STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MILTON F. STEVENSON	:	DETERMINATION DTA NO. 822641
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, Milton F. Stevenson, filed a petition 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.

On April 27, 2009 and May 6, 2009, respectively, petitioner, by his representative, Hiscock & Barclay, LLP (Amanda K. Davis, Esq., of counsel) and the Division of Taxation, by its representative, Daniel Smirlock, Esq. (Sarah Dasenbrock, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based upon documents and briefs to be submitted by October 8, 2009, which date began the six-month period for issuance of this determination. After review of the evidence and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

The parties entered into a stipulation of facts which has been incorporated into the findings of fact below.

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

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

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

4. Anoplate pays eligible real property taxes on five parcels of land in Onondaga County, pursuant to statements of taxes issued by the City of Syracuse and Onondaga County. The record includes statements of taxes issued by the City of Syracuse and Onondaga County on each of the

---

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

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

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

6. The special assessments levied on Anoplate for each year at issue included sanitary unit charges, flushing charges, water frontage charges and sidewalk charges.

7. Petitioner and his wife, Ann M. Stevenson, timely filed joint New York State resident income tax returns for the tax years 2004, 2005, and 2006. On each of those resident income tax returns, petitioner claimed the QEZE credit for real property taxes (QEZE real property tax credit) as an other refundable credit, based upon special assessments and other real property taxes paid by Anoplate for the tax years 2004, 2005, and 2006. Specifically, petitioner claimed a QEZE real property tax credit in the amount $146,779.00, $145,148.00 and $165,363.00, respectively, for the years 2004, 2005 and 2006, which amounts were refunded to petitioner and Mrs. Stevenson by the Division.[2]

8. The Division conducted a desk audit of the resident personal income tax returns filed by petitioner and Mrs. Stevenson for the years 2004, 2005 and 2006. During that audit, the Division reviewed the QEZE real property tax credit claimed by petitioner for the years 2004, 2005, and

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

2006 and determined that those QEZE real property tax credits included special assessments paid by Anoplate. Thereafter, the Division denied a portion of the QEZE real property tax credit claimed by petitioner in 2004, 2005 and 2006 because it included special assessments paid by Anoplate.

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

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

CONCLUSIONS OF LAW

A. 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. Specifically, the Empire Zones Program Act entitled QEZE Credit for Real Property Taxes (Tax Law § 15) and QEZE Tax Reduction Credit (Tax Law § 16). Tax Law § 15 provides for a credit against corporate and personal income taxes for QEZEs subject to tax under articles 9-A, 22, 32 or 33 of the Tax Law that annually meet an employment test for eligible real property taxes paid or incurred by the QEZE. For taxable years beginning on or after January 1, 2004, agricultural

cooperatives subject to tax under Tax Law, article 9 (§ 185) are eligible for the QEZE real property tax credit (***see*** Tax Law § 187-j).

B. For a QEZE, such as Anoplate, first certified under article 18-b of the General Municipal Law before April 1, 2005, the amount of the real property tax credit is the product (or pro rata share of the product, in the case of a New York S corporation or a partner of a partnership) 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 (Tax Law § 15[b][1]).[3] In the case of a QEZE certified under article 18-b of the General Municipal Law prior to August 1, 2002, the statute allows for a potential credit, to be used or refunded, in the amount of the eligible real property taxes paid or incurred by the QEZE on empire zone property (***see*** Tax Law §§ 15[a], [b]). Any amount of the QEZE credit for real property taxes that is not used to reduce the income tax liability of a New York S corporation shareholder is 100% refundable (***see*** Tax Law §§ 606 [i], [bb]).

C. For tax years beginning on or after January 1, 2001 through 2004, Tax Law § 15(e) defined "eligible real property taxes" as follows:

> 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 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, 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. Provided, however, a payment in lieu of taxes made by the QEZE pursuant to a written agreement executed or amended on or after January first, two thousand one, shall not constitute eligible real property taxes

---

[3] The Division of Taxation does not dispute Anoplate's benefit period factor or employment increase factor.

> unless such written agreement is approved by both the department of economic development and the office of real property services as satisfying generally accepted and recognized norms and standards of real property tax appraisals.

D. For tax years beginning on or after January 1, 2005, Tax Law § 15(e) defines "eligible real property taxes" in relevant part as:

> 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.

E. As noted above, petitioner was the majority shareholder of Anoplate, a QEZE, first certified on July 31, 2002, and a New York S corporation. In the years 2004, 2005 and 2006, Anoplate passed the employment test, had a 100% employment increase factor, and paid eligible real property taxes on five parcels in Onondaga County. As such, Anoplate was entitled to the QEZE real property tax credit provided in Tax Law § 15 in each of the years 2004, 2005 and 2006. As a shareholder of a New York S corporation, petitioner was treated as the taxpayer with respect to his pro rata share of Anoplate's QEZE real property tax credits for the years 2004,

2005 and 2006, and allowed to use same against his personal income tax liabilities for such years (Tax Law § 606[i][1][B]). On each of their resident income tax returns filed for the years 2004, 2005 and 2006, petitioner and his wife claimed the QEZE real property tax credit, which the Division refunded. Subsequently, after conducting an audit of Mr. and Mrs. Stevenson's income tax returns for the years 2004, 2005 and 2006, the Division disallowed a portion of the claimed QEZE real property tax credit in each of those years because it included special assessments paid by Anoplate, and issued a notice of deficiency asserting additional tax due for each of the years 2004, 2005 and 2006.

F. While Tax Law § 15(e) defines "eligible real property taxes" as "taxes imposed on real property . . . .", the Division points out that the phrase "taxes imposed on real property" is not defined in Tax Law § 15. Since the QEZE real property tax credit is applicable to both corporate franchise taxes and personal income tax that are federally based taxes, the Division maintains that it is appropriate to look at the Internal Revenue Code for guidance in interpreting the term "real property taxes." The Division further maintains that in the case of an Article 22 taxpayer, such as petitioner, Tax Law § 607 compels it to follow the guidance of the federal income tax statutes and regulations in determining the definition of "taxes imposed on real property" for the purposes of the QEZE real property tax credit. While real property taxes are deductible under IRC § 164(a)(1), the Division argues that special assessments are not deductible under the Internal Revenue Code and the federal regulations because they are taxes assessed against local benefits of a kind tending to increase the value of the property assessed (IRC § 164[c][1]; 26 CFR 1.164-2[g]; 1.164-4[a]). The Division further argues that the federal treatment of real property taxes for purposes of income or franchise tax deductions is comparable to the Tax Law's treatment of real property tax credits allowed to QEZEs. It is the Division's position that

special ad valorem levies or special assessments that do not meet the federal rules for deductibility also do not meet the definition of "eligible real property taxes" under Tax Law § 15.

G. Petitioner asserts that there is no comparable context in the Internal Revenue Code to the Empire Zones Program, and therefore, the Internal Revenue Code cannot provide guidance in this matter. Petitioner maintains that the deduction of real property taxes on a federal income tax return is simply one of several deductions allowed under the federal tax scheme. Petitioner further maintains that the QEZE real property tax credit is an element of a larger New York State economic development program which offers incentives that create jobs and bring investment to communities that have been deemed by New York State to be economically distressed. Since the contexts of the allowance for a real property tax deduction from federal income taxes and of the inclusion of real property taxes and special assessments in a state incentive program, which targets economically distressed areas of New York State, are two wholly different contexts, petitioner argues that the Division's reference to the Internal Revenue Code must be rejected. Petitioner contends that the term defined in Tax Law § 15(e), and which is at issue here, is "eligible real property taxes," not simply "real property taxes" as the Division claims. Since the Internal Revenue Code does not define "eligible real property taxes," petitioner asserts that it is not instructive on the definition of that phrase. Petitioner also contends that the Tax Law § 15(e) definition of "eligible real property taxes" is complex and contemplates many scenarios, while the portion of the definition disputed by the Division is only a small part of the entire definition. He claims that the references to the Internal Revenue Code in the definition of "eligible real property taxes" clearly demonstrate the Legislature's awareness of the consequences of federal income tax. Petitioner further claims that the Legislature purposefully declined to require "eligible real property taxes" to be deductible for federal income tax purposes. Because all

statutes and all parts of a statute which reference the same subject must be construed together (McKinney's Cons Law of NY, Book 1, Statutes § 221), petitioner maintains that the Legislature's deliberate reference to federal income tax in one section shows the equally deliberate lack of reference to federal income tax in another section. Additionally, petitioner contends that the definition of "eligible real property taxes" is a refined one. He points out that Tax Law § 15(e) was initially enacted in 2000, amended in 2002 to allow payments made pursuant to a PILOT agreement to qualify as "eligible real property taxes," and amended again in 2005 to allow tenants which were certified as QEZEs to take the QEZE real property tax credit based upon "eligible real property taxes" paid. Given the number of times it reviewed and amended the Tax Law § 15(e) definition, petitioner argues that the Legislature had ample opportunity either to require that "eligible real property taxes" be deductible for federal income tax purposes or to exclude special ad valorem levies and special assessments from the definition, if it so intended. Petitioner maintains that the Tax Law § 15(e) definition of "eligible real property taxes" clearly reflects the Legislature's intention to create "tax free" qualified empire zone programs to maintain and expand employment in economically distressed local communities throughout the State. As such, he claims the definition of "eligible real property taxes" includes special ad valorem levies and special assessments, and the Division's disallowance of his QEZE real property tax credits attributable to special assessments for the years 2004, 2005 and 2006 was improper.

H. 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, 371 NYS2d 715 [1975], ***lv denied*** 37 NY2d 708, 375 NYS2d 1027 [1975]; ***Matter of***

Blue Spruce Farms v. New York State Tax Commn., 99 AD2d 867, 427 NYS2d 744 [1984], ***affd*** 64 NY2d 682, 485 NYS2d 526 [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 Avenue Co. v. Gliedman***, 62 NY2d 539, 478 NYS2d 846 [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, 673 NYS2d 966 [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, 541 NYS2d 191 [1989]; ***Matter of American Communications Technology v. State of New York Tax Appeals Tribunal***, 185AD2d 79, 592 NYS2d 147 [1993], ***affd*** 83 NY2d 773, 611 NYS2d 125 [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 Technology v. State of New York Tax Appeals Tribunal***). 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 Technology v. State of New York Tax Appeals Tribunal***). Although Tax Law § 15 has been amended a number of times, the language of statute is ambiguous, the term "taxes imposed on real property" is not defined in Tax Law § 15.

I. McKinney's Cons Laws of NY, Book 1, Statutes § 97 provides, in pertinent part:

> It is a fundamental rule of statutory construction that a statute or legislative act is to be construed as a whole, and that all parts of an act are to be read and construed together to determine the legislative intent. . . . Statutory words must be read in their context, and words, phrases, and sentences of a statutory section should be interpreted with reference to the scheme of the entire section. Thus the meaning of an unidentified word depends on the meaning of the whole act. . . . The different parts of the same act, though contained in different sections, are to be construed together as if they were all in the same section, and the meaning of a single section may not be determined by splitting it up into several parts.

McKinney's Cons Laws of NY, Book 1, Statutes § 192 provides, in pertinent part:

> In accordance with the general rules of statutory construction, amendments and the original statute will be construed together, and . . . an original act, with all its amendments, must be viewed as one law passed at the same time. They are viewed in this light, however, only for the purpose of interpretation, and the fact that an amendatory act is deemed a part of the original will not make the amendment retroactive to the time when the original was passed, though such was formerly the law. . . . In reading the original act and the amendatory act no part of either is to be held inoperative if they can be made to stand and work together.

J. A review of Tax Law § 15(e) reveals that the Legislature has amended the definition of "eligible real property taxes" a number of times since its enactment as part of Tax Law § 15 in 2000. The definition of "eligible real property taxes," as amended, is set forth in Conclusion of Law D. As petitioner correctly noted in his brief, this definition is complex and contemplates many scenarios. The meaning of "eligible real property taxes," as summarized, includes the following: taxes paid or incurred by a QEZE that are imposed upon real property owned by the QEZE and located in an empire zone in which the QEZE is certified; taxes paid by a QEZE which is the lessee of real property, under certain conditions; and PILOTS (payments in lieu of taxes) made by the QEZE pursuant to a written agreement, subject to certain written approvals and certain payment limitations. The Division construes Tax Law § 15(e) as requiring "eligible real property taxes" to be deductible under Tax Law § 164(a)(1) and 26 CFR 1.164-3(b).[4]

[4] 26 CFR 1.164-3(b) defines "'real property taxes' as taxes imposed on *interests* in real property and levied for the general public welfare, but it does not include taxes assessed against local benefits" (emphasis supplied).

Assuming it met the employment test set forth in Tax Law § 15, a QEZE that is a lessee of real property would never qualify for a QEZE credit for real property taxes under the Division's interpretation of Tax Law § 15(e). As a lessee, the QEZE does not have an ownership interest in the real property and must deduct any taxes it pays on such leased property under IRC § 162(a)(3), rather than under IRC § 164(a)(1). Since, for purposes of statutory construction, Tax Law § 15, with all of its amendments, must be viewed as one law passed at the same time (McKinney's Cons Laws of NY, Book 1, Statutes § 192; ***see Lyon v. Manhattan Railway Co.***, 142 NY 298 [1894]), it is clear that the Legislature intended the allowance of a QEZE credit for real property taxes to a QEZE that is a lessee of real property, under certain circumstances. As such, I find the Division's interpretation of Tax Law § 15(e) to be unreasonable and inconsistent with the governing statute. Further, as part of the definition of "eligible real property taxes," Tax Law § 15(e) also requires such taxes to become a lien on the real property during a taxable year in which the QEZE, as the owner of the real property or as the lessee of the real property, is certified and a qualified empire zone enterprise. Statutory rules of construction provide that "[t]he legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction" (McKinney's Cons Laws of NY, Book 1, Statutes § 94). Real Property Tax Law § 102(21) defines "tax lien" as "an unpaid tax, special ad valorem levy, special assessment or other charge imposed upon real property by or on behalf of a municipal corporation or special district which is an encumbrance on real property, whether or not evidenced by a written instrument."

For the reasons set forth above, it is clear that the Legislature intended the Tax Law § 15(e) definition of "eligible real property taxes" to include special ad valorem assessments and special assessments as the petitioner claims.

K. In sum, petitioner has carried his burden of proof to establish that his interpretation of Tax Law § 15(e) is the only reasonable construction (***Matter of Blue Spruce Farms v. New York State Tax Commn***.), and that the Division's interpretation of Tax Law § 15(e) is unreasonable and inconsistent with the statute (***Matter of Trump-Equitable Fifth Avenue Co. v. Gliedman***).

L. The petition of Milton F. Stevenson is granted; and the notices of deficiency, dated August 18, 2008, are cancelled.

DATED: Troy, New York
April 8, 2010

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE