

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

---

|  |   |                          |
|--|---|--------------------------|
| In the Matter of the Petitions                     | : |                          |
| of   | : |                          |
| <b>ALAN GINSBERG,</b>                              | : | DECISION                 |
| <b>CANDICE GINSBERG TRUST,</b>                     | : | DTA Nos. 822853, 822855, |
| <b>DEAN GINSBERG TRUST,</b>                        | : | 822859, 822856, 822858,  |
| <b>MIKENZIE GINSBERG TRUST,</b>                    | : | 822857 and 822860        |
| <b>BRANDON WEISS TRUST,</b>                        | : |                          |
| <b>BRETT WEISS TRUST, AND</b>                      | : |                          |
| <b>PETER WEISS TRUST</b>                           | : |                          |
| for Redetermination of Deficiencies or for Refund  | : |                          |
| of Personal Income Tax under Article 22 of the Tax | : |                          |
| Law for the Year 2004.                             | : |                          |

---

Petitioners, Alan Ginsberg, Candice Ginsberg Trust, Dean Ginsberg Trust, Mikenzie Ginsberg Trust, Brandon Weiss Trust, Brett Weiss Trust and Peter Weiss Trust, filed an exception to the determination of the Administrative Law Judge issued on May 6, 2010. Petitioners appeared by Hiscock & Barclay (Kevin R. McAuliffe, Esq., and David G. Burch, Jr., Esq., of counsel). The Division of Taxation appeared by Mark Volk, Esq. (Margaret T. Neri, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument, at petitioners' request, was heard on May 11, 2011, in Troy, New York.

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

***ISSUE***

Whether the “Ulster Road Benefit” tax levy imposed on the properties owned by petitioners in their respective interests was an eligible real property tax for purposes of the credit against tax provided for in Tax Law § 15(a).

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for findings of fact “8” and “14,” which have been modified. The Administrative Law Judge’s findings of fact and the modified findings of fact are set forth below:

Both the Ulster Business Complex, LLC (Ulster Business Complex) and AG Properties of Kingston, LLC (AG Properties) (collectively, the companies) were certified Qualified Empire Zone Enterprises (QEZE) in the Kingston Ulster Empire Zone pursuant to Article 18-B of the New York State General Municipal Law, effective October 24, 2000.

In 2004, petitioner Alan Ginsberg owned 99 percent of the membership interests of Ulster Business Complex and 66 percent of the membership interests of AG Properties. In the same year, the Candice Ginsberg Trust, the Dean Ginsberg Trust and the Mikenzie Ginsberg Trust each owned 10% of AG Properties, and the Brandon Weiss Trust, the Brett Weiss Trust and the Peter Weiss Trust each owned 1%.

During the period in issue, 2004, the companies owned a multi-building campus known as TechCity, located in the Town of Ulster, County of Ulster. The site was the former location of an IBM complex where mainframe computers were manufactured until the early 1990s. Upon IBM’s departure, the site was placed on the market.

In 1997, Alan Ginsberg undertook an extensive due diligence analysis of the site as part

of an acquisition strategy and established multiple entities to purchase portions of the site. In February 1998, AG Properties and Ulster Business Complex each acquired certain parcels that comprised TechCity. TechCity consisted of 257 acres, with 2.5 million square feet of office and commercial space in 27 buildings.

Currently, TechCity has nine tenants, including Bank of America, IBM, Hunter Panels and several smaller businesses, regularly employing 850 employees, a number that swells by 500 to 600 when Bank of America is processing income tax returns.

The Town of Ulster created the Development Facilitation Improvement District in October 1990 pursuant to special legislation passed by the Legislature and signed by former Governor Mario Cuomo (L1990, ch 521). The required public hearing was held by the Ulster Town Board on November 26, 1990 after proper notice was duly published. The New York State Comptroller issued an order on August 28, 1991, granting permission for the establishment of the district and the Ulster Town Board passed the required resolution that established the district consistent with the Comptroller's order on September 16, 1991.

The district was created to fund the construction of a new road network to relieve traffic on Route 9W and open land for development that formerly was only accessible from Route 9W. All commercial properties along the Route 9W corridor, as well as vacant parcels to the north of Routes 209 and 199 and to the east of Route 9W, were included in the Development Facilitation Improvement District.

Although all properties in the district were deemed by the town to have benefitted from the traffic relief, it was not certain how the creation of the Development Facilitation Improvement District specifically affected the companies' lands in terms of their development.

However, other properties within the Development Facilitation Improvement District were ultimately developed, yielding the construction of the Hudson Valley Mall, the Kings Mall, and stand-alone stores such as Walmart, the Marriott Hotel, Target, Sam's Club, Lowes, Toys R Us, Marshall's and others.

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

To finance the construction of the roadways within the Development Facilitation Improvement District, the Town of Ulster imposed a charge on all commercial and industrial property along the Route 9W corridor and all the lands accessible on the newly-created roadway system, which included properties owned by the companies. The name of this specific charge was the "Ulster Road Benefit tax." It was used not only to fund the construction of, but also the maintenance and improvements to, the roads constructed in the district.<sup>1</sup>

Petitioners timely filed their New York State personal income tax returns for the year 2004. Each petitioner requested a refund of certain empire zone credits for which they believed the companies were eligible, including a refund of the real property taxes paid by the companies. These credits were available to petitioners as a flow through from the companies.

The Division of Taxation (Division) issued refunds to petitioners based on the claimed QEZE real property tax credits. Petitioner Alan Ginsberg received a refund in the amount of \$1,665,323.67. The Candice Ginsberg Trust, the Dean Ginsberg Trust and the Mikenzie Ginsberg Trust each received a refund in the amount of \$80,605.00. The Brett Weiss Trust, the Brandon Weiss Trust and the Peter Weiss Trust each received a refund in the amount of \$8,061.00.

The Division conducted an audit of petitioners' personal tax returns for the year 2004 and

---

<sup>1</sup> We modify this fact to more accurately reflect the record.

came to the conclusion that part of the real property tax credits that had been refunded to petitioners was not refundable because it was based on a special assessment for the Development Facilitation Improvement District. The Division noted that these taxes, denoted on the tax bills as “Ulster Road Benefit,” were levied against the approximately 150 parcels located in the Town of Ulster’s commercial district and were calculated with a formula that linked traffic generation with property class (not assessed value). The tax parcels owned by the companies in 2004 and the Ulster Road Benefit tax levy on each of those parcels was as follows:

**AG PROPERTIES**

| <u>Tax Parcel</u> | <u>2004 Ulster Road Benefit Tax Levy</u> |
|-------------------|--|
| 48.7-1-29.230     | 5,980.24                                 |
| 48.7-1-29.700     | 2,525.75                                 |
| 48.7-1-29.800     | 2,950.74                                 |
| 48.7-1-29.900     | 2,525.75                                 |
| 48.7-1-29.110     | 4,992.65                                 |
| 48.7-1-29.120     | 1,497.00                                 |
| 48.7-1-29.130     | 419.70                                   |
| 48.7-1-29.140     | 516.37                                   |
| 48.7-1-29.150     | 6,720.41                                 |
| 48.7-1-29.160     | 1,879.68                                 |
| 48.7-1-29.170     | 3,845.04                                 |
| 48.7-1-29.180     | 771.27                                   |
| 48.7-1-29.190     | 1,071.87                                 |
| 48.7-1-29.200     | 663.80                                   |
| 48.7-1-29.220     | 2,031.50                                 |
| 48.7-1-29.240     | 327.14                                   |
| 48.7-1-29.250     | 17,861.16                                |
| 48.7-1-29.260     | 25.53                                    |
| 48.7-1-29.270     | 1,804.47                                 |
| 48.7-1-29.300     | 571.59                                   |
| 48.7-1-29.400     | 868.40                                   |
| 48.7-1-29.500     | 17,082.78                                |
| 48.7-1-29.600     | <u>2,301.97</u>                          |
|                   | <b>79,234.81</b>                         |

### ULSTER BUSINESS COMPLEX

| <u>Tax Parcel</u> | <u>2004 Ulster road Benefit Tax Levy</u> |
|-------------------|--|
| 48.7-1-29.210     | 2,631.77                                 |
| 48.7-1-29.290     | 3,161.77                                 |
| 48.7-1-29.100     | <u>30,592.79</u>                         |
|                   | <b>36,386.29</b>                         |

**Total 115,621.10**

According to Town of Ulster Assessor Jim Maloney,<sup>2</sup> the Ulster Road Benefit tax “could be considered a ‘special assessment’.”

Each of the petitioners was issued a Statement of Proposed Audit Changes. However, only the statement issued to Alan Ginsberg set forth an extensive explanation of the proposed changes,<sup>3</sup> which stated, in part, as follows:

This assessment is based on your claim for QEZE Credit for Real Property Taxes Form IT-604, filed with your 2004 IT-201 New York State income tax return.

After a review of the 2004 IT-204 Partnership Returns filed for AG Properties of Kingston, LLC and Ulster Business Complex, LLC we found that special assessments were included in the amount of property taxes that were taken as a Credit on the partnership returns. Special assessments (The Ulster Road Benefit) included in Real property tax bills are not eligible for the QEZE Real Property Tax Credit. We have disallowed \$79,235.00 in special assessments for AG Properties of Kingston, LLC. Since you are a 66.00% partner your portion of that amount that has been disallowed is \$52,295.00. We have also disallowed \$36,386.00 in special assessments for Ulster Business Complex, LLC. The total disallowed for special assessments on the IT-604 is \$88,681.00.

Based on New York State Real Property Tax Law, “Tax” or “Taxation” is

---

<sup>2</sup> Mr. Maloney was the assessor as of July 24, 2009.

<sup>3</sup> The parties agreed to have all their cases associated because the legal issue in each matter is identical, the sole difference being the shares each owned in the companies. That factor accounted for the differences in the amount assessed to each petitioner.

defined by Real Property Tax law [RPTL] Section 102(20) as 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.

Generally, the taxes that are eligible for QEZE Real Property Tax Credit are based on the assessed value of the property and are collected for the benefit of every property owner in the municipality and not just for property owners within a special downtown district.

A “Special Assessment” is defined by the Real Property Tax Law [RPTL] 102(15) as a charge imposed upon benefited real property in proportion to the benefit received by such property to defray the cost, including operation and maintenance, of a special district improvement or service, or of a special improvement or service. Such a charge may be imposed by a city, county, town or village to pay the costs of eligible improvements or services.

A “Special district” means a town or county improvement district, corporation or other district established for the purpose of carrying on, performing, or financing one or more improvement or services intended to benefit the health, welfare, safety or convenience of the inhabitants of such district or benefit the real property within such district, and in which real property is subject to special ad valorem levies or special assessments for the purpose for which such district was established.

Since you have already been refunded this credit; this assessment has been issued to recapture the disallowed portion.

Following the issuance of statements of audit changes to petitioners, the Division issued notices of deficiency to petitioners which set forth the following:

| <u><b>Petitioner</b></u>   | <u><b>Notice Number</b></u> | <u><b>Date</b></u> | <u><b>Tax</b></u> | <u><b>Interest</b></u> |
|----------------------------|-----------------------------|--------------------|-------------------|------------------------|
| Alan Ginsberg              | L-029759936-1               | 04/28/2008         | \$88,681.00       | \$21,200.66            |
| Candice Ginsberg<br>Trust  | L-029741712-2               | 04/21/2008         | \$7,924.00        | \$2,262.31             |
| Mikenzie Ginsberg<br>Trust | L-029741749-4               | 04/21/2008         | \$7,924.00        | \$2,262.31             |

|                     |               |            |            |            |
|---------------------|---------------|------------|------------|------------|
| Dean Ginsberg Trust | L-029716588-4 | 04/10/2008 | \$7,924.00 | \$2,240.85 |
| Brett Weiss Trust   | L-029716602-2 | 04/10/2008 | \$792.00   | \$223.97   |
| Brandon Weiss Trust | L-029716573-9 | 04/10/2008 | \$792.00   | \$223.97   |
| Peter Weiss Trust   | L-029716568-4 | 04/10/2008 | \$792.00   | \$223.97   |

***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) and Real Property Tax Law § 120. The Administrative Law Judge found that the Ulster Road Benefit tax was a special assessment benefitting the property owners and properties in the Development Facilitation Improvement District within the Town of Ulster. The Administrative Law Judge concluded that the subject charge could not be an eligible real property tax under Tax Law § 15(e) because the Ulster Road Benefit tax was a special assessment and specifically excluded from the definition of a tax. Accordingly, the Administrative Law Judge held that petitioners are not entitled to QEZE real property tax credits for the amounts paid towards the Ulster Road Benefit tax.

***ARGUMENTS ON EXCEPTION***

Petitioners argue that the determination should be reversed because the Administrative Law Judge misapplied the law. Petitioners contend that they do not bear the burden of establishing entitlement to Empire Zone Program benefits because the Empire Zone legislation constitutes a contract with the State, under which such benefits are consideration. Petitioners also argue that the Ulster Road Benefit tax is not a special assessment because they purportedly



received no benefit from the building and maintenance of the new roads in the Development Facilitation Improvement District. Petitioners argue that even if the Ulster Road Benefit tax is a special assessment, it is still includible within the term “eligible real property tax” as provided by Tax Law § 15(e).

The Division argues that the determination should be affirmed.

### ***OPINION***

We affirm the determination of the Administrative Law Judge.

Initially, we reject petitioners’ argument that they do not bear the burden of establishing entitlement to QEZE benefits. Contrary to petitioners’ assertions, New York State has no contractual obligation to provide petitioners with their sought QEZE real property tax credits. The record contains no evidence indicating that the State of New York entered into private contracts by reason of its QEZE certification under Article 18-B of the General Municipal Law. It is a long-standing principle in this State that:

It is never to be assumed that the State has, by any act, fettered its power of taxation in the future, unless it appears with irresistible clearness that the enactment was intended to be in the nature of a private contract as distinguished from a mere act of general legislation (*People ex rel v. Commissioners*, 67 NY 516, 519 [1876]; *see People v. Roper*, 35 NY 629; *The People v. The Commissioners etc.*, 47 Id., 501; *Rector, etc. of Christ Church v. County of Philadelphia*, 24 How. [US]. 300; *see also People ex rel Iroquois Door Co. v. Knapp*, 186 App Div 172 [1919]).

It is clear that Article 18-B of the General Municipal Law was enacted by the Legislature as general legislation and not in the nature of establishing private contracts. There is no evidence of a contract. Accordingly, we reject petitioners’ argument that the State of New York is contractually obligated to provide the QEZE credits.

The subject QEZE real property tax credit at issue is a particularized species of

exemption from tax (*Matter of New York Fuel Terminal Corp.*, Tax Appeals Tribunal, August 27, 1998). As such, petitioners bear the burden of establishing clear entitlement to the desired exemption (*see Golub Serv. Sta. v. Tax Appeals Trib.*, 181 AD2d 216 [1992]). In order to prevail, petitioners must show that their interpretation of the statute is the only reasonable construction (*see Matter of Federal Deposit Ins. Corp. v. Commissioner of Taxation & Fin.*, 83 NY2d 44 [1993]). Additionally, the statutes granting exemptions from taxation must be narrowly construed against petitioners (*see General Mills Rest. Group v. Chu*, 125 AD2d 762 [1986]).

This matter presents the question of what constitutes an eligible real property tax for the purposes of the QEZE real property tax credit. We have previously addressed this legal question in *Matter of Herrick* (Tax Appeals Tribunal, August 4, 2011), as well as *Matter of Stevenson* (Tax Appeals Tribunal, August 4, 2011) and *Matter of Piccolo* (Tax Appeals Tribunal, August 4, 2011). In these cases, we rejected the taxpayers' position that the term eligible real property taxes includes special assessments or *ad valorem* levies. We interpreted the term "tax on real property" within Tax Law § 15(e) using Real Property Tax Law § 102(20), which defines "tax" for real property purposes. In *Matter of Piccolo (supra)*, we concluded that a levy or charge constitutes an eligible real property tax for QEZE purposes 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 addressed the standard of what constitutes an eligible real property tax, we now turn to the determination.

We agree with the Administrative Law Judge's determination that the Ulster Road Benefit tax is not a tax, but a special assessment under the Real Property Tax Law. Initially, we note that labeling a charge or levy as a "tax" is not dispositive of whether the item actually constitutes a tax under the Real Property Tax Law. Real Property Tax Law § 102(15) defines a special assessment as:

[A] charge imposed upon benefitted real property in proportion to the benefit received by such property to defray the cost, including operation and maintenance, of a special district improvement or service or of a special improvement or service but does not include a special ad valorem levy.

The record shows that the Ulster Road Benefit tax meets the definition of a special assessment. The Town of Ulster imposes the charge on property owners within the Development Facilitation Improvement District pursuant to the district's authorizing legislation (L 1990, ch 521). As discussed above, the purpose of this special improvement district is to establish and maintain a road network in petitioners' area that would alleviate traffic along the main road in the Town of Ulster and to open new parcels for development. The record shows that the Ulster Road Benefit tax was levied in order to build, maintain and improve these roads in the Development Facilitation Improvement District pursuant to the legislation.

The statute authorizing the district's creation provides that the costs of the roads, "shall be raised through levy of special assessments upon all lots or parcels of land within such improvement district or benefitted [sic] area in proportion to the benefit derived therefrom" (L 1990, ch 521). Accordingly, the Ulster Road Benefit tax is imposed upon properties in the district at a rate in proportion to the calculated benefit received. These facts clearly meet the definition provided in Real Property Tax Law § 102(15), and we conclude that the Administrative Law Judge properly determined the Ulster Road Benefit tax to be a special

assessment.

We agree with the Administrative Law Judge's conclusion that the Ulster Road Benefit tax levy does not constitute an eligible real property tax under Tax Law § 15(e). Real Property Tax Law § 102(20) defines a tax as:

[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.

The Ulster Road Benefit tax does not meet the foregoing definition because it is a special assessment, which is a charge specifically excluded from tax (*see Matter of Herrick, supra; Matter of Piccolo, supra; Matter of Stevenson, supra*). Accordingly, we find that the Administrative Law Judge properly concluded that petitioners are not entitled to QEZE real property tax credits for amounts paid pursuant to the Ulster Road Benefit tax.

We also find no merit in petitioners' argument that the Ulster Road Benefit tax does not constitute a special assessment because they accrued no benefit from the project. The record shows that the Town of Ulster concluded that all properties located within the Development Facilitation Improvement District accrued some benefit from the road services for which the Ulster Road Benefit tax is levied. Although petitioners now claim they received no benefits, the record includes no evidence indicating that they challenged the findings of the Town of Ulster or otherwise took the position that they did not receive any benefit from the roads. Accordingly, we reject this argument as it lacks factual support.<sup>4</sup>

We have considered petitioners' remaining arguments and find them lacking in merit or

---

<sup>4</sup> We further note that this would not be the proper forum to challenge whether petitioners' properties should be included in the district.

properly addressed by the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Alan Ginsberg, Candice Ginsberg Trust, Dean Ginsberg Trust, Mikenzie Ginsberg Trust, Brandon Weiss Trust, Brett Weiss Trust and Peter Weiss Trust are denied;

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

3. The petitions of Alan Ginsberg, Candice Ginsberg Trust, Dean Ginsberg Trust, Mikenzie Ginsberg Trust, Brandon Weiss Trust, Brett Weiss Trust and Peter Weiss Trust are denied; and

4. The Notices of Deficiency dated April 10, 2008, April 21, 2008, and April 28, 2008 are sustained.

DATED: Troy, New York  
November 3, 2011

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

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