STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANTHONY AND JOANNE PICCOLO	:	DETERMINATION DTA NO. 822835
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2004, 2005 and 2006.	:	

Petitioners, Anthony and Joanne Piccolo, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 2004, 2005 and 2006.

On July 5, 2009 and July 30, 2009, respectively, petitioners, by their representative, Hiscock & Barclay, LLP (David G. Burch, Jr., Esq., of counsel), and the Division of Taxation, by its representative, Daniel Smirlock, Esq. (Margaret T. Neri, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based upon documents and briefs to be submitted by January 19, 2010, 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 petitioners on their New York State resident income tax returns for the years 2004, 2005 and 2006.

FINDINGS OF FACT

1. Petitioners, Anthony and Joanne Piccolo, were members of Piccolo Properties, LLC (Piccolo Properties) during the years 2004, 2005 and 2006.

2. Piccolo Properties was certified on June 1, 2001 under the Empire Zones Program as a qualified empire zone enterprise (QEZE) in accordance with Article 18-B of the General Municipal Law.

3. Piccolo Properties 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. During the period in issue, Piccolo Properties owned five parcels of land in the Auburn Empire Zone. The record includes statements of taxes issued by the City of Auburn on each of the five parcels, which were paid by Piccolo Properties for the years 2004, 2005 and 2006. On the statement of city taxes issued by the City of Auburn, the total amount of taxes due included tax amounts levied for city tax, capital improvement program, library and downtown improvement tax.

5. The Auburn Downtown Business Improvement District was created pursuant to Council Resolution No. 17 of 2001 of the Council of the City of Auburn and enacted in accordance with Article 19-A of the General Municipal Law as Local Law No. 1 (2001) of the City of Auburn. The Auburn Downtown Business Improvement District was created in the public interest and included all properties located within the boundaries of the district. The provision of services within the district was pursuant to the district plan of the Auburn Downtown Business Improvement District and a Memorandum of Understanding between the

City of Auburn and the District Management Association. All services provided within the district were in addition to, and not a substitution for, required municipal services provided by the City of Auburn on a city-wide basis.

6. The Auburn downtown improvement tax is levied to pay for, among other things, beautification projects, cultural events, safety programs, and accessibility projects that benefit both the district and the Auburn community as a whole.

7. Petitioners timely filed joint New York State resident income tax returns for the years 2004, 2005, and 2006.

8. On their 2004 tax return, petitioners computed New York State tax due in the amount of $9,708.00, and claimed a nonrefundable EZ wage tax credit in the amount of $4,854.00 and a refundable QEZE credit for real property taxes (QEZE real property tax credit) in the amount of $74,635.00. The Division allowed the full amount of the claimed EZ wage tax credit. The Division issued a refund of the QEZE real property tax credit to petitioners in the amount of $69,781.00.

9. On their 2005 tax return, petitioners computed New York State tax due in the amount of $5,298.00, and claimed a nonrefundable EZ wage tax credit in the amount of $2,649.00 and a refundable QEZE real property tax credit in the amount of $98,921.00. The Division allowed the full amount of the claimed EZ wage tax credit. The Division issued a refund of the QEZE real property tax credit to petitioners in the amount of $96,272.00.

10. On their 2006 tax return, petitioners computed New York State tax due in the amount of $2,345.00 and sales or use tax due in the amount of $53.00. Petitioners claimed a nonrefundable QEZE tax reduction credit in the amount of $2,345.00 and a refundable QEZE real property tax credit in the amount of $99,607.00. The Division allowed the full amount of the

claimed QEZE tax reduction credit. The Division issued a refund of the QEZE real property tax credit to petitioners in the amount of $99,554.00.

11. The Division conducted a desk audit of the resident personal income tax returns filed by petitioners for the years 2004, 2005 and 2006. During that audit, the Division reviewed the QEZE real property tax credit claimed by petitioners for the years 2004, 2005, and 2006 and determined that those QEZE real property tax credits included special assessments paid by Piccolo Properties. Thereafter, the Division disallowed a portion of the QEZE real property tax credit claimed by petitioners because it included special assessments for the City of Auburn capital improvement program and the downtown improvement district.

12. As a result of its audit, on November 19, 2007, the Division issued to petitioners notices of deficiency (nos. L-029138915-6, L-029138911-1 and L-0291555981-1) asserting tax due in the amounts of $6,931.79, $8,047.20 and $6,935.60, respectively, for the years 2004, 2005 and 2006. The tax amount of each assessment corresponded to the amount of special assessments paid by Piccolo Properties and claimed by petitioners as a portion of the QEZE real property tax credit for such year, which credit was previously refunded.

13. Following a conciliation conference held on June 17, 2008, the Bureau of Conciliation and Mediation Services issued a Conciliation Order (CMS No. 221988), dated October 31, 2008, denying petitioners' request and sustaining the statutory notices.

14. After further research, the Division determined that the City of Auburn capital improvement program was a tax that qualified for the QEZE real property tax credit. As a result, the Division recomputed the deficiencies so as to subtract the portion attributable to the City of Auburn capital improvement program from the amounts due. Notices and demands for payment of tax due dated September 21, 2009 were sent to petitioners' representative indicating the

following revised tax deficiencies: tax due in the amount of $3,224.61, plus interest for the year 2004; tax due in the amount of $3,812.93, plus interest for the year 2005 and tax due in the amount of $3,394.26, plus interest for the year 2006. The remaining tax deficiencies are attributable to the Auburn downtown improvement tax levied against the five parcels owned by Piccolo Properties.

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 Piccolo Properties, 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]).[1] In

[1] The Division of Taxation does not dispute Piccolo Properties' benefit period factor or employment increase factor.

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 taxpayer who is a member of a partnership that is a QEZE is 100% refundable (***see*** Tax Law § 606[bb][2]).

C. The issue in this proceeding is the Division's denial of a portion of the QEZE real property tax credit claimed by petitioners in each of the years 2004, 2005 and 2006 that was attributable to the City of Auburn downtown improvement tax and whether that levy was an "eligible real property tax" as used and defined in Tax Law § 15.

D. 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 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.

E. 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.

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 (IRC) for guidance in interpreting the term "real property taxes." The Division further maintains that in the case of Article 22 taxpayers, such as petitioners, 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. The Division notes that under the IRC, real property taxes are those imposed on interests in real property and levied for the general public welfare, but not taxes assessed against local benefits, which tend to increase the

value of the property assessed. It further notes that taxes assessed against local benefits are imposed because of, and measured by, some benefit inuring directly to the property against which the tax is levied. The Division contends that the municipal resolution creating the Auburn Downtown Business Improvement District contains specific language setting forth the exact boundaries of the district and stating that all properties within the district will benefit and all properties to be benefitted are within the district. It further contends that it is clear that the downtown improvement district was to bear the costs associated with the special district. Therefore, the Division argues that the charges against Piccolo Properties' real property for the Auburn Downtown Business Improvement District was a special assessment and not taxes that are deductible under the IRC. 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 do not meet the federal rules for deductibility, and therefore, special assessments are not "eligible real property taxes" for purposes of a credit under Tax Law § 15.

G. Petitioners assert that there is no comparable context in the IRC to the Empire Zones Program, and therefore, the IRC cannot provide guidance in this matter. Petitioners further assert 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,

petitioners argue that the Division's reference to the IRC must be rejected. Petitioners also contend 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. Noting that Tax Law § 15(e) was amended in 2002 and 2005, petitioners contend that the definition of "eligible real property taxes" is a refined one. Given the number of times the Tax Law § 15(e) definition was amended, petitioners argue 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. As such, they claim the definition of "eligible real property taxes" includes special ad valorem levies and special assessments. Additionally, petitioners contend that the Auburn downtown improvement tax is not a special assessment as the Division claims. Petitioners maintain that the Auburn downtown improvement district provides benefits to the general public, and that the downtown improvement tax is imposed upon a property within the district based upon the assessed value of the property and a rate per thousand charge. They further maintain that General Municipal Law § 980-k(b) requires business improvement district charges imposed upon real property located within a business improvement district to be included in the total amount that a municipality may legally raise in a year "by a tax on real property." Since the Auburn downtown improvement tax is clearly a real property tax, petitioners assert that it is an eligible real property tax and therefore, is includable in the QEZE real property tax credit.

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. Conners***, 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 the statute is ambiguous, the term "taxes imposed on real property" is not defined in Tax Law § 15.

I. McKinney's Consolidated 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 Consolidated 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 E. As petitioners correctly noted in their 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).[2] 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

[2] 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).

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 petitioners claim.

K. The City of Auburn downtown improvement tax is also an eligible real property tax for the following reasons. The Auburn Downtown Business Improvement District was established in accordance with Article 19-A of the General Municipal Law, which specifically governs business improvement districts, including the imposition of charges associated with them. With respect to the imposition of the charge upon business improvement district real property, it shall be "imposed as provided in the district plan" and "determined, levied and collected in the same manner, at the same time and by the same officers, as general municipal taxes are levied and collected" (General Municipal Law § 980-j[b]). However, the district charge levied in a given year against real property in a district is limited by General Municipal Law § 980-k(b), which provides that it cannot exceed 20% of the total general municipal taxes levied in that year against the taxable real property in the district. General Municipal Law § 980-k(b) also requires the district charge levied against real property in the business improvement district to "be included in the total amount, if any, that the municipality is permitted by law to raise" in a given year "by a tax on real property." Given the requirement that the district charge must be included in the total amount of tax on real property a municipality can legally raise in a given year, it is clear that the district charge is a tax imposed on real property. Therefore, the City of Auburn downtown improvement tax imposed on Piccolo Properties' real property located within the Auburn

Downtown Business Improvement District and within the Auburn Empire Zone is an eligible real property tax and is properly includable in the QEZE real property tax credit.

L. In sum, petitioners have carried their burden of proof to establish that their 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***).

M. The petition of Anthony and Joanne Piccolo is granted and the notices of deficiency dated November 17, 2007, as revised by the notices and demands for payment of tax due dated September 21, 2009, are cancelled.

DATED: Troy, New York
July 15, 2010

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE