STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| **THE GOLUB CORPORATION** | : | DETERMINATION<br>DTA NO. 823095 |
| for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Years Ended April 30, 2007 and April 30, 2008. | : | |

Petitioner, The Golub 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 fiscal years ended April 30, 2007 and April 30, 2008.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on February 24, 2010 at 10:30 A.M., with all briefs to be submitted by September 11, 2010, which date commenced the six-month period for issuance of this determination.[1] By a letter dated February 11, 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 Kevin R. McAuliffe, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Robert J. Tompkins, Esq., of counsel).

[1] All briefs were scheduled to be filed by August 11, 2010. However, per permission sought and granted after such August 11, 2010 date, the parties were afforded the opportunity to submit additional written arguments regarding Legislative amendments potentially impacting the BID issue presented in this matter. For purposes of the due date for issuance of this determination, the one-month period for such additional arguments was measured from the August 11, 2010 due date for briefs. Hence, all briefs were due to be filed, as indicated, by September 11, 2010.

## *ISSUES*

I. Whether payments in lieu of taxes made by petitioner pursuant to its lease obligation qualify as "eligible real property taxes" per Tax Law § 15(e), such that petitioner is entitled to receive a qualified empire zone credit per Tax Law § 15(a), notwithstanding that petitioner is not a party to the agreement between its landlord and the industrial development agency pursuant to which such payments in lieu of taxes were required to be made.

II. Whether the Division of Taxation properly disallowed petitioner's claim for a qualified empire zone credit per Tax Law § 15(a) on the basis that certain business improvement district assessments paid by petitioner were not "eligible real property taxes" for purposes of such credit per Tax Law § 15(e).

## *FINDINGS OF FACT* [2]

### *THE PILOT ISSUE*

1. Petitioner, The Golub Corporation, owns or operates more than 100 supermarkets in six states. Petitioner is certified as a Qualified Empire Zone Enterprise (QEZE) pursuant to Article 18-B of the General Municipal Law (GML) in multiple empire zones, including Schenectady County, New York. Its earliest QEZE effective date is October 23, 2001.

2. In 2004, petitioner determined that it needed a larger, more up-to-date and efficient freezer facility so as to be able to expand its frozen food distribution operations. Petitioner considered multiple locations upon which to lease a freezer facility to be constructed to its specifications.

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[2] While this matter concerns petitioner's entitlement to credits provided under the Empire Zones Program based on "eligible real property taxes," there are two separate issues presented based on two different types of payments made. These issues pertain, respectively, to credit availability based on payments in lieu of taxes (the Pilot Issue) and to credit availability based on business improvement district payments (the BID Issue). For clarity, each will be addressed independently.

3. Rotterdam Ventures (RV) is the owner of the Rotterdam Industrial Park. FM Ventures, Inc. (FM), an affiliate of RV, leases the entire Rotterdam Industrial Park from RV. FM learned of petitioner's search for a location on which to site its new freezer facility and approached petitioner with the suggestion that petitioner consider leasing property within the Rotterdam Industrial Park for that purpose. FM proposed to sublease to petitioner 8.22 acres of the Rotterdam Industrial Park (the Property) upon which petitioner's freezer facility (the Facility or the Project) could be sited.

4. Petitioner agreed to sublease property within the Rotterdam Industrial Park from FM, and the two entities structured a transaction whereby the freezer facility, consisting of some 152,000 square feet of space, was designed, set up and constructed under petitioner's supervision and oversight for exclusive use by petitioner for the purpose of storing frozen foods to be distributed by petitioner to its various supermarkets located within and beyond New York State. One of the bases upon which petitioner chose the Rotterdam site out of several acceptable sites was the availability of empire zone benefits to petitioner if it brought investment and jobs to the Rotterdam area.

5. In March 2005, FM, as landlord, and petitioner, as tenant, signed a sublease agreement (Sublease) for the Property. One of the key components in making the financial part of the transaction viable for petitioner was petitioner's receipt of the Empire Zone real property tax credit (RPTC) relative to the payment of real property taxes associated with the property, and the Sublease had been negotiated based, in part, upon this component. Accordingly, pursuant to the terms of the Sublease with FM, petitioner was obligated to make all tax payments, including any payments in lieu of taxes (PILOT payments) that might arise under a PILOT agreement. In light of this obligation, the Sublease provided petitioner with the right to review and approve any

PILOT agreement that FM might seek to enter, and included a prohibition on FM entering into a PILOT agreement absent receipt of such approval from petitioner.

6. In February 2005, FM submitted an application to the Rotterdam Industrial Development Agency (IDA) seeking financial assistance for the Facility.[3] The application concerned the construction of a frozen food freezer distribution facility to serve petitioner's (then)107-store Price Chopper supermarket chain. The application identified petitioner as the occupant of the Facility, and all disclosures, including employment information and cost/benefit analysis, were specific to petitioner.

7. At approximately the same time in February 2005, petitioner submitted to the IDA its own application for financial assistance in connection with the Facility regarding items to be purchased individually by petitioner and used with respect thereto (e.g., warehouse racking, forklift trucks, pallet jacks, battery chargers, and other equipment). This application, similarly, identified petitioner as the occupant of the Facility and contained employment information and the like concerning petitioner.

8. In the event an applicant to an IDA seeks a PILOT agreement that differs from the standard PILOT agreement offered by that particular IDA, the applicant must make a written request for a deviation from the standard PILOT agreement, on notice to any impacted taxing jurisdictions (the Taxing Jurisdictions). FM and petitioner wanted a PILOT agreement that differed from the standard PILOT agreement, and FM requested this of the IDA by a letter dated February 4, 2005. In response, the IDA held a series of meetings and proceedings, on notice as required, that were attended by Steven Porter, Senior Vice President and General Counsel to RV,

[3] The IDA holds title to the land and the Facility, which are then leased back to FM and, in turn, subleased to petitioner.

on behalf of both FM and petitioner. His presentations at these meetings and proceedings were made on behalf of both FM and petitioner, and it was known that FM was undertaking the freezer project on behalf of petitioner.[4]

9. In response to the foregoing applications, the IDA passed resolutions granting financial assistance to FM and to petitioner. This assistance included mortgage recording tax relief, sales tax relief, and a PILOT agreement with respect to FM (***see*** Finding of Fact 7), and sales tax relief with respect to petitioner's "fit up" of the Facility (***see*** Finding of Fact 8). The PILOT agreement (PILOT Agreement), dated August 1, 2005, was negotiated by Mr. Porter on behalf of both FM and petitioner.

10. As the development of the Facility progressed, FM and petitioner amended and restated the Sublease to reflect changes in fact, law and circumstances arising after the execution of the Sublease. As a result, and to reflect such changes in one document, FM and petitioner signed an amended sublease (Amended Sublease) in April 2007. The terms of the Amended Sublease reflected, among other things:

> a) petitioner's approval of the August 1, 2005 PILOT Agreement (Exhibit 23, ¶ 4.9),
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> b) that the Property was its own separate tax assessment parcel (Exhibit 23, ¶ 4.2),
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> c) FM's obligation under its sublease with petitioner to authorize the Taxing Jurisdictions to send tax bills or PILOT Agreement bills directly to petitioner (Exhibit 23, ¶ 4.3 [this provision is phrased in the sublease as "in order to expedite (petitioner's) payment of taxes (as it is obliged to do under the terms of the sublease)]," and

[4] Two members of the IDA were also employees of petitioner, were thus obliged to recuse themselves from voting on the matter, and they did so.

> d) petitioner's obligation under its sublease with FM to make tax payments including PILOT payments, per the PILOT Agreement, directly to the Taxing Jurisdictions (Exhibit 23, ¶ 4.3) subject, however, to petitioner's option to cease making such payments directly to the Taxing Jurisdictions and instead make such payments to FM (Exhibit 23, ¶ 4.4).

11. The last two Amended Sublease tax provisions described above, concerning FM's obligation to authorize the Taxing Jurisdictions to send bills directly to petitioner (in order to expedite payments of such bills) and petitioner's obligation to make such payments directly to the Taxing Jurisdictions, differ from the provision concerning payment of taxes as set forth in the initial Sublease for the premises. Under the initial Sublease, petitioner was obligated to pay the amount of any real property taxes on the premises directly to FM (Exhibit 1, ¶4.5). Under the Amended Sublease, petitioner's lease obligation to make direct payments to the Taxing Authorities commenced upon petitioner's receipt of the 2006-07 school tax bill for the fiscal year beginning July 1, 2006.

12. The Facility was completed in 2005. The bills for the payments due pursuant to the PILOT agreement were issued by the three impacted Taxing Jurisdictions to FM.[5] However, by way of a "care of" (i.e., c/o) designation, both the county and town bills were addressed for delivery to petitioner, as follows:

County of Schenectady and Town of Rotterdam

FM Ventures, Inc.
c/o Golub Corp. Real Estate Dept.
P.O. Box 1074
Schenectady, New York 12301.

[5] The taxing jurisdictions included the Schalmont Central School District, Schenectady County, and the Town of Rotterdam.

In the case of the school district bills, the invoices were addressed for delivery to FM, but by "courtesy copy" (i.e., cc) designation, a copy of the bill was also addressed for delivery to petitioner, as follows:

Schalmont Central School District

FM Ventures
695 Rotterdam Industrial Park
Duanesburg Rd.
Schenectady, NY 12308
Attn: David M. Buiko
[phone number]
[Billing Information and Amount Due]

cc: Golub Corp
Attn: RE Dept
PO Box 1074
Schenectady, NY 12301.

In turn, the payments necessary to satisfy the PILOT amounts due were made by petitioner directly to the applicable taxing jurisdictions.

***THE BID ISSUE***

13. Price Chopper Operating Co., Inc. (Price Chopper), a wholly-owned subsidiary of petitioner, rents property located at 40 Delaware Avenue in Albany, New York, on which Price Chopper operates one of petitioner's supermarkets (the Delaware Avenue Store).[6] The New York State corporation franchise tax report for Price Chopper was filed, during the relevant years, under the combined report of petitioner.

14. Price Chopper is responsible for paying the real property taxes for the Delaware Avenue Store. Included on the real property tax bills for the Delaware Avenue Store are line

[6] The property is owned by Clark Trading Corporation, an affiliate of petitioner, who in turn leases the same to Price Chopper.

item charges for "COUNTY TAX," "CITY TAX," and "LARK STREET BID," with the latter charge pertaining to the Lark Street Business Improvement District. Petitioner's witness described his understanding of this line item to be that "anybody within a certain geographic area of that street [Lark Street] has to pay on their tax bill a portion to help contribute towards their good will." He was unaware of any specific benefits received in return for this payment, and noted his belief that the charge is not "elective" but rather is a required item the nonpayment of which would result in a lien against the Delaware Avenue Store for nonpayment of taxes. Petitioner reports the Lark Street BID charge as a deductible real estate tax on its federal (corporate) income tax returns, and this position has not been challenged by the Internal Revenue Service (IRS). As with the line item charges for county tax and city tax, the Lark Street BID is calculated based upon the taxable assessed value of the property.

15. The Lark Street Neighborhood District Management Association, incorporated as a not-for-profit corporation in 1996 and known as the Lark Street BID, is a coalition of over 180 owners of real property located within the Lark Street Business Improvement District and governed by a board of 12 elected and 3 appointed directors. The 12 directors are elected from among 4 membership classes, consisting of commercial property owners, residential property owners, commercial property tenants and residential tenants, while the 3 appointed directors represent, respectively, the Mayor of Albany, the Albany City Council, and the Albany City Controller's Office. As set forth in its 2007 Annual Report, the "Organization and Mission" of the Lark Street BID is as follows:

> The Lark Street Neighborhood District Management Association, Inc. (Lark Street BID) was created to execute the responsibilities of a district management association as set forth in Article 19-A of the New York General Municipal Law and to operate a Business Improvement District program to include, but not be limited to, the administration, marketing,

> special events, project development, public relations and public improvements in the Lark Street Area Business Improvement District as established by the Common Council of the City of Albany pursuant to Article 19 of the New York General Municipal Law of the State of New York and the Lark Street Area Plan. The Lark Street BID is set up as a not-for-profit corporation as set forth in section 202 of the Not-For-Profit Corporation Law of the State of New York. The Lark Street BID operates under a contract with the City of Albany to provide the above services.

15. The website for the Lark Street BID further describes the history and mission of the BID as a commitment to "enhance the quality of life" and to "improve and promote" the BID through a "variety of programs and services" so as to "build, sustain and enhance a unique and prosperous living and business community for the residents, visitors and merchants" of the BID. The programs and services focus on

> a) neighborhood safety (e.g., crime deterrence through neighborhood "watch" programs and "walk and watch" programs),
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> b) neighborhood marketing (aimed at continued occupancy of existing businesses and enhancement of the BID, including production of a Lark Street BID merchant member business directory and production and distribution of a quarterly newsletter),
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> c) special events and promotions (seasonal celebrations and community events including Champagne on the Park, Art on Lark, Monday Nights in the Park Concert Series, LarkFEST, A Taste of Lark 'n Art, Lark or Treat, and Winter WonderLARK) and,
>
> d) street maintenance and beautification (a year-round maintenance staff of employees who remove and control sidewalk and street litter and autumn leaves, and clear crosswalks in winter).

16. The costs for the foregoing programs and services are funded through grants, revenues (net of expenses) from special events, rental income, interest income and the City of Albany Assessment, i.e., the "LARK STREET BID" item appearing on the tax bills of those within the

BID, including petitioner. This latter item is by far the largest revenue source listed in the Annual Report for the Lark Street BID.

17. On April 30, 2008, the Division of Taxation (Division) issued to petitioner a Statement of Tax Reduction or Overpayment, pertaining to petitioner's fiscal year ended April 30, 2007 and disallowing petitioner's claim for credit for such fiscal year in the amounts of $682,248.39, pertaining to the PILOT issue, and $7,247.80, pertaining to the BID issue, respectively. On May 21, 2009, the Division issued to petitioner a Statement of Tax Reduction or Overpayment, pertaining to petitioner's fiscal year ended April 30, 2008 and disallowing petitioner's claim for credit for such fiscal year in the amounts of $606,163.27, pertaining to the PILOT issue, and $7,392.06, pertaining to the BID issue, respectively.[7]

18. Petitioner submitted with its brief 27 proposed findings of fact and 34 proposed conclusions of law. In accordance with State Administrative Procedure Act (SAPA) § 307(1), each of the proposed findings of fact have been accepted and incorporated into the Findings of Fact set forth above, noting only that:

> -proposed finding of fact 8-b has been clarified to reflect that petitioner retained the right, upon notice to FM, to opt out of the lease obligation to make direct payments of tax or PILOT payment amounts to the Taxing Jurisdictions and,
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> -proposed finding of fact 21 has been modified to eliminate the legal conclusion set forth therein that petitioner was the "ultimate obligor" in the event of a default under the PILOT Agreement.

[7] At hearing, the parties agreed that the dollar amounts of credit sought are not in dispute, but rather that the question is whether petitioner has established entitlement to the credits it seeks. The parties further noted that the BID issue presented here is identical to that concerning petitioner's property located in Utica, New York. In recognition of this, the parties have agreed that the result with respect to the BID issue herein will govern the result for the same issue presented for the Utica property and that the Division will adjust its tax credit determination on the Utica property if petitioner prevails on the BID issue presented herein. As a consequence of this agreement the parties did not introduce evidence specific to the Utica property as part of their presentations herein.

SAPA does not require rulings with respect to proposed conclusions of law and none have been made herein.

## *CONCLUSIONS OF LAW*

A. Chapter 63 of the Laws of 2000 amended the Tax Law to provide benefits under the Empire Zones Program Act, specifically by amending articles 9-A, 22, 32 and 33 of the Tax Law to provide new tax credits applicable to taxable years beginning on or after January 1, 2001. Tax Law § 15 provides for a credit against the taxes imposed pursuant to Tax Law Articles 9-A, 22, 32 and 33 for "eligible real property taxes" paid or incurred by a QEZE. 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. Any amount of the real property tax credit (RPTC) which is not used to reduce tax liability is treated as an overpayment of tax to be credited or refunded (Tax Law § 210[27][a]). In order to be eligible for such credit or refund, however, certain criteria set forth in Tax Law § 15 must be met. There are two questions presented here, and both hinge upon whether certain payments made by petitioner, a QEZE, qualify as "eligible real property taxes" as defined by Tax Law § 15(e).

## *THE PILOT ISSUE*

B. The crux of the first issue in this case is whether the PILOT payments required to be made under the terms of the PILOT agreement between the Town of Rotterdam IDA and FM, constitute "eligible real property taxes" as to petitioner because such payments, though required to be made by FM, under the PILOT Agreement, were in fact made by petitioner directly to the three Taxing Jurisdictions (Schenectady County, Town of Rotterdam, and Schalmont Central School District) as allowed by the terms of the sublease for the subject property between FM and

petitioner.[8] Resolution of this matter, then, turns upon an examination of the definition of what constitutes "eligible real property taxes" per Tax Law § 15(e).

C. Tax Law § 15(e), as first enacted, defined "eligible real property taxes" to mean "taxes imposed on real property which is *owned* by the taxpayer and located in empire zones with respect to which the taxpayer is certified pursuant to article eighteen-B of the general municipal law for the taxable year." (***See*** L 2000, ch 63, effective May 15, 2000 and applicable to taxable years beginning on and after January 1, 2001; emphasis added.)[9]

D. In 2002, Tax Law § 15(e) and its definition of "eligible real property taxes" was amended. Specifically, the term "taxpayer" therein was changed to "QEZE," a requirement was added that the "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," and the definition of the payments which comprised "eligible real property taxes" for purposes of the credit was expanded as follows:

> 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*. (Emphasis added.)

By this amendment to Tax Law § 15(e) the Legislature recognized that both PILOT payments and payments of real property taxes, made by a certified and qualified QEZE owner of property, constituted "eligible real property taxes" (L 2002, ch 85, effective April 12, 2005 and

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[8] The PILOT Agreement provides that the payments required to be made thereunder to the three Taxing Jurisdictions are to be made by FM to the taxing jurisdictions (as opposed to being made to the Town of Rotterdam IDA and in turn paid over to the three jurisdictions).

[9] A transfer and leaseback arrangement between a QEZE entity (such as FM) and an IDA (such as the Town of Rotterdam IDA) for purposes of gaining Empire Zone tax benefits results in the leaseback entity being viewed as an "owner" (***see***, ***e.g.***, 20 NYCRR 575.11[b]).

applicable to taxable years beginning on and after January 1, 2001). This amendment essentially codified the conclusion to this effect set forth by the Division in its March 28, 2001 letter response to a taxpayer's February 27, 2001 request for a ruling on such issue.

E. In 2005, Tax Law § 15(e) and its definition of "eligible real property taxes" was again amended. Specifically, the definition of the payments which comprised "eligible real property taxes" for purposes of the credit was further expanded as follows:

> In addition, "eligible real property taxes" shall include taxes paid by a QEZE which is 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.

By this amendment, the Legislature recognized that, in addition to PILOT payments and taxes paid by a certified and qualified QEZE *owner* of property, taxes paid directly by a certified and qualified QEZE *tenant* to a taxing authority under an explicit written lease obligation to make such tax payments constituted "eligible real property taxes" (***see*** L 2005, ch. 61, Pt W, § 16, eff April 12, 2005, as added by L 2005, ch 63, pt A § 5, eff April 12, 2005).

D. In sum of the foregoing initial Legislative enactment and two subsequent amendments thereto, Tax Law § 15(e) sets forth three specifically defined circumstances under which payments may qualify as "eligible real property taxes" for purposes of the Article 9-A RPTC, as follows:

1) *taxes* paid by a certified and qualified QEZE *owner* of property.

> 2) *PILOT payments* by a certified and qualified QEZE when made directly 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.*
>
> 3) *taxes* paid by a certified and qualified QEZE *tenant*.

Through the progression of these amendments, the Legislature broadened the original definition of what qualified as "eligible real property taxes" for purposes of the credit, first to include PILOT payments and thereafter to include tax payments (including PILOT payments) made by a tenant (as distinguished from a property-owning QEZE). This progression leads to petitioner's argument that the Legislature clearly intended to expand the availability of the RPTC to parties who in fact invested in empire zones consistent with the aim of increasing employment and otherwise economically improving these designated areas. There is no dispute that petitioner is, in fact, making the PILOT payments as described. Petitioner's argument is that the Legislature's intent under these circumstances militates clearly in favor of allowing the credit. However, as amended and in effect during the years in issue, Tax Law § 15(e), whether as the result of legislative intent or oversight, specifically retained, in the case of PILOT payments, the requirement, as enacted via the 2002 amendment, of a written agreement entered into between the QEZE making the PILOT payments and the recipient of the payments (the state, municipal corporation or public benefit corporation). Unfortunately, under the facts of this case, there is no written agreement between the paying QEZE (i.e., petitioner) and the recipient of the PILOT payments.

E. It is clear from the foregoing, and there appears to be no dispute, that *taxes* paid and *PILOT payments* are functionally equivalent for purposes of the credit. That is, Tax Law § 15(e) specifically includes, as the result of its 2002 and 2005 amendments, both PILOT payments and

tax payments made by a certified and qualified QEZE as payments of "qualified real property taxes" which may give rise to the credit. At the same time, the statute reflects a specific distinction in the case of PILOT payments such that the same are "eligible real property taxes" if paid pursuant to a written agreement between the QEZE and the state, municipal corporation or public benefit corporation. Here, the written agreement pursuant to which the PILOT payments are required to be made is clearly between FM and the IDA, and not between petitioner and the IDA. Thus, petitioner is not making the PILOT payments in question pursuant to a written agreement between it and the state, municipal corporation or public benefit corporation. Notwithstanding petitioner's arguments to the contrary, and notwithstanding that petitioner receives notice of the payments (i.e., receives bills in the method described in Finding of Fact 11) directly from the Taxing Jurisdictions when due, and notwithstanding that petitioner had a right of approval or rejection with respect to the terms of the PILOT Agreement, it is clear that the PILOT Agreement is between FM and the IDA, and does not include petitioner as a party thereto. As a result, petitioner's payments do not constitute "eligible real property taxes" as defined by Tax Law § 15(e), and are not allowable as such for purposes of the RPTC under Tax Law § 210(27).

F. Careful review of the terms of the PILOT Agreement, executed by FM and the IDA but not petitioner, reveals that the agreement is between FM and the IDA and that under its terms only FM is obligated to make the PILOT payments (***see*** Exhibit 18, § 2.02). Petitioner's obligation to make such payments, in contrast, clearly arises under the Amended Sublease agreement between it and FM (***compare*** Exhibit 23, § 4.1, Exhibit 1, ¶ 4.5, Finding of Fact 11). Similarly, in the event of default, the IDA's remedy is to commence whatever action it deems appropriate directly against FM (***see*** Exhibit 18, § 4.02; General Municipal Law § 874[6]).

While subsequent actions would almost certainly involve petitioner, the same would arise as the result of petitioner's obligation under its sublease with FM, rather than via any direct relationship between petitioner and the IDA. Such subsequent actions neither make petitioner a party to the PILOT Agreement nor a direct obligor thereunder. Petitioner did, in fact, receive bills for the PILOT payments and did in fact pay the same. At the same time, however, the bills reflect their issuance to FM, with the same furnished to petitioner either via a "care of" designation, in the case of the Schenectady County and the Town of Rotterdam bills, or via "carbon copy" designation, in the case of the Schalmont Central School District bills (***see*** Finding of Fact 11). Testimony at hearing indicated that this arrangement was undertaken to avoid the possibility of FM "forgetting" to pay (or timely pay) the amounts due under the PILOT agreement. This explanation for the arrangement is fully consistent with the terms of the sublease between FM and petitioner which states "[i]n order to *expedite* Lessee's [i.e., petitioner's] payment of taxes pursuant to this Article 4, Lessor [i.e., FM] shall *authorize* the taxing authority to send original bills for Lessee's Tax Parcel directly to Lessee" (***see*** Exhibit 23, § 4.3; emphasis added). The right to authorize this arrangement, however, rested solely with FM as one of the two parties to the PILOT Agreement (the written agreement between the QEZE and the state, municipal corporation or public benefit corporation required per Tax Law § 15[e]) (***see*** Exhibit 18, § 2.02, Exhibit 23, ¶4.3). Moreover, petitioner retained the right, under its sublease with FM, to opt out of making payments directly to the various taxing jurisdictions (***see*** Exhibit 23, § 4.4), a significant fact in support of the conclusion that petitioner was not a direct obligor with respect to the PILOT Agreement between FM and the IDA. It is noteworthy that all of those involved in this transaction by which the freezer facility was constructed knew at all times that petitioner would be the QEZE utilizing the facility (clearly this freezer facility was not one built on mere

speculation that a suitable tenant would materialize), and that the empire zone benefits, including the subject RPTC, were an important part of making this particular facility at this particular location attractive to petitioner. Nonetheless, it remains that petitioner was not, and is not, made (e.g., through an assignment and assumption agreement or other mechanism by and between petitioner, FM and, critically, the IDA), a party to the PILOT Agreement, as is specifically required under the statute in order to allow petitioner to be entitled to claim and receive the subject credit. Notwithstanding the recognized possibility that neither FM nor petitioner will receive the credit in question, it remains that petitioner is not included as a party to the PILOT agreement and is thus precluded from receiving the credit. It is noted that the lease between FM and petitioner recognizes that FM could have been the QEZE able to receive the subject credit, and requires, under such circumstances, that FM remit the credit to petitioner (***see*** Exhibit 23, § 4.6). Tax Law § 15(e) is clear and unambiguous in its definition of what constitutes "*eligible* real property taxes" for purposes of the RPTC including, as relevant here, PILOT payments made by a QEZE pursuant to a written agreement between that QEZE and the recipient of the PILOT payments. Ultimately, it is the fact that petitioner is not included in the PILOT agreement between FM and the IDA, and is thus not obligated thereunder to make the PILOT payments to the taxing jurisdictions, as required under Tax Law § 15(e), which precludes petitioner from receiving the credit in issue.

G. This is not an instance of interpreting whether PILOT payments are the functional equivalent of real property taxes, as the Division did in issuing its opinion to that effect and which interpretation was later specifically accepted and adopted by the Legislature in 2002 (***see*** Conclusion of Law D). Rather, to decide in petitioner's favor requires the conclusion that PILOT payments are "eligible real property taxes" upon which the credit may be allowed, whether or not

paid pursuant to a written agreement between the paying QEZE and the payment recipient, a result which (under the guise of "interpretation"), ignores the statutory requirement of a written agreement between the paying QEZE and the recipient. The statutory language as it has evolved and exists simply does not cover petitioner's circumstances, and allowing the credit to petitioner requires a conclusion that ignores the statutory requirement of a written agreement with the IDA in favor of a presumption of having discerned that the intent of the Legislature would be to override such requirement under these circumstances. Stated more directly, for petitioner to prevail requires one to ignore the words of the statute, which require a direct obligation of payment by the QEZE to the taxing jurisdiction. Notwithstanding the steps amending the law to broaden the definition of "eligible real property taxes" under Tax Law § 15(e), by which taxes paid by owners, then PILOT payments made by QEZE's, and then taxes paid by tenants, were "qualified" as "real property taxes" for credit purposes, the language requiring a direct obligation between payor and taxing jurisdiction in the case of PILOT payments remains a part of the statute. While these broadening amendments were ostensibly aimed at making the credit available to the party who in fact furthered the employment and other economic aims of the Empire Zones Program by investing in the designated empire zones, the language and its requirement remains. Thus, petitioner's remedy, if any, would appear to rest with the Legislature under these circumstances.

***THE BID ISSUE***

H. Turning to the BID issue, the question is whether petitioner is paying a real property tax as opposed to a special assessment or an ad valorem levy. Resolution of this issue, as above, turns upon discerning what payments qualify as "eligible real property taxes" per Tax Law § 15(e).

I. While Tax Law § 15(e) defines "eligible real property taxes" as "taxes imposed on real property," the phrase "taxes imposed on real property" is otherwise not defined in Tax Law § 15. The Division argues that the Lark Street BID charges at issue are not "eligible real property taxes" within the meaning of the QEZE credit because they are special assessments or ad valorem levies, which do not fall within the definition of tax on real property under the Real Property Tax Law. Petitioner argues that such charges are "eligible real property taxes" as intended by the Legislature in authorizing the RPTC and as is consistent with the aim of creating tax free zones.

J. 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 term "taxes imposed on real property" is not defined therein and thus that particular phrase contained in the statute is ambiguous.

K. The Division's initial position for deducing the meaning of "taxes imposed on real property" included the argument that it is appropriate to consult the Internal Revenue Code (IRC) and the regulations promulgated thereunder to determine the meaning, maintaining that under the IRC, real property taxes are deductible for federal income tax purposes 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. In support of its proposition, the Division cites sections 1.164-3(b) and 1.164-4(a) of the Treasury Regulations. Section 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" (Treas Reg § 1.164-3[b]; 4[a]). The Division's conclusion was that, consistent with the definition of real property taxes contained in the IRC, "taxes imposed on real property" for purposes of the QEZE credit cannot include a tax on a local benefit. Petitioner countered that the context of the IRC and federal

regulations pertaining to deductions for real estate taxes paid are not comparable to the QEZE credit provisions. Petitioner argued that the legislative intent behind the QEZE credits differs from the intent behind the federal tax deductions in that the QEZE credits were meant to spur economic development and investment through incentives for economically distressed areas.

L. The QEZE credits at issue were claimed by petitioner on its corporation tax returns. While the provision of Tax Law § 15 providing for the QEZE credit for real property taxes specifically cross-references Article 9-A, § 210(27); Article 22, § 606(I), (bb); Article 32, § 1456(o); and Article 33, § 1511(r), for the application of the credit, the same section specifically states that "[f]or definitions of terms used in this section see section fourteen of this article" (Tax Law § 15[h]). The plain language of the QEZE credit then, by specifically referencing Article 9-A, § 210(27) for purposes of application, but referencing only Tax Law §14, and omitting any reference to Article 9-A for the meaning of terms, would indicate that the legislators did not intend to rely on the meaning of the terms relating to federal income taxes for purposes of the QEZE credit for real property taxes.[10]

M. While the language of the QEZE credit for real property taxes 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." 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. This brings us to the Division's second argument, which is that pursuant to the Real Property Tax Law, "taxes imposed on real property" do not include special assessments or ad valorem levies.

[10] In fact, and perhaps in recognition of this, the Division did not address this argument in its brief and appears to have abandoned the same.

N. 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 was reasonable for the Division to seek guidance from the RPTL 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 RPTL 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). [11]

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:

> [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).

The term "special ad valorem levy" is defined in Real Property Tax Law § 102(14) as:

> [A] charge imposed upon benefited real property in the same manner and at the same time as taxes for municipal purposes to defray the cost, including operation and maintenance, of a special district improvement

[11]It is noted that various particular statutes, i.e., 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]).

> or service, but not including any charge imposed by or on behalf of a city or village.

O. The Lark Street BID was created in accordance with General Municipal Law Article 19-A, which governs business improvement districts and the imposition of charges associated therewith. In enacting Article 19-A, the Legislature stated :

> [t]hat the business districts within many municipalities in the state are in a deteriorated condition. This condition adversely affects the economic and general well-being of the people of the state. It is further found that and declared that the establishment of business improvement districts is an effective means for restoring and promoting business activity. (L 1989, ch 282, § 2)

Petitioner notes that Article 19-A also provides that in establishing a business improvement district the enacting legislative body (here the Albany Common Council) must make a finding that "the establishment or extension of the district is in the public interest (General Municipal Law § 980-f[a][4]), and that charges imposed upon real property located within a business improvement district are imposed for "additional maintenance and other additional services required for the enjoyment and protection of the public" (General Municipal Law § 980-c[c]). From this, petitioner argues that the charges imposed upon real property located within the business improvement district are not imposed for the benefit of the real property owners, but are for the benefit of the general public. While enhancing the enjoyment and protection of the public by restoring and promoting business activity is unquestionably of interest and benefit to the general public, the same is not mutually exclusive of being of benefit to the real property owners within the district, including merchants and other business interests therein. Rather, such endeavors would appear to be of mutual benefit and gain, as stated above by the Legislature upon its enactment of Article 19-A. This conclusion overrides petitioner's

argument that the BID charges are imposed for the enjoyment and protection of the public but are not of benefit to the real property owners within the BID.

P. Chapter 142 of the Code of the City of Albany established the Lark Street BID and states, at section 142-4 thereof, "that all properties within the district will benefit from the establishment and that all property benefited is included in the boundaries of the district." Section 142-5 provides that the services within the district shall be in addition to, and not a substitute for, required municipal services provided by the City of Albany on a City-wide basis. Section 142-6 provides that General Municipal Law Article 19-A shall govern the operation of the BID to the extent not provided for in Section 145. In turn, General Municipal Law § 980-j provides as follows:

> Expenses of the district.
>
> (a) The expense incurred in the construction or operation of any improvement or provision of additional services in a district pursuant to [Article 19-A] shall be financed in accordance with the district plan upon which the establishment or extension of the district was based. Services for which district property owners are charged pursuant to the plan must be in addition to or an enhancement of those provided by the municipality prior to the establishment of the district. The expense and cost apportioned to benefited real property in accordance with the plan shall be a charge upon each benefited parcel of real property within the district.
>
> (b) The charge upon benefitted real property pursuant to [Article 19-A] shall be imposed as provided in the district plan. If the formula includes an ad valorem component, this component shall be determined by the assessed value of each parcel as entered on the latest complete assessment roll used by the municipality for the levy of general municipal taxes. The charge shall be determined, levied and collected in the same manner and at the same time and by the same officers, as general municipal taxes are levied and collected.

Q. As noted in the Findings of Fact, the Lark Street BID is a specific district, the enhancements and benefits of the BID's efforts and activities pertain specifically to the properties

encompassed within that district, and the benefits derived therefrom inure to both the general public as well as the property owners within the district, including businesses and merchants such as petitioner. The services, enhancements and benefits provided by the activities undertaken by the Lark Street BID are in addition to the services otherwise provided by the municipality (the City of Albany). The amount of the BID levy charged and collected via each district property owner's tax bill is calculated upon the assessed taxable value of that owner's property and is collected in the same manner and at the same time and by the same officers as general municipal taxes are levied and collected. In light of the Real Property Tax Law provisions set forth above, the charges attributable to the Lark Street BID were unquestionably ad valorem levies. Since special assessments and ad valorem levies 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.

R. It is noted that special assessments and ad valorem levies are included in the Real Property Tax Law definition of the term tax when used in specific sections. However, this is true only to the extent that special ad valorem levies are included in the specific enumerated sections for levy and collection purposes. In this regard, 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.

Having determined that the Lark Street BID charge was a special ad valorem levy, it would only be included in the term "tax" for purposes of RPTL § 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 and does not include special assessments.

It is also noted that part of the definition of eligible real property taxes contained in Tax Law § 15(e) requires the taxes to become a lien on the real property during the tax year, and that RPTL § 102(21) defines "tax lien" as "an unpaid tax, special ad valorem levy, special assessment or other charge imposed upon real property by or on behalf of a municipal corporation or special district which is an encumbrance on real property . . . .". While it is true that part of the definition of eligible real property taxes requires that such taxes become a lien on the real property when unpaid, it is equally true that the additional language contained in the definition states that the term "tax" means "a charge imposed on real property." As noted above, based on the definition contained in the Real Property Tax Law, such tax does not include special assessments or ad valorem levies. Although included for purposes of tax liens under RPTL § 102(21), the language of RPTL § 102(20) is clear that the term "tax" does not include special assessments or ad valorem levies, but for the enumerated exceptions listed above.

S. The petition of The Golub Corporation is hereby denied and the reductions set forth by the Division on its Statement of Tax Reduction or Overpayment dated April 30, 2008 (pertaining

to petitioner's fiscal year ended April 30, 2007) and its Statement of Tax Reduction or Overpayment dated May 21, 2009 (pertaining to petitioner's fiscal year ended April 30, 2008) are sustained.[12]

DATED: Troy, New York
May 26, 2011

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

[12] In light of this conclusion, it is not necessary to address the arguments submitted by the parties with respect to certain amendments enacted by the Legislature in 2010 (***see*** Footnote 1).