decided the PILOT issue. It argues that Tax Law former § 15 (e) clearly defines eligible real property taxes as including PILOT payments only to the extent that the QEZE is obligated to make such payments under a written agreement with a taxing jurisdiction.

Petitioner also contends that the Administrative Law Judge erroneously concluded that charges assessed by the Lark Street BID are not eligible real property taxes. Petitioner contends that the charges are taxes under the Real Property Tax Law because they were established for the public benefit. Petitioner argues that even if the charges are not taxes under the Real Property Tax Law, the charges should be eligible real property taxes under Tax Law former § 15 (e) because the Legislature sought to create "tax-free" zones for businesses.

The Division argues that the Administrative Law Judge correctly determined that the subject charges were not eligible real property taxes. The Division notes that Lark Street BID charge was imposed only on properties in the district, and was assessed only for benefits provided by the Lark Street BID to the properties within the district. As such, the Division argues that the Administrative Law Judge properly found that this charge was not a real property tax, and therefore, could not be an eligible real property tax under Tax Law former § 15 (e).

OPINION

This matter presents two questions regarding the definition of "eligible real property taxes" provided by Tax Law former § 15 (e). This statute defines the term for the purposes of QEZE-RPTC provided under Tax Law § 15 (a).

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 tax (***Matter of Marriott Family Rests. v Tax Appeals Trib. of State of N.Y.***, 174 AD2d 805 [1991], ***lv denied*** 78 NY2d 863 [1991]). "Statutes creating tax exemptions must be construed against the taxpayer" (***Matter of Federal Deposit Ins. Corp. v Commissioner of Taxation & Fin.***, 83 NY2d 44, 49 [1993] [internal quotation marks and citation omitted]; ***Matter of Grace v New York State Tax Commn.***, 37 NY2d 193 [1975], ***rearg denied*** 37 NY2d 816 [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 [2010], ***lv denied*** 16 NY3d 704 [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 [2009] [internal quotation marks and citations omitted]).

Having reviewed the relevant general principles of law, we now turn to the specific questions of whether petitioner is entitled to QEZE credits for either its payments in lieu of taxes or the charges assessed by the Lark Street BID. We address each question separately.

THE PILOT ISSUE

We first address whether petitioner's payments in lieu of taxes qualify as "eligible real property taxes" under Tax Law former § 15 (e). The specific question is whether the payments may be considered "eligible" when they were not obligated under a written agreement between the payor and a taxing entity or other government instrumentality.

Tax Law former § 15 (e), in effect for the period at issue, provided as follows:

> "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 the 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.

Generally, the foregoing statute provides three broad conditions under which a levy constitutes "eligible real property taxes":

> 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 the tax credit for its amounts remitted as payments in lieu of taxes.[12]

We affirm the determination of the Administrative Law Judge with respect to the PILOT Issue.

Our review of the record confirms the findings of the Administrative Law Judge. Petitioner was not a party to the subject PILOT Agreement. The record contains no written agreement between petitioner and either the Taxing Jurisdictions or a public benefit corporation that obligated petitioner to remit payments in lieu of taxes. Petitioner cannot meet its burden of proof merely by showing that its planned occupancy of the Rotterdam facility influenced the PILOT negotiations. The statute clearly requires a written agreement between a QEZE and an

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[12] Petitioner cannot claim the credit as a QEZE lessee because the provision of Tax Law former § 15 (e) permit the credit only for payments of taxes, and not payments in lieu of taxes.

eligible entity. Petitioner has not produced an agreement between itself and the Taxing Jurisdictions that obligated the payments for which it seeks QEZE credits. Accordingly, we must conclude that petitioner's payments do not meet the definition of "eligible real property taxes" because these payments were not made pursuant to a written agreement or obligation as required by Tax Law former § 15 (e).

Petitioner's arguments are primarily based on the legislative history of Tax Law § 15 (e). It contends that the history of this statute shows that the Legislature intended to provide this credit to all payments of lieu of taxes. Petitioner argues that its involvement in the PILOT negotiations obviates the statutory requirement that the writing be between itself and the Taxing Jurisdictions or a public benefit corporation (e.g., Rotterdam IDA).

We reject the notion that it was unnecessary for petitioner to produce a written PILOT agreement between itself and either the Taxing Jurisdictions or a public benefit corporation. Initially, we note that petitioner bears the burden of proof, and it cannot simply ignore the statutory requirement that its payments be made pursuant to a written agreement. Further, our review of the record confirms the Administrative Law Judge's conclusions regarding the Amended Sublease. Under this agreement, FM possessed the sole authority to authorize petitioner's payments (Exhibit 23 [Amended Sublease] at ¶ 4.3), and petitioner had an opt-out clause with regard to its responsibility for payments to the Taxing Jurisdictions (Exhibit 23 at ¶ 4.4). As noted in the determination, these facts support the conclusion that petitioner was not a direct obligor with respect to the PILOT Agreement between FM and the Rotterdam IDA.

Turning to petitioner's legislative argument, we note that "the legislative history of an enactment should not be ignored" (***see Matter of Yellow Book of N.Y., Inc.***, 75 AD3d 931, 932

[2011]). Over time, the Legislature has substantially modified this particular subsection. The initial enactment of Tax Law § 15 (e) provided that "eligible real property taxes" included only "taxes imposed on real property" owned by a certified QEZE. In 2002, the Legislature amended this definition to include "payments in lieu of taxes" made by the QEZE pursuant to a written agreement entered into between the QEZE and a state, municipal corporation, or public benefit corporation. In 2005, the definition was expanded to include real property taxes paid by a QEZE lessee under certain conditions. However, we are not persuaded by petitioner's arguments premised on legislative history.

Tax Law former § 15 (e) clearly states that, in order for payments in lieu of taxes to be considered "eligible real property taxes," such payments must be made pursuant to a written agreement between the QEZE and the state, municipal corporation, or public benefit corporation. To construe the language otherwise would violate our authority because "an administrative agency may not extend the meaning of statutory language to apply to situations not embraced within the statute" (***Matter of Bloomingdale Bros. v Chu***, 70 NY2d 218, 223 [1987]). As such, we reject petitioner's argument regarding the PILOT Issue and note that the remedy sought by petitioner can only be provided by the Legislature.

THE BID ISSUE

We affirm the determination of the Administrative Law Judge with respect to the BID Issue.

The instant matter presents the question of whether the charges assessed for a special assessment district, in this case, the Lark Street BID, constitute "eligible real property taxes" for the purpose of the Empire Zones RPTC.

This Tribunal addressed this exact question in ***Matter of Piccolo*** (Tax Appeals Tribunal, August 4, 2011). Therein, we held that, under the Real Property Tax Law, similar charges assessed by a downtown improvement district were properly classified as special assessments (Real Property Tax Law § 102 [15]). As such, those charges could not be considered "eligible real property taxes" because special assessments are specifically excluded from the definition of a "tax" under the Real Property Tax Law (Real Property Tax Law § 102 [20]). We concluded in ***Matter of Piccolo*** that the taxpayer could not deduct amounts paid towards business improvement district charges because the charges were not "eligible real property taxes" under former Tax Law § 15 (e).

We hold the same in the instant matter. Herein, petitioner presents legal arguments that are identical to those we rejected in ***Matter of Piccolo*** (***see also Matter of Herrick***, Tax Appeals Tribunal, August 4, 2011; ***Matter of Stevenson***, Tax Appeals Tribunal, August 4, 2011). Chapter 162 of the Code of the City of Albany established the Lark Street BID. Section 162-1 provides that the purpose of this district was to benefit the properties located within the boundaries of the district. This establishes that the subject charges were levied to benefit specific properties. The Administrative Law Judge properly noted that the existence of a secondary benefit to a municipality at large does not discount or replace the intended primary benefit to the parcels within a special assessment district. As such, we conclude that the charges assessed for the Lark Street BID were not eligible real property taxes for the purposes of the QEZE-RPTC because the charges were not taxes, but special assessments.

We conclude that the Administrative Law Judge properly resolved the issues in this matter and that no argument raised on exception compels any additional modification to the

determination below.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Golub Corporation is denied;

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

3. The petition of the Golub Corporation is denied; and,

4. The Statements of Tax Reduction or Overpayment, dated April 30, 2008, and May 21, 2009, are sustained.

DATED: Albany, New York
May 31, 2012

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

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