

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
ALAN GINSBERG,	:	
CANDICE GINSBERG TRUST,	:	DETERMINATION
DEAN GINSBERG TRUST,	:	
MIKENZIE GINSBERG TRUST	:	DTA NOS. 822853, 822855,
BRANDON WEISS TRUST,	:	822859, 822856, 822858,
BRETT WEISS TRUST, AND	:	822857 AND 822860
PETER WEISS TRUST	:	
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 petitions for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the year 2004.

On June 29, 2009 and July 17, 2009, respectively, petitioners, appearing by Hiscock and Barclay, LLP (Amanda K. Davis, Esq., of counsel), and the Division of Taxation, appearing by Daniel Smirlock, Esq. (Margaret T. Neri, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by November 9, 2009, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

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

1. 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.

2. 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%.

3. 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.

4. 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.

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

6. 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.

7. 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.

8. To finance the construction of the roadways within the Development Facilitation Improvement District, the Town of Ulster imposed a tax 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 tax levy was the Ulster Road Benefit tax. It was used to not only fund the construction of, but also the maintenance and improvements to, the roads constructed in the Development Facilitation Improvement District.

9. 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.

10. The Division of Taxation 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.

11. The Division conducted an audit of petitioners' personal tax returns for the year 2004 and 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>
	79,234.81

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>
	36,386.29
Total	<u>115,621.10</u>

12. According to Town of Ulster Assessor, Jim Maloney,¹ the Ulster Road Benefit tax “could be considered a ‘special assessment’.”

13. 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,² 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 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

¹Mr. Maloney was the assessor as of July 24, 2009.

²The 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 difference in the amount assessed to each petitioner.

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.

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

Petitioner	Notice Number	Date	Tax	Interest
Alan Ginsberg	L-029759936-1	04/28/2008	\$88,681	\$21,200.66
Candice Ginsberg Trust	L-029741712-2	04/21/2008	7,924	2,262.31
Mikenzie Ginsberg Trust	L-029741749-4	04/21/2008	7,924	2,262.31
Dean Ginsberg Trust	L-029716588-4	04/10/2008	7,924	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
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SUMMARY OF THE PARTIES' POSITIONS

15. Petitioners contend that they are entitled to the credit for the real property taxes paid on their parcels pursuant to the provisions of Tax Law § 15, including the Ulster Road Benefit tax, which they argue is an “eligible real property tax” as defined in Tax Law § 15(e). Petitioners maintain that the road benefit tax is eligible for the real property tax credit regardless of whether it is determined to be a special assessment, which petitioners believe is not the case.

However, even if the road benefit tax is found to be a special assessment, petitioners contend that such a finding does not provide a basis for excluding it from the “eligible real property taxes,” which constitute the real property tax credit for purposes of the Empire Zones Program.

16. Petitioners believe the legislative history of the Empire Zones Program supports a broad interpretation of the taxes eligible for inclusion in the credit since the program was developed to create tax-free qualified empire zone enterprise programs to maintain and expand employment. To allow local governments to circumvent this tax-free status by imposing special assessments would defeat the legislative intent to create a partnership with businesses where they would receive economic incentives and tax-free status in exchange for the production of employment and local investment.

17. Petitioners argue that the definition of eligible real property taxes contained in Tax Law § 15(e) is unique and not subject to further elaboration by reference to the Internal Revenue Code (IRC), which is often consulted for the meaning of terms used in Article 22 that are used in a comparable context in the IRC. Since the definition of “eligible real property taxes” in Tax

Law § 15(e) does not present a term with a comparable context within the IRC, there is no basis for requiring conformance with the term “real property taxes” as that term is defined in the IRC or its regulations. Further, given the amendments to the definition of “eligible real property taxes” in 2002 and 2005, it is clear the Legislature had ample opportunity to require that “eligible real property taxes” be deductible for federal income tax purposes or to provide that special assessments be excluded from the definition, but took no such action.

18. Finally, petitioners contend that even if the IRC definition of real property taxes applies, the road benefit tax is includible as an eligible real property tax because the tax is not imposed because of, and measured by, a benefit inuring directly to the properties assessed. The benefit, argue petitioners, inures to many more properties than those assessed, and thus should be considered real property taxes as defined by the IRC.

19. The Division of Taxation argues that the credit available to a QEZE is for eligible real property taxes only and that the definition of that term in Tax Law § 15(e) only provides that they are taxes imposed on real property, not special assessments or ad valorem taxes like the road benefit levy.

20. The Division contends that since the QEZE credit is dealt with in both the personal income tax and corporation tax, both of which are federally-based taxes, it is appropriate to look to the IRC for guidance in interpreting the term “real property taxes.” The Division notes that under the IRC, real property taxes are those imposed on interests in real property and levied for the general welfare, but not taxes assessed against local benefits which tend to increase the value of the property assessed. These taxes are imposed because of, and measured by, some benefit inuring directly to the property against which the tax is levied.

The Division notes that the Ulster Town Board created the District and included in it all those properties which it believed benefitted from the road improvements and adopted a formula for assessing each property in proportion to the benefits received. As such, it is an ad valorem tax or special assessment, not a real property tax as defined by the IRC, not deductible and, by operation of Tax Law § 607, not a real property tax for purposes of Article 22 of the Tax Law.

21. Finally, as the agency charged with enforcement of Tax Law § 15(e), the Division contends that its interpretation should be given significant weight and judicial deference, as long as its interpretation is not irrational, unreasonable or inconsistent with the governing statute.

CONCLUSIONS OF LAW

A. Chapter 63 of the Laws of 2000 amended the Tax Law to provide benefits under the Empire Zones Program Act, amending articles 9-A, 22, 32 and 33 of the Tax Law to provide new tax credits, which applied to taxable 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.

B. Tax Law § 15(b) provides that the amount of the credit shall be equal to the product of the benefit period factor, the employment increase factor and the eligible real property taxes paid or incurred by the QEZE during the taxable year. Neither the Division nor petitioners dispute petitioners' benefit period factor or employment increase factor. Any amount of the real property tax credit which is not used to reduce income tax liability is treated as an overpayment of tax to be credited or refunded. (Tax Law § 606[bb][2].) As noted above, each of the petitioners herein received a refund of tax for the year in issue.

C. The question presented concerns only the credit claimed by petitioners that was based on the Ulster Road Benefit tax levy and whether that levy was an "eligible real property tax" as

used and defined in Tax Law § 15. The term is defined in Tax Law § 15(e) as a tax imposed on real property which is owned by the QEZE and is located in an empire zone with respect to which the QEZE is certified and provided said taxes become a lien on the real property during the 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 QEZE.

The definition begs the question of exactly what constitutes a “tax on real property,” and to this end, the Tax Law is silent. The Division contends that since the QEZE credit emanated from limited liability corporations and were claimed by members through their personal income tax returns, it is appropriate to consult the IRC and the regulations promulgated thereunder. In general, a term used in Article 22 has the same meaning when used in a comparable context in the IRC. (Tax Law § 607[a].) However, the Division jumps from this provision to its statement that “real property taxes are deductible under IRC § 164(a)(1)” when levied for the general public welfare, but not those taxes assessed against local benefits of a kind tending to increase the value of the property assessed (IRC § 164[c][1]; 26 CFR 1.164-2[g]; 26 CFR 1.164-4[a]). Thus, the Division concludes for purposes of its analysis herein that a tax on a local benefit cannot be a tax on real property.

What the Division has failed to take into account is the language in Tax Law § 607 that permits such an interpretation when the term is “used in a comparable context.” The IRC section cited by the Division, IRC § 164, and the regulations thereunder, pertain to deductions from tax for real estate taxes paid. The differentiation between the types of tax which are deductible is not necessarily applicable to the case at hand because the analysis here focuses on the broader question of what constitutes a tax on real property for purposes of the definition of “eligible taxes on real property” as applied to the QEZE real property tax credit. The two areas - deductions

from tax and QEZE credits - are not comparable contexts and the meaning of terms for purposes of the IRC, although ultimately found to be the same herein, do not provide the basis for excluding special assessments from the meaning of tax on real property as used in Tax Law § 15(e).

Further clarifying the difference in contexts between the IRC and the Tax Law's QEZE provisions, petitioners note that the QEZE program has a much broader intent and purpose, i.e., economic development through incentives that create jobs and bring investment to communities that have been deemed by New York State to be economically distressed. Petitioners maintain that this program is funded by the real property tax credits afforded to businesses that agreed to partner with the State of New York to create jobs and spur investment. While these statements help crystalize the difference between the contexts, they do not explain the meaning of the term "taxes imposed on real property."

D. Although its provisions speak to the tax on real property, the Tax Law does not contain provisions specifically applicable to this area of New York law. In 1958, the Legislature codified, in a newly consolidated law (the Real Property Tax Law [RPTL]), all the provisions of the Tax Law, the Education Law, the Village Law and other laws relating to the assessment and taxation of real property. Therefore, it is logical to seek guidance from the Real Property Tax Law for the meaning of a real property term used in Tax Law § 15(e). Further, it is presumed that the Legislature, in enacting the QEZE statute, was aware of the RPTL definitions pertaining to the QEZE provisions they were enacting, which the Legislature itself placed there over 40 years earlier.

It is a general rule of statutory construction that earlier statutes are properly considered as illuminating the intent of the Legislature in passing later acts, especially where there is doubt as to how the later act should be construed, since

when enacting a statute the Legislature is presumed to act with deliberation and with knowledge of the existing statutes on the same subject. (McKinney's Cons Laws of NY, Book 1, Statutes § 222.)³

In fact, the term tax is defined in Real Property Tax Law § 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*.

The term special assessment is defined in the Real Property Tax Law § 102(15) 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. (Emphasis added.)

E. Thus, the Ulster Road Benefit tax, although levied for an apparent municipal purpose, is unquestionably a special assessment, as testified to by the facts. The Town of Ulster created the Development Facilitation Improvement District in October 1990 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, including those owned by the companies, 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 district.

Subsequently, the Town of Ulster imposed a tax 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 tax levy was the Ulster Road Benefit tax. It was used to not only fund the construction of, but also the maintenance and improvements to, the roads constructed in the Development Facilitation

³It is noted that various particular statutes, like the Tax Law and the RPTL may be considered in *pari materia* when they reference the same subject matter. (McKinney's Cons Laws of NY, Book 1, Statutes § 221[c]).

Improvement District. These taxes were levied against the approximately 150 parcels located in the district and were calculated with a complex benefit formula that linked traffic generation with property class (not assessed value).

It is noted that the Ulster Town Board, after public comment and a reasonable period within which petitioners might have raised their opposition, proclaimed that all the property owners and property within the Development Facilitation Improvement District benefitted. Nothing in the record indicates that petitioners raised any objection or sought legal recourse in response to the Ulster Town Board's actions or its proclamation that all properties in the District had benefitted.

F. Since special assessments are excluded from the definition of tax on real property pursuant to the Real Property Tax Law definitions, it is concluded that they are not eligible real property taxes and the Division properly disallowed them as a credit against tax.

G. Petitioners argue that special assessments and ad valorem levies are included in the Real Property Tax Law definition of the term tax for purposes of levy and collection. However, this argument is rejected. First, Real Property Tax Law § 102(20) states:

The term 'tax' or 'taxes' as used in articles five, nine ten and eleven of this chapter shall for levy and collection purposes include special ad valorem levies.

Since it was concluded that the Ulster Road Benefit tax was a special assessment, given the fact that it was imposed in proportion to the benefit received by the property, the provision with respect to special ad valorem levies was not applicable. However, even if the tax was determined to be a special ad valorem tax, it would only be included in the term "tax" for purposes of Real Property Tax Law § 102(20) where used in articles five, nine, ten and eleven of the chapter, i.e., those articles dealing strictly with procedural matters: assessment procedure (Article 5); levy and

collection of taxes (Article 9); enforcement of collection of delinquent taxes (Article 10) (repealed); and procedures for enforcement of collection of delinquent taxes (Article 11). The language of the section is unambiguous. In all other instances, the term “tax” would not include special ad valorem levies.

H. Tax Law § 15(e) has been amended since its enactment in 2000. In 2005, the section was amended to include in the definition of “eligible real property taxes” certain payments in lieu of taxes made pursuant to a written agreement between the QEZE and the state, a municipal corporation or public benefit corporation, and also taxes paid by a QEZE which is a lessee of real property. (L 2005, ch 161; L 2005, ch 61.) However, neither of these amendments elaborated on the term “tax on real property” and do not alter the rationale or conclusions reached above.

I. A tax credit is a particularized species of exemption from tax (*Matter of New York Fuel Terminal Corp.*, Tax Appeals Tribunal, August 27, 1998). Petitioners herein bear the burden of establishing entitlement to the exemption, in the face of the added hurdle that statutes creating tax exemptions are construed most strongly against the taxpayer. Further, the taxpayer must show that its interpretation of the statute is the only reasonable construction. (*Matter of CBS Corporation v. Tax Appeals Tribunal*, 56 AD3d 908, 867 NYS2d 270, 273 [2008].) It is determined that petitioners have not met their burden given the rationale set forth above.

J. 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 the Notices of Deficiency, dated April 10, 2008, April 21, 2008 and April 28, 2008, are sustained.

DATED: Troy, New York
May 6, 2010

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE