STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH R. NICOLLA	:	
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2011 and 2012.	:	DETERMINATION DTA NOS. 828238 AND 828239
In the Matter of the Petition	:	
of	:	
RICHARD A. ROSEN AND CHERI ROSEN	:	
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2011 and 2012.	:	

Petitioners, Joseph R. Nicolla, Richard A. Rosen, and Cheri Rosen, filed petitions for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law for the years 2011 and 2012.

On January 10, 2019 and January 17, 2019, respectively, petitioners, appearing by Lynn D'Elia Temes & Stanczyk (Timothy M. Lynn, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Christopher O. O'Brien, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by August 22, 2019, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, James P. Connolly, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly disallowed a portion of petitioners' empire zone real property tax credits claimed as a pass-through via Columbia Lodge, LLC for the tax year 2012 on the ground that the LLC sold the real property giving rise to the credit during that year.

FINDINGS OF FACT

1. Petitioner Joseph Nicolla filed a resident income tax return (form IT-201) for the tax year 2012, while petitioners Richard Rosen and Cheri Rosen filed a joint form IT-201 for that year. Line 71 of Mr. Nicolla's return showed "other refundable credits" of $783,807.00. The Rosens' joint return showed other refundable credits of $83,662.00 on line 71. The copies of the two returns in the record do not have form IT-201-ATT attached, as required by line 71 of the returns.

2. In 2012, Mr. Nicolla owned both a direct interest in Columbia Lodge, LLC (Columbia Lodge) and an indirect interest in that entity through an ownership interest in Lodge Street, LLC, for a total ownership interest of 42.575%, while the Rosens owned a 4.95% interest in Columbia Lodge through an ownership interest in Lodge Street, LLC. Petitioners also owned separate interests in other LLCs, including 25 Monroe Street, LLC.

3. For tax year 2012, Columbia Lodge owned real property at 30 Clinton Avenue in the City of Albany, County of Albany, New York State from January 1, 2012 to August 29, 2012.

4. By certificate of eligibility dated April 28, 2004, Columbia Lodge was certified as a qualified empire zone enterprise (QEZE) for, among other properties, 30 Clinton Avenue within the boundaries of the City of Albany's empire zone, which certificate of eligibility remained in effect for 2012.

5. Columbia Lodge's 2012 property tax bill for real property taxes imposed by the City and County of Albany for 30 Clinton Avenue has a warrant date of December 31, 2011 and states that payment was due by January 31, 2012.

6. Columbia Lodge paid the full amount of the City and County taxes due for 2012, in the amount of $150,070.00, on January 24, 2012.

7. Columbia Lodge sold 30 Clinton Avenue to the County of Albany and closed on such sale on August 29, 2012. While the closing statement does not show any amount being credited to Columbia Lodge for the real property taxes it paid on the property in 2012, petitioners concede in their proposed findings of fact that at the sale "the purchase price of [30 Clinton Avenue] was increased to credit Columbia Lodge for the payment of taxes earlier in 2012."

8. The Division of Taxation (Division) performed an audit of petitioners' respective income tax returns for the years 2010 through 2012. By separate letters dated June 25, 2015, the Division's auditor advised petitioners that the Division was making a number of adjustments to the flow-through qualified empire zone enterprise (QEZE) credits they reported on their respective form IT-201 returns, including, as relevant here: (i) disallowing the full amount of the QEZE credit for real property taxes (RPTC) flowing through to them from 25 Monroe Street LLC; and (ii) reducing the RPTC flowing through to them from Columbia Lodge based on that LLC's sale of the 30 Clinton Avenue property on August 29, 2015. With regard to the second adjustment, the letters noted that petitioners had not supplied a copy of the closing statement on audit, showing the portion of the taxes reimbursed to Columbia Lodge, so the auditor prorated the amount of the credit based on the portion of 2012 for which Columbia Lodge owned the property (eight months), which had the effect of reducing the amount of the RPTC for which Columbia Lodge was eligible from $150,070.00 claimed by the LLC to $100,047.00.

According to their respective June 25, 2015 letters, the effect of the decreased amount of the RPTC earned by Columbia Lodge was to reduce the credit from that source to which Mr. Nicolla was otherwise entitled to $42,595.00 and the credit to which the Rosens were otherwise entitled to $4,952.00.

9. In their petitions, petitioners objected to both of the above adjustments. However, in their brief on submission, petitioners withdrew their protest of the denial of the RPTC flow through from 25 Monroe St. LLC.[1]

CONCLUSIONS OF LAW

A. In light of petitioners' withdrawal of their objection to the Division's denial of the RPTC flowing through 25 Monroe St. LLC for 2012, the sole remaining issue in this case is the amount of the RPTC due petitioners as a flow through from Columbia Lodge for that year.

B. The RPTC was one of the empire zone credits created by chapter 63 of the Laws of 2000 and amended by chapter 85 of the Laws of 2002. A tax credit is a particularized species of exemption from tax (***see Matter of New York Fuel Terminal Corp.***, Tax Appeals Tribunal, August 27, 1998) and, therefore, petitioners bear the burden of showing "a clear cut entitlement" to the credit (***Matter of Luther Forest Corp. v McGuiness***, 164 AD2d 629, 632 [3d Dept 1991]).

C. Under Tax Law § 15 (b) (1), for an enterprise certified before April 1, 2005, such as Columbia Lodge, the amount of the RPTC is equal to the product of "(i) the benefit period factor, (ii) the employment increase factor, and (iii) the eligible real property taxes paid or incurred by the enterprise during the taxable year." Here, the only part of the computation at

[1] Petitioners submitted nine proposed findings of fact. Those proposed findings of fact have been modified to remove conclusions of law and to correct a misstatement of petitioners' ownership interests in Columbia Lodge, but have been otherwise accepted and incorporated in substance herein, except that proposed finding of fact 8 has been modified to more accurately reflect the record.

issue is the amount of the "eligible real property taxes paid or incurred" by petitioner for 2012. Tax Law § 15 (e) defines "eligible real property taxes" as follows:

> "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 . . . 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."

D. The Division does not dispute that Columbia Lodge qualifies for the RPTC here, and that, through Columbia Lodge, petitioners qualify under Tax Law § 606 (bb) for that credit (***see*** Tax Law § 2 [6]). The only question is the amount of the RPTC that is due Columbia Lodge for 2012. It appears that, on the face of the statute, Columbia Lodge was entitled to RPTC based on the full amount of the real property taxes it paid on the 30 Clinton Avenue property for 2012, $150,070.00, because there is no dispute that: (i) Columbian Lodge was a QEZE certified for the City of Albany's empire zone in 2012; (ii) it owned the Clinton Avenue property, which was located in that empire zone; and (iii) it paid that amount of tax in January 2012, which had become a lien against the property as of December 31, 2011. Not surprisingly, then, petitioners assert that, under the plain language of Tax Law § 15, Columbia Lodge's sale of the property does not reduce the amount of eligible real property taxes the LLC paid and, thus, there should be no reduction in the amount of its RPTC that they claimed as a flow through in 2012.

E. In arguing to the contrary that the amount of the RPTC to which Columbia Lodge is entitled must be reduced to reflect the fact that Columbia Lodge sold the 30 Clinton Avenue property on August 29, 2015, the Division does not point to any language in Tax Law § 15 that would undermine petitioners' plain language reading of the section. Rather, it argues that the phrase "the eligible real property taxes paid or incurred by the enterprise during the taxable year"

in Tax Law § 15 (b) (1) must be interpreted in light of § 164 of the Internal Revenue Code (IRC). That section provides a deduction for "State and local, and foreign, real property taxes." Subdivision (d) of IRC § 164 provides:

> **"Apportionment of taxes on real property between seller and purchaser.—**
>
> **(1) General rule.**--For purposes of subsection (a), if real property is sold during any real property tax year, then--
>
> (A) so much of the real property tax as is properly allocable to that part of such year which ends on the day before the date of the sale shall be treated as a tax imposed on the seller, and
>
> (B) so much of such tax as is properly allocable to that part of such year which begins on the date of the sale shall be treated as a tax imposed on the purchaser."

The Division is correct that, if the apportionment rule in IRC § 164 (d) applies in determining "the eligible real property taxes paid or incurred by the enterprise during the taxable year" under Tax Law § 15 (b) (1), then Columbia Lodge would be entitled to RPTC for only the prorated portion of the real property taxes it paid with regard to 30 Clinton Avenue corresponding to its sale of the property on August 29, 2012. The Division's interpretation of the statute must be upheld unless it is found to be irrational or unreasonable (***see Marriott Family Restaurants, Inc. v Tax Appeals Tribunal of State of N.Y.***, 174 AD2d 805, 807 [3d Dept 1991]). The issue, then, distils to whether the Division's interpretation of the phrase "the eligible real property taxes paid or incurred by the enterprise during the taxable year" under Tax Law § 15 (b) (1) as requiring application of the pro rata apportionment rule in IRC § 164 (d) is irrational or unreasonable.

F. In support of its interpretation, the Division points out that the personal income tax imposed by article 22 of the Tax Law is built on federal adjusted gross income, while entire net income under article 9-a of the Tax Law is presumed to be the same as "entire taxable income" that the taxpayer is required to report to the United States treasury department (***see*** Tax Law §§

601 [a]; 612 [a]; 208 [9]). It points out further that IRC § 164 governs the portion of the real property taxes paid by a QEZE that the enterprise can deduct in computing its article 9-a tax, concluding that "this amount is used to compute the [RPTC]."

The Division is in effect relying on the federal conformity principle, which has been described as the doctrine that "courts should adopt, whenever reasonable and practical, the [f]ederal construction of substantially similar tax provisions, particularly where the state statute is modeled on [the] federal law" (***Matter of Astoria Fin. Corp. v Tax Appeals Trib. of State of N.Y.***, 63 AD3d 1316, 1319 [3d Dept 2009] [internal quotation marks and citations omitted]; ***accord Matter of Marx v Bragalini***, 6 NY2d 322, 333 [1959]). This doctrine only applies, however, when the two provisions are substantially similar ***(see id.***; ***Matter of Karlsberg,*** Tax Appeals Tribunal, March 1, 2010, ***confirmed*** 85 AD3d 1347 [3d Dept 2011], ***appeal dismissed*** 17 NY3d 900 [2011]). Here, the contexts of Tax Law § 15 (c) and IRC § 164 are significantly different. IRC § 164 pertains to deductions from income tax for real estate taxes paid, whereas the term at issue here, "the eligible real property taxes paid or incurred by the enterprise during the taxable year" is part of the QEZE real property tax credit. The QEZE program was enacted by the Legislature in order to promote economic growth and job creation through incentives that create jobs and bring investment to communities that have been deemed by New York State to be economically distressed (***see*** General Municipal Law § 956; ***Matter of Hucko Trust***, Tax Appeals Tribunal, September 19, 2013). Thus, Tax Law § 15 and IRC § 164 have distinct purposes.

The contexts of the statutes are different for a second reason. Under IRC § 164, the buyer of the real property on which state property tax was paid is entitled to deduct the share of the real property tax paid that is apportioned to it under that section. In contrast, under Tax Law

§ 15, the buyer of the real property giving rise to the RPTC would never qualify for any RPTC as a result of the purchase of the property. Even assuming that the buyer is certified as a QEZE in the empire zone where the property is located, the buyer would not have paid the real property tax on the property – at most the buyer would have reimbursed the QEZE seller for the real property tax paid by the seller – and thus would not be eligible for any RPTC with regard to that property for the year of the sale (***see Matter of Forest City Enterprises, Inc.***, Tax Appeals Tribunal, October 1, 2018 [Tribunal holds that petitioner may not treat an employee of a related entity as petitioner's employee for QEZE RPTC purposes even though the employee did work for petitioner and petitioner paid the related entity a site management fee to reimburse it for the employee's wages and benefits]).[2] Therefore, the result of applying the federal conformity principle to Tax Law § 15 is not to "apportion" a deduction between two parties, as occurs in relation to real property taxes subject to IRC § 164 (d), but rather just to reduce the total amount of the credit that the Division must afford the QEZE in the year of the sale. More importantly, by reducing the RPTC for which a QEZE is eligible for any year in which it sells the underlying real property, the Division's application of the federal conformity principle lessens the value of a QEZE designation, which is not consistent with the economic development rationale underlying the QEZE program. Thus, it is not appropriate to apply the federal conformity principle to import the pro-rata apportionment rule found in IRC § 164 into Tax Law § 15. This is

[2] In its hearing brief, the Division argues that, under petitioners' interpretation of Tax Law § 15, if a QEZE sold qualifying real property to a buyer which qualified as a QEZE in the same empire zone, both QEZEs would be eligible for RPTC based on the real property tax paid by the first QEZE. According to the Division, because its position that IRC § 164's apportionment rule applies in determining the "the eligible real property taxes paid or incurred by the enterprise during the taxable year" under Tax Law § 15 (b) (1) would avoid this result, the Division's position is the only reasonable one. This argument is rejected. In the scenario posited by the Division, only the first QEZE would qualify for the RPTC because only it would have paid the taxes. As discussed above, reimbursing a party for taxes it paid is not the same as paying the tax.

especially true given the Appellate Division's caution that the federal conformity principle does not require a court to "strain" to construe the statutes as substantially similar (***see Matter of Codata Corp. v Commissioner of Taxation & Fin.***, 163 AD2d 755, 756 [3d Dept 1990]; ***see also Matter of Karlsberg v Tax Appeals Tribunal of State***, 85 AD3d 1347, 1348 [3d Dept 2011] [holding that, because Tax Law § 615 (f)'s limitation on itemized deductions was not "substantially similar" to IRC § 68 [c] [3]'s rule limiting the amount of federal itemized deductions, the principle of federal conformity did not require the application of that federal provision in interpreting Tax Law § 615 (f)'s limitation]; ***Astoria Fin. Corp. v Tax Appeals Tribunal of State of New York***, 63 AD3d at 1319 [notwithstanding that a bank tax provision in former Tax Law article 32 incorporated by reference a definition from an IRC provision while also deriving its definition of another key term from that IRC provision, the Appellate Division declines to apply federal conformity principle because the purpose of the IRC provision was different than that of the bank tax provision]).[3]

G. In sum, the clear language of Tax Law § 15 (b) (1) and (e) supports petitioners' view that the amount of the RPTC to which petitioners are otherwise entitled in 2012 may not be reduced merely because Columbia Lodge sold the real property that triggered the credit in 2012. Petitioners have shown that the Division's attempt to interpret the provision to reach a contrary conclusion is unreasonable and thus must be rejected.

[3] As discussed in finding of fact 7, the record is not completely clear as to whether Columbia Lodge, at the time it sold the 30 Clinton Avenue property that gave rise to the RPTC at issue herein, was reimbursed by the buyer for its 2012 real property taxes on the property. It is determined herein that the outcome would be no different whether or not Columbia Lodge was so reimbursed (***see Matter of Forest City Enterprises, Inc.***).

H. The petition of Joseph R. Nicolla and the petition of Richard A. Rosen and Cheri Rosen are granted to the extent of conclusions of law F and G, but are otherwise denied.

DATED: Albany, New York
February 20, 2020

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE