STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
GREG SCHAHET, LISA SCHAHET SCHUSTER AND JASON S. SCHUSTER, JEFFREY AND WENDY BROWN, AND GARY AND PHYLLIS SCHAHET	:	DETERMINATION DTA NOS. 827351, 827352, 827353 AND 827354
for Redetermination of Deficiencies or for Refunds of New York Personal Income Tax under Article 22 of the Tax Law for the Years 2011 through 2013.	:	

Petitioners, Greg Schahet, Lisa Schahet Schuster and Jason S. Schuster,[1] Jeffrey and Wendy Brown, and Gary and Phyllis Schahet, filed petitions for redetermination of deficiencies or for refunds of New York State personal income tax under article 22 of the Tax Law for the years 2011 through 2013.

On December 4, 2017 and December 14, 2017, respectively, petitioners, appearing by Hodgson Russ LLP (Christopher L. Doyle, Esq., and Ariele R. Doolittle, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Tobias Lake, Esq., of counsel), waived a hearing and agreed to submit these matters for consolidated determination based upon documents and briefs to be submitted by May 30, 2018, which date began the six-month period for issuance of this determination. After review of the evidence and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

[1] Prior to her marriage to Jason Schuster, Lisa Schahet Schuster was Lisa Schahet. Jason Schuster is not a petitioner for the years 2011 and 2012, and is a petitioner for the year 2013 only by virtue of his filing a joint tax return with Lisa Schahet Schuster for that year.

ISSUES

I. Whether the Division of Taxation's decision to grant Schenectady Hotel LLC's request under Tax Law § 15 (e) to disregard certain basis adjustments on a prospective-only basis was arbitrary and capricious and/or an abuse of discretion.

II. Whether the Division of Taxation properly calculated the payments in lieu taxes limitation or "cap" provided in Tax Law § 15 (e) by using the estimated effective full value tax rate within Schenectady County for each of the relevant years.

FINDINGS OF FACT

The parties submitted a joint stipulation of facts into the record. Such stipulated facts have been substantially incorporated into the findings of fact set forth herein. In addition, petitioners submitted 68 proposed findings of fact, all of which have been accepted and substantially included in the findings of fact set forth herein. The Division of Taxation (Division) submitted 31 proposed findings of fact. The Division's proposed findings of fact 1 through 6, 8, 12 through 16, and 18 through 31 have been accepted and substantially incorporated into the findings of fact set forth herein. The Division's proposed finding of fact 7 and 10 are rejected as irrelevant. The Division's proposed finding of fact 9 is rejected as argumentative and a misstatement of the record. The Division's proposed findings of fact 11 and 17 are rejected as irrelevant and argumentative. Additional findings of fact have been made and set forth herein.

1. Petitioners were members of Schenectady Hotel, LLC (SHLLC), during the years 2011 through 2013.[2]

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[2] "Petitioners" refers to those captioned petitioners who were, during the tax years at issue, direct owners of interests in SHLLC. Certain captioned petitioners may be included in this matter for no reason other than that they are spouses who filed joint returns with direct-owning petitioners.

2. Petitioners filed timely nonresident income tax returns (forms IT-203) for each of the years 2011, 2012, and 2013 (audit period).

3. On August 2, 2006, SHLLC was certified as a Qualified Empire Zone Enterprise (QEZE) in the Schenectady Empire Zone. The New York State Department of Economic Development, Empire State Development, issued to SHLLC an Empire Zone Retention Certificate (EZRC) that was "[r]equired to claim Empire Zone and Qualified Empire Zone Enterprise tax credits for tax year 2008 and later."

4. During 2006 and 2007, SHLLC invested funds to develop a new hotel property (Hotel) in Schenectady, New York, which it owned and operated during the years 2011 through 2013. The initial financial investment by SHLLC in the Hotel was approximately $10 million.

5. To help facilitate the development of the Hotel, SHLLC entered into an agreement through which the Schenectady County Industrial Development Agency (SCIDA) took an underlying leasehold interest in the real estate and building comprising the Hotel. As a result, the Hotel became exempt from New York State real property taxes to the extent the real property leased by an industrial development agency is tax exempt.

6. After SHLLC's initial financial investment was included in its federal income tax basis in the Hotel, SHLLC's federal tax basis in the Hotel was reduced by two events. First, the basis was reduced by nearly $1.8 million to account for SHLLC's receipt of a grant from Empire State Development in 2007. Second, the basis was reduced by $2.5 million to account for SHLLC's receipt of a $5 million allocation of the Federal Renewal Community benefit in 2007. The basis reductions resulting from both events were required by the Internal Revenue Code.

7. In late 2006 and early 2007, SHLLC entered into agreements with Schenectady Metroplex Development Authority (Metroplex) and the SCIDA to make payment in lieu of tax

(PILOT) payments. There was a subsequent amendment in 2011. Pursuant to the PILOT Agreement, SHLLC agreed to make PILOT payments directly to Metroplex for property located at the southwest corner of State and Clinton Streets,[3] in the City of Schenectady, County of Schenectady. The PILOT Agreement was signed by Greg Schahet as the managing member of SHLLC.

8. SHLLC made the required PILOT payments of $200,000.00 to Metroplex during the years 2011 through 2013. The payments required under the PILOT Agreement were lower than the taxes SHLLC would have otherwise paid.

9. SHLLC timely filed its New York State partnership returns (forms IT-204) for the calendar years 2011, 2012, and 2013 and claimed the QEZE Credit for Real Property Taxes for each of such years. On each of these partnership returns, SHLLC indicated that it had five article 22 partners.

10. Along with its forms IT-204 for the years 2011 through 2013, SHLLC filed claims for QEZE Credit for Real Property Taxes (forms IT-606). On line 46 of the forms IT-606, SHLLC reported eligible real property taxes of $286,880.00, $338,017.00, and $364,195.00 for the years 2011, 2012, and 2013, respectively.

11. SHLLC claimed a QEZE Real Property Tax Credit (QEZE Credit) in the amount of $286,880.00 for each of the years 2011 and 2012, and claimed a QEZE Credit in the amount of $364,195.00 for the year 2013. The QEZE credits were reported as "Other flow-through credits" on SHLLC's forms IT-204, line 147a, for each of the years 2011 through 2013.[4]

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[3] The street address of this 1.3 acre parcel is 450 State Street, Schenectady, New York.

[4] The $286,880.00 QEZE credit reported on line 147a of SHLLC's 2012 form IT-204 was an error. The QEZE credit reflected on SHLLC's 2012 form IT-606 was $338,017.00.

12. The eligible real property taxes described in finding of fact 11 included (a) the PILOT payments to Metroplex, (b) real property taxes paid to the City of Schenectady, and (c) real property taxes paid to the Schenectady City School District, as follows:

Eligible Real Property Taxes Reported

	2011	2012	2013
PILOT Payment	$200,000.00	$200,000.00	$200,000.00
City Tax	$ 41,078.00	$ 64,434.00	$ 80,069.00
School Tax	$ 45,802.00	$ 73,583.00	$ 84,126.00
Total Eligible Real Property Tax	$286,880.00	$338,017.00	$364,195.00

13. In calculating the QEZE credits, SHLLC reported a net new employment number of 1.0 during each of the years in the audit period.

14. SHLLC's benefit period factor was 1.0 during each of the years in the audit period.

15. The benefits of the QEZE credits claimed by SHLLC for the years 2011 through 2013 flowed through to petitioners (as members of SHLLC) and were claimed on petitioners' respective nonresident income tax returns.

16. If the Hotel had not been exempt from real property taxes to the extent provided by the agreement described in finding of fact 5 and the PILOT Agreement, it would have been subject to real property taxation by Schenectady County, the City of Schenectady, and the Schenectady School District (collectively, taxing jurisdictions) during the years 2011 through 2013.

17. The sum of the real property tax rates that would have been imposed by the taxing jurisdictions in 2011 through 2013 on the Hotel, were it not exempt from taxation to the extent provided by the agreement described in finding of fact 5 and the PILOT Agreement, are as follows:

Year	Sum of Tax Rates (per $1000 of assessed value)
2011	$40.6527
2012	$41.5750
2013	$42.8629

Greg Schahet (DTA No. 827351)

18. Petitioner Greg Schahet timely filed nonresident and part-year resident income tax returns (forms IT-203) for each of the years 2011 through 2013.

19. On line 61 of his nonresident income tax return filed for the year 2011, Mr. Schahet claimed refundable QEZE credits in the total amount of $66,606.00, as pass throughs from two QEZEs, i.e., SHLLC and State Street Hotel, Inc.

20. On line 61 of his nonresident income tax returns filed for the years 2012 and 2013, Mr. Schahet claimed refundable QEZE credits in the amount of $70,984.00 and $76,481.00, respectively, as a pass through from SHLLC.

21. On January 26, 2015, the Division issued a notice of deficiency (assessment no. L-042264598) to Mr. Schahet asserting additional personal income tax due in the amount of $12,346.00, plus interest and penalty, for the year 2011.

22. By an "Account Adjustment Notice - Personal Income Tax" (notice of account adjustment), dated December 15, 2014, the Division disallowed a portion ($10,629.00) of the pass through QEZE Credit claimed as a refundable credit by Mr. Schahet on his 2012 nonresident income tax return.

23. On March 31, 2015, the Division issued a letter disallowing $9,426.00 of the pass through QEZE Credit claimed as a refundable credit by Mr. Schahet on his 2013 nonresident income tax return.

24. The tax asserted due by Greg Schahet for the year 2011 and the partial refund disallowances for the years 2012 and 2013 resulted from the Division reducing the amount of QEZE credits from SHLLC claimed by him in the forms IT-203 filed for these years.

Lisa Schahet Schuster and Jason S. Schuster (DTA No. 827352)

25. For the years 2011 and 2012, Lisa Schahet timely filed nonresident income tax returns. Petitioners Lisa Schahet Schuster and Jason S. Schuster timely filed a joint nonresident income tax return for the year 2013.

26. On line 61 of her nonresident income tax return filed for the year 2011, Ms. Schahet claimed refundable QEZE credits in the total amount of $66,606.00 as pass throughs from two QEZEs, i.e., SHLLC and State Street Hotel, Inc.

27. On line 61 of her nonresident income tax return filed for the year 2012, Ms. Schahet claimed a refundable QEZE Credit in the amount of $70,984.00 as a pass through from SHLLC. On line 61 of their nonresident income tax return filed for the year 2013, Ms. Schahet Schuster and Mr. Schuster claimed a refundable QEZE Credit in the amount of $76,481.00, as a pass through from SHLLC.

28. On January 26, 2015, the Division issued a notice of deficiency (assessment no. L-042264597) to Ms. Schahet asserting additional personal income tax due in the amount of $12,346.00, plus interest and penalty, for the year 2011.

29. By a notice of account adjustment, dated December 4, 2014, the Division disallowed a portion ($10,629.00) of the pass through QEZE Credit claimed as a refundable credit by Ms. Schahet on her 2012 nonresident income tax return.

30. On March 31, 2015, the Division issued a letter disallowing $9,426.00 of the pass through QEZE Credit claimed as a refundable credit by Ms. Schahet Schuster and Mr. Schuster

on their 2013 nonresident income tax return.

31. The tax asserted due for the year 2011 and the partial refund disallowances for the years 2012 and 2013 resulted from the Division reducing the amount of QEZE credits from SHLLC claimed by Lisa Schahet Shuster and Jason S. Schuster during these years.

Jeffrey and Wendy Brown (DTA No. 827353)

32. Petitioners Jeffrey and Wendy Brown timely filed nonresident income tax returns for the years 2011 through 2013.

33. On line 61 of their nonresident income tax return filed for the year 2011, Mr. and Mrs. Brown claimed refundable QEZE credits in the total amount of $31,431.00, as pass throughs from two QEZEs, i.e., SHLLC and State Street Hotel, Inc.

34. On line 61 of their nonresident income tax returns filed for the years 2012 and 2013, Mr. and Mrs. Brown claimed refundable QEZE credits of $33,802.00 and $36,420.00, respectively, as a pass through from SHLLC.

35. On January 28, 2015, the Division issued a notice of deficiency (assessment no. L-042268911) to Mr. and Mrs. Brown asserting additional personal income due in the amount of $5,879.00, plus interest and penalty, for the year 2011.

36. On January 28, 2015, the Division issued a notice of deficiency (assessment no. L-042268912) to Mr. and Mrs. Brown asserting additional personal income due in the amount of $5,061.00, plus interest and penalty, for the year 2012.

37. On August 24, 2015, the Division issued a notice of deficiency (assessment no. L-043314606) to Mr. and Mrs. Brown asserting additional personal income due in the amount of $4,489.00, plus interest, for the year 2013.

38. The tax asserted due for the years 2011, 2012, and 2013 resulted from the Division

reducing the amount of QEZE credits from SHLLC claimed by Mr. and Mrs. Brown during these years.

Gary and Phyllis Schahet (DTA No. 827354)

39. Petitioners Gary and Phyllis Schahet timely filed nonresident income tax returns for the years 2011 through 2013.

40. On line 61 of their nonresident income tax return filed for the year 2011, Mr. and Mrs. Schahet claimed refundable QEZE credits in the total amount of $214,163.00, as pass throughs from two QEZEs, i.e., SHLLC and State Street Hotel, Inc.

41. On line 61 of their nonresident income tax returns filed for the years 2012 and 2013, Mr. and Mrs. Schahet claimed refundable QEZE credits of $162,248.00 and $174,513.00, respectively, as a pass through from SHLLC.

42. On January 26, 2015, the Division issued a notice of deficiency (assessment no. L-042265265) to Mr. and Mrs. Schahet asserting additional personal income due in the amount of $28,722.00, plus interest, for the year 2011.

43. By a notice of account adjustment dated December 15, 2014, the Division disallowed a portion ($24,293.00) of the pass through QEZE Credit claimed as a refundable credit by Mr. and Mrs. Schahet on their 2012 nonresident income tax return.

44. On March 31, 2015, the Division issued a letter disallowing $21,551.00 of the pass through QEZE Credit claimed as a refundable credit by Mr. and Mrs. Schahet on their 2013 nonresident income tax return.

45. The tax asserted due for the year 2011 and the partial refund disallowances for the years 2012 and 2013 resulted from the Division disallowing a portion of the QEZE credits from SHLLC claimed by Mr. and Mrs. Schahet during these years.

46. On May 27, 2015, while the refund and assessment statute of limitations periods were still open for all of the tax years at issue in this matter, Christopher Doyle, Esq., on behalf of SHLLC, submitted a written request to the commissioners of the Departments of Taxation and Finance and Economic Development to disregard the basis adjustments described above in finding of fact 6 for purposes of the QEZE credits pursuant to Tax Law § 15 (e) (A) (ii) (Basis Request).[5] The letter asserted, in part, as follows:

> "Following its certification as a QEZE, [SHLLC] built a new hotel in the City of Schenectady with the expectation that it would enjoy the full range of tax benefits available under the Empire Zones Program.
>
> [SHLLC] received $1,778,202 in grant funds from Empire State Development to be used to assist in the construction of the hotel. For federal tax purposes, the grant was treated as a non-shareholder contribution under I.R.C. § 118 and was reflected as such on the balance sheet of [SHLLC's] 2007 federal income tax return (Form 1065, Schedule L). In accordance with this treatment [SHLLC] reduced its basis in the hotel by the amount of the grant.
>
> [SHLLC] also requested and received a $5 million allocation of the Federal Renewal Community benefit in 2007, the year in which the hotel was placed in service. That allowed [SHLLC] to deduct $2,500,000.00 from its federal taxable income in 2007. The federal tax 'quid pro quo' for this special benefit was a reduction in [SHLLC's] federal tax basis in the hotel by $2,500,000.
>
> We submit that the basis reductions resulting from both [SHLLC's] receipt of the grant and its participation in the Federal Renewal Community Program should be disregarded for purposes of the QEZE Credit for Real Property Taxes (the 'Credit') under Tax Law § 15 for several reasons: (1) the adjustments distort the amount expended by [SHLLC] to improve the real property, (2) the adjustments do not accurately reflect the fair value of the real property, and (3) disregarding the adjustments is consistent with the purpose of the Credit, which is to provide an Empire Zone credit for [PILOTS] in an amount not to exceed the real property taxes that might otherwise apply."

47. By letter dated July 2, 2015, Amanda Hiller, Esq., the Department of Taxation and Finance's (Tax Department) Deputy Commissioner and Counsel, responded to SHLLC's Basis

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[5] The letter is labeled "Petition to Disregard QEZE's Reduction in Basis."

Request. Ms. Hiller's letter stated that SHLLC's request to disregard the "basis reductions for the basis limitation computation" was approved "for the tax returns that have not yet been filed, e.g. 2014." Her letter further stated that:

> "because tax returns for the tax years 2011, 2012 and 2013 on which the QEZE credit for real property taxes was claimed by members of Schenectady Hotel LLC have already been filed, we conclude your request to disregard the required IRC basis reductions for these years is untimely. The petition mechanism in section 15(e) of the Tax Law is a request for the Department of Taxation and Finance and the Department of Economic Development to exercise discretion. Like a request to exercise discretion to vary a statutory business allocation percentage under 20 NYCRR 4-6.1(c) for which the request must be submitted and approved before a tax return varying the percentage can be filed, this request must also be submitted and approved before a tax return is filed disregarding the required basis reductions. Because tax returns for tax years 2011, 2012 and 2013 have already been filed, Schenectady Hotel LLC's petition to disregard the required IRC basis reductions in the basis limitation of [Tax Law] [sic] § 15(e) in the tax years 2011, 2012 and 2013 is not approved.
>
> We have reviewed this conclusion with the Department of Economic Development and they concur."

48. SHLLC's Basis Request was the first such request ever received by the Division. Prior to its receipt and consideration of SHLLC's Basis Request, the Division had no policy regarding whether basis adjustments such as the one requested by SHLLC would be applied prospectively only or both prospectively and retroactively.

49. 20 NYCRR 4-6.1 (c) is a corporation franchise tax (article 9-A) regulation.

50. SHLLC is a limited liability company subject to article 22 of the Tax Law. All of SHLLC's owners are individuals subject to article 22 of the Tax Law. Neither SHLLC nor any of its owners are subject to article 9-A of the Tax Law.

51. The undepreciated cost and value of the Hotel in 2014 was not materially different than it was during the years comprising the audit period, aside from adjustments for minor upgrades and refurbishments. Specifically, SHLLC reported the basis of the property as

$4,573,451.00 in 2011, $4,589,185.00 in 2012, $4,589,185.00 in 2013, and $4,589,185.00 in 2014, on its U.S. Returns of Partnership Income, forms 1065, Schedule L Balance Sheets for such respective years.[6]

52. The Division audited SHLLC and at the conclusion of the audit, disallowed a portion of the QEZE credits it claimed during the audit period as follows:

QEZE CREDITS	2011	2012	2013
Tax paid, as claimed	$286,880.00	$338,017.00	$367,493.00
Amount Disallowed	$ 58,077.00	$ 50,611.00	$ 48,184.00
Amount Allowed	$228,803.00	$287,406.00	$319,309.00

53. The majority of the disallowed portion of the QEZE credits, according to the Division, reflected a limitation (or cap) on the amount of PILOT payments that could be claimed as eligible real property taxes under Tax Law 15 (e), as follows:

PILOT Limitation

	2011	2012	2013
PILOT Payment Claimed as Eligible Real Property Taxes	$200,000.00	$200,000.00	$200,000.00
Amount Allowed	$144,064.00	$152,361.00	$155,114.00
Amount Disallowed	$ 55,936.00	$ 47,639.00	$ 44,886.00

54. The Division computed the PILOT limitation for each year, based upon the following formula: (estimated effective full value tax rate within the county x federal basis) ÷ 1,000.

55. For the 2011 tax year, the Division used a total federal basis of $4,573,451.00 and the estimated effective full value tax rate within Schenectady County of 31.50, and calculated the

[6] Review of the forms 1065 Schedule L Balance Sheets for the years 2011 through 2014 indicates that the cost of the Hotel's land remained $103,336.00 throughout the period, and the cost of the buildings and other depreciable assets in the Hotel increased by only $15,734.00 during the period.

PILOT limitation as follows:

$$\frac{\text{tax rate x federal basis (all)}}{1{,}000} = \frac{31.50 \times \$4{,}573{,}451.00}{1{,}000} = \$144{,}064.00$$

56. For the 2012 tax year, the Division used a total federal basis of $4,589,185.00 and the estimated effective full value tax rate within Schenectady County of 33.20, and calculated the PILOT limitation as follows:

$$\frac{\text{tax rate x federal basis (all)}}{1{,}000} = \frac{33.20 \times \$4{,}589{,}185.00}{1{,}000} = \$152{,}361.00$$

57. For the 2013 tax year, the Division used a total federal basis of $4,589,185.00 and the estimated effective full value tax rate within Schenectady County of 33.80, and calculated the PILOT limitation as follows:

$$\frac{\text{tax rate x federal basis (all)}}{1{,}000} = \frac{33.80 \times \$4{,}589{,}185.00}{1{,}000} = \$155{,}114.00$$

58. The Division computed the PILOT limitations, and the resulting partial QEZE Credit disallowances, using a county-wide "estimated full value tax rate" for Schenectady County, rather than the combined county, city, and school district tax rates that actually would have been applied to the Hotel were it not exempt from taxation to the extent provided by the PILOT agreement.

59. The Division further reduced the QEZE credits claimed by SHLLC during the audit period based upon its conclusion that a portion of the real property taxes paid to the City of Schenectady were not "eligible real property taxes" for purposes of the QEZE Credit (ineligible charges).[7] For purposes of this matter only, petitioners concede that the ineligible charges were

[7] The Division concluded that a small portion of the QEZE credits claimed were attributable SHLLC's payments for special district charges and not eligible real property taxes under Tax Law § 15 (e).

properly disallowed.

60. The Division "flowed" the entity-level adjustments referenced in findings of fact 52, 53 and 59 through to petitioners' nonresident income tax returns for the audit period. The notices of deficiency and partial disallowances issued to petitioners for the audit period reflect these adjustments, and are set forth above in findings of fact 21 through 23, 28 through 30, 35 through 37, and 42 through 44.

61. The Division submitted the affidavit of James McGovern, a Real Property Analyst II with the Division's Office of Real Property Tax Services (ORPTS). Mr. McGovern has worked for ORPTS since October 2003.[8] As part of his regular duties, Mr. McGovern annually calculates the overall full value tax rate within each county. He has personally conducted these calculations since 2014. Mr. McGovern's affidavit explains the manner in which the effective full value tax rate for each county is calculated, and the uses of the effective full value tax rate.

62. The "overall full value tax rate" within a county is the same thing as the "effective full value tax rate" within a county. The effective full value tax rate within each county is based upon a combination of levies for county, city, town, village, school district, and certain special district purposes.

63. For each county in any given year, the effective full value rate within that county is calculated as follows:

> Overall full value tax rate = (Taxes levied by all municipal corporations in the county ÷ Equalized taxable value of all property within the county) x 1,000.[9]

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[8] In 2010 the former Office of Real Property Services was merged into the Tax Department and was renamed ORPTS. Mr. McGovern was employed by the former Office of Real Property Services, and remained with ORPTS after its 2010 merger with the Tax Department.

[9] The New York State Comptroller's Office provides the data regarding how much tax is levied. The value of real property in each county is determined based upon assessment rolls prepared by each assessing unit. ORPTS annually determines the equalization rates applicable to each municipality.

64. The "estimated effective full value tax rate" within a county for any given year is the prior year's effective full value tax rate within the same county.

65. For 2010, ORPTS calculated the overall tax rate for each county in New York State and determined that the rate in Schenectady County was 31.50.[10] In 2011, the estimated effective full value tax rate in Schenectady County was 31.50.

66. For 2011, ORPTS calculated the overall full value tax rate for each county in New York State and determined that the tax rate in Schenectady County was 33.20.[11] In 2012, the estimated effective full value tax rate in Schenectady County was 33.20.

67. For 2012, ORPTS calculated the overall full value tax rate for each county in New York State and determined that the rate in Schenectady County was 33.80.[12] In 2013, the estimated effective full value tax rate in Schenectady County was 33.80.

68. Mr. McGovern avers that the overall or effective full value tax rate within a county is not the same as the combined tax rates that actually apply to a particular property. If ORPTS was required to annually calculate the effective full value tax rate within the county by simply adding together the various tax rates applicable to a particular property, Mr. McGovern would have to conduct over 1,000 calculations each year.

69. Mr. McGovern also notes that if the effective full tax rate within a county was simply a combination of the various local tax rates applicable to a particular property, the phrase "full value" would be meaningless because real property tax rates are not required to be, and generally

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[10] ORPTS calculated Schenectady County's 2010 overall full value tax rate as follows: (328,157,115 ÷ 10,423,297,509) x 1,000 = 31.483 (rounded up to 31.50).

[11] ORPTS calculated Schenectady County's 2011 overall full value tax rate as follows: (336,380,923 ÷ 10,139,070,867) x 1,000 = 33.177 (rounded up to 33.20).

[12] ORPTS calculated Schenectady County's 2012 overall full value tax rate as follows: (340,258,099 ÷ 10,066,538,197) x 1,000 = 33.801 (rounded down to 33.80).

are not, full value tax rates. The total assessed value of real property within a municipality generally must be divided by the applicable equalization rate in order to reach the full value of real property within the municipality. The same is true of individual parcels of land: the assessed value must be divided by the equalization rate in order to determine full value.

70. The effective full value tax rate within a county is a way of demonstrating the overall real property taxes associated with owning real property in a county when compared to other counties in New York State. There is only one effective full value tax rate within a county in any given year.

71. Petitioners have raised two objections to the Division's partial disallowance of the QEZE credits for the years 2011 through 2013:

a. In computing the PILOT limitation applicable to the Hotel, the Division used a county-wide rate as the "estimated effective full value tax rate within the county"; instead, petitioners maintain that the Division should have "calculate[d] estimated full value tax rates" in Schenectady County and used the sum of the actual tax rates that would have been imposed on the Hotel were it not exempt from taxation to the extent provided by the PILOT agreement; and

b. The Division should have permitted the same basis adjustments to the Hotel for the 2011 through 2013 tax years that it permitted for the 2014 and subsequent tax years.

72. Petitioners and the Division have stipulated to four possible "hypothetical outcomes" to these matters: (1) the Division prevails on all issues; (2) the PILOT limitation is computed using the sum of the real property tax rates in effect at the Hotel's locale rather than the countywide "estimated full value tax rate" for Schenectady County; (3) the basis adjustments allowed for 2014 and subsequent tax years are allowed for 2011 through 2013 tax years; or (4)

petitioners prevail on all issues, i.e., the two issues identified in finding of fact 71.[13]

Hypothetical No. 1

73. If the Division prevails on all issues raised in this case, the result for petitioner Greg Schahet (DTA No. 827351) will be as follows: (a) for 2011, the notice of deficiency asserting tax due of $12,346.00 will be sustained; (b) for 2012, the refund disallowance of $10,629.00 will be sustained; and (c) for 2013, the refund disallowance of $9,426.00 will be sustained.

74. If the Division prevails on all issues raised in this case, the result for petitioners Lisa Schahet Schuster and Jason Schuster (DTA No. 827352) will be as follows: (a) for 2011, the notice of deficiency asserting tax due of $12,346.00 will be sustained; (b) for 2012, the refund disallowance of $10,629.00 will be sustained; and (c) for 2013, the refund disallowance of $9,426.00 will be sustained.

75. If the Division prevails on all issues raised in this case, the result for petitioners Jeffrey and Wendy Brown (DTA No. 827353) will be as follows: (a) for 2011, the notice of deficiency asserting tax due of $5,879.00 will be sustained; (b) for 2012, the Notice of Deficiency asserting tax due of $5,061.00 will be sustained; and (c) for 2013, the notice of deficiency asserting tax due of $4,489.00 will be sustained.

76. If the Division prevails on all issues raised in this case, the result for petitioners Gary and Phyllis Schahet (DTA No. 827354) will be as follows: (a) for 2011, the notice of deficiency asserting tax due of $28,722.00 will be sustained; (b) for 2012, the refund disallowance of $24,293.00 will be sustained; and (c) for 2013, the refund disallowance of $21,545.00 will be sustained.

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[13] The portion of the adjustments attributed to the ineligible charges, conceded by petitioners for purposes of this matter only (***see*** finding of fact 59), are accounted for in the four hypothetical outcomes.

Hypothetical No. 2

77. For 2011, if it is determined that the Division should have used the sum of the county, city, and school tax rates of 40.6527 to compute the PILOT limitation, then SHLLC's PILOT limitation will increase from $144,064.00 to $185,923.00. The difference of $41,859.00 would flow through to petitioners such that the tax asserted due in their 2011 notices of deficiency would be reduced as follows:

2011
Compute PILOT Limitation Using Sum of Real
Property Tax Rates in Effect at the Hotel's Locale

Petitioner	DTA No.	Tax in notice of deficiency reduced to
G. Schahet	827351	$ 3,556.00
Schuster	827352	$ 3,556.00
Brown	827353	$ 1,693.00
G. and P. Schahet	827354	$ 8,130.00

78. For 2012, if it is determined that the Division should have used the sum of the county, city, and school tax rates of 41.5750 to compute the PILOT limitation, then SHLLC's PILOT limitation will increase from $152,361.00 to $190,795.00. The difference of $38,434.00 would flow through to petitioners such that the following petitioners would be entitled to a refund:

2012
Compute PILOT Limitation Using Sum of Real
Property Tax Rates in Effect at the Hotel's Locale

Petitioner	DTA No.	Tax Refund Due
G. Schahet	827351	$ 8,071.00
Schuster	827352	$ 8,071.00
G. and P. Schahet	827354	$18,448.00

Additionally, the tax asserted due in the 2012 notice of deficiency issued to petitioners Jeffrey

and Wendy Brown (DTA No. 827353) would be reduced to $1,218.00.

79. For 2013, if it is determined that the Division should have used the sum of the county, city, and school tax rates of 42.8629 to compute the PILOT limitation, then SHLLC's PILOT limitation will increase from $155,114.00 to $196,705.00. The difference of $41,591.00 would flow through to petitioners such that the following petitioners would be entitled to a refund:

2013
Compute PILOT Limitation Using Sum of Real
Property Tax Rates in Effect at the Hotel's Locale

Petitioner	DTA No.	Tax Refund Due
G. Schahet	827351	$ 8,734.00
Schuster	827352	$ 8,734.00
G. and P. Schahet	827354	$19,864.00

Additionally, the tax asserted due in the 2013 notice of deficiency issued to petitioners Jeffrey and Wendy Brown (DTA No. 827353) would be reduced to $330.00.

Hypothetical No. 3

80. For 2011, if it is determined that the Division's denial of SHLLC's request to disregard the basis adjustments for the years 2011 through 2013 was arbitrary and capricious and/or an abuse of discretion, then the tax asserted due in the notices of deficiency issued for 2011 would be reduced as follows:

2011 Allow Adjustments to Federal Basis

Petitioner	DTA No.	Tax in notice of deficiency reduced to
G. Schahet	827351	$ 599.00
Schuster	827352	$ 599.00
Brown	827353	$ 285.00
G. and P. Schahet	827354	$1,373.00

81. For 2012, if it is determined that the Division's denial of SHLLC's request to

disregard the basis adjustments for the years 2011 through 2013 was arbitrary and capricious and/or an abuse of discretion, then the following petitioners would be entitled to a refund of the tax paid for 2012, as follows:

2012 Allow Adjustments to Federal Basis

Petitioner	DTA No.	Tax Refund Due
G. Schahet	827351	$10,004.00
Schuster	827352	$10,004.00
G. and P. Schahet	827354	$22,867.00

Additionally, the tax asserted due in the 2012 notice of deficiency issued to petitioners Jeffrey and Wendy Brown (DTA No. 827353) would be reduced to $297.00.

82. For 2013, if it is determined that the Division's denial of SHLLC's request to disregard the basis adjustments for the years 2011 through 2013 was arbitrary and capricious and/or an abuse of discretion, then the following petitioners would be entitled to a refund of the tax paid for 2013, as follows:

2013 Allow Adjustments to Federal Basis

Petitioner	DTA No.	Tax Refund Due
G. Schahet	827351	$ 9,426.00
Schuster	827352	$ 9,426.00
G. and P. Schahet	827354	$21,545.00

Additionally, the tax asserted due in the 2013 notice of deficiency issued to petitioners Jeffrey and Wendy Brown (DTA No. 827353) would be cancelled.

Hypothetical No. 4

83. For 2011, if it is determined (a) that the Division should have used the sum of the real property tax rates in effect at the Hotel's locale of 40.6527 to compute the PILOT limitation (as

described in Hypothetical No. 2) and (b) that the Division's denial of SHLLC"'s request to disregard the basis adjustments for the years 2011 through 2013 was arbitrary and capricious and/or an abuse of discretion (as described in Hypothetical No. 3), then the notices of deficiency for 2011 would be reduced as follows:

2011
Allow Adjustments to Federal Basis and Use Sum of Real Property Tax Rates in Effect at the Hotel's Locale

Petitioner	DTA No.	Tax in notice of deficiency reduced to
G. Schahet	827351	$ 599.00
Schuster	827352	$ 599.00
Brown	827353	$ 285.00
G. and P. Schahet	827354	$1,373.00

84. For 2012, if it is determined (a) that the Division should have used the sum of the real property tax rates in effect at the Hotel's locale of 41.5750 to compute the PILOT limitation (as described in Hypothetical No. 2) and (b) that the Division's denial of SHLLC's request to disregard the basis adjustments for the years 2011 through 2013 was arbitrary and capricious and/or an abuse of discretion (as described in Hypothetical No. 3), then the following petitioners would be entitled to a refund of the tax paid for 2012:

2012
Allow Adjustments to Federal Basis and Use Sum of Real Property Tax Rates in Effect at the Hotel's Locale

Petitioner	DTA No.	Tax Refund Due
G. Schahet	827351	$10,004.00
Schuster	827352	$10,004.00
G. and P. Schahet	827354	$22,867.00

Additionally, the tax asserted due in the 2012 notice of deficiency issued to petitioners Jeffrey

and Wendy Brown (DTA No. 827353) would be reduced to $297.00.

85. For 2013, if it is determined (a) that the Division should have used the sum of the real property tax rates in effect at the Hotel's locale of 42.8629 to compute the PILOT limitation (as described in Hypothetical No. 2) and (b) that the Division's denial of SHLLC's request to disregard the basis adjustments for the years 2011 through 2013 was arbitrary and capricious and/or an abuse of discretion (as described in Hypothetical No. 3), then the following petitioners would be entitled to a refund of the tax paid for 2013:

2013
Allow Adjustments to Federal Basis and Use Sum of Real Property Tax Rates in Effect at the Hotel's Locale

Petitioner	DTA No.	Tax Refund Due
G. Schahet	827351	$ 9,426.00
Schuster	827352	$ 9,426.00
G. and P. Schahet	827354	$21,545.00

Additionally, the tax asserted due in the 2013 notice of deficiency issued to petitioners Jeffrey and Wendy Brown (DTA No. 827353) would be cancelled.

CONCLUSIONS OF LAW

A. Tax Law § 15 permits a business enterprise certified as a QEZE to claim a credit against tax for eligible real property taxes paid or incurred by the QEZE. The manner by which a QEZE may claim such credit depends upon its classification for tax reporting purposes (***see*** Tax Law § 15 [h]). Where, as here, the certified QEZE is a partnership,[14] the credit flows through to the members of the partnership, who may claim their proportionate share of such credit on their New York nonresident income tax returns (***see*** Tax Law § 606 [bb]). Tax Law § 15 (b) states

[14] A limited liability company that is classified as a partnership for federal income tax purposes, such as SHLLC, is a partnership under article 22 (Tax Law § 601 [f]).

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.

B. The term "eligible real property taxes" is defined by Tax Law § 15 (e) to include, among other taxes, PILOT payments made pursuant to a written agreement executed or amended on or after January 1, 2001. However, the PILOT payments are subject to certain limitations. Tax Law § 15 (e) provides, in relevant part, as follows:

> "Provided, however, a payment in lieu of taxes made by the QEZE pursuant to a written agreement executed or amended on or after January first, two thousand one, shall not constitute eligible real property taxes in any taxable year to the extent that such payment exceeds the product of (A) the greater of (i) the basis for federal income tax purposes, calculated without regard to depreciation, determined as of the effective date of the QEZE's certification pursuant to article eighteen-B of the general municipal law of real property, including buildings and structural components of buildings, owned by the QEZE and located in empire zones with respect to which the QEZE is certified pursuant to such article eighteen-B of the general municipal law, and provided that if such basis is further adjusted or reduced pursuant to any provision of the internal revenue code, the QEZE may petition the department and the department of economic development to disregard such reduction or adjustment for the purpose of this subdivision or (ii) the basis for federal income tax purposes of such real property described in clause (i) of this subparagraph, calculated without regard to depreciation, on the last day of the taxable year, and provided that if such basis is further adjusted or reduced pursuant to any provision of the internal revenue code, the QEZE may petition the department, the department of economic development and the office of real property services to disregard such reduction or adjustment for the purpose of this subdivision; and (B) the estimated effective full value tax rate within the county in which such property is located, as most recently calculated by the commissioner. The commissioner shall annually calculate estimated effective full value tax rates within each county for this purpose based upon the most current information available to him or her in relation to county, city, town, village and school district taxes."

C. The parties in these matters agree that SHLLC was eligible to claim the QEZE Credit during the years 2011 through 2013. However, their disagreement, for purposes of these matters, centers around the PILOT payments made by SHLLC during such years. As noted above, where PILOT payments are involved, the QEZE Credit is subject to a limitation or cap. The cap is

calculated by multiplying the federal tax basis[15] in the eligible real property by the estimated effective full value tax rate within the county in which such property is located. The federal tax basis portion of the calculation can be adjusted if (1) the basis has been adjusted or reduced pursuant to any provision of the IRC and (2) the QEZE petitions "the department [of taxation and finance and] the department of economic development . . . to disregard such reduction or adjustments."

Adjustments to SHLLC's federal tax basis in the eligible real property were made as a result of its receipt of grant funds from Empire State Development and its participation in the Federal Renewal Community Program (***see*** finding of fact 6). On May 27, 2015, while the refund and assessment statute of limitations periods were still open for all of the tax years at issue in these matters, SHLLC petitioned the Tax Department and the Department of Economic Development to disregard these basis adjustments (***see*** finding of fact 46). SHLLC, in its letter, set forth the following reasons for disregarding the downward adjustments to the federal tax basis: (1) the adjustments distort the amount expended by SHLLC to improve the real property, (2) the adjustments do not accurately reflect the fair value of the Hotel, and (3) disregarding the adjustments is consistent with the QEZE Credit, which is to provide a QEZE Credit for PILOTs in an amount not to exceed the real property taxes that might otherwise apply (***id.***). By letter dated July 2, 2015, the Division responded to SHLLC's Basis Request (***see*** finding of fact 47). While SHLLC's Basis Request was approved "for the tax returns that have not yet been filed, e.g. 2014," the Division denied SHLLC's Basis Request for the years 2011 through 2013 because tax returns had already been filed and the QEZE Credit already claimed. In deeming the Basis

[15] The federal tax basis does not include depreciation. It is determined as of the effective date of the QEZE's certification or as of the last day of the relevant taxable year. In the present case, there is no dispute that the federal tax basis is determined as of the last day of the taxable year.

Request untimely for the years 2011 through 2013, Ms. Hiller's letter likened the request to "a request to exercise discretion to vary a statutory business allocation percentage under 20 NYCRR 4-6.1(c) for which the request must be submitted and approved before a tax return varying the percentage can be filed." Therefore, SHLLC's Basis Request "must also be submitted and approved before a tax return is filed disregarding the required basis reductions."

D. Petitioners contend that the Division's decision to deny SHLLC's Basis Request for a discretionary adjustment in the federal tax basis in the Hotel for the years 2011 through 2013 was arbitrary and capricious. They maintain that the Division has ruled differently on the same facts with respect to SHLLC's federal tax basis. Specifically, the Hiller letter argues that the difference between the 2011 through 2013 tax returns and the subsequent returns is that the 2011 through 2013 returns have already been filed. Petitioners contend that whether tax returns have been filed is not relevant to the value of the Hotel, or whether that value is properly reflected in its federal tax basis. Rather, petitioners argue that the only relevant issue in determining the propriety of the discretionary basis adjustment should be whether the federal tax basis of the property in question is a proper reflection of its value. They point out that the Division granted the requested basis adjustments for the years 2014 and beyond even though the relevant facts were the same in the years 2011 through 2013 for which the basis adjustment was denied. Petitioners also contend that the Division abused its discretion. They maintain that the Division's rationale for permitting basis adjustments only for returns not yet filed is simply wrong. Petitioners point out that 20 NYCRR 4-6.1 (c) is a corporation franchise tax regulation, whereas SHLLC's request involves only personal income tax. As such, petitioners contend that the Division referenced a wholly inapplicable regulation in a rash attempt to justify its arbitrary and capricious decision. They also assert that even if the procedure described in 20 NYCRR 4-

6.1 (c) was applicable, the Division's Technical Services Bureau Memorandum, TSB-M-11(3)C explicitly provides that a request under 20 NYCRR 4-6.1 "may be submitted either before or after" the report is filed. Petitioners argue that TSB-M-11(3)C undermines "the already dubious reason cited" in Ms. Hiller's letter for disallowing SHLLC's Basis Request for the years 2011 through 2013.

The Division contends that it acted reasonably by granting SHLLC's requested adjustment to the federal tax basis of the Hotel starting at the time the Basis Request was made, i.e., for tax year 2014 and subsequent years (prospectively only). It maintains that Ms. Hiller's letter did not cite 20 NYCRR 4-6.1 (c) as binding authority. Rather, the Division asserts that it viewed the discretionary adjustment to a business allocation percentage under 20 NYCRR 4-6.1 (c) as roughly equivalent to SHLLC's request, and treated the request similarly. Given the novelty of SHLLC's request and the lack of any guidance other than "discretion," the Division argues that its decision to draw a distinction between tax years for which returns have already been filed and tax years for which returns have not yet been filed is entirely reasonable. The Division further argues that its interpretation is supported by the statutory text in Tax Law § 15 (e) that states the federal tax basis to be used in computing the PILOT cap is the basis "on the last day of the taxable year." As such, the Division maintains it did not abuse its discretion in its decision to deny SHLLC's Basis Request for tax years 2011 through 2013.

E. While petitioners agree that the Division is permitted to exercise discretion in addressing requests for basis adjustments under Tax Law § 15 (e) (A) (ii), they maintain that the exercise of discretion cannot be arbitrary and capricious. The Tax Appeals Tribunal has a "policy of *de novo* review of the exercise of discretion" ***(see Matter of Vinter***, Tax Appeals Tribunal, September 27, 2001, ***dismissed on other grounds sub nom Matter of Vinter v***

Commissioner of Taxation & Fin., 305 AD2d 738 [3d Dept 2003]). The "arbitrary and capricious" test chiefly looks to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact (***Murphy v New York State Div. of Housing and Community Renewal***, 21 NY3d 649 (2013), ***citing Pell v Board of Educ.***, 34 NY2d 222, 231 (1974). It is well settled that judicial review of an administrative determination is limited to the grounds invoked by the agency at the time the determination was made (***see Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.***, 77 NY2d 753, 758 [1991]). The Division's letter deemed SHLLC's Basis Request untimely for the years 2011 through 2013 because tax returns had already been filed and the QEZE Credit claimed for these years. In deeming SHLLC's Basis Request untimely for these years, the Division's letter likened SHLLC's Basis Request to a request to exercise discretion to vary a statutory business allocation percentage under 20 NYCRR 4-6.1 (c), where the request must be submitted and approved before a tax return varying the business allocation percentage can be filed.

Initially, it is noted that the parties stipulated that SHLLC's Basis Request was the first such request ever received by the Division and that before the Division considered SHLLC's Basis Request, it had no policy regarding whether basis adjustments such as the one requested by SHLLC would be applied prospectively only or both prospectively and retroactively (***see*** finding of fact 48). The prospective-only decision reflected in the Division's letter has not appeared in any notice, publication, regulation, memorandum, guidance or advisory opinion issued by the Division. 20 NYCRR 4-6.1 (c) is a corporation franchise tax regulation, whereas SHLLC's request involves only personal income tax. Even if the procedure for requesting a discretionary adjustment varying the business allocation percentage described in 20 NYCRR 4-6.1 (c) was applicable, the Division's published guidance, TSB-M-11(3)C, explicitly provides that a request

under 20 NYCRR 4-6.1 "may be submitted either before or after" the report is filed. TSB-M-11(3)C expressly and unambiguously authorizes taxpayers to do precisely what the Division's letter states is prohibited for purposes of these matters. Consequently, TSB-M-11(3)C undermines the reason cited in the Division's letter for disallowing SHLLC's Basis Request for the years 2011 through 2013. Furthermore, there is no explicit statutory time limit to make a request for a discretionary basis adjustment under Tax Law § 15 (e). Accordingly, the Division's decision to deny the retroactive downward adjustments to SHLLC's federal tax basis was arbitrary and capricious, and was an abuse of its discretion. As such, the basis adjustments allowed for tax year 2014 and subsequent tax years are allowed for tax years 2011 through 2013.

F. Petitioners also claim that the Division incorrectly calculated the PILOT cap by using the estimated effective full value tax rate within Schenectady County instead of the sum of the tax rates that actually applied to the Hotel in each of the years at issue.

The portion of Tax Law § 15 (e) relevant to petitioner's argument follows:

> ". . . and (B) *the estimated effective full value tax rate within the county in which such property is located*, as most recently calculated by the commissioner. The commissioner shall annually calculate *estimated effective full value tax rates within each county* for this purpose based upon the most current information available to him or her in relation to county, city, town, village and school district taxes" (emphasis supplied).

Petitioners maintain that the statute is clear - it contemplates multiple rates be computed in each county taking into account the city, town, village and school district taxes applicable in the various jurisdictions in which empire zones are located. They further maintain that the commissioner has not complied with the statute's requirements. Instead of calculating multiple "rates within each county," the commissioner has computed single county-wide rates that the Division has applied in this case. Petitioners claim that since the real property tax rate in the city

of Schenectady to which the Hotel would have been subject was considerably higher than the single county-wide rate that the commissioner calculated, SHLLC and they were not permitted by the Division to claim a QEZE Credit equal to all of the PILOT payments made by SHLLC. They further claim that had the commissioner done what is required by statute, SHLLC and petitioners would have received a QEZE Credit equal to the sum of all of the taxes and PILOTs actually paid, just as the Legislature intended.

The Division contends that petitioners simply refuse to acknowledge the plain language of the statute. With respect to the use of the plural "rates" in the final sentence of Tax Law § 15 (e) as demonstrating that the Tax Department is required to calculate multiple estimated effective full value tax rates within each county, the Division maintains that petitioners are "playing semantics." It further maintains that the "prior sentence of the statute clearly demonstrates that the rate to be used is 'the estimated effective full value tax rate [(singular)] within the county [(singular)] in which such property is located." The Division posits that when the following sentence in the statute is read in its proper context, it simply means that the Tax Department must annually calculate such a rate within each of New York State's counties. It also points out that despite their assertion that each county in New York State has multiple estimated effective full value tax rates, petitioners offer no explanation of what those rates are and how they are calculated. Rather, petitioners assert that the relevant figure to be used is "the sum of the actual tax rates that would have applied to the Hotel in the absence of the PILOT Agreement."

G. A tax credit is a particularized species of exemption from tax (***Matter of New York Fuel Terminal Corp.***, Tax Appeals Tribunal, August 27, 1998). Statutes creating exemptions from tax are to be strictly construed against the taxpayer (***see Matter of Grace v New York State Tax Commn***., 37 NY2d 193 [1975], ***rearg denied*** 37 NY2d 816 [1975], ***lv denied*** 338 NE2d 330

[1975]; ***Matter of Blue Spruce Farms v New York State Tax Commn***., 99 AD2d 867 [3d Dept 1984], ***affd*** 64 NY2d 682 [1984]). However, construction of an exemption or credit statute should not be so narrow as to defeat the provision's settled purpose (***Matter of Grace v New York State Tax Commn.***). In addition, it is well established that the interpretation given a statute by the agency authorized with its enforcement should generally be given weight and judicial deference if the interpretation is not irrational, unreasonable or inconsistent with the statute (***Matter of Trump-Equitable Fifth Avenue Co. v Gliedman***, 62 NY2d 539 [1984]). However, in addition, the statutory language providing the exemption must be construed in a practical fashion with deference to the legislative intent behind the exemption (***see Majewski v Broadalbin-Perth Cent. School Dist***., 91 NY2d 577 [1998]***; Matter of Qualex, Inc.***, Tax Appeals Tribunal, February 23, 1995). When construing a statute, the primary focus is on the intent of the Legislature in enacting the statute (McKinney's Cons Laws of NY, Book 1, Statutes § 92[a]; ***see Matter of Sutka v Connors***, 73 NY2d 395 [1989]; ***Matter of American Communications Technology v State of New York Tax Appeals Tribunal***, 185 AD2d 79 [3d Dept 1993], ***affd*** 83 NY2d 773 [1994]). When that intent is clear from the wording of the statute itself, the inquiry ends (McKinney's Cons Laws of NY, Book 1, Statutes § 76).

H. The language of the statute "is the clearest indicator of the legislative intent and courts should construe unambiguous language to give effect to its plain meaning" (***Matter of DaimlerChrysler Corp. v Spitzer***, 7 NY3d 653, 660 [2006]). Such language "must be read in [its] context, and words, phrases, and sentences of a statutory section should be interpreted with reference to the scheme of the entire section" (McKinney's Cons Law of NY, Book 1, Statutes § 97). Where the statutory language is ambiguous, however, extrinsic aids, such as the statute's legislative history, may be used to ascertain legislative intent (***see*** McKinney's Cons Laws of

NY, Book 1, Statutes §§ 76, 92; ***Matter of Blau Par Corp***., Tax Appeals Tribunal, May 21, 1992). Ultimately, proper statutory construction focuses on "the precise language of the enactment in an effort to give a correct, fair and practical construction that properly accords with the discernable intention and expression of the Legislature [citation omitted]" (***Matter of 1605 Book Ctr. v Tax Appeals Trib. of State of N.Y.***, 83 NY2d 240, 244, 245 [1994], ***cert denied*** 513 US 811 [1994]).

I. Petitioners have the burden to establish "unambiguous entitlement" to the claimed statutory benefit (***Matter of United Parcel Serv., Inc. v Tax Appeals Trib. of State of N.Y.***, 98 AD3d 796, 798 [3d Dept 2012], ***lv denied*** 20 NY3d 860 [2013]). Indeed, petitioners must prove that the Division's interpretation is irrational and that their interpretation of the statute is the only reasonable construction (***Matter of American Food & Vending Corp. v New York State Tax Appeals Trib***., 144 AD3d 1227 [3d Dept 2016]; ***Matter of Brooklyn Navy Yard Cogeneration Partners, L.P. v Tax Appeals Trib. of State of N.Y.***, 46 AD3d 1247 [3d Dept 2007], ***lv denied*** 10 NY3d 706 [2008]).

J. I find that the Division's interpretation of Tax Law § 15 (e) is reasonable and, therefore, I conclude that petitioners have not met their burden of proof to show that theirs is the only reasonable construction.

As noted above, PILOT payments will qualify as eligible real property taxes to the extent they do not exceed the product of the QEZE's federal tax basis in the real property and "the estimated effective full value tax rate" within the county in which such property is located, as most recently calculated by the commissioner (Tax Law § 15 [e]). The last sentence of Tax Law § 15 (e) provides instructions on how the estimated effective full value tax rate is determined: "[t]he commissioner shall annually calculate effective full value tax rates within each county for

this purpose based upon the most current information available to him or her in relation to county, city, town, village and school district taxes." Under petitioners' interpretation of the statute, the relevant figure to be used by the commissioner would not be the estimated effective full value tax rate within the county in which the Hotel is located but, rather, would be the sum of the actual tax rates that would have applied to the Hotel in the absence of the PILOT Agreement. If the sum of the actual tax rates were to be used, there is no "estimate" involved and the statutory term "estimated" is rendered meaningless. In addition, if the sum of the actual tax rates applicable to the property were used, the rates would not be at full value because local governments are not required to, and generally do not, value real property at full value (***see*** Real Property Tax Law § 305; ***see also Foss v City of Rochester***, 65 NY2d 247 [1985]). Therefore, under petitioners' interpretation, the statutory term "full value" is also rendered meaningless. One of the general rules in the interpretation of statutes is that, if possible, all parts of the statute must be harmonized with each other as well as with the general intent of the whole statute, and meaning and effect given to all provisions of the statute (***see*** McKinney's Cons Laws of NY, Book 1, Statutes § 98; ***see also*** McKinney's Cons Laws of NY, Book 1, Statutes § 97).

Petitioners also assert that the Division has failed to comply with the statute's requirements that the commissioner annually calculate estimated effective full value tax rates within each county for purposes of calculating the QEZE Credit. Their interpretation of the statute would mean that every year the Tax Department would need to add together the tax rates applicable to over 1,000 parcels of real property in New York State in order to fulfill its statutory obligation. "The courts may consider public inconvenience in construing a statute whose meaning is in doubt" (***see*** McKinney's Cons Laws of NY, Book 1, Statutes § 142). As the Division points out, it makes no sense to read the second sentence as directing the commissioner to determine

estimated effective full value tax rates for each city, town, village and school district in a county because those calculations would serve no purpose. By the plain terms of the statute, the PILOT cap can only be computed using "the estimated effective full value tax rate within the county." The Legislature would not direct the commissioner to calculate a separate estimated effective full value tax rate for each and every level of local government when only the county-level tax rate can be used to calculate the PILOT cap. "Generally, statutes will be given a reasonable construction, it being presumed that a reasonable result was intended by the Legislature" (McKinney's Cons Laws of NY, Book 1, Statutes § 143). In sum, the Division's interpretation of the statute is reasonable.

K. In conclusion of law E, it was determined that the Division's denial of SHLLC's request to disregard the basis adjustments for tax years 2011 through 2013 was arbitrary and capricious, and an abuse of its discretion. It was further determined that the basis adjustments allowed to the federal tax basis of the Hotel for tax years 2014 and subsequent tax years are allowed for tax years 2011 through 2013. The Division is directed to recompute SHLLC's PILOT cap computation for tax years 2011 through 2013, disregarding the adjustments to the Hotel's federal tax basis for such years. Such results will also result in an increase in the amount of SHLLC's QEZE credits for the years 2011 through 2013 that pass through to the petitioners. Accordingly, petitioners are entitled to the relief described in Hypothetical No. 3, as follows:

(a) For 2011, the notices of deficiency should be reduced as follows:

2011 Allow Adjustments to Federal Basis

Petitioner	DTA No.	Tax in notice of deficiency reduced to
G. Schahet	827351	$ 599.00
Schuster	827352	$ 599.00
Brown	827353	$ 285.00

G. and P. Schahet	827354	$1,373.00

(b) For 2012, the following petitioners are entitled to a refund of the tax paid for 2012, as follows:

2012 Allow Adjustments to Federal Basis

Petitioner	DTA No.	Tax Refund Due
G. Schahet	827351	$10,004.00
Schuster	827352	$10,004.00
G. and P. Schahet	827354	$22,867.00

Additionally, the tax asserted due in the 2012 notice of deficiency issued to petitioners Jeffrey and Wendy Brown (DTA No. 827353) would be reduced to $297.00.

(c) For 2013, the following petitioners are entitled to a refund of the tax paid for 2013, as follows:

2013 Allow Adjustments to Federal Basis

Petitioner	DTA No.	Tax Refund Due
G. Schahet	827351	$ 9,426.00
Schuster	827352	$ 9,426.00
G. and P. Schahet	827354	$21,545.00

Additionally, the tax asserted due in the 2013 notice of deficiency issued to petitioners Jeffrey and Wendy Brown (DTA No. 827353) would be cancelled.

L. The petitions of Greg Schahet, Lisa Schahet Schuster and Jason S. Schuster, Jeffrey and Wendy Brown, and Gary and Phyllis Schahet are granted in accordance with conclusions of law E and K, and in all other respects are denied. The notices of deficiency and partial refund disallowances issued to Greg Schahet, Lisa Schahet Schuster and Jason S. Schuster, Jeffrey and Wendy Brown, and Gary and Phyllis Schahet are hereby modified in accordance with

conclusions of law E and K, and the Division is directed to issue refunds in accordance with conclusions of law E and K. The notices of deficiency and the partial refund disallowances, as modified, are otherwise sustained.

DATED: Albany, New York
November 29, 2018

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE