STATE OF NEW YORK

TAX APPEALS TRIBUNAL

| | | |
|---|---|---|
| In the Matter of the Petition | : | |
| of | : | |
| **MARTIN B. & IRENE B. GINSBURG** | : | DECISION<br>DTA NO: 830408 |
| for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 2016. | : | |

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on February 8, 2024. The Division of Taxation appeared by Amanda Hiller, Esq. (Amy Seidenstock, Esq., of counsel). Petitioners appeared by Bousquet Holstein, PLLC (Casey A. Johnson, Esq., and Julia J. Martin, Esq., of counsel).

The Division of Taxation filed a brief in support of the exception. Petitioners filed a brief in opposition. The Division of Taxation filed a reply brief. Oral argument was heard on January 30, 2025, in Albany, New York, which date began the six-month period for issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

## ***ISSUE***

For the purposes of the Brownfield Redevelopment Tax Credit, whether the definition of qualified tangible property applies not only to the project for which a taxpayer seeks the credit, but also its capitalized costs.

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge except that we have modified the facts without altering their substantive content to reflect the record more clearly. Additionally, nonessential abbreviations have been removed for purposes of clarity. The findings of fact as so modified are set forth below.

1. At all relevant times, petitioner, Martin B. Ginsburg, possessed an ownership interest in Ginsburg Development Companies, LLC, which in turn owned an 80% interest in Harbor Square Crossings, LLC during the 2016 taxable year.

2. On April 10, 2014, Harbor Square, LLC transferred title to a parcel of real property located in Ossining, New York (the site) to Harbor Square Crossings, LLC. Prior to the transfer, the site had been remediated under New York State's Brownfield Cleanup Program for a variety of uses, including residential rental apartments and commercial space (the project).

3. On December 8, 2006, the New York State Department of Environmental Services accepted the project into the Brownfield Cleanup Program. On the same date, the New York State Department of Environmental Conservation (DEC) and Harbor Square, LLC entered into a Brownfield Cleanup Agreement.

4. Pursuant to the Brownfield Cleanup Agreement the site was remediated, and on December 31, 2008, the DEC issued a certificate of completion to Harbor Square, LLC.

5. On November 6, 2013, the Village of Ossining, New York (the Village), passed a "Resolution Calling for Approval of the Harbor Square Request for Amended Site Plan and Special Use Permit" (the Village Resolution).

6. The Village Resolution approved the application of Harbor Square, LLC to redevelop the site, subject to certain conditions, which included entering into an amended and restated Land Development Agreement.

7. As a requirement for the issuance of a building permit for the site, Harbor Square, LLC had to satisfy the conditions in the Village Resolution by entering into an amended and restated Land Development Agreement. On March 21, 2014, Harbor Square, LLC and the Village entered into a Supplement to the Land Acquisition and Disposition Agreement.

8. The Land Acquisition and Disposition Agreement required Harbor Square, LLC to replace approximately 2,600 linear feet of existing 6-inch Village water main on Snowden Avenue with 12-inch ductile iron pipe, connections for water service and fire hydrants as well as restoration of Snowden Avenue (collectively, the Water Main Improvements or WMI).

9. Harbor Square, LLC transferred the certificate of completion to Harbor Square Crossings, LLC on February 25, 2015.

10. The certificates of occupancy for the resident building of the project were issued to Harbor Square Crossings, LLC on June 30, 2016, August 1, 2016, August 26, 2016 and August 21, 2016, covering all 187 apartments in the building.

11. In a letter dated December 20, 2016, the Westchester County Department of Health approved the WMI.

12. The Village in the Land Acquisition and Disposition Agreement required the completion of the WMI.

13. Whereas the project was located on the site, the WMI was not physically located on the site.

14. The residential building and commercial space are physically located on the site.

15. Based on the Village Resolution's requirement that Harbor Square, LLC make the WMI, Harbor Square Crossings, LLC concluded that the costs of the WMI were construction costs that directly benefitted and were incurred by reason of the construction of the property located on the site. Harbor Square Crossings, LLC therefore capitalized these costs into the basis of such property.

16. On its 2016 federal tax return, Harbor Square Crossings, LLC capitalized the cost of the WMI to the basis of buildings and other depreciable assets located on the site for federal income tax purposes.

17. Petitioners, Martin B. and Irene B. Ginsburg, filed a New York State resident income tax return, form IT-201, for tax year 2016, claiming a Brownfield Redevelopment Tax Credit (BRTC) of $5,507,940.00 and requested a refund in the amount of $5,510,157.00.

18. On November 10, 2017, the Division of Taxation (Division) issued an Account Adjustment Notice to petitioners, which allowed a refund of $2,217.00 out of the requested $5,510,157.00.

19. The Division audited petitioners' claim for the BRTC for the 2016 tax year. On March 14, 2018, the Division sent a letter to petitioners requesting documentation to verify their claim for the BRTC. On April 12, 2018, petitioners responded and sent in additional documentation.

20. After reviewing the documentation submitted by petitioners, the Division sent letters, dated May 3, 2018 and May 17, 2018 requesting additional documentation, including a request for copies of invoices supporting costs claimed for the Tangible Property Credit Component (TPCC) of the BRTC. In response, petitioners provided invoices and noted when the work was done off the site.

21. Based on its review, the Division determined that invoices in the amount of $2,955,374.00 were dated prior to when the Brownfield Cleanup Agreement was executed. Invoices in the amount of $1,463,634.00 were for costs attributable to the WMI.

22. The Division issued a Notice of Disallowance dated November 14, 2018 reducing the claimed refund of $5,510,157.00 by $357,940.00 to $5,152,217.00. Of that amount, $2,217.00 was previously refunded, leaving a refund due of $5,150,000.00. The Division determined that $2,955,374.00 related to costs paid or incurred prior to the execution of the Brownfield Cleanup Agreement. It also determined that $1,463,634.00 related to costs attributable to the WMI for work done off the site and do not qualify for the TPCC of the BRTC. The denial for costs attributed to the WMI resulted in a reduction of petitioners' refund by $118,554.00.

23. On December 3, 2018, the Division issued an Account Adjustment Notice informing petitioners that their refund for tax year 2016 is $5,150,000.00 and issued a refund check in that amount to petitioners.

24. The former 6-inch water main pipes servicing the area of the site did not have the capacity to service the planned residential units.

25. Once the WMI were completed, they were immediately dedicated back to the Village for general public use. Harbor Square Crossings, LLC neither owns nor maintains the WMI; rather, the Village both owns and maintains them.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge began his determination by stating that the controversy at hand did not involve any specialized knowledge or expertise by the Division, instead requiring only statutory reading and analysis.

Next, the Administrative Law Judge reviewed the legislative history for the enactment of Brownfield Cleanup Program and found that it was enacted for the purpose of promoting the cleanup, reuse and redevelopment of abandoned and likely contaminated properties (***see*** Environmental Conservation Law § 27-1403) and accordingly, the BRTC was introduced (***see*** Tax Law § 21). The Administrative Law Judge noted that the controversy may be distilled to whether the situs requirement (***see*** Tax Law § 21 [b] [3] [A] [iv]) applied to the capitalized costs of the brownfield redevelopment projects.

Relying on the language of Tax Law § 21, the Administrative Law Judge concluded that it is proper to interpret the situs requirement as applying only to the tangible property for which the taxpayer seeks the BRTC. The Administrative Law Judge noted that the project itself, for which petitioners seek the BRTC, meets the situs requirement, and accordingly, they are entitled to the costs for tangible property related to the project and properly capitalized thereto.

The Administrative Law Judge found that the Division's interpretation of Tax Law § 21, as applied in the refund denial, denies the BRTC for elements necessary for redeveloping the site and consequently, not only ignores but defeats the legislative purpose of the BRTC. The Administrative Law Judge found the Division's interpretation of Tax Law § 21 to be irrational and unreasonable and thus granted the petition of Martin B. and Irene B. Ginsburg.

***ARGUMENTS ON EXCEPTION***

The Division, on exception, argues that the Administrative Law Judge erred in determining that petitioner's interpretation of Tax Law § 21 was the only reasonable one. According to the Division, the "property" qualifying for the credit must meet the situs requirement of Tax Law § 21 (b) (3) (A), i.e., it must constitute tangible property actually located on the brownfield site. The Division asserts that the definition of "property" does not

encompass the project in its entirety (residential buildings and commercial space) but rather the individual structural components of the project, regardless of whether they were properly capitalized to the cost of the building for federal tax purposes. The Division contends that Tax Law § 21 (a) (3) is clear that only "qualified tangible property" is eligible for the TPCC and that "qualified tangible property" must be located on a qualified site pursuant to Tax Law § 21 (b) (3) (A). The Division argues that the cost of the WMI cannot be eligible for the tangible property credit as no part of the WMI is located on the site.

The Division asserts that petitioners' argument that Tax Law § 21 (a) (3) allows them to include costs properly capitalized under Internal Revenue Code (IRC) (26 USC) §§ 263 and 263A in the TPCC is without merit. According to the Division, petitioners' interpretation would produce an unreasonable result that totally disregards the intent of the BRTC to allow eligible costs paid or incurred to clean up and redevelop a qualified site.

Petitioners assert that the Administrative Law Judge correctly determined that this case is one of pure statutory interpretation, and insofar that the language of Tax Law § 21 is unambiguous, it is proper to include capitalized costs for a project in the definition of qualified tangible property.

Petitioners contend that the WMI were a requirement imposed by the municipality to return the site to beneficial use and since such expenditures were necessary for the projects to proceed, the Administrative Law Judge's construction of Tax Law § 21 was correct.

Petitioners assert that the Division has distorted the way the credit component is to be calculated under Tax Law § 21. In furtherance thereof, petitioners argue that Tax Law § 21 (a) (3) requires petitioners to first determine "the cost or other basis for federal income tax purposes of tangible personal property and other tangible property, including buildings and structural

components of buildings . . . .” According to petitioners, Tax Law § 21 (a) (3) requires applying IRC (26 USC) § 263A (***see also*** Treas Reg [26 CFR] § 263 [a]-3 [e] [2] [i]) to determine the property to which the TPCC applies.

Petitioners assert that the building, including the WMI, meet the definition of qualified tangible property. Petitioners contend that the Division advances an unreasonable interpretation of Tax Law § 21 (a). Petitioners assert that Tax Law § 21 (b) (3) expressly states that it is applicable to “property,” not to individual components of a project. Accordingly, petitioners argue that the determination properly found that petitioners’ calculation of the TPCC component of the BRTC including the costs associated with the WMI required for the building was correct.

***OPINION***

The Brownfield Cleanup Program, established in 2003, aims to encourage the remediation and redevelopment of hazardous waste sites, or brownfields, in New York State (***see*** Environmental Conservation Law §§ 27-1401 to 27-1431). The program creates a statutory framework designed to facilitate private investment in the cleanup of such sites (***Matter of Coltec Indus. Inc.***, Tax Appeals Tribunal, March 18, 2016). Tax Law § 21 was enacted as part of the Brownfield Cleanup Program legislation to promote private development of brownfield sites by offsetting costs associated with, among other things, site preparation, water treatment expenses, and property improvements (***id.***).

Tax Law § 21 (a) (3) (i) describes the requirements for the tangible property component of the BRTC, the construction of which is at issue here. The TPCC is set forth under the statute as “equal to the applicable percentage of the cost or other basis for federal income tax purposes of tangible personal property and other tangible property, including buildings and structural components of buildings, which constitute qualified tangible property . . .” (Tax Law § 21 [a] [3]

[i]). Tax Law § 21 (b) (3) provides in relevant part:

> "'Qualified tangible property' is property described in either subparagraph (A) or (B) of this paragraph which:
>
> (A) (i) is depreciable pursuant to section one hundred sixty-seven of the internal revenue code,
>
> (ii) has a useful life of four years or more,
>
> (iii) has been acquired by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code,
>
> (iv) has a situs on a qualified site in this state, and
>
> (v) is principally used by the taxpayer for industrial, commercial, recreational or environmental conservation purposes (including the commercial development of residential housing)"

The issue in the present dispute centers around the situs requirement found within Tax Law § 21 (b) (3) (A) (iv) that applies to the tangible property for which the taxpayer seeks the BRTC. The Administrative Law Judge found that the Division's interpretation of the situs requirement was unreasonable as it conflicted with the goals of the Brownfield Cleanup Program legislation. As described, the Division interprets the situs requirement under Tax Law § 21 (b) (3) as excluding any tangible property not physically located on the brownfield site that is being redeveloped.

A statute granting a tax credit must be interpreted in the same manner as statutes granting tax exemptions (***Matter of Purcell v New York State Tax Appeals Trib.***, 167 AD3d 1101 [3d Dept 2018], ***lv denied*** 33 NY3d 913 [2019], ***appeal dismissed*** 33 NY3d 999 [2019]). Exemptions from taxation, such as the brownfield redevelopment tax credit here at issue, are not a matter of right, but are allowed only as a matter of legislative grace (***Matter of Constellation Nuclear Power Plants LLC v Tax Appeals Trib. of State of N.Y.***, 131 AD3d 185, 189 [3d Dept

2015], ***appeal dismissed*** 26 NY3d 996 [2015], citing ***Matter of Grace v New York State Tax Commn.***, 37 NY2d 193, 196 [1975], ***rearg denied*** 37 NY2d 816 [1975], ***lv denied*** 338 NE2d 330 [1975]). "A tax credit is 'a particularized species of exemption from taxation'" (***Matter of Golub Serv. Sta. v Tax Appeals Trib. of State of N.Y.***, 181 AD2d 216, 219 [3d Dept 1992], citing ***Matter of Grace v New York State Tax Commn.***) and a taxpayer carries "the burden of showing 'a clearcut entitlement' to the statutory benefit" (***Matter of Golub Serv. Sta.***, at 219 [citation omitted]). A taxpayer is required to prove that "its interpretation of the statute is the only reasonable interpretation" (***Matter of Brooklyn Navy Yard Cogeneration Partners***, Tax Appeals Tribunal, May 9, 2006, confirmed 46 AD3d 1247 [3d Dept 2007], ***lv denied*** 10 NY3d 706 [2008]); ***see also Matter of Astoria Fin. Corp. v Tax Appeals Trib. of State of N.Y.***, 63 AD3d 1316, 1318 [3d Dept 2009]).

Tax credits are a type of exemption to taxation and, consequently, "[s]tatutes creating exemptions must be strictly construed against the taxpayer and, if ambiguity arises, against the exemption, although such statutes should not be interpreted so narrowly as to defeat their settled purposes" (***Matter of Purcell*** at 1103; ***see Matter of Gordon v Town of Esopus***, 15 NY3d 84, 90 [2010]).

We begin our analysis by determining whether the property meets all the requirements of Tax Law § 21 (b) (3) (A). When tangible property, including building and structural components of buildings are completely located on the qualified site, the Division has stated that it would be appropriate to allocate 100% of the cost basis of that component to the qualified site (***see*** Advisory Opinion, TSB-A-13[10]C). However, the Division also opined that if a component or item is partially located on the qualified site, it would be appropriate to allocate the cost basis by a fraction, the numerator of which is the amount of the square footage of the

building on the qualified site and the denominator of which is the square footage of the entire building (***see id.***). That advisory opinion further addresses the allocation of costs as applying to forklifts, and other tangible property, that are stored on the site but move on and off the qualified site. The Division concluded the advisory opinion by endorsing a "principally used" test to determine whether the tangible property has a situs on the qualified site (***id.***).

Here, the WMI, consisting of approximately 2,600 linear feet of new pipe and related infrastructure were not physically located on the site (***see generally*** finding of fact 13). Once the WMI were completed, they were immediately dedicated back to the village (***see*** finding of fact 25). Petitioners capitalized the cost of the WMI to the project because the Village bargained for these improvements as a required component of the project. The Administrative Law Judge found that because the Village bargained for these improvements and, without them, the Village's infrastructure could not sustain the development, petitioners were entitled to the costs that have been properly capitalized to the building.

We do not agree with the determination of the Administrative Law Judge. While the WMI may have served the project and enabled its development, they did not have a situs on the property. On this point, Tax Law § 21 (a) (3) is clear: only qualified tangible property is eligible for the TPCC, and the property must have a situs on a qualified site (***see*** Tax Law § 21 [b] [3] [A] [iv]). The criteria have clearly not been met here as none of the WMI are physically located on the site. Petitioners insist on a broader reading of the statute, arguing that Tax Law § 21 (b) (3) applies to property as a whole and not individual components such as the WMI. Petitioners are requesting the Tribunal to deem any expenditures for tangible property linked to conditions precedent to development of the brownfield site as qualifying for the TPCC. Accepting petitioners' arguments would lead to inclusion of virtually every off-site improvement

cost in the TPCC, so long as it is capitalized into the basis of the property.

While the BRTC is meant to incentivize brownfield redevelopment, the purpose must be balanced with statutory constraints, i.e., the legislative purpose is found within the statutory text itself, and it is not the Tribunal's role to read otherwise clear language out of the statute. The Administrative Law Judge's broad interpretation of the statute fails to align with the plain language of the statute that requires qualified tangible property have a situs on a qualified site. Wholly off-site infrastructure improvements, even when required by a municipality, do not meet the threshold of use in the qualified site and the situs requirement for qualified tangible property on a qualified site as required by Tax Law §§ 21 (a) (3) and (b) (3) (A).

We find that the Division's interpretation of the situs requirement under Tax Law § 21 (b) (3) is a reasonable interpretation. Therefore, we reverse the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Martin B. and Irene B. Ginsburg is denied; and
4. The Notice of Disallowance dated November 14, 2018 is sustained.

DATED: Albany, New York
June 12, 2025

/s/ Jonathan S. Kaiman
Jonathan S. Kaiman
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner