STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANGELO AND ELENA BALBO	:	DETERMINATION DTA NOS. 825765
for Redetermination of Deficiencies or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2011 and 2012.	:	AND 826269

Petitioners, Angelo and Elena Balbo, filed petitions for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 2011 and 2012.

A hearing was held before Arthur S. Bray, Administrative Law Judge in Albany, New York, on September 18, 2014 at 10:30 A.M., with all briefs due by March 9, 2014, which date began the six-month period for the issuance of this determination. Petitioners appeared by Hiscock & Barclay, LLP (David G. Burch, Jr., Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

ISSUE

Whether the payment by Balbo Management, LLC, as a tenant, into a lender's escrow account established for the payment of real property taxes to the taxing jurisdictions constitutes "eligible real property taxes" under Tax Law § 15(e).

FINDINGS OF FACT

1. Angelo Balbo is the sole shareholder of Angelo Balbo Realty Corp. (Balbo Realty). Balbo Realty is a New York corporation that elected to be taxed under Subchapter S of the Internal Revenue Code.

2. Angelo Balbo Management LLC (Balbo Management) is a New York limited liability company whose sole member is Angelo Balbo. Since July 30, 2002, Balbo Management has been certified in the Empire Zone at various locations, including a parcel located at 9-11 Raymond Avenue, Poughkeepsie, New York (the property).

3. Balbo Management entered into a lease agreement commencing on January 1, 2008, whereby Balbo Realty, as landlord, leased the property to Balbo Management, as tenant (Original Lease Agreement). The Original Lease Agreement provided that the tenant would pay the landlord the amount due on the tax bills. Subsequently, Balbo Realty and Balbo Management entered into a Revised Lease Agreement, dated November 1, 2009, which required Balbo Management to make payment of all state, county, city and school taxes directly to the taxing authority. The Revised Lease Agreement was in effect during the audit period.

4. Previously, Balbo Realty, as borrower, entered into a Loan Agreement, dated March 14, 2007, with IXIS Real Estate Capital Inc. (the Lender) with respect to the property (Loan Agreement). Angelo Balbo executed the Loan Agreement as the managing member of Balbo Management and sole shareholder of Balbo Realty. The Loan Agreement required Balbo Realty to make monthly payments to the Lender. The amounts were to be deposited into an escrow account, known as the "Tax and Insurance Subaccount." Wells Fargo was the Lender's servicing agent and the amounts were held for payment to the taxing authority of all real estate taxes on the property.

5. Balbo Management made payments to the Lender for deposit into the Tax and Insurance Subaccount, and the Lender made payment of the real property taxes from the subaccount to the taxing jurisdictions.[1]

6. Petitioners filed joint New York State income tax returns for the years 2011 and 2012. On each return, petitioners claimed tax credits arising from Balbo Management's certification as an empire zone enterprise. One of the credits claimed was the Qualified Empire Zone Enterprise (QEZE) credit for real property taxes. Balbo Management determined the amount of QEZE credit on property owned by Balbo Management and on property leased by Balbo Management including the property. In order to calculate the amount of the credit, petitioners relied in part upon the property tax bills from the Town of Poughkeepsie and Dutchess County for the 2011 and 2012 calendar years and the Poughkeepsie school tax bill for the fiscal years ended June 30, 2012 and June 30, 2013, less any special assessments.

7. On audit, the Division reduced the amount of the refund claimed for 2011 and 2012 on the basis that Balbo Management made real property tax payments to Balbo Realty's tax escrow account rather than directly to the taxing jurisdictions. The Division reached this conclusion following a review of the cancelled checks payable to the escrow account, an examination of Schedule E of petitioners' income tax return and Schedule 8825 pertaining to Balbo Realty.

8. On the basis of the foregoing, the Division issued a notice dated November 1, 2012, reducing the amount of the refund claimed for the year 2011 from $240,126.00 to $99,465.04. Similarly, on April 4, 2014, the Division issued a notice that stated that the amount of refund claimed for the year 2012 had been reduced from $241,103.00 to $86,850.48.

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[1] The checks from Balbo Management were made payable to Wells Fargo.

SUMMARY OF THE PARTIES' POSITIONS

9. Petitioners contend that the Division's modifications are prohibited by Tax Law § 15 because there is no indication that payments into an escrow account are prohibited. According to petitioners, the Division's contention that the payment of property taxes into an escrow account established by the lender for the payment of taxes to a taxing jurisdiction does not constitute a direct payment of property taxes circumvents the tax law. Petitioners note that the purpose of the law was to create tax free Empire Zone programs in order to maintain and increase employment. Petitioners submit that the Legislature required that the tenant make the payment of real property taxes directly to the taxing jurisdiction in order to ensure that the tenant and the owner did not both claim the credit. They also posit that the definition of "eligible real property taxes" was modified to allow tenants to take advantage of the tax credit because it was allegedly recognized that the tenant was more likely to create employment in the Empire Zone.

10. In essence, the Division contends that taxes are not eligible real property taxes since they were not paid directly to a taxing authority.

11. In a reply brief, petitioners reiterate their previous arguments and further assert that the payments into an escrow account are tantamount to payments to the taxing authority. Petitioners note that payments by owners of property are treated as eligible real property taxes after they are released from escrow to the taxing authority. Petitioners posit that the result should be no different for a tenant that is required by its lease to pay taxes to a lender required escrow account rather than a taxing authority.

CONCLUSIONS OF LAW

A. Tax Law § 15(e) states:

> "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" (emphasis added).

B. Since petitioners are seeking a tax credit, they bear the burden of proof of establishing through clear and convincing evidence that the exemption applies and that they are entitled to the statutory benefit (***see e.g. Matter of The Golub Corporation***, Tax Appeals Tribunal, May 31, 2012, ***confirmed*** 116 AD3d 1261 [3d Dept 2014]).

C. In this instance, the plain language of the statute that governs the outcome of this matter requires that the lessee make a direct payment to the taxing authority. However, despite this requirement, petitioners made their payments to a tax escrow account. There is no question that the amounts deposited in the tax escrow account were ultimately paid to the taxing jurisdictions.

D. In ***Golub***, the Court was confronted with a situation where it appeared that the imposition of the plain language of the Tax Law presented an inequitable outcome. In response to this circumstance, the Court stated:

> "We cannot, under long settled principles of statutory interpretation, essentially rewrite an unambiguous provision of a statute by ignoring explicit language, no matter how equitable such a result may appear (***see .e.g. Matter of DaimerChrysler Corp. v. Spitzer***, 7 NY3d 653, 660 [2006] ['Courts should construe unambiguous language to give effect to its plain meaning.']; ***Majewski Broadalbin-Perth Cent. School Dist.***, 91 NY2d 577, 583 [1998], quoting ***Tompkins v. Hunter***, 149 NY 117, 122-123 [1896]['"'In construing statutes, it is

> a well-settled rule that resort must be had to the natural signification of words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning’’’’]).

E. The reasoning of the Court in ***Golub*** is controlling here. In view of the explicit language of Tax Law § 15(e), which requires that the payments be made directly to the taxing authorities, and the fact that the payments in issue were made to an escrow account, I am constrained to sustain the Division’s denial of a portion of the refunds.

F. The petitions Angelo and Elena Balbo are denied and the notices adjusting the refunds are sustained.

DATED: Albany, New York
August 27, 2015

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE