STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ELAYNE HERRICK	:	DETERMINATION DTA NO. 822854
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2004, 2005 and 2006.	:	

Petitioner, Elayne Herrick, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2004, 2005 and 2006.

On April 27, 2009 and May 22, 2009, respectively, petitioner, appearing by Hiscock and Barclay, LLP (Amanda K. Davis, Esq., of counsel), and the Division of Taxation, appearing by Daniel Smirlock, Esq. (Margaret T. Neri, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by November 16, 2009, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly disallowed portions of petitioner's claims for the QEZE real property tax credit on the grounds that certain special assessments did not constitute "eligible real property tax" for purposes of the credit against tax provided for in Tax Law § 15(a).

FINDINGS OF FACT

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

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

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

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

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

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

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

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

9. Resolution 260 of the Onondaga County Legislature created the Onondaga County Sanitary District in 1978, which provided for its funding by sewer rents and taxes levied on an ad valorem basis (i.e., against assessed valuation of the real property). Resolution 260 refers to Article 11-A of the Onondaga County Administrative Code, which provided that the Legislature was empowered to establish how the costs of maintenance and operation of the sewers would be borne - including assessing parcels that were especially benefited by an improvement in accordance with a proportionate benefit formula.

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

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

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

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

14. On petitioner's 2006 return, she claimed the refundable QEZE real property tax credit in the amount of $1,145,055.00. The Division disallowed $88,991.00, the portion of the credit associated with special assessments and issued a refund of $1,056,063.26. The refund was sent with a letter to petitioner on March 3, 2008 and explained that the refund had been reduced by the amount attributable to special assessments, which were not considered taxes eligible for the claimed credit.

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

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

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

SUMMARY OF THE PARTIES POSITIONS

18. Petitioner contends that she is entitled to the credit for the real property taxes paid pursuant to the provisions of Tax Law § 15, including the special assessments, which she argues are "eligible real property tax[es]" as defined in Tax Law § 15(e). Specifically, petitioner believes that since the definition of eligible real property taxes does not exclude special assessments and ad valorem levies, they should not be excluded, particularly in light of the fact that the term "taxes imposed on real property" is not defined "anywhere."

19. Petitioner believes the legislative history of the Empire Zones Program supports a broad interpretation of the taxes eligible for inclusion in the credit since the program was developed to create tax-free qualified empire zone enterprise programs to maintain and expand

employment. Petitioner argues that to allow local governments to circumvent this tax-free status by imposing special assessments would defeat the legislative intent to create a partnership with businesses where they would receive economic incentives and tax-free status in exchange for the production of employment and local investment.

20. Petitioner maintains that the definition of eligible real property taxes contained in Tax Law § 15(e) is unique and not subject to further elaboration by reference to the IRC, which is often consulted for the meaning of terms used in Article 22 that are used in a comparable context in the IRC. Since the definition of "eligible real property taxes" in Tax Law § 15(e) does not present a term with a comparable context within the IRC, petitioner believes there is no basis for requiring conformance with the term "real property taxes" as that term is defined in the IRC or its regulations. Further, given the amendments to the definition of "eligible real property taxes" in 2002 and 2005, it is clear the Legislature had ample opportunity to require that "eligible real property taxes" be deductible for federal income tax purposes or to provide that special assessments be excluded from the definition, but took no such action.

21. Finally, petitioner contends that even if the IRC definition of real property taxes applies, special assessments and ad valorem levies are includible as eligible real property taxes because the tax is not imposed because of, and measured by, a benefit inuring directly to the properties assessed. The benefit, argues petitioner, inures to many more properties than those assessed, and thus must be considered real property taxes as defined by the IRC.

22. Petitioner argues in the alternative that if federal deductibility is a prerequisite for a charge to be an eligible real property tax for purposes of the QEZE credit, the charges for the Onondaga County Sanitary District and the Downtown Syracuse Special Assessment District satisfy the two prongs of the test for deductibility set forth in 26 CFR 1.164-4(a), namely, that the

charges were imposed for the general public's welfare and were levied against all properties within the county and district at a like rate.

23. The Division of Taxation argues that the credit available to a QEZE is for eligible real property taxes only and that the definition of that term in Tax Law § 15(e) only provides that they are taxes imposed on real property, not special assessments or ad valorem taxes like the Onondaga County Sanitary District and the Downtown Syracuse Special Assessment District.

24. The Division contends that since the QEZE credit is dealt with in both the personal income tax and corporation tax, both of which are federally-based taxes, it is appropriate to look to the IRC for guidance in interpreting the term real property taxes. The Division notes that under the IRC, real property taxes are those imposed on interests in real property and levied for the general welfare, but not taxes assessed against local benefits, which tend to increase the value of the property assessed. These taxes are imposed because of, and measured by, some benefit inuring directly to the property against which the tax is levied.

25. The Division maintains that the municipal resolutions creating both the City of Syracuse Special Assessment District and the Onondaga County Sanitary District contained specific language that required that the costs of improvements, operations, and maintenance be borne by the properties within the district in accordance with a formula that reflected the benefits accruing to each property. As such, they were ad valorem levies or special assessments, not a real property tax as defined by the IRC, and not deductible. By operation of Tax Law § 607, they are also not a real property tax for purposes of Article 22 of the Tax Law.

26. Finally, as the agency charged with enforcement of Tax Law § 15(e), the Division contends that its interpretation should be given great weight and judicial deference, as long as its interpretation is not irrational, unreasonable or inconsistent with the governing statute.

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. Tax Law § 15 allows for a credit against corporate and personal income taxes for a qualified QEZE for eligible real property taxes.

B. Tax Law § 15(b) provides that the amount of the credit shall be the product of the benefit period factor, the employment increase factor and the eligible real property taxes paid or incurred by the QEZE during the taxable year. Neither the Division nor petitioner disputes petitioner's benefit period factor or employment increase factor. Any amount of the real property tax credit which is not used to reduce income tax liability is treated as an overpayment of tax to be credited or refunded. (Tax Law § 606[bb][2].)

C. The question presented concerns only the credit claimed by petitioner, which was based on the charges assessed for the Onondaga County Sanitary District and the Downtown Syracuse Special Assessment District and whether those levies were "eligible real property tax[es]" as used and defined in Tax Law § 15. The term is defined in Tax Law § 15(e) as a tax imposed on real property which is owned by the QEZE and is located in an empire zone, with respect to which the QEZE is certified, and provided said taxes become a lien on the real property during the taxable year in which the owner of the real property is both certified pursuant to Article 18-B of the General Municipal Law and a QEZE.

The definition begs the question of exactly what constitutes a "tax on real property," and to this end, the Tax Law is silent. The Division contends that since the QEZE credits emanated from Subchapter S corporations and were claimed by petitioner as the sole shareholder through

her personal income tax returns, it is appropriate to consult the IRC and the regulations promulgated thereunder. In general, a term used in Article 22 has the same meaning when used in a comparable context in the IRC. (Tax Law § 607[a].) However, the Division jumps from this provision to its statement that "real property taxes are deductible under IRC § 164(a)(1)" when levied for the general public welfare, but not those 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]; 26 CFR 1.164-4[a].) Thus, the Division concludes for purposes of its analysis herein that a tax on a local benefit cannot be a tax on real property.

What the Division has failed to take into account is the language in Tax Law § 607 that permits such an interpretation when the term is "used in a comparable context." The IRC section cited by the Division, IRC § 164, and the regulations thereunder, pertain to deductions from tax for real estate taxes paid. The differentiation between the types of tax which are deductible is not necessarily applicable to the case at hand because the analysis here focuses on the broader question of what constitutes a tax on real property for purposes of the definition of "eligible taxes on real property" as applied to the QEZE real property tax credit. The two areas - deductions from tax and QEZE credits - are not comparable contexts, and the meaning of terms for purposes of the IRC, although ultimately found to be the same herein, do not provide the basis for excluding special assessments from the meaning of tax on real property as used in Tax Law § 15(e).

Further clarifying the difference in contexts between the IRC and the Tax Law's QEZE provisions is petitioner's observation that the QEZE program espoused a much broader intent and purpose, i.e., economic development through incentives that create jobs and bring investment to communities that have been deemed by New York State to be economically distressed.

Petitioner maintains that this program is funded by the real property tax credits afforded to businesses that agreed to partner with the State of New York to create jobs and spur investment. While these statements help crystalize the difference between the contexts, they do not explain the meaning of the term "taxes imposed on real property."

D. Although its provisions speak to the tax on real property, the Tax Law does not contain provisions specifically applicable to this area of New York law. In 1958, the Legislature codified, in a new consolidated law (the Real Property Tax Law [RPTL]), all the provisions of the Tax Law, the Education Law, the Village Law and other laws relating to the assessment and taxation of real property. Therefore, it is logical to seek guidance from the Real Property Tax Law for the meaning of a real property term used in Tax Law § 15(e). Further, it is presumed that the Legislature, in enacting the QEZE statute, was aware of the RPTL definitions pertaining to the QEZE provisions they were enacting, which the Legislature itself placed there over 40 years earlier.

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

In fact, the term tax is defined in Real Property Tax Law § 102(20) as:

> [A] charge imposed upon real property by or on behalf of a county, city, town, village or school district for municipal or school district purposes, but does not include a special ad valorem levy or a special assessment.

The term special assessment is defined in the Real Property Tax Law § 102(15) as:

---

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

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

E. Thus, the charges attributable to the Onondaga County Sanitary District and the Downtown Syracuse Special Assessment District, although levied for an apparent municipal purpose, were unquestionably special assessments, as testified to by the facts in light of the Real Property Tax Law provisions above.

The City of Syracuse 1988 General Ordinance #53 created the special assessment district within the City of Syracuse and provided that the properties in the district may be assessed according to a formula which reflected the benefits accruing to the various properties in the district by reason of the improvements. This is precisely the type of proportional benefit formula RPTL § 102(15) was describing and mandates a conclusion that the Downtown Syracuse Special Assessment District charge was a special assessment.

The Onondaga County Sanitary District provided for its funding by sewer rents and taxes levied on an ad valorem basis (i.e., against assessed valuation of the real property). [2] Resolution 260 of the Onondaga County Legislature referred to Article 11-A of the Onondaga County Administrative Code, which provided that the Legislature was empowered to establish how the costs of maintenance and operation of the sewers would be borne - including assessing parcels that are especially benefited by an improvement in accordance with a proportionate benefit formula. Once again, the intent in establishing the district was to benefit a specific area and to

[2]To the extent that any part of the sewer tax is an ad valorem tax and not a special assessment, it would still be a tax by definition. (See RPTL § 102[20].)

tax the various properties in that area on an ad valorem basis using sewer rents and in accordance with a proportionate benefit formula.

It must be noted that petitioner never denied that the charges imposed for the Onondaga County Sanitary District and the Downtown Syracuse Special Assessment District were special assessments. Rather, petitioner has consistently taken the position that such special assessments are eligible real property taxes for purposes of the QEZE credit.

F. Since special assessments are excluded from the definition of tax on real property pursuant to the Real Property Tax Law definitions, it is concluded that they are not eligible real property taxes and the Division properly disallowed them as a credit against tax.

G. Petitioner argues that special assessments and ad valorem levies are included in the Real Property Tax Law definition of the term tax for purposes of levy and collection. While true, the argument is rejected for the purposes of the issue herein. First, Real Property Tax Law § 102(20) states:

> The term 'tax' or 'taxes' as used in articles five, nine ten and eleven of this chapter shall for levy and collection purposes include special ad valorem levies.

However, even if the Onondaga County Sanitary District charge was determined to be a special ad valorem tax, it would only be included in the term "tax" for purposes of Real Property Tax Law § 102(20) where used in articles five, nine, ten and eleven of the chapter, i.e., those articles dealing strictly with procedural matters : assessment procedure (Article 5); levy and collection of taxes (Article 9); enforcement of collection of delinquent taxes (Article 10) (repealed); and procedures for enforcement of collection of delinquent taxes (Article 11). The language of the section is unambiguous. In all other instances, the term "tax" would not include special ad valorem levies.

H. Tax Law § 15(e) has been amended since its enactment in 2000. In 2005, the section was amended to include in the definition of "eligible real property taxes" certain payments in lieu of taxes made pursuant to a written agreement between the QEZE and the state, a municipal corporation or public benefit corporation, and also taxes paid by a QEZE that is a lessee of real property. (L 2005, ch 161; L 2005, ch 61.) However, neither of these amendments elaborated on the term "tax on real property" and do not alter the rationale or conclusions reached above.

I. A tax credit is a particularized species of exemption from tax (***Matter of New York Fuel Terminal Corp.***, Tax Appeals Tribunal, August 27, 1998). Petitioner herein bears the burden of establishing entitlement to the exemption, in the face of the added hurdle that statutes creating tax exemptions are construed most strongly against the taxpayer. Further, the taxpayer must show that its interpretation of the statute is the only reasonable construction. (***Matter of CBS Corporation v. Tax Appeals Tribunal***, 56 AD3d 908, 867 NYS2d 270,273 [2008].) It is determined that petitioners have not met their burden given the rationale set forth above.

J. The petition of Elayne Herrick is denied, the Division's denials of petitioner's claims for refund for the years 2005 and 2006 are sustained, and the Notice of Deficiency, dated May 5, 2008, is sustained.

DATED: Troy, New York
May 13, 2010

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE