

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>FOREST CITY ENTERPRISES, INC.</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 822184</b>
for Redetermination of a Deficiency or for Refund of	:	
Corporation Franchise Tax under Article 9-A of the Tax	:	
Law for the Period February 1, 2004 through January 31,	:	
2005.	:	

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Petitioner, Forest City Enterprises, Inc., filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the period February 1, 2004 through January 31, 2005.

On October 10, 2008, petitioner, by its representative, Harris Beach, PLLC (Robert J. Ryan, Esq., of counsel) and the Division of Taxation, by its representative, Daniel Smirlock, Esq. (Clifford M. Peterson, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs to be submitted by April 6, 2009, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Brian L. Friedman, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation properly denied petitioner's claim for a qualified empire zone enterprise (QEZE) credit for eligible real property taxes paid by an affiliate, FC Yonkers Associates, LLC.

***FINDINGS OF FACT***

On October 10, 2008, the parties entered into a written stipulation of facts, the relevant portions of which have been incorporated into the following Findings of Fact. In addition, included with its brief, the Division of Taxation (Division) submitted 33 proposed findings of fact, each of which has been incorporated into the following Findings of Fact except: subparagraph (4) of proposed finding of fact 17 which states that FC Yonkers paid the subject “real property taxes” on the Ridge Hill Property when, in fact, the payment was a payment in lieu of taxes; and proposed findings of fact 24, 25, 27, 28, 30, 31 and 32 which are irrelevant to this proceeding.

1. Forest City Enterprises, Inc. (Enterprises) timely filed a form CT-3-A, General Business Corporation Combined Franchise Tax Return, in the name of “Forest City Enterprises, Inc. and Subsidiaries” for the fiscal year ended January 31, 2005. The CT-3-A was received by the Division on April 17, 2006. On the return, Enterprises claimed a credit for QEZE real property taxes totaling \$301,936.00 and claimed a refund for a portion of those credits, \$214,562.00. The computation of the amount of the credits claimed by Enterprises, to wit, \$301,936.00 is not at issue.

2. Enterprises’ claim was denied by the Division which issued a form AU-20.1, Statement of Tax Reduction or Overpayment (Statement of Refund Denial), dated June 19, 2007. The Statement provided, in pertinent part, as follows:

Per your correspondence received March 20, 2007, FC Yonkers Associates, LLC leases the property located at 1 Ridge Hill, Yonkers, NY. In addition, per your correspondence dated March 23, 2007, FC Yonkers Associates, LLC is not a party to the original PILOT agreement for this parcel of property.

As FC Yonkers Associates, LLC is neither the owner of the real property or a party to the PILOT agreement with the City of Yonkers, property taxes levied for this location do not constitute eligible real property taxes in the period ended January 31, 2005, as defined by Section 15(e) of the New York State Tax Law.

Based on the above, your claim for QEZE Credit for Real Property Taxes passed through from FC Yonkers Associates, LLC is **disallowed**.

3. On December 5, 1979, Loral Corporation (Loral) entered into a lease agreement with the State of New York for property in Ridge Hill, New York (the Loral Lease Agreement) known as the former Ridge Hill Rehabilitation Center (the Ridge Hill Property).

4. In December 1979, the city council of the City of Yonkers, by a special ordinance, authorized the city manager to execute an agreement with Loral regarding payments in lieu of real property taxes for the Ridge Hill Property.

The record herein does not include a copy of the written agreement between the City of Yonkers and Loral containing the terms agreed upon by the parties.

5. In 1996, Loral and Lockheed Martin Corporation (Lockheed Martin) agreed that Lockheed Martin would purchase Loral and merge it into a subsidiary of Lockheed Martin.

6. On December 14, 2000, Lockheed Martin assigned different interests in the Ridge Hill Property to the Ridge Hill Development Corporation (Ridge Hill) and the City of Yonkers Industrial Development Agency (YIDA). Ridge Hill agreed to assume certain obligations of Lockheed Martin, as successor in interest to Loral in those obligations.

7. On December 14, 2000, YIDA and Ridge Hill entered into a Leasehold Mortgage Security Agreement and Assignment of Leases regarding the Ridge Hill Property.

8. FC Yonkers Associates, LLC (FC Yonkers) executed a Ground Lease with Ridge Hill dated August 8, 2002 (the 2002 Ground Lease). Pursuant to the Ground Lease, FC Yonkers

agreed to be responsible for Loral's PILOT (payment in lieu of taxes) payments under the 1979 special ordinance directly to the City of Yonkers as a result of FC Yonkers's lease of Ridge Hill's right, title and interest in and to the Ridge Hill Property.

9. FC Yonkers and Ridge Hill entered into the first amendment to the 2002 Ground Lease that was effective on November 8, 2002.

10. FC Yonkers and Ridge Hill entered into a second amendment to the 2002 Ground Lease that was effective May 2003.

11. The City of Yonkers Department of Finance and Management Services issued an invoice dated April 27, 2004 to Mr. John Swagerty of Forest City Ratner Co. for \$301,936.10 for payments to be made in lieu of taxes for the Ridge Hill Property. Forest City Ratner Co. is an affiliate of FC Yonkers.

12. FC Yonkers and Ridge Hill entered into a third amendment to the 2002 Ground Lease that was executed on November 30, 2004. Pursuant to this third amendment, FC Yonkers agreed to be responsible for all taxes and PILOT payments with respect to periods on or after January 1, 2004, and FC Yonkers further agreed to make such payments directly to the respective taxing jurisdictions.

13. By a check dated January 18, 2005, FC Yonkers paid \$301,936.10 to the City of Yonkers.

14. For the period at issue, Enterprises and its subsidiary F.C. Member, Inc. (Member) were New York taxpayers. Member was a 70% owner in FC Yonkers. Member full-funded FC Yonkers. Whether Member is entitled to 100% of the pass through credits from its interest in FC Yonkers is not at issue in this proceeding.

15. FC Yonkers was a New York State Qualified Empire Zone Enterprise (QEZE). FC Yonkers became certified as a QEZE on March 8, 2004.

16. For federal and New York tax purposes, FC Yonkers reported its taxes as if it were a partnership.

17. Along with the form CT-3-A, the taxpayer members of the combined group (Taxpayer Members) filed a form CT-604-CP for credits earned by Member's interest in FC Yonkers. On line one of the CT-604-CP, the Taxpayer Members claimed a QEZE credit of \$301,936.00 for real property taxes paid by FC Yonkers.

On line 78 of the CT-3-A, the Taxpayer Members reduced their tax liability by applying \$180,748.00 in credits. Of the amount reported on line 78, \$87,374.00 represented the QEZE credit for real property taxes allegedly earned by FC Yonkers and passed through to Member. Then the Taxpayer Members requested a refund of \$214,562.00 for the balance of Member's claimed QEZE credit for real property taxes.

On the CT-3-A, the Taxpayer Members claimed pass-through credits earned by another qualified empire zone enterprise, FC Gowanus Associates, LLC. The QEZE credits passed through from FC Gowanus Associates, LLC, are not at issue in this proceeding.

18. Enterprises' entitlement to a pass through of FC Yonkers's asserted right to a tax credit is not at issue herein. Enterprises' claim for the credit flows from: (1) its filing the relevant combined report along with Member; (2) Member's interest in FC Yonkers; (3) FC Yonkers's status as a QEZE; and (4) FC Yonkers's payments in lieu of taxes on the Ridge Hill Property.

19. Mr. Frederick Houser was the auditor assigned by the Division to review Enterprises' claim. At the time of the audit, Ms. Diane Houck was Mr. Houser's supervisor.

20. By a letter dated July 13, 2006 and addressed to Enterprises, Mr Houser requested certain information concerning FC Yonkers and the QEZE credit for real property taxes. By a letter dated October 24, 2006 and addressed to Enterprises, Mr. Houser requested the material that had previously been requested in the July 13, 2006 letter.

21. By a letter dated November 15, 2006, Mr. Joseph L. Krivis, Federal Tax Manager for Enterprises, responded to Mr. Houser's letter dated July 13, 2006. Documents that were attached to Mr. Krivis's letter included the Operating Agreement of FC Yonkers Associates, LLC, the April 27, 2004 letter sent by the City of Yonkers Department of Finance and Management Services to Mr. John Swagerty of Forest City Ratner Co., and a copy of FC Yonkers's canceled check in the amount of \$301,936.10.

22. By a letter dated November 27, 2006, Mr. Houser requested additional information from Enterprises. Mr. Houser requested a copy of the PILOT agreement between FC Yonkers and the City of Yonkers.

By a letter dated January 9, 2007, Mr. Krivis responded to Mr. Houser's letter of November 27, 2006. The letter stated, in relevant part, as follows:

You have requested a copy of the PILOT agreement between FC Yonkers Associates, LLC and the City of Yonkers. If that agreement was executed or amended on or after January 1, 2001 then you wish to have copies of the Certificate of Approval, Eligible Real Property Taxes for the Real Property Tax Credit. Since the subject PILOT agreement existed prior to that date, we do not believe that we are subject to this requirement but in an effort to cooperate with your request, we are trying to have the State Office of Real Property Services issue and forward a certificate.

It should be noted that the existing agreement was assigned to FC Yonkers and there was no amendment to the substantive terms of the PILOT, merely an assumption of the payments by FC Yonkers Associates.

Enterprises did not provide Mr. Houser with a copy of the PILOT agreement which it claimed “existed prior to” January 1, 2001.

23. By a letter dated February 13, 2007, Ms. Houck wrote to Enterprises informing it that the audit of its tax returns for the fiscal year January 31, 2005 had resulted in additional tax liability. Attached to Ms. Houck’s letter is a Schedule A entitled “Notes and References.” In paragraph 2 of the Schedule A, Ms. Houck explained the basis for the Division’s denial of Enterprises’ claim. This explanation stated, in part, as follows:

As shown on form CT-604-CP, QEZE Credit for Real Property Taxes and QEZE Tax Reduction Credit for Corporate Partners, you are claiming QEZE Credit for Real Property taxes, in the amount of \$301,936, passed through from FC Yonkers Associates, LLC.

Per your correspondence dated January 9, 2007, the above referenced PILOT payment was assumed by FC Yonkers Associates, LLC, as FC Yonkers Associates, LLC was not part of the original agreement.

As the original PILOT agreement has not been amended to include FC Yonkers Associates, LLC as a party, the Department’s position is that the above referenced PILOT payment, the amount of \$301,936 does not constitute eligible real property taxes as defined by Section 15(e) of the New York State Tax Law.

Based on the above, your claim for QEZE Credit for Real Property Taxes, in the amount of \$301,936, passed through from FC Yonkers Associates, LLC is **disallowed**.

24. By a letter dated March 23, 2007, Mr. Krivis responded to the Division’s denial of Enterprises’ claim. On March 31, 2007, Mr. Krivis sent to Mr. Houser by facsimile a copy of the second amendment to the 2002 Ground Lease.

25. FC Yonkers sent an application, signed on April 5, 2007, to the New York State Empire State Development and the Office of Real Property Services for PILOT certification.

26. In January 2008, the City of Yonkers and FC Yonkers executed a document entitled “Memorandum of Understanding” whereby the City of Yonkers and FC Yonkers acknowledged that FC Yonkers became Empire Zone certified effective March 8, 2004 and is therefore eligible to access the benefits referred to in section 966 of the General Municipal Law of the State of New York, including QEZE benefits. In the Memorandum of Understanding, the City of Yonkers and FC Yonkers acknowledged and agreed that FC Yonkers is legally responsible for making payment-in-lieu-of tax payments to the City of Yonkers pursuant to the amounts, terms and conditions contained in the 1979 PILOT Ordinance, for periods on or after January 1, 2004.

27. By a letter dated July 15, 2008, Enterprises’ representative, Mr. Robert J. Ryan, wrote to Mr. Randal Coburn, Director, Empire Zones Program, which stated, in part, as follows:

In 2004, FC Yonkers took responsibility for PILOT payments pursuant to a 1979 Ordinance PILOT between the City of Yonkers and Loral Corporation. The Ordinance PILOT was executed in 1979 and was never amended. Pursuant to Tax Law § 15(e), for taxable years beginning on or after January 1, 2002 through taxable years beginning prior to January 1, 2005, PILOT agreements “executed or amended on or after January first, 2001, shall not constitute eligible real property taxes unless such written agreement is approved by both the department of economic development and the office of real property services as satisfying generally accepted and recognized norms and standards of real property tax appraisals.” Therefore, it is our position that since the PILOT agreement was executed prior to January 1, 2001 and was never amended; such agreement is not subject to approval by both the department of economic development and the office of real property services. If your office agrees that the enclosed PILOT agreement is not subject to approval, please send a written reply indicating such. In the alternative, if your office determines that such PILOT agreement is subject to approval, please proceed with the review process.

28. By a letter dated August 22, 2008, Mr. Alan P. Lebowitz, General Counsel to the New York State Department of Economic Development, responded to Mr. Ryan’s July 15, 2008 letter to Mr. Coburn. The letter stated, in part, as follows:



After careful review, I have concluded that a determination about FC Yonkers' application cannot be made without making a determination as to whether FC Yonkers' PILOT payments constitute 'eligible real property taxes' as defined in Section 15(e) of the New York State Tax Law. As such a determination falls squarely within the province of the New York State Department of Taxation and Finance ("T and F"), the New York State Department of Economic Development will not be in a position to act on the application unless it is advised by T and F that the PILOT payments are "eligible real property taxes" under Section 15(e).

29. By a letter dated August 27, 2008, Mr. Ryan responded to Mr. Lebowitz's August 22, 2008 letter. In the letter, Mr. Ryan expressed his disagreement with Mr. Lebowitz's statement that a determination cannot be made without knowing whether a PILOT payment will be considered eligible real property taxes. Mr. Ryan stated:

ESD's [Empire State Development] failure to make a determination on FC Yonkers' PILOT application based upon a lack of a determination by T&F to whether the PILOT payments constitute "eligible real property taxes" is statutorily incorrect and places FC Yonkers in a classic catch 22 - in a denial of a credit for real property taxes, T&F states that certain payments made under the PILOT are not "eligible real property taxes" because the PILOT agreement was not approved by ESD and ORPS [Office of Real Property Services] as satisfying generally accepted and recognized norms and standards of real property tax appraisals and upon application to ESD for PILOT approval, ESD states that it cannot act on the application without knowing whether the payments made thereunder constitute "eligible real property taxes."

30. By a letter dated September 3, 2008, Mr. Stephen J. Harrison, Associate Attorney and Records Access Officer for the State of New York Office of Real Property Services, responded to an August 22, 2008 request by Mr. Ryan for certain records pertaining to the criteria and process used by the Office of Real Property Services to determine whether a PILOT agreement satisfies generally accepted and recognized norms and standards of real property tax appraisals pursuant to Tax Law former § 15(e), such process having been eliminated by chapter 63 of the Laws of 2005. With the letter, Mr. Harrison enclosed the PILOT approval process used by ORPS.

31. By a letter dated September 8, 2008, Mr. Lebowitz of ESD responded to Mr. Ryan's letter of August 27, 2008. The letter stated that Mr. Lebowitz disagreed with Mr. Ryan's assertion that ESD should render a decision on FC Yonkers's application for PILOT certification without first knowing from T&F whether, in its opinion, FC Yonkers's PILOT payment constitutes eligible real property taxes under Tax Law § 15(e). Mr. Lebowitz further stated that "as your letter states that this matter is currently pending before the New York State Division of Tax Appeals, DED [Department of Economic Development] will not consider taking any further action on this matter until there is a final resolution to the litigation."

32. To date, neither the New York State Office of Real Property Services nor the New York State Department of Economic Development have certified FC Yonkers's arrangement with the City of Yonkers as a qualified PILOT agreement for purposes of Tax Law § 15(e).

### ***CONCLUSIONS OF LAW***

A. Tax Law § 15 provides for a credit against taxes imposed pursuant to articles 9-A, 22, 32 or 33 of the Tax Law for "eligible real property taxes" paid or incurred by a QEZE. In order to be eligible for such credit, however, certain criteria set forth in section 15 must be met.

B. Tax Law § 15(former [e]), in effect for the period at issue, provided as follows:

Eligible real property taxes. The term "eligible real property taxes" means 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 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. In addition, the term "eligible real property taxes" includes payments in lieu of taxes made by the QEZE to the state, a municipal corporation or a public benefit corporation pursuant to a written agreement entered into between the QEZE and the state, municipal corporation, or public benefit corporation. 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 unless such written agreement is approved by both the department of economic development and the office of real property services as satisfying generally accepted and recognized norms and standards of real property tax appraisals.

C. Pursuant to the terms of Tax Law § 15(former [e]), for the period at issue in this proceeding, i.e., February 1, 2004 through January 31, 2005, in order for a payment made in lieu of taxes, i.e., a PILOT, to constitute eligible real property taxes, the payment must have been made “by the QEZE to the state, municipal corporation or public benefit corporation *pursuant to a written agreement entered into between the QEZE and the state, municipal corporation, or public benefit corporation*” (emphasis added). In the matter at issue, when FC Yonkers made its PILOT payment of \$301,936.10 to the City of Yonkers on January 18, 2005, no written agreement existed between FC Yonkers and the City of Yonkers.

D. FC Yonkers did not become certified as a QEZE until March 8, 2004. Moreover, the only written agreement between FC Yonkers and the City of Yonkers was the Memorandum of Understanding, executed in January 2008, by which the City of Yonkers and FC Yonkers acknowledged that FC Yonkers was legally responsible for making PILOT payments to the City of Yonkers, for periods on or after January 1, 2004, pursuant to the amounts, terms and conditions contained in the 1979 PILOT ordinance entered into between the City of Yonkers and Loral, the corporation which, on December 5, 1979, had leased the Ridge Hill Property from the State of New York.

Since, as provided in Tax Law § 15(former [e]), any written agreement executed or amended on or after January 1, 2001 (such as the January 2008 Memorandum of Understanding) required the approval of both the Department of Economic Development and the Office of Real Property Services, without such approval, PILOT payments made by FC Yonkers could not be

considered to be “eligible real property taxes.” In the present matter, while it is clear that Enterprises attempted to secure this approval, the record is clear that such approval was not sought until January 2008, a time which is well after FC Yonkers’s January 18, 2005 PILOT payment to the City of Yonkers.

E. FC Yonkers did not become involved with the Ridge Hill Property until it executed a ground lease with Ridge Hill on August 8, 2002. While, pursuant to the ground lease, FC Yonkers agreed to be responsible for Loral’s PILOT payments to the City of Yonkers under the terms of the 1979 special ordinance entered into between Loral and the City of Yonkers, the ground lease was not an agreement between FC Yonkers and the City of Yonkers but was, instead, an agreement between Ridge Hill, as landlord, and FC Yonkers, as tenant. Accordingly, the ground lease cannot be found to qualify as “a written agreement entered into between the QEZE and the state, municipal corporation, or public benefit corporation.”

F. As correctly noted by the Division in its brief, the invoice issued by the City of Yonkers on April 27, 2004 to Forest City Ratner, an affiliate of FC Yonkers, and the check from FC Yonkers, dated January 18, 2005, to the City of Yonkers in the amount of \$301,936.10, even when taken together, do not constitute a “written agreement” since, in neither document, is there a mention of the 1979 special ordinance or any written agreement arising thereunder.<sup>1</sup> Moreover, even if these documents did constitute a written agreement, by virtue of the provisions of Tax Law § 15(former [e]), since they were entered into after January 1, 2001, the approval of

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<sup>1</sup> As has been previously noted, the record in this proceeding does not contain the written agreement between the City of Yonkers and Loral, the authority for which was derived from the December 1979 special ordinance of the City Council of the City of Yonkers which authorized the City Manager to enter into such agreement with Loral regarding payments in lieu of real property taxes for the Ridge Hill Property.

the Department of Economic Development and the Office of Real Property Services was required and such approval has not been obtained.

G. Since Enterprises has failed to produce a written agreement between FC Yonkers and the City of Yonkers executed prior to January 1, 2001 or a written agreement between FC Yonkers and the City of Yonkers executed after January 1, 2001 which has been approved by the Department of Economic Development and the Office of Real Property Services, the payment by FC Yonkers to the City of Yonkers on January 18, 2005 in the amount of \$301,936.10 cannot be found to have been a PILOT payment which falls within the definition of “eligible real property taxes” under Tax Law §15(former [e]),<sup>2</sup> and accordingly, the Division’s denial of petitioner’s claim for a QEZE credit for such payment was proper.

H. The petition of Forest City Enterprises, Inc. is denied and the Division of Taxation’s refund denial is sustained.

DATED: Troy, New York  
September 17, 2009

/s/ Brian L. Friedman  
ADMINISTRATIVE LAW JUDGE

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<sup>2</sup> It must be noted that for taxable years beginning on or after January 1, 2005, chapter 61 of the Laws of 2005 amended Tax Law § 15(e) to expand the definition of “eligible real property taxes” to include payments made by lessees under certain conditions. Since the period at issue in this proceeding precedes the effective date of this amendment, it shall not be considered herein.