STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NEW PROCESS GEAR, INC.	:	DETERMINATION DTA NO. 822899
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Years 2005 and 2006.	:	

Petitioner, New Process Gear, Inc., filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 2005 and 2006.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on February 16, 2010 at 10:00 A.M., with all briefs to be submitted by September 17, 2010, which date began the six-month period for issuance of this determination. By letter dated February 10, 2011, this six-month period was extended for an additional three months (Tax Law § 2010[3]). Petitioner appeared by Hiscock & Barclay, LLP (David G. Burch, Jr., Esq., and Peter J. Crosset, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Nicholas A. Behuniak, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly disallowed a portion of the QEZE credits for real property taxes claimed by petitioner on its corporation franchise tax returns for the years 2005 and 2006.

FINDINGS OF FACT

Pursuant to section 3000.15(d)(6) of the Rules of Practice and Procedure of the Tax Appeals Tribunal and section 3007(1) of the State Administrative Procedure Act, both parties submitted proposed findings of fact. Petitioner submitted 14 proposed findings of fact and 28 conclusions of law. The Division of Taxation submitted 9 proposed findings of fact. The proposed findings of fact have been substantially incorporated into this determination with exceptions noted in the final two findings of fact.

1. Petitioner, New Process Gear, Inc. (New Process Gear), a Delaware corporation authorized to do business in New York State, manufactures automobile components. New Process Gear was certified as a Qualified Empire Zone Enterprise (QEZE) on July 13, 2004 pursuant to Article 18-B of the General Municipal Law.

2. In 2005 and 2006, petitioner leased a manufacturing facility located in Onondaga County at 6600 New Venture Gear Drive, DeWitt, New York, from DCC 929, Inc. (formerly known as New Venture Gear, Inc.). Pursuant to a lease agreement, as amended on September 1, 2005, petitioner was obligated to pay real property taxes on the leased premises.

3. Petitioner paid the 2005 and 2006 real property taxes on the leased premises. The record includes receipted real property tax bills issued by the Town of DeWitt, Onondaga County, New York, totaling $1,272,659.00 and $1,376,442.00 for the years 2005 and 2006, respectively. The Onondaga County Sanitary District Unit special assessment was separately identified on the relevant county and town tax bills with a line item designation of "CSW15 Onon co san un." The relevant county and town real property tax bills also identify separate and distinct charges for "Sewer maintenance," which were assessed on an ad valorem basis. The Onondaga County Sanitary District Unit Charge was a component of the total real property taxes

petitioner paid, and petitioner did not separate the charge from the remainder of the charges included on the real property tax bill. Petitioner believes that if the Onondaga County Sanitary District Unit Charge were not paid with the other charges on the real property tax bill, a lien would be assessed against the property for underpayment of taxes.

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

5. The Onondaga County Sanitary District Unit Charge is based upon the units of water that petitioner discharges to the sanitary sewer system annually.[1] In general, each business is assessed the Onondaga County Sanitary District Unit Charge based upon the amount of water the particular business uses.[2] Users of septic systems are not assessed an Onondaga County Sanitary District Unit Charge. Onondaga County separately bills tax-exempt properties directly for the Onondaga County Sanitary District Unit Charge because such entities do not receive other real property tax statements.

6. 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

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[1] Residential properties are assessed the Onondaga County Sanitary District Unit Charge based upon a different formula. Single family homes are charged one unit per year and multiple-family dwellings are charged 0.75 units per year per dwelling.

[2] The Onondaga County Department of Water Protection website states that "[b]usinesses that use a large volume of water for irrigation, HVAC, or other processes that do not return water to the sanitary sewer system can receive a credit toward their unit charge once they show the amount diverted."

borne, including assessing parcels that were especially benefitted by the improvement in accordance with a proportionate benefit formula.

7. Petitioner deducts the Onondaga County Sanitary District Unit Charge that it pays each year on its federal income tax return as it does with all charges included on the real property tax bills it pays. New Process Gear is a franchise taxpayer pursuant to Tax Law § 210 and timely filed its corporation franchise tax returns for the years at issue.

8. For the years 2005 and 2006, petitioner was eligible to claim 100 percent of the eligible real property taxes it paid in each of those years as the refundable QEZE credit for real property taxes (QEZE real property tax credit). In fact, petitioner claimed a refundable QEZE real property tax credit in the amounts of $1,272,659.00 and $1,376,442.00 for the years 2005 and 2006, respectively.

9. The Division of Taxation (Division) conducted a desk audit of petitioner's franchise tax returns for the 2005 and 2006 taxable years. Following the desk audit, the Division denied, among other items, portions of the refundable QEZE real property tax credit claimed by petitioner in 2005 and 2006. The stated grounds for the Division's denial of a portion of the QEZE real property tax credit in each of those years was that the Onondaga County Sanitary District Unit Charge paid by petitioner was not deductible under Treasury Regulation § 1.164-4(a) and, therefore, could not be included in the refundable QEZE real property tax credit claimed.

10. The Division sent petitioner statements of tax reduction or overpayment, dated June 30, 2008, reducing petitioner's refunds for 2005 and 2006 by the amounts of $336,047.00

and $328,190.00, respectively.[3] The amount of each reduction corresponded with the amount of the Onondaga County Sanitary Unit Charge petitioner paid and claimed as a portion of its refundable QEZE real property tax credit for each year at issue.

11. At the hearing, the auditor testified that "the New York State tax law doesn't address what is property tax. That's why we refer to the Internal Revenue Code, and that's where we get our guidance from." He also explained that a redacted letter, dated February 28, 2008, from Stafford Davis, a senior attorney in the Division's Office of Counsel, Legislation & Guidance - Income & Corporate Tax Section, was the sole basis for his determination of whether a charge was deductible as a real property tax under the Internal Revenue Code (IRC). The auditor also confirmed that the Division has not prepared or issued any guidance documents regarding this issue.

12. Mr. Davis's letter states, in pertinent part, that:

> Real property taxes are deductible under the IRC §164(a)(1). Under the IRC, "real property taxes" are taxes imposed on interests in real property and levied for the general public welfare, but they are not taxes assessed against local benefits. There is a two-pronged test for deductibility. the [*sic*] taxes must be (1) levied for the general public welfare, and (2) levied at a like rate against all property in the jurisdictional territory.

13. The auditor conceded that the reason for his determination that the Onondaga County Sanitary District Unit Charge should not be included in the refundable QEZE real property tax credit was because the unit charge was based upon consumption. The auditor also stated that the test set forth in Mr. Davis's letter, despite being the only guidance he relied upon for the test of

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[3] For the year 2005, adjustments were also made to the refundable EZ Wage Tax Credit and the refundable EZ Investment Tax Credit. For the year 2006, an adjustment was also made to the refundable EZ Wage Tax Credit. Petitioner is not challenging any of the other refund adjustments made for the years at issue.

whether a particular charge constitutes "real property tax," does not refer to consumption in any way.

14. The auditor also conceded that the general public at large benefitted from a maintained sewer system. According to the auditor, if a property owner failed to pay the Onondaga County Sanitary District Unit Charge, it would "most likely" become a lien on the real property. Furthermore, the auditor testified that each taxpayer subject to the Onondaga County Sanitary District Unit Charge pays the same rate.

15. Petitioner submitted proposed findings of fact numbered 1 through 14 and 28 conclusions of law. Proposed findings of fact 6 and 10 are rejected for being in the nature of argument or a conclusion of law. The State Administrative Procedure Act does not require a ruling upon a proposed conclusion of law.

16. The Division submitted proposed findings of fact numbered 1 through 9. Proposed findings of fact 4 and 8 are unsupported by the record and are therefore rejected. In ruling on the Division's proposed findings of fact, if any part of a proposed finding is unsupported by the record the proposed finding of fact has been rejected in its entirety.

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 that is not used to reduce corporate income tax liability is treated as an overpayment of tax to be credited or refunded (Tax Law § 210[27]).

C. The question presented concerns the credit claimed by petitioner based only upon the unit charge assessed for the Onondaga County Sanitary District, and whether this levy was an "eligible real property tax" as used and defined in Tax Law former § 15.

For tax years beginning on or after January 1, 2005, Tax Law former § 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.

D. Tax Law § 15(e) has been amended since its enactment in 2000. As noted above, 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 the amendments further defined the term "tax on real property."

E. While Tax Law § 15(e) defines "eligible real property taxes" as "taxes imposed on real property," the phrase "taxes imposed on real property" is not defined in Tax Law § 15. The Division argues that the Onondaga County Sanitary District Unit Charge is not an "eligible real property tax" within the meaning of the QEZE real property tax credit because it is a special assessment, which is excluded from the definition of tax on real property under the Real Property Tax Law. Petitioner argues that the Onondaga County Sanitary District Unit Charge is an "eligible real property tax" as intended by the Legislature in creating the credit.

F. 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***, 185 AD2d 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.

G. As noted in Finding of Fact 9, the Division denied a portion of the QEZE real property tax credit claimed by petitioner because the Onondaga County Sanitary District Unit Charge paid by petitioner was not deductible under Treas Reg § 1.164-4(a). In its brief, the Division abandoned that argument and now argues that the Onondaga County Sanitary District Unit Charge is not an "eligible real property tax" within the meaning of the QEZE real property tax credit because it is a special assessment, which is excluded from the definition of tax pursuant to Real Property Tax Law § 102(20). The Division points out that ***Matter of Herrick*** (Division of Tax Appeals, May 13, 2010) supports the alternative ground for the denial of the QEZE real property tax credit that it now raises.

Petitioner maintains that the meaning of “eligible real property taxes” must be determined with reference to the Legislature’s intent behind the wording of Tax Law § 15. It further maintains that in enacting the QEZE real property tax credit, the Legislature intended to create “tax free” qualified empire zone programs to maintain and expand employment in economically distressed local communities throughout the state. Petitioner argues that allowing the Division to now interpret the term “eligible real property taxes” so narrowly under the Real Property Tax Law so that it excludes many of the charges local governments routinely impose on property owners is tantamount to allowing the Division to rewrite the Legislature’s direction that businesses qualifying for the QEZE real property tax credit would be free of all taxes. It further argues that if the Legislature intended to classify “eligible real property taxes” under Tax Law § 15(e) solely by the definitions provided in Real Property Tax Law § 102(14), (15) and (20), the language requiring the same would be expressly included in the statute. Since there is no reference to specific provisions of the Real Property Tax Law in Tax Law § 15(e), petitioner contends that the Division’s unilateral decision to require “eligible real property taxes” to qualify as a “tax” pursuant to Real Property Tax Law § 102(20) is impermissible and should be rejected.

H. The threshold question to be addressed is whether the Division of Tax Appeals may consider a new issue raised for the first time in the Division’s brief. The Tax Appeals Tribunal has uniformly held that new legal issues, as opposed to factual issues, may be raised on exception (***Matter of Chuckrow***, Tax Appeals Tribunal, July 1, 1993). The new theory raised in the Division’s brief is clearly a legal issue that, in view of petitioner’s opportunity to respond in its reply brief, was properly raised in this instance. With respect to the Administrative Law Judge determination, ***Matter of Herrick***, referenced by the Division in its brief, petitioner correctly notes in its reply brief that determinations of administrative law judges are not considered

precedent, nor are they given any force or effect in other proceedings in the Division of Tax Appeals (Tax Law § 2010[5]; ***see also*** 20 NYCRR 3000.15[e][2]).

I. While Tax Law § 15(h) specifically refers only to Tax Law § 14 for definitions of terms, that section does not provide the meaning of the term "taxes imposed on real property." Indeed, 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), 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 reasonable for the Division to seek guidance from the Real Property Tax Law for the meaning of a real property term used in Tax Law § 15(e). Further, in enacting the QEZE statute, it is presumed that the Legislature was aware of the Real Property Tax Law definitions, which the Legislature itself enacted 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).[4]

In fact, as the Division correctly notes, 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 Real Property Tax Law § 102(15) as:

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[4] It is noted that various particular statutes, i.e., the Tax Law and the Real Property Tax Law, 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.)

J. In light of the Real Property Tax Law provisions above, the Onondaga County Sanitary District Unit Charge, although levied for an apparent municipal purpose, was unquestionably a special assessment. Resolution 260 of the Onondaga County Legislature created the Onondaga County Sanitary District in 1978. In that resolution, the Onondaga County Legislature determined that it was in the public interest to create the Onondaga County Sanitary District and provided for its funding by sewer rents[5] and taxes levied on an ad valorem basis (i.e., against assessed valuation of the real property). 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 benefitted by an improvement in accordance with a proportionate benefit formula. The Onondaga County Sanitary District Unit Charge is based upon the units of water that the benefitted property (leased by petitioner) discharges to the sanitary system annually. Clearly, this formula, based upon the leased property's use of the sanitary system, is precisely the type of proportional benefit formula Real Property Tax Law § 102(15) was describing and mandates a conclusion that the Onondaga County Sanitary District Unit Charge was a special assessment. Inasmuch as a special assessment is excluded from the definition of tax on real property pursuant to Real Property Tax Law definitions, it is concluded that it is not an eligible real property tax and the Division

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[5] Onondaga County Administrative Code § 11.79(a) provides that the term "sewer rents" shall be as such is defined in Article 14-F of the General Municipal Law, i.e., General Municipal Law § 451(1). Pursuant to General Municipal Law § 451(1), sewer rents are annual charges for the actual use of the sewer system.

properly disallowed the Onondaga County Sanitary District Unit Charge, a special assessment, as a credit against tax.

K. It is noted that a separate charge delineated as "sewer maintenance" was levied on the county and town real property tax bills issued by the Town of DeWitt, Onondaga County, New York, for the years 2005 and 2006. These "sewer maintenance" charges were included by petitioner in the QEZE real property tax credits that it claimed for the years 2005 and 2006. Because the sewer maintenance charges were levied on an ad valorem basis, they constitute taxes on real property pursuant to Real Property Tax Law § 102(20) and were properly claimed as part of the QEZE real property tax credit.

L. The petition of New Process Gear, Inc., is denied, and the statements of tax reduction and overpayment, dated June 30, 2008, are sustained.

DATED: Troy, New York
June 9, 2011

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE