

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BOMBARDIER MASS TRANSIT CORPORATION	:	DETERMINATION DTA NO. 822999
for Redetermination of a Deficiency or for Refund of	:	
Corporation Franchise Tax under Article 9-A of the Tax	:	
Law for the Period Ended December 18, 2003 and	:	
Fiscal Years Ended January 31, 2005 through January 31,	:	
2008.	:	

Petitioner, Bombardier Mass Transit Corporation, 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 period ended December 18, 2003 and the fiscal years ended January 31, 2005 through January 31, 2008.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at 641 Lexington Avenue, New York, New York, on March 9, 2010 at 10:30 A.M., with all briefs to be submitted by July 28, 2010, which date began the six-month period for the issuance of this determination. By a letter dated January 14, 2011, the time for issuance of the determination was extended pursuant to Tax Law § 2010(3) for three months to April 28, 2011. Petitioner appeared by Ernst & Young LLP (Kenneth T. Zemsky, CPA). The Division of Taxation appeared by Daniel Smirlock, Esq. (Clifford M. Peterson, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly disallowed claimed qualified empire zone enterprise (QEZE) credits for real property taxes for the years in issue because petitioner was not a party to a qualifying written agreement.

FINDINGS OF FACT

1. On April 21, 1995, Bombardier Corporation reorganized and spun off its Plattsburgh, New York, Mass Transit Division into a separate newly-formed corporation called Bombardier Transit Corporation.

2. Corporate tax returns show that Bombardier Corporation owned more than 50 percent of Bombardier Transit Corporation.

3. On January 31, 1997, Bombardier Transit Corporation changed its name to Bombardier Mass Transit Corporation (BMTC). During the period in issue, BMTC was a subsidiary of Bombardier Corporation.

4. The BMTC site in Plattsburgh is situated at the same location, and has maintained the same operation, as Bombardier Corporation's New York Mass Transit divisional operation.

5. BMTC is a subsidiary of the Bombardier Corporation & Subsidiaries consolidated group.

6. On February 1, 1996, the County of Clinton Industrial Development Agency (Clinton IDA), Plattsburgh City LDC, Inc. (Plattsburgh LDC), and the County Treasurer of Clinton County (Clinton County treasurer) entered into a payment in lieu of taxes agreement, also known as a PILOT agreement (PILOT 1). The Clinton IDA owned the land and buildings at 71 Wall Street in Plattsburgh and sold them to the Plattsburgh LDC. The agreement contemplated that Bombardier Corporation would acquire an interest as a tenant in a 15-acre parcel of land located

at 71 Wall Street, Plattsburgh, New York, in order for Bombardier Corporation to build a facility to manufacture rail cars and related products. Throughout the agreement, Bombardier Corporation was referred to as the tenant and the facility and the equipment to build the rail cars and related products were called the Project Facility. According to PILOT 1, the Plattsburgh LDC was responsible for the PILOT payments and agreed to make said payments to the Clinton County Treasurer. The agreement was signed by individuals on behalf of the Clinton IDA, the county treasurer and Plattsburgh LDC. Neither BMTC nor Bombardier Corporation was a signatory to the agreement.

7. Also on February 1, 1996, Plattsburgh LDC entered into a lease agreement with Bombardier Corporation whereby Bombardier Corporation agreed to rent a certain "Project Facility" from Plattsburgh LDC. The agreement provided at section 5.2(D) that "the Agency and the PLDC have entered into the Series Pilot Agreement which provides for certain in-lieu payments" that if Bombardier Corporation

fails to . . . make any payments in lieu of taxes due under Section 5.2(D) hereof, the [Plattsburgh LDC] may pay or cause to be paid such items or items after giving notice to the [Bombardier Corporation] of an intention to pay such item or items. The [Bombardier Corporation] shall reimburse the [Plattsburgh LDC] for any amount paid under this Section together with interest thereon from the date of payment at the Default Interest Rate.

8. On May 1, 1998, the Clinton IDA, the Plattsburgh LDC and the County Treasurer of Clinton County entered into a PILOT agreement (PILOT 2) regarding the acquisition of land located at 69 Main Mill Street and 77 Main Mill Street in Plattsburgh, New York, the construction of buildings and the installation of machinery and equipment. The agreement contemplated that the financing of the project would be accomplished through the issuance of bonds and the granting of other financial assistance. In the agreement, the Plattsburgh LDC

agreed to make payments in lieu of taxes to the County Treasurer. Bombardier Corporation was referred to as the original tenant and BMTC was referred to as the tenant. This agreement was signed by individuals representing the Clinton IDA, Plattsburgh LDC and County Treasurer of Clinton County.

9. Also on May 1, 1998, the Clinton IDA, Bombardier Corporation, BMTC and Marine Midland Bank entered into an “Assignment and Assumption Agreement” (PILOT 3) in which Bombardier Corporation assigned, and BMTC assumed, all rights and obligations that Bombardier Corporation had to 71 Wall Street, 69 Main Mill Street and 77 Main Mill Street, Plattsburgh, New York (collectively the Plattsburgh properties). In section 1(B), the agreement stated:

[BMTC] hereby agrees, that so long as it or Bombardier Corporation has any interest in the Project Facility, [BMTC] will perform all of the covenants and obligations of [Bombardier Corporation] . . . including, but not limited to . . . payment in lieu of taxes and expenses owed to [Clinton IDA] by the vendee under the Original Installment Sale Agreement and the Original Payment in Lieu of Tax Agreement.

10. The description of the land in the Assignment and Assumption Agreement corresponds with the description of the land in Pilot 1.

11. Pursuant to a Certificate of Eligibility issued on November 1, 2007, but effective as of July 23, 2004, BMTC became certified as eligible to access Empire Zone Benefits, effective July 23, 2004 for 71 Wall Street, 69 Main Mill Street and 77 Main Mill Street, Plattsburgh, as well as other properties which are not involved in this proceeding.

12. BMTC filed general business corporation combined franchise tax returns for the fiscal years in issue, wherein it claimed the following QEZE Credits for real property taxes:

Tax Year Ending	Amount of Credit Claimed
December 18, 2003	\$ 88,413.00
January 31, 2005	145,586.00
January 31, 2006	201,965.00
January 31, 2007	142,076.00
January 31, 2008	272,458.00
Total	\$850,498.00

13. In a letter dated February 6, 2008, the Division of Taxation (Division) denied BMTC's claim for a QEZE credit for real property taxes for the fiscal year ending January 31, 2006. The letter explained the reason for the disallowance of the credit as follows: "[a]s Bombardier Mass Transit Corporation is neither the owner of the real property nor a party to the original agreements with the County of Clinton Industrial Development Agency, payments in lieu of taxes made by Bombardier Mass Transit Corporation do not constitute eligible real property taxes."

14. In a letter dated January 9, 2009, petitioner's claims for QEZE credit for real property taxes for the periods ending December 18, 2003, January 31, 2005, January 31, 2007 and January 31, 2008 were denied. The letter explained the reason for the denials as follows: "[a]s Bombardier Mass Transit Corporation is not a party to either of the provided PILOT agreements, nor have we received written evidence that Bombardier Mass Transit Corporation assumed the obligations of Plattsburgh City LDC, Inc. as set forth in the original PILOT's, it is the Department's position that your payments to the Clinton County Treasurer do not constitute 'eligible real property taxes' as defined in Section 15(e) of the New York State Tax Law."

15. BMTC was a tenant of the Plattsburgh properties for all of the years in issue.

16. BMTC remitted all of the PILOT payments in issue to the County Treasurer of Clinton County.

17. Clinton County sent the PILOT invoices to Bombardier Corporation at 71 Wall Street, Plattsburgh, New York. This was a common mistake and Bombardier Corporation was no longer at this address. The Clinton County authorities were notified of the change in the entity that was responsible for the payments. BMTC was the only entity that was located at this address. BMTC made the payments and the payments were accepted.

18. In accordance with State Administrative Procedure Act § 307(1), the Division of Taxation's proposed findings of fact have been generally accepted and incorporated herein. It is noted that the decision to not separately number many of the proposed findings of fact makes it difficult to address said proposed findings of fact separately. Certain statements were rejected as argumentative or redundant. Proposed finding of fact 15 was rejected because a finding of whether the Division allowed a claim for the QEZE Credit for Real Property Taxes in the past has no bearing on whether the credit should be allowed in this proceeding. Proposed findings of fact 18 and 19 are rejected because they are unnecessary to resolve the issues in this proceeding. Proposed finding of fact 20 is rejected because a finding of fact reciting the testimony of a witness is not a proper finding of fact. Petitioner's proposed findings of fact have generally been accepted and incorporated herein. Additional findings of fact have also been made.

CONCLUSIONS OF LAW

A. Tax Law § 15 provides for a credit against taxes imposed pursuant to articles 9-A, 22, 32 or 33 of the Tax Law for "eligible real property taxes" paid or incurred by a QEZE. In order to be eligible for such credit, however, certain criteria set forth in section 15 must be met.

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

Eligible real property taxes. The term “eligible real property taxes” means taxes imposed on real property which is owned by the QEZE and located in an empire zone with respect to which the QEZE is certified pursuant to article eighteen-B of the general municipal law, provided such taxes 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. (Emphasis added.)

C. In its brief, the Division presented a detailed analysis of each of the agreements in the record and maintains that petitioner has not established that it entered into a qualifying written agreement with the state, a municipal corporation or public benefit corporation. In response, petitioner submits that the statutory requirement is satisfied by the document described as PILOT 3. Since petitioner is relying upon PILOT 3 to satisfy the statutory requirement of a written agreement, this document will be the focus of the determination.

D. Initially, the Division has repeatedly stressed in its proposed findings of fact and in its argument that a copy of PILOT 3 was not made available until relatively late in its audit. This argument is without merit. If this document qualifies as a written agreement within the meaning of Tax Law § 15(former [e]), it is irrelevant that this document was not provided until after other documents were offered. The timing of petitioner’s offering of its documents has no bearing upon the merits of the proceedings.

E. The Division argues that PILOT 3 cannot qualify as a written agreement since the parties' description of petitioner's obligations regarding payments in lieu of tax incorporates by reference the terms of the "Original Payment in Lieu of Tax Agreement" and the "Original Installment Sale Agreement." According to the Division, there are no such documents in the record and therefore, it is not possible to determine the nature or extent of petitioner's obligations under this agreement. The Division further submits that since PILOT 3 does not have a description of either document, it would not be reasonable to conclude that either PILOT 1 or PILOT 2 is the "Original Payment In Lieu of Tax Agreement."

The forgoing argument is rejected because it ignores the fact that PILOT 3 includes the same description of property as the Payment in Lieu of Tax Agreement executed on February 1, 1996. Moreover, PILOT 1 refers to this property as 71 Wall Street in the City of Plattsburgh. Accordingly, it is readily evident that the Original Payment in Lieu of Tax Agreement was PILOT 1.

F. The Division next argues that the parties identified the County of Clinton IDA as the entity to which the payments are owed, but that petitioner sent the payments to the County Treasurer. The Division then notes that unlike PILOT 1, which directed that the payments be made to the County Treasurer, PILOT 3 does not contain a similar requirement.

This argument is also clearly erroneous. Pursuant to PILOT 3, petitioner undertook the obligations of Bombardier Corporation with respect to the payments in lieu of taxes. Since Bombardier Corporation was required to remit the payments in lieu of taxes to the County Treasurer of Clinton County, it was appropriate for petitioner to continue this practice.

G. The Division contends that the relevance of BMTC's obligations under PILOT 3 cannot be determined because the parties did not refer to either 71 Wall Street or Main Mill

Street. In addition, the Division notes that the parties did not define the term “Project Facility.” It is also argued that PILOT 3 may have been referring to other properties on Main Mill Street.

The reasoning set forth above is fallacious. That is, it has already been shown that the term Original Payment in Lieu of Tax Agreement refers to 71 Wall Street in Plattsburgh (Conclusion of Law F). In turn, the PILOT 2 agreement, which concerns 69 and 77 Main Mill Street in Plattsburgh, makes reference to the original project at 71 Wall Street. It follows that BMTC’s obligations under PILOT 3 involve 69 and 77 Main Mill Street and 71 Wall Street in Plattsburgh. There is no reason to believe that PILOT 3 may have been referring to other properties on Main Mill Street.

H. The Division argues that petitioner relies upon the testimony of its witness to prove that the Assumption and Assignment Agreement incorporated the language of PILOT 1 and PILOT 2. It is maintained that since she only worked for petitioner for five years, she cannot testify with personal knowledge regarding the terms of PILOT 1, PILOT 2, the Lease or the Assignment and Assumption Agreement. This argument is also without merit. The testimony of petitioner’s witness was credible and helpful insofar as it established the relationship and practices between the parties to the agreements. As set forth above, this testimony is consistent with the documents in the record. Further, relevant and probative hearsay is admissible in an administrative proceeding (*Matter of Flanagan v. New York State Tax Commn.*, 154 AD2d 758 [3d Dept 1989]).

I. Lastly, the Division argues that petitioner’s obligations cannot be determined without reviewing the “Original Payment in Lieu of Tax Agreement” or the “Original Installment Sale Agreement.” As previously discussed, the documents are sufficiently clear that the Original Payment in Lieu of Tax Agreement is Pilot 1. Furthermore, it is clear from PILOT 1 that there

was an Installment Payment Agreement, wherein the Clinton County IDA agreed to hold title to the Project Facility during the term of the payment in lieu of tax agreement. There is no showing that this document has any bearing on the issues in this matter and the argument that a decision cannot be rendered in petitioner's favor without this document is rejected.

J. In sum, it is concluded that by the terms of PILOT 3 petitioner agreed to make all of the payments in lieu of taxes that Bombardier Corporation had previously been obligated to make and that the assumption of this obligation was agreed to by petitioner, Clinton IDA, Bankers Trust Company, Marine Midland Bank and Plattsburgh City, LDC. The Division's denial of the credits was in error.

K. The petition of Bombardier Mass Transit Corporation is granted and the Division of Taxation is directed to grant the credits in issue.

DATED: Troy, New York
March 24, 2011

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE