STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	DECISION DTA NO. 822835
ANTHONY AND JOANNE PICCOLO	:	
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2004, 2005 and 2006.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on July 15, 2010. The Division of Taxation appeared by Mark Volk, Esq. (Margaret T. Neri, Esq., of counsel). Petitioners appeared by Hiscock & Barclay, LLP (David G. Burch, Jr., Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioners filed a brief in opposition. The Division of Taxation filed a reply brief. Oral argument, at the Division of Taxation's request, was heard on February 16, 2011, in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly disallowed a portion of the QEZE credits for real property taxes claimed as other refundable credits by petitioners on their New York State resident income tax returns for the years 2004, 2005 and 2006.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "6," which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioners, Anthony and Joanne Piccolo, were members of Piccolo Properties, LLC (Piccolo Properties) during the years 2004, 2005 and 2006.

Piccolo Properties was certified on June 1, 2001 under the Empire Zones Program as a qualified empire zone enterprise (QEZE) in accordance with Article 18-B of the General Municipal Law.

Piccolo Properties passed the employment test in 2004, 2005, and 2006 and had a 100% employment increase factor for those same years, and was therefore entitled to QEZE credits for real property taxes equal to the full amount of the eligible real property taxes paid for those years pursuant to Tax Law § 15.

During the period in issue, Piccolo Properties owned five parcels of land in the Auburn Empire Zone. The record includes statements of taxes issued by the City of Auburn on each of the five parcels, which were paid by Piccolo Properties for the years 2004, 2005 and 2006. On the statement of city taxes issued by the City of Auburn, the total amount of taxes due included tax amounts levied for city tax, capital improvement program, library and downtown improvement tax.

The Auburn Downtown Business Improvement District was created pursuant to Council Resolution No. 17 of 2001 of the Council of the City of Auburn and enacted in accordance with Article 19-A of the General Municipal Law as Local Law No. 1 (2001) of the City of Auburn.

The Auburn Downtown Business Improvement District was created in the public interest and included all properties located within the boundaries of the district. The provision of services within the district was pursuant to the district plan of the Auburn Downtown Business Improvement District and a Memorandum of Understanding between the City of Auburn and the District Management Association. All services provided within the district were in addition to, and not a substitution for, required municipal services provided by the City of Auburn on a city-wide basis.

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

> The Auburn downtown improvement tax is levied to pay for, among other things, beautification projects, cultural events, safety programs, and accessibility projects that benefit both the district and the Auburn community as a whole. The Auburn downtown improvement tax is levied at the rate per thousand equally based on assessed value.[1]

Petitioners timely filed joint New York State resident income tax returns for the years 2004, 2005, and 2006.

On their 2004 tax return, petitioners computed New York State tax due in the amount of $9,708.00, and claimed a nonrefundable EZ wage tax credit in the amount of $4,854.00 and a refundable QEZE credit for real property taxes (QEZE real property tax credit) in the amount of $74,635.00. The Division allowed the full amount of the claimed EZ wage tax credit. The Division issued a refund of the QEZE real property tax credit to petitioners in the amount of $69,781.00.

On their 2005 tax return, petitioners computed New York State tax due in the amount of

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[1] We modify this fact to more accurately reflect the record.

$5,298.00, and claimed a nonrefundable EZ wage tax credit in the amount of $2,649.00 and a refundable QEZE real property tax credit in the amount of $98,921.00. The Division allowed the full amount of the claimed EZ wage tax credit. The Division issued a refund of the QEZE real property tax credit to petitioners in the amount of $96,272.00.

On their 2006 tax return, petitioners computed New York State tax due in the amount of $2,345.00 and sales or use tax due in the amount of $53.00. Petitioners claimed a nonrefundable QEZE tax reduction credit in the amount of $2,345.00 and a refundable QEZE real property tax credit in the amount of $99,607.00. The Division allowed the full amount of the claimed QEZE tax reduction credit. The Division issued a refund of the QEZE real property tax credit to petitioners in the amount of $99,554.00.

The Division conducted a desk audit of the resident personal income tax returns filed by petitioners for the years 2004, 2005 and 2006. During that audit, the Division reviewed the QEZE real property tax credit claimed by petitioners for the years 2004, 2005, and 2006 and determined that those QEZE real property tax credits included special assessments paid by Piccolo Properties. Thereafter, the Division disallowed a portion of the QEZE real property tax credit claimed by petitioners because it included special assessments for the City of Auburn capital improvement program and the downtown improvement district.

As a result of its audit, on November 19, 2007, the Division issued to petitioners notices of deficiency (nos. L-029138915-6, L-029138911-1 and L-0291555981-1) asserting tax due in the amounts of $6,931.79, $8,047.20 and $6,935.60, respectively, for the years 2004, 2005 and 2006. The tax amount of each assessment corresponded to the amount of special assessments paid by Piccolo Properties and claimed by petitioners as a portion of the QEZE real property tax

credit for such year, which credit was previously refunded.

Following a conciliation conference held on June 17, 2008, the Bureau of Conciliation and Mediation Services issued a Conciliation Order (CMS No. 221988), dated October 31, 2008, denying petitioners' request and sustaining the statutory notices.

After further research, the Division determined that the City of Auburn capital improvement program was a tax that qualified for the QEZE real property tax credit. As a result, the Division recomputed the deficiencies so as to subtract the portion attributable to the City of Auburn capital improvement program from the amounts due. Notices and demands for payment of tax due, dated September 21, 2009, were sent to petitioners' representative indicating the following revised tax deficiencies: tax due in the amount of $3,224.61, plus interest for the year 2004; tax due in the amount of $3,812.93, plus interest for the year 2005 and tax due in the amount of $3,394.26, plus interest for the year 2006. The remaining tax deficiencies are attributable to the Auburn downtown improvement tax levied against the five parcels owned by Piccolo Properties.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge observed principles of statutory construction and the statutes authorizing the QEZE real property tax exemption, including Tax Law § 15(e). The Administrative Law Judge determined that petitioners met their burden of proving that assessments by the Auburn business improvement district constitute taxes under Tax Law § 15 because, under Real Property Tax Law § 102(21), failure to pay special assessments and *ad valorem* charges become tax liens. The Administrative Law Judge also determined that the Auburn downtown business improvement district tax constituted an eligible real property tax

because such charges are subject to the provisions of General Municipal Law § 980. Accordingly, the Administrative Law Judge granted the petition and cancelled portions of the Notices relating to the business improvement district charges.

The Administrative Law Judge found that the Auburn downtown business improvement district tax constituted a special assessment. The Administrative Law Judge concluded that the Legislature intended to include such special assessments within the definition of "eligible real property taxes" in former Tax Law § 15(e) because, under Real Property Tax Law § 102(21), such levies can become tax liens. Accordingly, the Administrative Judge found that the Auburn downtown business improvement district tax met the definition of eligible real property taxes.

ARGUMENTS ON EXCEPTION

On exception, the Division argues that a recent amendment to Tax Law § 15(e) should apply retroactively to this matter and that the provided definition of "eligible real property tax" requires reversal. In the alternative, the Division argues that the Auburn downtown business improvement district tax is not a tax, which goes to the general fund, but a special assessment that supports specific initiatives. The Division supports its theory by citing to the relevant definition provided in Real Property Tax Law § 102. The Division submits that the Administrative Law Judge erroneously misread the requirement that subject levy "become a lien" in former Tax Law § 15(e) as synonymous with the term "tax lien" in Real Property Tax Law § 102(21) and refers back to the definitions within the same section.

Petitioners argue that the recent amendment to Tax Law § 15(e) should not apply herein because the statute specifically exempts retroactive application with respect to maintenance charges. Petitioners also argue that it is inappropriate to look to the Real Property Tax Law in

interpreting the terms within Tax Law § 15(e) because the terms are clear. In the alternative, petitioners argue that excluding local charges, such as the Auburn downtown business improvement district tax, would run counter to the legislative intent to create tax-free zones.

OPINION

We reverse the determination of the Administrative Law Judge.

In cases of statutory interpretation, our prerogative is to ascertain and give effect to the intent of the Legislature (***Patrolmen's Benevolent Assn. v. City of New York***, 41 NY2d 205 [1976] ***citing Matter of Petterson v. Daystrom Corp.***, 17 NY2d 32 [1966]). The language of the statute is the clearest evidence of such intent (McKinney's Cons Laws of NY, Book 1, Statutes § 51[d]). Where no ambiguity exists, "the court should construe it so as to give effect to the plain meaning of the words used" (***Patrolmen's Benevolent Assn. v. City of New York***, ***supra*** at 208). However, "taxing statutes, when ambiguous and doubtful, should be construed liberally in favor of the taxpayer" (***City of New York v. Procaccino***, 46 AD2d 594, 595 [1975]).

We now turn to the statutes authorizing the subject QEZE real property tax credits. Chapter 63 of the Laws of 2000 amended portions of the Tax Law to provide additional tax credits under the Empire Zones Program Act. These amendments to Articles 9-A, 22, 32, and 33 of the Tax Law provided new tax credits, applicable to the years beginning on or after January 1, 2001.

Tax Law § 15 allows for a credit against corporate and personal income taxes for a qualified QEZE for eligible real property taxes. Tax Law § 15(b) provides that the amount of the credit shall be the product of the benefit factor, the employment factor, and the eligible real property taxes paid or incurred by the QEZE during the taxable year. Tax Law § 15(e) provides

the definition of eligible real property taxes. The parties dispute no issues of fact. What remains is the legal question of whether the term "eligible real property tax" in Tax Law § 15(e) includes special assessment or *ad valorem* charges such as those imposed by the Auburn downtown business improvement district.

We first address the Division's argument that the 2010 amendment to Tax Law § 15 retroactively applies and requires a ruling in its favor. Tax Law § 15(e) was amended by Chapter 57 of the Laws of 2010 and, the Division contends, this amendment merely clarifies the definition of "eligible real property taxes." Tax Law § 15(e), as amended, contains the following additional language, in relevant part:

> For purposes of this subdivision, the term "tax" means a charge imposed upon real property by or on behalf of a county, city, town, village or school district for municipal or school district purposes, provided that the charge is levied for the general public welfare by the proper taxing authorities at a like rate against all property in the territory over which such authorities have jurisdiction . . . . The term "tax" does not include a charge for local benefits, including any portion of that charge that is properly allocated to the costs attributable to maintenance or interest, when (1) the property subject to the charge is limited to the property that benefits from the charge, or (2) the amount of the charge is determined by the benefit to the property assessed, or (3) the improvement for which the charge is assessed tends to increase the property value (Tax Law § 15[e]).

As set forth within the Laws of 2010 (ch 57, pt R, § 18), the amendment's effective date was set forth as follows:

> This act shall take effect immediately, provided that . . . section thirteen of this act [amending Tax Law § 15(e) and clarifying the definition of eligible real property taxes for purposes of the QEZE credit] shall take effect immediately and apply to all taxable years beginning on or after January 1, 2010 and, except with respect to maintenance or interest charges, to all taxable years for which the statute of limitations for seeking a refund or assessing additional tax are still open.

We reject the Division's argument that the amendment applies retroactively to the instant matter. The effective date provides an exception for maintenance charges. As used above, the

term "maintenance" is ambiguous, because it may refer to debt servicing but also may refer to the "care and work put into property to keep it operating and productive" (Black's Law Dictionary, 9th ed, 1039). Due to this ambiguity, we construe this term in the light most favorable to petitioners. The record reveals, and the Division concedes, that the levies imposed by the Auburn downtown business improvement district support maintenance and beautification of properties within the district. As such, the subject charges constitute maintenance and meet the exception provided in the effective date in the Laws of 2010 (ch 57, pt R, § 18). Accordingly, we hold that the 2010 amendment to Tax Law § 15(e) has no bearing on this matter.

We now turn to former Tax Law § 15(e), which was in effect for the tax years at issue. The statute defines eligible real property taxes as "taxes imposed on real property . . . provided 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 18-B of the General Municipal Law and a qualified empire zone enterprise" (Tax Law § 15[e]). As relevant herein,[2] we interpret the statutory scheme of former Tax Law § 15(e) to provide that a levy or charge constitutes an eligible real property tax upon proving that:

(I) the levy constitutes a tax imposed upon real property; and

(II) if unpaid, such tax becomes a lien upon the real property.

Therefore, the task before this Tribunal is to determine the meaning of the phrase "tax imposed on real property" under former Tax Law § 15(e).

We reject petitioners' contention that the inclusion of the "eligible" in the term "eligible

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[2] Tax Law § 15(e) also imposes the requirement that the recipient of the tax credit be a certified QEZE that owns the subject real property, which must be located within the respective certified empire zone. We need not address these requirements because both parties concede that petitioners meet the foregoing eligibility requirements.

real property taxes" changes the meaning of "real property taxes" such that it would be inappropriate to consider the Real Property Tax Law. In our opinion, former Tax Law § 15(e) and the Real Property Tax Law are *in pari materia* and, therefore, should be construed together (McKinney's Cons Laws of NY, Book 1, Statutes § 221[c]; ***Siemens Corp. v. Tax Appeals Trib.***, 217 AD2d 247 [1996], ***lv granted*** 88 NY2d 811 [1996], ***revd*** 89 NY2d 1020 [1997], ***rearg denied*** 90 NY2d 845 [1997]). Both former Tax Law § 15(e) and the Real Property Tax Law deal with taxation, specifically taxes upon real property, and as such, "they must be read together and applied harmoniously" (***Matter of Inter-Co. Tit. Guar. & Mtge. v. State Tax Commn.***, 33 AD2d 251, 254 [1970], ***affd*** 28 NY2d 179 [1971], ***citing Smith v. People***, 47 NY 330 [1872]). Accordingly, we hold that it is appropriate to consider the Real Property Tax Law in construing the QEZE real property tax credit.

We now look to the Real Property Tax Law for guidance in interpreting the phrase "tax imposed on real property" within former Tax Law § 15(e). Real Property Tax Law § 102 defines those terms used in the real property tax law. As relevant herein, Real Property Tax Law § 102(20) defines a "tax," for real property tax purposes, as follows:

> [A] charge imposed upon real property by or on behalf of a county, city, town, village, or school district for municipal or school district purposes, but does not include a special ad valorem levy or a special assessment.

Reading this definition into the statutory framework of Tax Law § 15(e), we find that a levy or charge constitutes an eligible real property tax upon proving that:

> (I) it is a charge on real property, excluding a special *ad valorem* levy or a special assessment, imposed by or on behalf of a county, city, town, village or school district for municipal or school district purposes; and,
>
> (II) if unpaid, such a charge becomes a lien on the real property.

Having interpreted the relevant statutes, we now turn to the determination of the Administrative Law Judge.

We conclude that the Administrative Law Judge erroneously held that the levies imposed by the Auburn downtown business improvement district constitute a tax based upon the Real Property Tax Law definition of a tax lien (Real Property Tax Law § 102[21]). Under the statutory scheme of former Tax Law § 15(e), the threshold inquiry is whether the subject levy constitutes a tax on real property. As such, the trier of fact arrives at the issue of whether a charge or levy becomes a tax lien only after determining that the charge constitutes a tax. The Administrative Law Judge found the Auburn downtown business improvement tax to be a special assessment, which is specifically excluded from the definition of a tax. Accordingly, the inquiry should have terminated and the petition denied.

We further disagree with the Administrative Law Judge and hold that a "tax lien" is not synonymous with a tax that becomes a lien because the plain language of Tax Law § 15(e) includes only taxes, which definitively excludes other charges such as special assessments and *ad valorem* levies (Real Property Tax Law §§ 102[20], 102[15] and 102[14]).

We also conclude that the Administrative Law Judge erroneously found that the phrase "eligible real property taxes" under Tax Law § 15(e) includes special assessment and *ad valorem* charges. It is well-settled that tax credits are a particularized species of exemption from tax (***Matter of New York Fuel Terminal Corp.***, Tax Appeals Tribunal, August 27, 1998), and that statutes authorizing tax exemptions, such as the one at issue, are to be narrowly construed (***Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193 [1975], ***lv denied*** 37 NY2d 708 [1975]; ***Matter of Blue Spruce Farms v. New York State Tax Commn.***, 99 AD2d 867 [1984],

affd 64 NY2d 682 [1984]).

In our review, we can find neither legal support nor evidence to support the Administrative Law Judge's expansive interpretation of the term "tax" within former Tax Law § 15(e). The plain language of former Tax Law § 15(e) indicates that an eligible real property tax must first be a "tax imposed upon real property." The Real Property Tax Law clearly defines a tax as different from both special and *ad valorem* assessments. Courts have also held these distinctions to be significant (***see Watergate II Apts. v. Buffalo Sewer Auth.***, 46 NY2d 52 [1978] [levies imposed by a local sewer authority held not to be a tax]; ***Town of Cheektowaga v. Niagara Frontier Transp. Auth.***, 82 AD2d 175 [1981] [rejecting the argument that a special assessment constitutes a tax when the charge is based on land value and acreage]). Reading the plain language of the statute, we find that the Legislature clearly sought to provide an exemption for real property taxes, not special assessment charges or *ad valorem* levies.

We find that the levies imposed by the Auburn downtown improvement district do not meet the definition of eligible real property tax under former Tax Law § 15(e), although they bear the label "tax." In order to be considered such, the levy must be imposed by a municipality or school district for municipal or school district purposes. The record reveals that the Auburn downtown business improvement district tax is not imposed by or for either a municipality or a school district but to support the activities of the Auburn downtown business improvement district. We find levies funding the activities of a business improvement district to be mutually exclusive of levies for municipal and school district purposes. Accordingly, the Auburn downtown business improvement district tax does not constitute an eligible real property tax under former Tax Law § 15(e) and, as such, petitioner is not entitled to a QEZE real property tax

credit for Auburn downtown improvement district tax.

We conclude that the Auburn downtown improvement district tax does not meet the definition of a tax under former Tax Law § 15(e) as it was not levied by or for a municipality or school district and petitioners are not entitled to a QEZE real property tax credit for these levies. We also find that General Municipal Law § 980, as relied upon by the Administrative Law Judge, is not relevant herein.

We have considered the remaining arguments raised by petitioners and the Division and find them either without merit or not requiring a different result.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of Anthony and Joanne Piccolo is denied;

4. The Notices of Deficiency dated November 17, 2007 as revised by the Notices and Demands for Payment of Tax Due dated September 21, 2009 are sustained.

DATED: Troy, New York
August 4, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner