STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN P. AND JENNIFER L. FUNICIELLO	:	
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2005 and 2006.	:	DETERMINATION DTA NO. 823721

Petitioners, John P. and Jennifer L. Funiciello, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 2005 and 2006.

On November 17, 2011 and December 5, 2011, respectively, petitioners, appearing by Hiscock and Barclay, LLP (David G. Burch, Jr., and Kevin R. McAuliffe, Esqs., of counsel), and the Division of Taxation, appearing by Mark F. Volk, Esq. (Christopher O'Brien, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by May 18, 2012, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly disallowed portions of petitioners' claims for the qualified empire zone enterprise real property tax credit for the years 2005 and 2006 on the grounds that certain special assessments did not constitute "eligible real property tax" for purposes of the credit against tax provided for in Tax Law § 15(a).

FINDINGS OF FACT

1. Atrium Associates, LLC (Atrium) is a New York limited liability company that was certified as a qualified Empire Zone enterprise (QEZE) on January 3, 2001, pursuant to Article 18-A of the of the New York State General Municipal Law. In 2005, the members of Atrium were J.F. Real Estate Properties, Inc. (J.F. Real Estate), Andrew Larew and Anthony Fiorito. In 2006, the members of Atrium were J.F. Real Estate and Anthony Fiorito. The members of Atrium were entitled to claim empire zone benefits to which Atrium was entitled.

2. 224 Harrison Associates, LLC (224 Harrison) is a New York limited liability company that was certified as a QEZE on July 22, 1999, pursuant to Article 18-A of the New York State General Municipal Law. In 2005, the members of 224 Harrison were J.F. Real Estate, Partnership Properties, Inc., and Andrew Larew. In 2006, the members of 224 Harrison were J.F. Real Estate and Partnership Properties, Inc. The members of 224 Harrison were entitled to claim empire zone benefits to which 224 Harrison was entitled.

3. J.F. Real Estate is a New York Corporation that elected to be taxed pursuant to Subchapter S of the Internal Revenue Code. Petitioner John Funiciello is the sole shareholder of J.F. Real Estate and is entitled to claim the empire zone benefits to which J.F. Real Estate is entitled to claim as a member of Atrium and 224 Harrison.

4. Petitioners, John and Jennifer Funiciello, timely filed joint tax returns for tax years 2005 and 2006, and on each return claimed the Empire Zone real property tax credit (RPTC) for real property taxes paid by Atrium and 224 Harrison. At some point after such filings, petitioners filed amended tax returns for those years.

5. The Division of Taxation (Division) issued to petitioners a Statement of Tax Refund dated July 7, 2008, concerning tax year 2005. It disallowed $14,318.00 of RPTC claimed by petitioners, stating the following, in pertinent part:

> The refund requested on your 2005 amended return has been adjusted as explained below:
>
> We are allowing your claim for the QEZE tax reduction credit, in the amount of $25,734. However, a review of the entire return showed that the original claim for the QEZE real property tax credit included $14,318 in special assessments, which have been disallowed.
>
> Along with the downtown special assessment bills, the following items from the county and city tax bills were disallowed for both Atrium Associattes [*sic*] and 224 Harrison Associattes [*sic*], because they were not city or county wide assessments or because they were based on usage or consumption:
>
> Flushing, special lighting, water frontage, sidewalk, and county sanitary unit.
>
> As tax credits are to be strictly construed, it is our interpretation that a special ad valorem levy or a special assessment that does not meet the federal rules for deductibility does not meet the definition of "eligible real property taxes" under subsection [*sic*] of 15 of the New York State Tax Law and can not be used in calculation of the QEZE real property tax credits.

6. The Division of Taxation (Division) issued to petitioners a Statement of Tax Refund dated August 11, 2008, concerning tax year 2006. It disallowed $16,659.00 of RPTC claimed by petitioners, stating the following, in pertinent part:

> The refund requested on your 2006 amended return has been adjusted as explained below:
>
> We are allowing your claim for the QEZE tax reduction credit in the amount of $34,906. However, a review of the entire return showed that the original claim for the QEZE real property tax credit included $16,659 in special assessments, which have been disallowed.
>
> Along with the downtown special assessment bills, the following items from the county and city tax bills were disallowed for both Atrium Associates and 224 Harrison Associates, because they were not city or county wide assessments or because they were based on usage or consumption:

> Flushing, special lighting, water frontage, sidewalk, and county sanitary unit.
>
> As tax credits are to be strictly construed, it is our interpretation that a special ad valorem levy or a special assessment that does not meet the federal rules for deductibility does not meet the definition of "eligible real property taxes" under subsection [*sic*] of 15 of the New York State Tax Law and can not be used in calculation of the QEZE real property tax credit.

7. The Onondaga County Sanitary District charges, flushing charges, the special lighting charges, and the water frontage charges, disallowed by the Division for tax years 2005 and 2006, are all charges imposed on real property that is owned by either Atrium or 224 Harrison, which property is located in an empire zone in which Atrium or 224 Harrison is certified as a QEZE, and all such charges were paid by Atrium and 224 Harrison as the owner of various real property within the empire zones.

8. In 1975, the City of Syracuse was authorized to create a special assessment district by ordinance within the city (L 1975, ch 405). The purpose of the ordinance was to provide the city with certain powers with respect to the special assessment district as to the following, among other services: the construction and installation of landscaping, planting and park areas, construction of lighting and heating facilities, construction of certain facilities such as places of amusement, street furniture and fire hydrants, construction of pedestrian byways and the coordination of parking garage facilities within the special district. The city was further granted the power, as necessary, to carry out the improvement, maintenance and operation of the special district.

9. The City of Syracuse Code at section 19-103(A) and (B) provided that all properties within the special assessment district were subject to assessment for the improvements and services provided and the operation and maintenance costs incidental thereto. The ordinance specifically provided that all properties need not be assessed uniformly for the costs of

improvements, operations and maintenance, but may instead be assessed in accordance with a formula, established by ordinance, which, in the sole discretion of the Syracuse Common Council, reflects the benefits accruing to the various properties within the special assessment district by reason of such improvements and costs of operation and maintenance.

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioners contend that they are entitled to the credit for the real property taxes paid on parcels owned by Atrium and 224 Harrison pursuant to the provisions of Tax Law § 15, including the Onondaga County Sanitary District charges, the flushing charges, the special lighting charges and the water frontage charges, which they argue are "eligible real property taxes" as defined in Tax Law § 15(e). Petitioners maintain that the charges levied against properties within the Downtown Special Assessment District (District) are calculated based upon the zone within the District in which the property lies, the percentage share of the assessed value of the total District that the property represents, the property's exempt status, and the property's percentage share of the District front footage. Petitioners argue that since the Downtown Special Assessment District Tax is not a charge imposed upon 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, it is not a special assessment within the definition of Real Property Tax Law § 102(15).

Petitioners assert, in the alternative, that if it is determined that the Downtown Special Assessment District Tax is a special assessment, it is still includible as an eligible real property tax, since Tax Law § 15(e) does not exclude special assessments and special ad valorem levies from constituting taxes imposed on real property under that section, and the term "taxes imposed on real property" is not otherwise defined.

Petitioners believe the legislative history of the Empire Zones Program supports a broad interpretation of the taxes eligible for inclusion in the credit since the program was developed to create tax-free qualified empire zone enterprise programs to maintain and expand employment. They argue that, to allow local governments to circumvent this tax-free status by imposing special assessments would defeat the legislative intent to create a partnership with businesses where they would receive economic incentives and tax-free status in exchange for the production of employment and local investment.

11. Petitioners also argue that the definition of eligible real property taxes contained in Tax Law § 15(e) is unique and not subject to further elaboration by reference to the Internal Revenue Code (IRC), which is often consulted for the meaning of terms used in Article 22 that are used in a comparable context in the IRC (Tax Law § 607). Since the definition of "eligible real property taxes" in Tax Law § 15(e) does not present a term with a comparable context within the IRC, there is no basis for requiring conformance with the term "real property taxes" as that term is defined in the IRC or its regulations. Further, given the amendments to the definition of "eligible real property taxes" in 2002 and 2005, it is clear the Legislature had ample opportunity to require that "eligible real property taxes" be deductible for federal income tax purposes or to provide that special assessments be excluded from the definition, but took no such action.

Finally, petitioners contend that even if the IRC definition of real property taxes applies, the Downtown Special Assessment Tax is includible as an eligible real property tax because the tax is not imposed because of, and measured by, a benefit inuring directly to the properties assessed. The benefit, argue petitioners, inures to many more properties than those assessed, and thus should be considered real property taxes as defined by the IRC.

12. The Division of Taxation argues that the credit available to a QEZE is for eligible real property taxes only and that the definition of that term in Tax Law § 15(e) only provides that they are taxes imposed on real property, not special assessments or ad valorem taxes. The Division, referring to the New York Real Property Law, contrasts the definition of a tax with that of a special assessment. A tax, the Division asserts, is a levy upon all real property within a municipality to raise funds for general government purposes benefitting the entire community. A special assessment, in contrast, is a specific levy designed to recover the costs of an improvement that confers a direct and tangible local benefit upon property within a defined area. The Division points to the Syracuse ordinance as establishing a special district to benefit a specific area and to charge the various properties in that district for the benefits so received. In addition, the Division notes that, importantly, the charge is imposed in proportion to the benefit received by the property. The Division notes that several recent precedents address the issues presented herein (***see Matter of Herrick***, Tax Appeals Tribunal, August 4, 2011; ***Matter of Piccolo***, Tax Appeals Tribunal, August 4, 2011).

13. The Division maintains that a court cannot by implication supply in a statute a provision that it is reasonable to suppose the Legislature intended intentionally to omit, and the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended.

The Division asserts that the legislative history of the real property tax credit does not indicate that there was any intention on the part of the Legislature to depart from the Internal Revenue Code's definition of real property taxes so as to make the real property tax credit apply to special assessments.

The Division also points to the unambiguous language of the statute, and the clarity of the words contained therein, and concludes that Tax Law § 15 provides a real property tax credit for eligible real property taxes. The Division reasons that since special assessments are specifically excluded from the definition of real property taxes under the Internal Revenue Code, New York is constrained, under Tax Law § 607, to follow the same definition.

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

CONCLUSIONS OF LAW

A. Chapter 63 of the Laws of 2000 amended the Tax Law to provide benefits under the Empire Zones Program Act, amending articles 9-A, 22, 32 and 33 of the Tax Law to provide new tax credits, which applied to taxable years beginning on or after January 1, 2001. Tax Law § 15 allows for a credit against corporate and personal income taxes for a QEZE for eligible real property taxes.

B. The question presented is whether the charges assessed by a special assessment district constitute "eligible real property taxes" for the purpose of the Empire Zones real property tax credit claimed by petitioners. The term is defined in Tax Law § 15(e) as a tax imposed on real property which is owned by the QEZE and is located in an empire zone with respect to which the QEZE is certified, provided said taxes become a lien on the real property during the taxable year in which the owner of the real property is both certified pursuant to Article 18-B of the General Municipal Law and a QEZE. The definition begs the question of exactly what constitutes a "tax on real property," and to this end, the Tax Law is silent.

C. The Tax Appeals Tribunal has addressed the question presented herein and the arguments set forth by both parties on numerous occasions in recent matters (***Matter of Landmark Tri-State, Inc.***, March 22, 2012; ***Matter of Ginsberg,*** November 3, 2011; ***Matter of Herrick***, August 4, 2011; ***Matter of Stevenson***, August 4, 2011; ***Matter of Piccolo***, August 4, 2011). The Tribunal has held that under the Real Property Tax Law, similar charges assessed by a downtown improvement district were property classified as special assessments (Real Property Tax Law § 102[20]), and as such those charges could not be considered "eligible real property taxes" because special assessments are specifically excluded from the definition of a "tax" under the Real Property Tax Law (Real Property Tax Law § 102[20]).

In this case the Syracuse ordinance creating the special improvement district contains specific language requiring that the costs of improvements, operations and maintenance be borne by the properties within the established district by a formula that reflects the benefits accruing to the various properties. This is the heart of what comprises an assessment (Real Property Tax Law § 102[20]). It must be concluded that the charges against the real property in this case are special assessments and not real property taxes. Accordingly, the Division properly disallowed portions of petitioners' claims for the qualified empire zone enterprise real property tax credit for the years 2005 and 2006.

D. The petition of John P. and Jennifer L. Funiciello is denied, and the Division's statements of tax refund for years 2005 and 2006, dated July 7, 2008 and August 11, 2008, respectively, are sustained.

DATED: Albany, New York
November 15, 2012

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE