STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WILLIAM AND ANDREA MCNEARY	:	DETERMINATION DTA NO. 825093
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2007.	:	

Petitioners, William and Andrea McNeary, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2007.

A hearing was held before Timothy Alston, Administrative Law Judge, in Albany, New York, on September 25, 2013 at 9:15 A.M., with all briefs due by February 3, 2014, which date began the six-month period for the issuance of this determination. Petitioners appeared by Driver Greene, LLP (Patrick K. Greene, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel). This matter was transferred to Herbert M. Friedman, Jr., Administrative Law Judge, pursuant to the authority of section 3000.15(f) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

ISSUE

Whether petitioners' claim for QEZE credit for real property taxes paid for the year 2007 was properly disallowed by the Division of Taxation pursuant to Tax Law § 15(e).

FINDINGS OF FACT

1. During 2007, petitioner, William McNeary,[1] was the sole shareholder of Logistics One, Inc., f/k/a Integrated Logistics Corporation (Logistics One), and Logistics One Holding, Inc. (LOH).

2. LOH was the sole shareholder of McNeary, Inc.

3. Logistics One, LOH, and McNeary, Inc., were all flow-through subchapter S corporations pursuant to Internal Revenue Code (IRC) § 1362, allowing for the pass-through of items of income, loss, deduction and credit to petitioner as the sole shareholder.

4. Logistics One became certified under Article 18-B of the General Municipal Law as a Qualified Empire Zone Enterprise (QEZE) within the Saratoga County Empire Zone as of December 27, 2004 and remained certified up to and during the year at issue.

5. On December 28, 2001, McNeary, Inc., as landlord, and Integrated Logistics Corporation[2] and Saratoga Warehouse Associates, Inc., collectively, as tenant, executed a lease agreement for the premises at 29 and 33 Cady Hill Boulevard, Saratoga Springs, New York (2001 Lease Agreement). The two leased buildings were to be used as a public warehouse and transportation facility. The 2001 Lease Agreement, by its terms, was effective January 1, 2002, and had a duration of ten years.

6. The rental provision of the 2001 Lease Agreement called for the tenant to pay the annual rent on a "triple net" basis. This provision made the tenant responsible for the payment of

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[1] Petitioner Andrea McNeary's name appears herein by virtue of having filed joint federal and New York State personal income tax returns with her husband, William McNeary. Unless otherwise specified or required by context, references to "petitioner" shall mean petitioner William McNeary.

[2] Integrated Logistics Corporation was the prior name of Logistics One (***see*** Finding of Fact 1). The difference in names is immaterial to this determination.

all taxes, utilities and insurance. It did not, however, expressly state to whom such payments were to be made.

7. The parties do not dispute that all required real estate taxes for 2007 were timely paid by Logistics One to the applicable taxing authorities during that year.[3]

8. On June 27, 2008, McNeary, Inc., as landlord, and Logistics One, as tenant, executed a lease agreement, with a retroactive effective date of June 1, 2005, for the premises at 29 and 33 Cady Hill Boulevard, Saratoga Springs (2008 Lease Agreement). By its terms, the 2005 Lease Agreement amended, restated, and replaced the 2001 Lease Agreement.

9. The cover page of the 2008 Lease Agreement specifically states that it is dated "as of" June 1, 2005. In the body of the agreement, it goes on to state that it is made "as of the 1st day of June, 2005," and identifies its commencement date as June 1, 2005. The term of the 2008 Lease Agreement is stated as June 1, 2005 through May 31, 2018.

10. The 2008 Lease Agreement is also identified as a "triple net" lease and explicitly requires Logistics One to pay all real estate taxes "directly to the applicable taxing authorities on or prior to the date such [taxes] are due."

11. Petitioners timely filed their joint 2007 New York resident income tax return in August 2008. As sole shareholder of Logistics One, petitioner claimed a QEZE real property tax credit of $72,500.00 on the return attributable to Logistics One's payments in 2007 of real estate taxes for the Cady Hill Boulevard property.

12. The Division of Taxation (Division) subsequently reviewed petitioners' 2007 return and disallowed the QEZE real property tax credit attributable to Logistics One. As a result, on May 26, 2011, the Division issued to petitioners Notice of Deficiency number L-036034652-3,

[3] The record does not reflect the actual date in 2007 on which the real estate taxes were paid.

asserting a tax deficiency of $71,330.00,[4] plus interest. The Division explained its position in the Notice of Deficiency by stating that Logistics One was not eligible for the QEZE real property tax credit because the eligible real property taxes were not paid under a written lease agreement executed or amended on or after June 1, 2005, as required by law.

SUMMARY OF THE PARTIES' POSITIONS[5]

13. Petitioner contends that Logistics One was a certified QEZE that met all of the requirements of Tax Law § 15(e) in making its payments of the 2007 real property taxes for the 33 Cady Hill Boulevard property. As the sole shareholder of Logistics One, a subchapter S corporation, petitioner maintains he was entitled to and properly claimed the QEZE real property tax credit for that year.

14. The Division argues that the 2001 Lease Agreement predated the 2005 statutory amendment to Tax Law § 15(e), thereby precluding its use as a basis for the credit at issue. Moreover, the Division asserts that the 2008 Lease Agreement was not executed until June 2008, and therefore, no written lease agreement executed or amended on or after June 1, 2005 was in existence at the time the 2007 real property taxes were paid. Hence, according to the Division, Logistics One did not comply with the requirements of Tax Law § 15(e) and the credit was incorrectly claimed by petitioners.

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[4] The difference between the $72,500.00 credit claimed on petitioners' return and the $71,330.00 liability in the notice of deficiency reflects credit for an interim tax payment for 2007 of $1,170.00 made by petitioners on July 14, 2010.

[5] Neither party submitted a timely brief for consideration. As a result, their arguments are gleaned from those made at hearing and the evidence in the record.

CONCLUSIONS OF LAW

A. At issue is whether petitioner, as sole shareholder of Logistics One, is entitled to the real property tax credit in Tax Law § 15(e) for real property taxes paid in 2007 pursuant to either the 2001 Lease Agreement or 2008 Lease Agreement. Tax Law § 15(e) was amended in 2005 to expand the definition of the payments that comprised "eligible real property taxes" for purposes of the credit. The relevant language is 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 taxes paid directly by a certified and qualified QEZE tenant to a taxing authority under a timely, 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). It served to expand the previous requirement that the QEZE claiming the credit need be the owner of the property.

B. A tax credit is a particularized species of exemption from tax (***Matter of New York Fuel Terminal Corp***., Tax Appeals Tribunal, August 27, 1998), and statutes creating exemptions from tax are to be strictly construed (***see Matter of Grace v. New York State Tax Commn***., 37 NY2d 193 [1975], ***lv denied*** 37 NY2d 708 [1975]; ***Matter of Blue Spruce Farms v. New York State Tax Commn***., 99 AD2d 867 [1984], ***affd*** 64 NY2d 682 [1984]). It must be remembered, however, that the statutory language providing the exemption must be construed in a practical fashion with deference to the legislative intent behind the exemption (***see*** McKinney's Cons

Laws of NY, Book 1, Statutes § 92[a]; ***see also Majewski v. Broadalbin-Perth Cent. School Dist***., 91 NY2d 577 [1998]; ***Matter of Qualex, Inc***., Tax Appeals Tribunal, February 23, 1995). The plain meaning of the statute's language constitutes the "clearest indicator of the legislative intent" (***see e.g. Matter of New York County Lawyers' Assn. v Bloomberg***, 19 NY3d 712 [2012], ***rearg denied*** 20 NY3d 983 [2012]).

C. In the instant case, the only one of the aforementioned elements required for the credit remaining in dispute is whether payment of the relevant real property taxes by Logistics One was made "pursuant to the explicit requirements in a written lease executed or amended on or after" June 1, 2005 (Tax Law § 15[e]). Initially, the Division correctly points out that the 2001 Lease Agreement was not executed on or after the required date. Further, although the 2001 Lease Agreement was amended after June 1, 2005, it was not an amended lease at the time the 2007 real estate taxes were paid. Therefore, payment of real estate taxes could not be made pursuant to an amendment that did not exist, and the 2001 Lease Agreement cannot satisfy the requirement in Tax Law § 15(e).

Additionally, the Division correctly maintains that the 2008 Lease Agreement does not meet the requirements of Tax Law § 15(e) because that document was not executed until 2008. Petitioner argues that the 2008 Lease Agreement was made effective "as of" June 1, 2005 by its terms. It is true that under New York law, "[i]t is fundamental that where parties to an agreement expressly provide that a written contract be entered into 'as of' an earlier date than that on which it was executed, the agreement is effective retroactively 'as of' the earlier date and the parties are bound thereby accordingly" (***Colello v. Colello***, 9 AD3d 855 [2004]; ***Matthews v. Jeremiah Burns, Inc.***, 205 Misc 1006 [1954]). These cases are distinguishable, though, from the case at bar. They involved enforcement of the "as of" effective date of the contract with regard to the

rights and responsibilities of the parties themselves. In this case, the Division is not a party to the 2008 Lease Agreement. Consequently, although the language in the 2008 Lease Agreement describes its effective date "as of" June 1, 2005, that provision is binding and enforceable upon the parties alone, and the Division cannot be held to such an agreement to its detriment (***see Pacific Carlton Development Corp. v. 752 Pacific, LLC***, 62 AD3d 677 [2009]; ***Bartsch v. Bartsch***, 54 AD2d 940 [1976]).

In sum, the real estate taxes at issue were paid pursuant to the requirements of a written lease that was neither executed nor amended on or after June 1, 2005. Instead, they were paid pursuant to a lease that was amended after such payment. The 2008 Lease Agreement was not in existence in 2007. Hence, in reality, the real estate tax payments at issue could not have been made pursuant to its terms. Petitioners' reading of Tax Law § 15(e) unnaturally twists the statute and forces a result that circumvents its plain meaning. Moreover, such a reading would give rise to innumerable amendments to existing leases by other QEZEs in an attempt to back into the credit. It is highly unlikely that the Legislature intended such a result. Given the high legal standard petitioners face for entitlement to an exemption, their claim must fail.

D. Petitioners also argue that their position is consistent with the spirit of the 2005 amendment to Tax Law § 15(e), which expanded this subsection to permit eligible lessees, and not just owners, to claim the real property tax credit under certain circumstances in order to help promote business in New York State (***see generally Matter of The Golub Corporation,*** Tax Appeals Tribunal, May 31, 2012, ***confirmed*** 116 AD3d 1261 [2014] [discussion of modification over time of Tax Law § 15(e)]). Even if that were so, based on the record presented, petitioners failed to comply with the technical requirements of Tax Law §15(e). As the Appellate Division

has recently held, such strict compliance is essential, no matter how unsavory, in order to receive the benefit of the real property tax credit (***see Matter of The Golub Corporation***).

E. The petition of William and Andrea McNeary is denied, and the Notice of Deficiency dated May 26, 2011, is sustained.

DATED: Albany, New York
June 19, 2014

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE