STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARTIN B. & IRENE B. GINSBERG	:	DETERMINATION DTA NO. 830408
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 2016.	:	

Petitioners, Martin B. and Irene B. Ginsberg, filed a petition for redetermination of a deficiency or refund of New York State personal income tax under article 22 of the Tax Law for the year 2016.

On February 28, 2023, and March 1, 2023, petitioners, appearing by Bousquet Holstein, PLLC (Casey A. Johnson, Esq., and Julia J. Martin, Esq., of counsel) and the Division of Taxation, appearing by Amanda M. Hiller (Amy Seidenstock, Esq., of counsel), waived a hearing and submitted this matter for determination based upon documents and briefs to be submitted by August 11, 2023, which date commenced the six-month period for the issuance of this determination. After review of the evidence and arguments, Alexander Chu-Fong, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether deference should be applied to the Division of Taxation's interpretation of Tax Law § 21 due to its status as the enforcing agency or on any other ground.

II. For the purposes of the Brownfield Redevelopment Tax Credit, whether the definition of qualified tangible property applies not only to the project for which a taxpayer seeks the credit, but also its capitalized costs.

FINDINGS OF FACT

The parties stipulated to certain facts, all of which have been accepted and substantially incorporated into the findings of fact below.

1. At all relevant times, petitioner, Martin B. Ginsberg, possessed an ownership interest in Ginsberg Development Companies, LLC (GDC), which, in turn, during the 2016 taxable year, GDC owned an 80% interest in Harbor Square Crossings, LLC (HSC).

2. On April 10, 2014, Harbor Square, LLC, transferred title to a parcel of real property located in Ossining, New York (the Site) to HSC. Prior to the transfer, the Site had been remediated under New York State's Brownfield Cleanup Program (BCP), for a variety of uses, including residential rental apartments and commercial space (the Project).

3. On December 8, 2006, the New York State Department of Environmental Services accepted the Project into the BCP. On the same date, the New York State Department of Environmental Conservation (DEC) and Harbor Square, LLC, entered into a Brownfield Cleanup Agreement (BCA).

4. Pursuant to the BCA, the Site was remediated, and, on December 31, 2008, the DEC issued a Certificate of Completion (CoC) to Harbor Square, LLC.

5. On November 6, 2013, the Village of Ossining, New York (the Village), passed a "Resolution Calling for Approval of the Harbor Square Request for Amended Site Plan and Special Use Permit" (the Village Resolution).

6. The Village Resolution approved the application of Harbor Square, LLC, to redevelop the Site, subject to certain conditions, which included entering into an amended and restated Land Development Agreement.

7. As a requirement for the issuance of a building permit for the Site, Harbor Square, LLC, had to satisfy the conditions in the Village Resolution by entering into an amended and restated Land Development Agreement. On March 21, 2014, Harbor Square, LLC, and the Village entered into a Supplement to the Land Acquisition and Disposition Agreement (LADA).

8. The LADA required Harbor Square, LLC, to replace approximately 2,600 linear feet of existing 6-inch Village water main on Snowden Avenue with 12-inch ductile iron pipe, connections for water service and fire hydrants, as well as restoration of Snowden Avenue (collectively, the Water Main Improvements or WMI).

9. Harbor Square, LLC, transferred the CoC to HSC on February 25, 2015.

10. The certificates of occupancy for the resident building of the Project were issued to HSC on June 30, 2016, August 1, 2016, August 26, 2016, and August 21, 2016, covering all 187 apartments in the building.

11. In a letter dated December 20, 2016, the Westchester County Department of Health approved the WMI.

12. The Village in the LADA required the completion of the WMI.

13. Whereas the Project was and is located on the Site, the WMI was and is not physically located on the Site.

14. The residential building and commercial space are physically located on the Site.

15. Based on the Village Resolution's requirement that Harbor Square, LLC, make the WMI, HSC concluded that the cost of the WMI were construction costs that directly benefitted

and were incurred by reason of the construction of the property located on the Site, and HSC, therefore, capitalized these costs into the basis of such property.

16. On its 2016 federal tax return, HSC capitalized the cost of the WMI to the basis of buildings and other depreciable assets located on the Site for federal income tax purposes.

17. Petitioners, Martin B. and Irene B. Ginsburg, filed a New York State resident income tax return, form IT-201, for tax year 2016, claiming a brownfield redevelopment tax credit (BRTC) of $5,507,940.00, and requested a refund in the amount of $5,510,157.00.

18. On November 10, 2017, the Division of Taxation (Division) issued an account adjustment notice to petitioners, which allowed a refund of $2,217.00 out of the requested $5,510,157.00.

19. The Division audited petitioners' claim for the BRTC for the 2016 tax year. On March 14, 2018, the Division sent a letter to petitioners requesting documentation to verify their claim for the BRTC. On April 12, 2018, petitioners responded and sent in additional documentation.

20. After reviewing the documentation submitted by petitioners, the Division sent letters, dated May 3, 2018, and May 17, 2018, requesting additional documentation, including a request for copies of invoices supporting costs claimed for the Tangible Property Credit Component (TPCC) of the BRTC. In response, petitioners provided invoices and noted when the work was done off the Site.

21. Based on its review, the Division determined that invoices in the amount of $2,955,374.00 were dated prior to when the BCA was executed. Invoices in the amount of $1,463,634.00 were for costs attributable to the WMI.

22. The Division issued a Notice of Disallowance, dated November 14, 2018, reducing the claimed refund of $5,510,157.00 by $357,940.00 to $5,152,217.00. Of that amount, $2,217.00 was previously refunded, leaving a refund due of $5,150,000.00. The Division determined that $2,955,374.00 related to costs paid or incurred prior to the execution of the BCA. It also determined that $1,463,634.00 related to costs attributable to the WMI, for work done off the Site, and do not qualify for the TPCC of the BRTC. The denial for costs attributed to the WMI resulted in a reduction of petitioners' refund by $118,554.00.

23. On December 3, 2018, the Division issued an account adjustment notice informing petitioners that their refund for tax year 2016 is $5,150,000.00, and issued a refund check in that amount to petitioners.

24. The former 6-inch water main pipes servicing the area of the Site did not have the capacity to service the planned residential units.

25. Once the WMI were completed, they were immediately dedicated back to the Village for general public use. HSC neither owns nor maintains the WMI; rather, the Village both owns and maintains them.

POSITIONS OF THE PARTIES

26. In this matter, the parties agree on all the relevant facts. For example, no controversy exists regarding the Project's eligibility for the BRTC, or petitioner's entitlement to some amount of the credit. Rather, the dispute centers around interpreting and applying the requirements of the TPCC element of the credit, which are found in Tax Law § 21 (a) (3) and § 21 (b) (3). Respectively, these sections define the calculation of tangible property and the requirements to be qualified to be included in the TPCC component of the BRTC.

27. Petitioners argue that Tax Law § 21 (a) (3) provides the formula for how to calculate the TPCC and what costs to include in the calculation. This section defines the TPCC as equal to the applicable percentage of the cost or other basis for federal income tax purposes, which ties the term to federal basis rules. Petitioners contend that Tax Law § 21 (b) (3) identifies the type of tangible property to be included in the TPCC. They adopt the position that the analysis is whether the property itself meets the Tax Law § 21 (b) (3) requirements, not whether the underlying costs meet the definition.

28. Applying these rules to the facts, petitioners argue that all conditions have been met. They argue that the Project, i.e., the buildings, meets qualifications within Tax Law § 21 (b) (3). Petitioners argue that they properly capitalized WMI, as indirect costs of the Project, and, therefore, under Tax Law § 21 (a) (3), they should be included in the TPCC calculation.

29. The Division argues that petitioners bear the burden of demonstrating unambiguous entitlement to the exemption. Insofar as statutory interpretation may be involved, it argues that petitioners must prove that the Division's interpretation is irrational and that theirs is the only reasonable construction.

30. The Division focuses on Tax Law § 21 (b) (3) (A) (iv), which provides that, to be qualified for the TPCC, the tangible property must have a situs on a qualified site in New York. Applied to the instant facts, it contends that the WMI were done offsite and, therefore, ineligible for the TPCC because it lacks situs on a qualified site. The Division interprets the qualified site requirement within Tax Law § 21 (b) (3) as applying both to the project and its capitalized costs. It contends that, under petitioners' interpretation, all indirect costs to be capitalized with the Project would be included in the TPCC, which would disregard the qualified site requirement. The Division takes the position that only when an item is 100% on a qualified site can 100% of

the cost basis of that item be allocated to the qualified site. It posits that if an item is partially located on a qualified site, then only a fraction (i.e., the square footage located on the qualified site, divided by the total square footage) would be allocated for TPCC purposes. The Division argues that petitioners failed to meet their burden and, therefore, the partial disallowance of the refund claim should be sustained.

31. Petitioners counter that they have interpreted Tax Law § 21 rationally. In so arguing, they challenge the Division's entitlement to deference because this dispute centers purely around statutory interpretation, a role that falls not to the enforcing agency, but to the courts. Petitioners submit that as the building meets all the requirements of "qualified tangible property" under Tax Law § 21 (b) (3), all costs properly included in the basis of such property are properly included in calculating the TPCC under Tax Law § 21 (a) (3).

32. Additionally, petitioners take the position that the Division irrationally interprets Tax Law § 21 because it lacks consistency with federal tax law. They contend that the Division never disallowed costs of the WMI or challenged the amount capitalized to the basis of the building on petitioners' return (***see Robinson Knife Mfg. Co., Inc. v Commr***, 600 F3d 121, 125 [2d Cir 2010]; IRC [26 USC] § 263A; Treas Reg [26 CFR] § 1.263A-1 [e] [3]). Petitioners, therefore, argue that the Division agrees that they properly capitalized the WMI to the building. They also argue that the Division seeks to apply the qualification of Tax Law § 21 (b) (3) not to the actual property, but onto the costs of said property. Petitioners argue that this contradicts the references to federal tax law in Tax Law § 21 (a) (3), and its plain language, which includes the basis of qualified tangible property without limitation.

CONCLUSIONS OF LAW

A. A threshold question arises as to whether the Division's interpretation of the statute is entitled to deference. Deference is accorded to an agency's interpretation of a statute when the interpretation involves the specialized competence or expertise the agency has developed in administering the statute (***see Matter of Rosen v Public Empl. Relations Bd.***, 72 NY2d 42, 47 [1988]; ***Kurcsics v Merchants Mut. Ins. Co.***, 49 NY2d 451, 459 [1980]). Courts defer to the administrative agency where the issue "involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom" (***Kurcsics***, 49 NY2d at 459; ***see International Union of Painters & Allied Trades, Dist. Council No. 4 v New York State Dept. of Labor***, 32 NY3d 198, 209 [2018]; ***Matter of Albano v Board of Trustees of N.Y. City Fire Dept., Art. II Pension Fund***, 98 NY2d 548, 553 [2002]). However, "where the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency ... [and] the judiciary need not accord any deference to the agency's determination" (***Matter of Belmonte v Snashall***, 2 NY3d 560, 566 [2004] [internal quotation marks and citation omitted]; ***see Matter of Obus v New York State Tax Appeals Trib.***, 206 AD3d 1511, 1512 [3d Dept 2022], ***lv denied*** 39 NY3d 907 [2023]).

B. The instant controversy distills to whether it is proper to impose the definition of qualified tangible property not on a project, but on its capitalized costs. Resolving this question does not involve any specialized knowledge or expertise by the Division, instead, requiring purely statutory reading and analysis. Therefore, in this instance, deference to the Division's interpretation is not required.

C. This matter involves a tax credit, which must be interpreted in the same manner as those granting tax exemptions (***see Matter of Purcell v New York State Tax Appeals Trib.***, 167 AD3d 1101 [3d Dept 2018], ***lv denied*** 33 NY3d 913 [2019], ***appeal dismissed*** 33 NY3d 999 [2019]). Tax credit and exemption statutes must be strictly construed against the taxpayer when or if ambiguity arises (***Matter of Suozzi v Tax Appeals Trib.***, 179 AD3d 1253, 1255 [3d Dept 2020] [internal quotation marks and citations omitted]; ***Matter of 677 New Loudon Corp. v State of N.Y. Tax Appeals Trib.***, 85 AD3d 1341, 1342 [3d Dept 2011], ***affd*** 19 NY3d 1058, 1060 [2012], ***rearg denied*** 20 NY3d 1024 [2013], ***cert denied*** 571 US 952 [2013]). The party seeking the exemption must show that its proffered interpretation of the statute is not only plausible, but also that it is the only reasonable construction (***Matter of Forest City Realty Trust, Inc. v Tax Appeals Trib.***, 188 AD3d 1317, 1318 [3d Dept 2020]; ***Matter of Piccolo v New York State Tax Appeals Trib.***, 108 AD3d 107, 111-112 [3d Dept 2013]). When analyzing such statutes, the interpretation must not be so narrow as to defeat the settled purpose (***Matter of Grace v New York State Tax Commn.***, 37 NY2d 193, 196 [1975], ***rearg denied*** 37 NY2d 816 [1975], ***lv denied*** 338 NE2d 330 [1975]).

D. The Legislature enacted the BCP for the purpose of promoting the cleanup, reuse, and redevelopment of abandoned and likely contaminated properties (***see*** ECL 27-1403), and as an incentive, established the BRTC (***see*** Tax Law § 21). This system enables a taxpayer subject to article 22 to claim a credit against such tax for a qualified site (***see*** Tax Law former § 21 [a] [1]). The total BRTC consists of three parts: the "site preparation credit component" (Tax Law § 21 [a] [2]); the "on-site groundwater remediation credit component" (Tax Law § 21 [a] [4]); and the "TPCC" (Tax Law former § 21 [a] [3]). This matter concerns only the latter, which is defined as follows:

> "The tangible property credit component shall be equal to the applicable percentage of *the cost or other basis for federal income tax purposes* of tangible personal property and other tangible property, including buildings and structural components of buildings, which constitute qualified tangible property ..." (emphasis added).

Tax Law § 21 (b) (3) defines qualified tangible property. As relevant to this matter, this statute provides:

> "'Qualified tangible property' is property described in either subparagraph (A) or (B) of this paragraph which:
>
> (A) (i) is depreciable pursuant to section one hundred sixty-seven of the internal revenue code,
>
> (ii) has a useful life of four years or more,
>
> (iii) has been acquired by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code,
>
> (iv) has a situs on a qualified site in this state, and
>
> (v) is principally used by the taxpayer for industrial, commercial, recreational or environmental conservation purposes (including the commercial development of residential housing)…."

E. This controversy may be distilled to whether the situs requirement (Tax Law § 21 [b] [3] [A] [iv]) applies to the capitalized costs of brownfield redevelopment projects. This is material because the taxpayer's "cost or other basis for federal income tax purposes" of the property (Tax Law former § 21 [a] [3]) is used to calculate the TPCC by multiplying that amount times the "applicable percentage" (Tax Law former § 21 [a] [5]).

F. As it is clear and unambiguous, Tax Law § 21 should be construed "so as to give effect to the plain meaning of the words used" (***Patrolmen's Benevolent Assn. v City of New York***, 41 NY2d 205, 208 [1976] [citations omitted]), and should be interpreted as they would be by an ordinary reading (***Saltser & Weinsier v McGoldrick***, 295 NY 499, 508 [1946]). The term "qualified tangible property" plainly refers to property for which the taxpayer seeks the TPCC

component of the BRTC. It does not apply to capitalized costs. In fact, Tax Law § 21 does not consider individual costs associated with tangible property, much less apply requirements and standards to them. Therefore, it is proper to interpret the situs requirement found within Tax Law § 21 (b) (3) (A) (iv) as applying only to the tangible property for which the taxpayer seeks the BRTC.

Petitioners read Tax Law § 21 in accordance with the foregoing analysis. They contend, and the Division did not challenge, that they properly capitalized the cost of the WMI to the Project. Petitioners arrived at this conclusion because the Village bargained for these improvements and, without them, the Village's infrastructure could not sustain the development. Applying to preceding interpretation of Tax Law § 21, the Project itself, for which petitioners seek the BRTC, meets the situs requirement. Therefore, they are entitled to the costs that have been properly capitalized to that building. This interpretation is plausible; therefore, the inquiry now becomes it is the only reasonable interpretation (***Matter of Suozzi v Tax Appeals Trib.***, 179 AD3d at 1255).

G. As applied to the instant facts, the Division reads the situs requirement unreasonably. It treats the WMI as if they were the development for which petitioners seek the BRTC, which, from either a factual or logical perspective, makes little sense. From a general conceptual perspective, the Division's interpretation ignores the realities of real estate development, which often requires upgrading and installing infrastructure. This is particularly true for brownfields, which require remediation and often lack the improvements required for development. In this way, if adopted and applied, the Division's interpretation would thwart the BRTC's settled purpose of encouraging the development and use of brownfields (***see*** ECL 27-1403).

Applied to this specific matter, the irrational results of this reading become clear: the Division seeks to deny petitioners the BRTC for the WMI. Contrary to the Division's position, the objective of the Project was not to improve the Village water system. Put alternatively, petitioners would not have done the WMI out of the goodness of their hearts. Rather, the sole motivator for undertaking the WMI was to enable the Project. "But for" petitioner's agreement to do so, the Village would not have granted the requisite permits, and the infrastructure could not have supported the development. Therefore, without the WMI, the Site would have sat as an underutilized brownfield.

The Division's interpretation of Tax Law § 21, as applied in the refund denial, denies the BRTC for elements necessary for redeveloping the Site and, not only ignores but defeats the legislative purpose of the BRTC. This reading cannot be considered anything but irrational and unreasonable. As such, under these facts, petitioners have proven "an unambiguous entitlement thereto, showing that the proffered interpretation of the statute is not only plausible, but also that it is the only reasonable construction" (***Matter of Suozzi v Tax Appeals Trib.***, 179 AD3d at 1255 [internal quotations marks and citations omitted]).

H. The petition of Martin B. and Irene B. Ginsberg is granted. The notice of disallowance, dated November 14, 2018, is cancelled insofar as it denies the BRTC for the WMI, but is otherwise sustained. The Division of Taxation is ordered to grant petitioners the portion of the BRTC related to the WMI, as claimed on their 2016 return, with due interest.

DATED: Albany, New York
February 8, 2024

/s/ Alexander F. Chu-Fong
ADMINISTRATIVE LAW JUDGE