STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALLIED FROZEN STORAGE, INC.	:	DETERMINATION DTA NO. 824721
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Years 2007 through 2009.	:	

Petitioner, Allied Frozen Storage, Inc. filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 2007 through 2009.

On June 19, 2013, petitioner, by Boylan Code, LLP (Paul S. Fusco, Esq., of counsel), and the Division of Taxation, by Amanda Hiller, Esq. (Robert J. Tompkins, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs submitted by October 30, 2013. By letter dated April 18, 2014, the Administrative Law Judge extended the time for issuance of this determination for three months pursuant to Tax Law § 2010(3). After a review of the evidence and arguments presented, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly disallowed petitioner's claim for a qualified Empire Zone credit on the basis that payments in lieu of taxes made by petitioner were not "eligible real property taxes," as defined by Tax Law § 15(e).

II. Whether petitioner, as lessee, is precluded from receiving the benefit of a QEZE real property tax credit for its PILOT payments based upon the capping provision of Tax Law § 15(e).

FINDINGS OF FACT

The parties entered into a stipulation of facts with attached exhibits. The stipulation of facts forms the basis of the findings of fact. The attached exhibits were utilized to make additional findings of fact.

1. The Allied Group is an organization consisting of Allied Frozen Storage, Inc. (AFS) and Sweden Industrial Center, LLC (SIC).

2. Effective March 8, 2006, Blum Enterprises, LLC, acquired SIC. Drew Blum is the sole member of Blum Enterprises, LLC. He was also an officer of AFS and a director of SIC. At that time, the ownership of AFS was as follows: ninety percent of the issued and outstanding shares of AFS were owned by Allied Frozen Storage, Inc. Employee Stock Ownership Plan and the remaining 10 percent were owned by Drew Blum.

3. AFS is a third-party warehousing and logistics company that owns and operates more than 20 million cubic feet of frozen, chilled and dry warehouse space. Its warehouse facilities provide its customers with customized storage, handling and distribution.

4. On October 30, 2001, the Allied Group applied to a public benefit corporation called the County of Monroe Industrial Development Agency (COMIDA) for economic assistance in order to facilitate the acquisition and rehabilitation of a Facility located at 4 Owens Road,

Brockport, New York (the Facility).[1] At the time of the acquisition, the Facility was an approximately 600,000 square foot former manufacturing and warehouse complex situated on 54.4 acres of industrial land. The reason for the acquisition and rehabilitation of the Facility was to accommodate one of AFS's major customers, Agrilink Foods (Agrilink). Agrilink had sought to relocate its distribution and warehousing facilities in Pennsylvania, and the development of the Facility was key to Agrilink's continued presence in Brockport, New York. This impacted the employment of more than 300 individuals at Agrilink.

5. It was clear from the application that AFS would occupy and operate the Facility as a tenant and actually perform business operations at the Facility.

6. As a part of the application, the Allied Group disclosed the financial statements of AFS as the "project tenant." COMIDA approved the application and after certain steps, such as a public hearing and adoption of resolutions, COMIDA authorized its assistance in the development of the Facility by providing certain tax benefits to SIC and AFS.

7. In order to secure the desired tax benefits, COMIDA and SIC entered into a sale-leaseback transaction dated January 1, 2002. Pursuant to this agreement, COMIDA took legal title to the Facility and leased it to SIC. At the conclusion of the lease term, SIC was required to purchase the Facility from COMIDA. In section 3.3 of the agreement, SIC agreed to pay all taxes and government charges with respect to the Facility as well as all payments under the PILOT agreement, which were referenced in Article IX of the agreement.

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[1] This fact is consistent with the stipulation of the parties. The application itself shows that the application was made by SIC, which, as noted above, is part of the Allied Group. It is also noted that when COMIDA gave notice of a public hearing, it considered the applicant to be the Allied Group.

8. One of the benefits conferred upon the Allied Group by COMIDA was the exemption from general real property taxation with respect to the Facility, which exemption was to be offset in part by contractual payments in lieu of taxes (PILOT payments) for the benefit of the affected tax jurisdictions. Accordingly, COMIDA and SIC entered into a Payment in Lieu of Tax Agreement, dated January 17, 2002 (PILOT 1) that provided varying amounts of real property tax relief for a ten-year period. When PILOT 1 was entered into, AFS and SIC had identical ownership.

9. SIC, as the real estate holding company, entered into a lease with AFS, originally effective January 1, 2002 and subsequently amended and restated March 1, 2006, pursuant to which AFS would occupy, operate and maintain the Facility. Pursuant to the terms of the lease, AFS agreed to pay all real property taxes, including PILOT payments, and the lease expressly provided that AFS is to pay the taxes due "in the form of a check payable to the applicable taxing authority." Accordingly, tax bills from Brockport Central School District and the Village of Brockport for the years 2007, 2008 and 2009 were sent directly to AFS. Nevertheless, tax bills from the Town of Sweden and Monroe County were sent to SIC.

10. Each of the tax bills included notations indicating that they were paid during the years in issue.

11. AFS claimed the qualified empire zone enterprise (QEZE) real property tax credits under Tax Law § 15(e) on its returns for the years in question with respect to the Facility.

12. On or about March 31, 2010, the Division of Taxation (Division) mailed a Statement of Tax Reduction or Overpayment to AFS stating that:

> Since the payments in lieu of taxes made by [AFS] were not made pursuant to a written agreement entered into between [AFS] and the County of Monroe Industrial Development Agency, the payments made by [AFS] for property at 4

> Owens Rd. are not eligible real property taxes as defined by Section 15(e) of the Tax Law.

13. In response to the Division's concerns, COMIDA, AFS and SIC amended and restated PILOT 1 by adding AFS as a party (the amended and restated PILOT is known as PILOT 2). A copy of PILOT 2 was distributed to local government officials concerned with taxation in the Rochester and Brockport, New York areas. The letter, which accompanied the distribution, was dated February 24, 2010 and stated that PILOT 2 was not a new PILOT with a new term. Rather, the changes related to technical corrections for property in an Empire Zone.

14. The PILOT 2 agreement provided, among other things, as follows:

> WHEREAS, the parties have agreed to restate and amend the original PILOT Agreement to reflect the agreement and understanding of the parties that since 2002 QEZE has been and continues to be responsible for the payment of real property taxes with respect to the Facility directly to the Taxing Jurisdictions.

15. Paragraph 1(a) of PILOT 2 states that the Company (i.e., SIC) agrees to pay the PILOTs.

16. Paragraphs 9 and 10 of PILOT 2 state as follows:

> 9. Notwithstanding anything herein to the contrary, QEZE is hereby authorized and directed to make all payments for real property taxes assessed against the Facility directly to the Taxing Jurisdiction.
>
> 10. Payment in Lieu of Tax Agreement restates, replaces and supercedes that certain Payment in Lieu of Tax Agreement between the Agency and the Company dated January 17, 2002.

17. PILOT 2 was signed by the executive director of COMIDA on February 16, 2010, retroactive to January 17, 2002. It also bears two signatures of Drew Bum, one as the manager of SIC and one as president and CEO of AFS.

18. The real property on which the Facility was located was designated as an Empire Zone on April 1, 2004. However, AFS was not certified as a QEZE until November 3, 2006, retroactive to October 7, 2002.

19. On March 18, 2010, the Division issued a Notice and Demand for Payment of Tax Due to AFS that stated that tax was due for the year 2007 in the amount of $193,555.00 plus interest for a balance due of $194,107.22. A schedule attached to the notice explained that it was issued in order to recover the amount of the refundable QEZE credit that had previously been taken. According to the schedule, for the year ending December 31, 2007, the payments made by AFS, in lieu of taxes, for the property located at 4 Owens Road were not made pursuant to a written agreement between AFS and COMIDA. As a result, the payments made by AFS were not eligible real property taxes as defined in Tax Law § 15(e) and do not qualify for the real property tax credit. The notice further explained that, since it was determined that the $193,555.00 that was previously refunded was not eligible property taxes, the assessment was issued to recapture the disallowed portion.

20. On March 31, 2010, the Division issued a Statement of Tax Reduction or Overpayment to AFS for the year 2008. The statement disallowed the QEZE claimed for the PILOT on 4 Owens Road for the same reason that the Notice and Demand was issued for the year 2007.[2] The amount of the QEZE credit was reduced from $517,126.00 to $353,753.00.

21. On April 7, 2011, the Division issued a Statement of Tax Reduction or Overpayment to AFS for the year 2009, which again disallowed the QEZE credit claimed for the same reason

[2] The difference between this document and the prior document is that this document disallowed the credit claimed on the corporation franchise tax return for the year 2008 before the credit was paid.

that the Notice and Demand was issued for the year 2007.[3] The amount of the QEZE credit was reduced from $482,739.00 to $319,615.00.

22. In the course of the submission, the Division submitted an amended answer, which sought to add an additional argument that since the property located at 4 Owens Rd., Sweden, New York, was not owned by AFS, it must be excluded from the basis limitation computation set forth in Tax Law § 15(e). According to the answer, the Division has recomputed the basis limitation to include only the basis of the land improvements and building improvements that are the only parts of the property owned by AFS. The recomputed limitations are as follows: $117,977.00 for 2007, $117,389.00 for 2008 and $116,800.00 for 2009.

CONCLUSIONS OF LAW

A. During the years in issue, Tax Law § 15 provided for a credit for 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) states that the amount of the credit is 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 portion of the credit which is not deductible is treated as an overpayment of tax to be credited or refunded (Tax Law § 210[27][b]).

B. The outcome of this proceeding is governed by the interpretation of Tax Law § 15(e). During the period in issue, this section provided, in part:

> 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 are paid by the QEZE which is the owner of the real property or are paid by a tenant which either (i) does not meet the eligibility requirements under section fourteen of this article to be a QEZE or

[3] This document disallowed the credit claimed on the corporation franchise tax return for the year 2009.

> (ii) cannot treat such payment as eligible real property taxes pursuant to this paragraph and such taxes become a lien on the real property during a taxable year in which the owner of the real property is both certified pursuant to article eighteen-B of the general municipal law and a qualified empire zone enterprise.
>
> * * *
>
> In addition, "eligible real property taxes" shall include taxes paid by a QEZE which is a lessee of real property if the following conditions are satisfied: (1) the taxes must be paid by the lessee pursuant to explicit requirements in a written lease executed or amended on or after June first, two thousand five, (2) such taxes become a lien on the real property during a taxable year in which the lessee of the real property is both certified pursuant to article eighteen-B of the general municipal law and a qualified empire zone enterprise and (3) the lessee has made direct payment of such taxes to the taxing authority and has received a receipt for such payment of taxes from the taxing authority. In addition, the term "eligible real property taxes" *includes payments in lieu of taxes made by the QEZE* to the state, a municipal corporation or a public benefit corporation *pursuant to a written agreement entered into between the QEZE and the state, municipal corporation, or public benefit corporation*. (Emphasis added.)

C. Since petitioner is seeking a tax credit, it bears the burden of proof of establishing through clear and convincing evidence that the exemption applies and that it is entitled to the statutory benefit (***see e.g. Matter of Golub Serv. Sta. v. Tax Appeals Trib.***, 181 AD2d 216 [1992]; ***Matter of The Golub Corporation***, Tax Appeals Tribunal, May 31, 2012, ***confirmed*** __ AD3d __ [2014]).

D. The Division argues that the outcome of this matter is governed by the ***Golub*** case and petitioner has responded that ***Golub*** is distinguishable from the instant matter. It follows that a careful examination of ***Golub*** is in order.

In ***Golub***, the taxpayer owned and operated many supermarkets and was certified as a QEZE in a number of empire zones, including Schenectady County, New York. In 2004, which was after its earliest QEZE effective date, Golub determined that it needed a larger freezer facility in order to expand its distribution of frozen food.

Rotterdam Ventures was the owner of an industrial park and FM Ventures, an affiliate of the owner of the industrial park, leased the industrial park from Rotterdam Ventures. Golub agreed to sublease the property within the industrial park from FM. Thereafter, Golub and FM structured a transaction whereby a freezer facility was built under Golub's supervision for the exclusive use of Golub. Golub chose this particular industrial site because of the availability of Empire Zone credits.

FM, as landlord, and Golub, as tenant, executed a sublease agreement for the property at the industrial site. Pursuant to the terms of the sublease, Golub was obligated to make all tax payments including PILOT payments under a PILOT agreement. The sublease gave Golub the right to review and approve any PILOT agreement that FM might enter. It also prohibited FM from executing a PILOT agreement without approval from Golub.

FM submitted an application to the Rotterdam IDA seeking financial assistance wherein it identified Golub as the occupant of the facility and all disclosures concerning employment and cost/benefit analysis were specific to Golub. Golub also submitted its own application for financial assistance to the IDA pertaining to items it was going to purchase on its own.

As the new facility progressed, FM and Golub restated the sublease to reflect changes after the execution of the sublease. Among the changes noted were: (1) Golub approved the August 1, 2005 PILOT Agreement, (2) FM was obligated to authorize the taxing jurisdictions to send tax bills or PILOT agreements directly to Golub, and (3) Golub was obligated under its sublease with FM to make tax payments, including PILOT payments, directly to the taxing jurisdiction subject to Golub's option to cease such payments and instead make the tax payments directly to FM.

The amended sublease and the initial sublease provisions differed with respect to the payment of taxes insofar as under the original sublease, Golub paid the property taxes directly to

FM whereas under the amended sublease Golub's obligation to make payments directly to the taxing jurisdictions commenced upon the receipt of the 2006-2007 school tax bill.

Upon completion of the facility, the impacted taxing jurisdictions sent the bills for the payments due under the PILOT agreement to FM. However, the county and town bills were addressed to Golub through a "care of" designation. The PILOT amounts due were paid by Golub directly to the taxing jurisdiction.

The administrative law judge determined that payments in lieu of taxes qualify only if such payments were made pursuant to a written agreement between the QEZE and the taxing governmental bodies. To the extent relevant to this matter, the administrative law judge found Golub's obligation to pay was solely from its sublease with FM and therefore the payments could not be considered "eligible real property taxes" under Tax Law former §15(e).

On appeal, the determination of the administrative law judge was affirmed. After quoting the relevant portions of Tax Law former §15(e), the Tribunal noted that there are three situations wherein a levy constitutes "eligible real property taxes":

> 1) *taxes* paid by a certified and qualified QEZE *owner* of property;
>
> 2) *payments in lieu of taxes* 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"; or
>
> 3) *taxes* paid by a certified and qualified QEZE *lessee* (Tax Law former § 15 [e]) (***Matter of The Golub Corp.***).

The Tribunal then noted that the record lacked a written agreement between Golub and either a taxing jurisdiction or a public benefit corporation that required Golub to remit payments in lieu of taxes. As a result, the Tribunal concluded that Golub's payments did not constitute "eligible real property taxes" because it did not meet the second situation presented above. The

Tribunal also premised its conclusion on the additional factor that Golub had an opt-out clause with respect to its obligation to make payments to the taxing jurisdictions. As a result, it did not view Golub as a direct obligor with respect to the PILOT Agreement between FM and the IDA.

E. Petitioner contends that the ***Golub*** decision is not determinative of the outcome of this case for a series of reasons. Initially, petitioner notes that the parties in ***Golub*** were completely unrelated entities whereas in this case there was an identity of interest between AFS and SIC. According to petitioner, although Tax Law § 15(e) does not have related party relief, precluding it would frustrate the goal of the Legislature to induce capital investment and promote job creation. A second distinction is that the opt-out provision gave Golub the right to stop making payments to the various taxing jurisdictions whereas in this case AFS was, at all times, obligated to make the PILOT payments. Third, petitioner calls attention to the execution of PILOT 2, which establishes an obligation by AFS to the taxing jurisdictions for any of the payments in issue. Lastly, petitioner points out that in this case the Facility was not an Empire Zone until after the execution of PILOT 1 and AFS was not certified as a QEZE until November 3, 2006 retroactive to October 7, 2002. In ***Golub***, however, at the time the PILOT agreement was executed the property had been designated as an Empire Zone and Golub was certified as a QEZE.

In its reply brief, petitioner submits that PILOT 1 and PILOT 2, individually and together, satisfy the written agreement requirement of Tax Law § 15(e). Alternatively, petitioner maintains that PILOT 1 and the Sublease collectively satisfy the written agreement requirement. Petitioner also submits that the amended and restated PILOT agreement is retroactively binding on all of the parties with respect to the QEZE credits. According to petitioner, PILOT 2 is not a

new agreement but rather an amendment and restatement of PILOT 1 to reflect the understanding of the parties.

F. The arguments raised by petitioner do not warrant distinguishing ***Golub***. With respect to the contention that AFS and SIC had an identity of interest, it must be remembered that each of the firms were separate and distinct business entities. Petitioner has correctly noted that Tax Law § 15(e) does not contain a provision for related party relief. Having chosen the form of business organization in which to conduct business, it is reasonable to hold petitioner to the consequences of its choice. Petitioner is also correct that ***Golub*** had the right to stop making payments and that this option was not available to AFS. Moreover, the right to stop making payment was clearly an important consideration of the Tribunal in ***Golub***. However, this was not the only critical factor upon which the ***Golub*** decision was based. The absence of a written agreement between Golub and an eligible entity was also determinative of the outcome.

Lastly, the fact that AFS was not certified as a QEZE in 2002 does not warrant distinguishing this case from ***Golub***. As pointed out by the Division, petitioner could have signed the original PILOT agreement at the time of its execution even if it were not a QEZE or the original agreement could have been amended to include AFS when it became a QEZE.

G. Petitioner argues that a written agreement exists between AFS as the QEZE and COMIDA for three reasons. First, petitioner maintains that the agreement between AFS, SIC and COMIDA has been clear since the agreement's commencement. Second, petitioner contends that PILOT 2 is binding on all parties as of January 17, 2002 and third, the documents taken as a whole constitute a written agreement within the meaning of Tax Law § 15(e).

Petitioner argues that a contract is to be interpreted in order to give effect to the intention of the parties and that an amendment may be applied retroactively where the evidence establishes

that the amendment was made with the expectation that the parties would be bound prior to that date. Petitioner submits that the intention of the parties is clear, that the close relationship between AFS and SIC was evident to COMIDA, and that the Allied Group revealed that AFS was the project tenant and would ultimately bear the responsibility for the PILOT payments. According to petitioner, since SIC is a real estate holding company with no employees and no source of income other than rent from AFS, COMIDA always knew that AFS would ultimately be responsible for making the PILOT payments. Petitioner submits that SIC was never meant to be the beneficiary of the financial aspects of the arrangement.

Petitioner notes that when the Division first mentioned its current interpretation of Tax Law § 15(e) in 2009, COMIDA, AFS and SIC executed PILOT 2, wherein they confirmed that any PILOT payments were the responsibility of AFS and explicitly listed AFS as a party. Petitioner further notes that COMIDA, AFS and SIC expressly stated that PILOT 2 was effective January 17, 2002. In this regard, petitioner stresses that while the Division ignores the retroactive effect of PILOT 2, the QEZE Certificate of Eligibility was issued on November 3, 2006 yet it was effective as of October 7, 2002.

According to petitioner, the Division is employing a constrained view of the relevant statutory language by denying credits unless the "written agreement" is a single document. It is submitted that this is not required and is contrary to the nature of modern transactions. Petitioner maintains that AFS as the operating company entered into a lease with SIC as the landlord, and at the same time, SIC entered into a series of obligations with COMIDA . It is petitioner's position that the two documents were agreed upon at the same time and intended to be interrelated. Petitioner posits that they created a "written agreement" whereby COMIDA could enforce the PILOT payments.

H. Many of the arguments raised by petitioner were addressed in ***Golub***. Tax Law § 15(e) clearly states that the payments in lieu of taxes must be pursuant to a written agreement between a QEZE and an eligible entity. Relying upon the plain language of the statute, the Tribunal in ***Golub*** expressly rejected any suggestion that it is unnecessary to produce a written PILOT agreement between the entity paying the taxes and the taxing jurisdictions or a public benefit corporation. The determinative fact in this matter is that at the time the payments were made, they were tendered pursuant to a lease obligation and not a PILOT agreement. This obligation does not satisfy the statutory requirement of Tax Law § 15(e).

It is evident from the record that there was a close relationship between AFS and SIC, and it was also clear that it was widely known that AFS would be the project tenant. However, this showing is not sufficient to satisfy the statutory requirement. There must be a written agreement between a QEZE and an eligible entity. Petitioner's planned occupancy of the premises and its impact upon the PILOT negotiations does not satisfy this burden (***see Matter of the Golub Corporation***).

I. Petitioner contends, in the alternative, if it were concluded that there was not a written agreement, the substantial compliance doctrine allows it to satisfy the requirement of a written agreement. Petitioner posits that the requirement in Tax Law § 15(e) that the QEZE be a party to a written agreement does not relate to the essence of the statute, which is to provide tax credits to businesses that provide economic development and create jobs. According to petitioner, it met all of the criteria and AFS complied with the statutory criteria in all other respects.

The forgoing argument cannot be accepted. An administrative agency is not at liberty to ignore a statutory requirement that the payments in issue be made pursuant to a written agreement (***Matter of the Golub Corporation***).

J. Petitioner contends that PILOT 2 is binding on the parties effective January 2, 2002 and constitutes a written agreement that satisfies the requirement of Tax Law § 15(e). This argument is also unpersuasive. In reaching this conclusion, it is recognized that where the parties enter into a written agreement stating that it is effective "as of" a certain date, which is earlier then the date the agreement is executed, the parties are bound by their agreement (***see generally*** 22 NY Jur 2d, Contracts, § 14). In fact, however, at the time the payments were made, a document satisfying the requirements of Tax Law § 15(e) had not been executed. The parties may not contractually agree that a different set of events occurred than those that actually took place in order to establish entitlement to a credit. The adoption of petitioner's position would, as a practical matter, remove the statutory requirement that the payments be made pursuant to a written agreement between a QEZE and an eligible entity. It would also make the rationale of ***Golub*** a nullity.

K. Petitioner contends that the Division's position is contrary to the legislative intent of Tax Law § 15(e). According to petitioner, the Division erroneously interprets the phrase "a written agreement" in Tax Law § 15(e) to mean a single written agreement or contained in one document, which precludes the consideration of a group of documents or other indicia to prove the character of the arrangement.

Petitioner notes that there have been a series of revisions to Tax Law § 15(e) that expanded the group of taxpayers that were eligible for QEZE tax credits. According to petitioner, the Division's position thwarts the legislative intent and is incongruous with the expansion of the definition of eligible real property taxes. In this regard, petitioner points out that AFS was bound to make PILOT payments, created the necessary jobs and was involved in

the type of economic development intended by the QEZE program. Petitioner believes that it is unreasonable to interpret the relevant section in such an exclusionary manner.

Petitioner further submits that it fulfilled any possible legislative purpose for a written agreement. It argues that tenants are never parties to PILOT agreements and that the Division's interpretation of a written agreement creates a "booby-trap" for taxpayers because it imposes a requirement that is contrary to the way PILOT agreements are typically structured. Petitioner posits that AFS and SIC could not have known that the written agreement provision would have been interpreted so narrowly at the time they executed the first PILOT agreement.

L. Petitioner's argument with respect to the legislative history was also rejected in ***Golub***. It is recognized that the definition of the term "eligible real property taxes" has expanded over the years. However, the circumstance presented here was not included in such expansion. The clearest indicator of legislative intent is the statutory language (***Matter of Lewis Family Farm Inc. v. New York State Adirondack Park Agency***, 64 AD3d 1009 [2009]) and the Division of Tax Appeals is not at liberty to extend the coverage of statutory language to situations not covered by the statute (***Matter of Bloomingdale Bros. v Chu***, 70 NY2d 218, 223 [1987]). Rather, the Legislature is the only body empowered to provide the remedy sought by petitioner (***Matter of the Golub Corporation***).

M. Petitioner argues that the requirement of "a written agreement" in Tax Law § 15(e) may be satisfied by a group of documents. This argument overlooks the statutory language. The statute clearly requires a written agreement *between* the QEZE and an eligible entity. It is clear from the ***Golub*** decisions that this requirement may not be overlooked. This requirement cannot be met through the adoption of a legal fiction that each of the separate documents is treated as one. For the same reason, petitioner's substantial compliance argument must also be rejected.

N. With respect to the Division's argument regarding the basis limitation, it is recognized that the Tax Appeals Tribunal has permitted the raising of new legal issues after the record is closed (***see Matter of Howard Enterprises***, Tax Appeals Tribunal, August 4, 1994). Since the parties have addressed this matter as a question of law, the issue is properly raised.

Petitioner contends that the Division's position regarding the basis limitation is erroneous. It notes that as a result of the amendment to Tax Law § 15(e) in 2005, the Legislature recognized that taxes paid by a QEZE tenant to a taxing authority under a lease obligation to make such payments constitutes "eligible real property taxes" (L 2005, ch 61). However, since a tenant never has a tax basis in the property it leases, petitioner submits that acceptance of the Division's position means that a lessee will never receive the credit for payments under a PILOT agreement rendering the amendment to the tax law meaningless.

O. Since it is concluded that the payments in lieu of taxes made by petitioner were not "eligible real property taxes," the argument regarding the basis limitation is academic and will not be addressed.

P. It is noted that the determinations of administrative law judges cited in petitioner's briefs have not been addressed because Tax Law § 2010[5] proscribes the citing of such cases as precedent.

Q. The petition of Allied Frozen Storage, Inc. is denied and the Notice and Demand for Payment of Tax Due as well as the statements of tax reduction or overpayment are sustained.

DATED: Albany, New York
May 22, 2014

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE