STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LANDMARK TRI-STATE, INC.	:	DETERMINATION DTA NO. 823314
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Years 2006 and 2007.	:	

Petitioner, Landmark Tri-State, 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 years 2006 and 2007.

On December 15, 2010 and December 22, 2010, respectively, petitioner, appearing by Hiscock and Barclay, LLP (Kevin R. McAuliffe, Esq., and David G. Burch, Jr., Esq., of counsel), and the Division of Taxation, appearing by Mark F. Volk, Esq. (Robert Tompkins, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs submitted by April 20, 2011, 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 Division of Taxation properly disallowed portions of petitioner's claims for the qualified empire zone enterprise real property tax credit for the years 2006 and 2007 on the grounds that certain special assessments did not constitute "eligible real property tax" for purposes of the credit against tax provided for in Tax Law § 15(a).

FINDINGS OF FACT

The parties entered into a stipulation of facts, dated November 1, 2010 and November 22, 2010, which has been incorporated into the facts below without references to attachments.

1. Landmark Tri-State, Inc. (Landmark) is a member of Nocha, LLC (Nocha), the sole member of One Park Place, LLC (One Park Place).

2. One Park Place was certified as an Empire Zone Enterprise on July 31, 2002.

3. As Nocha is the sole member of One Park Place, it is a disregarded entity for tax purposes.

4. Nocha is a limited liability company and, as such, income, losses, and credits flow through to its members.

5. Under the terms of the Operating Agreement for Nocha, all deductions with respect to real property taxes paid on properties certified in an Empire Zone and all Empire Zone Real Property Tax Credits (RPTC) are allocated to petitioner.

6. Petitioner timely filed its corporate tax returns for the tax years 2006 and 2007.

7. One Park Place passed the employment test for the tax years 2006 and 2007 and computed a 100% employment increase factor for those same years, and was entitled to an RPTC equal to the full amount of the eligible real property taxes paid for those years.

8. One Park Place pays eligible real property taxes on three parcels of land in the City of Syracuse, the tax bills for which included a downtown charge, sometimes referred to as the "Downtown Special Assessment Tax." These parcels are known as 300 State Street S. & Fayette Street E., 345-67 Onondaga Street E. and 337 Onondaga Street E. All of the parcels are located in the Downtown Special Assessment District in the City of Syracuse.

9. The City of Syracuse 1988 General Ordinance Number 53 created the special assessment district within the City of Syracuse and provided that the properties in the district may be assessed according to a formula that reflected the benefits accruing to the various properties in the district by reason of the improvements. The district was formed for the benefit of properties within the special assessment district to further the construction of capital improvements and additional maintenance and operation costs, including extra security, snow plowing, sidewalk cleaning and special events.

General Ordinance Number 53, section 3(1), provided that all properties within the special assessment district were subject to assessment for the improvements and services provided and specifically provided that all properties need not be assessed uniformly for these benefits. The section also provided that properties could be assessed in accordance with a formula, established by ordinance, which in the sole discretion of the Common Council reflects the benefits accruing to the various properties within the district by reason of the improvements. The ordinance also provided that tax-exempt properties may be included within the boundaries of the district but were not subject to the special assessment.

10. The formula, which was devised to assess the properties within the district for their share of the benefits received, was explained by David M. Clifford, First Deputy Commissioner of the City of Syracuse Department of Assessment, in a letter to the Division of Taxation dated November 19, 2010. He stated that there exist three zones within the Downtown Special Assessment District, each with its own rate. Once the Common Council approves the budget for the district, each property is assessed based on the zone in which the property is located, its percentage share of total assessed value, its exempt status and each property's share of the district front footage.

11. The Annual Report of the Downtown Committee of Syracuse, Inc., for the period July 1, 2006 to June 30, 2007 discusses the work performed by the Downtown Committee and includes a Financial Report, which reflects income, including that from special assessments, and expenses. The Annual Report notes that the district was created to provide the financial resources necessary to ensure the proper management of the area to improve the area's image, strengthen the economic base, increase its attractiveness, and assure that the district is clean, safe and accessible.

12. The Division of Taxation conducted a review of petitioner's corporate tax returns for the years 2006 and 2007.

13. Petitioner claimed the RPTC on its 2006 and 2007 returns based on its payment of real property taxes and other charges on its tax bills. The Division of Taxation denied a portion of the RPTC claimed, excluding the "Downtown Special Assessment Tax" and other special charges from eligible real property taxes included in the RPTC.

14. Petitioner received an Account Adjustment Notice, document locator number CB0706197833, dated October 24, 2007, reducing the RPTC by $25,313.00 for the tax year 2006 and setting forth specific reasons for the adjustment.

15. Petitioner received a second Account Adjustment Notice, document locator number CB0806256179, dated April 16, 2009, reducing the RPTC by $26,036.00 for the tax year 2007. In addition, petitioner received a Statement of Tax Reduction or Overpayment regarding the tax year 2007, which explained the partial disallowance of the RPTC claimed as follows: "Based on IRC section 164, we have have [*sic*] disallowed Special Assessment taxes shown on the tax bills for the QEZE single member LLC's, One Park Place, LLC and Maltbie/Division, LLC."

SUMMARY OF THE PARTIES' POSITIONS

16. Petitioner contends that it is entitled to the credit for the real property taxes paid pursuant to the provisions of Tax Law § 15. Petitioner contends that the Downtown Special Assessment District tax is an eligible real property tax and not a special assessment as defined in Real Property Tax Law § 102(15). However, even if it were a special assessment, petitioner argues that it is an "eligible real property tax" as defined in Tax Law § 15(e). Specifically, petitioner believes that since the definition of eligible real property taxes does not exclude special assessments and ad valorem levies, they should not be excluded, particularly in light of the fact that the term "taxes imposed on real property" is not defined "anywhere."

17. Petitioner believes 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. Petitioner argues that 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.

18. Petitioner maintains 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 ambiguous 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, petitioner believes 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.

19. Petitioner contends that even if the IRC definition of real property taxes applies, special assessments and ad valorem levies are includible as eligible real property taxes because the tax is not imposed because of, and measured by, a benefit inuring directly to the properties assessed. The benefit, argues petitioner, inures to many more properties than those assessed, and thus must be considered real property taxes as defined by the IRC.

20. Petitioner also argues that if federal deductibility is a prerequisite for a charge to be an eligible real property tax for purposes of the QEZE credit, the charges for the Downtown Special Assessment District satisfy the two prongs of the test for deductibility set forth in Treas Reg § 1.164-4(a), namely, that the charges were imposed for the general public's welfare and were levied against all properties within the county and district at a like rate.[1]

21. Finally, petitioner also argues that reliance on the Real Property Tax Law to interpret the term "eligible real property tax" is in error since there is no authority for doing so and such reliance usurps the Legislature's role by adding requirements that are not expressly authorized by statute.

22. The Division of Taxation (Division) 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

[1]Although mentioned as the basis for its denial of part of the QEZE credit for 2007 in its Statement of Tax Reduction or Overpayment and for 2006 and 2007 in its answer, the Division has abandoned its reliance on IRC § 164 as a basis for its assessment and adopted an alternative legal theory with respect to its interpretation of the term "eligible real property taxes," an action the Tax Appeals Tribunal has consistently held is permissible (***Matter of Chuckrow***, Tax Appeals Tribunal, July 1, 1993; ***Matter of Delfino***, Tax Appeals Tribunal, February 23, 1995).

provides that they are taxes imposed on real property, not special assessments or ad valorem taxes like the Downtown Syracuse Special Assessment District charges.

23. The Division maintains that the municipal resolution creating the City of Syracuse Downtown Special Assessment District contained specific language that required that the costs of improvements, operations, and maintenance be borne by the properties within the district in accordance with a formula that reflected the benefits accruing to each property. As such, they were ad valorem levies or special assessments, not a real property tax for purposes of Tax Law § 15.

24. The Division contends further that chapter 57 of the Laws of 2010 (as amended) clarified the definition of "eligible real property taxes" in Tax Law § 15(e), providing that special assessments and ad valorem taxes were not included in the definition of that term. The Division noted that this provision was applicable to the period in issue because the legislation stated it was effective for all taxable years for which the statute of limitations for seeking a refund or assessing additional tax was still open.

However, petitioner argues that the amendment to Tax Law § 15(e) is not clearly applicable to this matter because the language with respect to maintenance and interest charges is confusing and does not expressly set forth that such amendment was retroactive.

25. Finally, the Division contends that petitioner bears the burden of establishing its entitlement to the credit, a particularized form of an exemption from tax. As such, it faces the reality that statutes creating tax exemptions are construed most strongly against taxpayers, and to gain entitlement to the exemption petitioner must demonstrate that its interpretation of the statute is the only reasonable construction.

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 that 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 empire zone enterprise (QEZE) for eligible real property taxes.

B. Tax Law § 15(b) provides that the amount of the credit shall be 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 petitioner disputes petitioner's 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].)

C. The question presented concerns only the credit claimed by petitioner, which was based on the charges assessed for the Downtown Special Assessment District and whether those levies were "eligible real property tax[es]" as used and defined in Tax Law § 15. The term is defined in Tax Law § 15(e) as taxes imposed on real property that 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 question is what constitutes a "tax on real property," and to this end, the Tax Law is silent. 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 new consolidated law (the Real Property Tax Law), 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.) [2]

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 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, but does not include a special ad valorem levy. (Emphasis added.)

Although petitioner objects to seeking guidance from other statutes when the meaning of a term is unclear and undefined, the rules of statutory construction and interpretation that are cited herein indicate to the contrary. Further, it is the judicial and quasi-judicial role to interpret the

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[2]It is noted that various particular statutes such as 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]).

law not create it, and use of established rules of statutory construction have been carefully used to accomplish that end.

D. Thus, the charges attributable to the Downtown Syracuse Special Assessment District, although levied for an apparent municipal purpose, were unquestionably special assessments, as demonstrated by the facts in light of the Real Property Tax Law provisions above.

The City of Syracuse 1988 General Ordinance Number 53 created the special assessment district within the City of Syracuse and provided that the properties in the district may be assessed according to a formula which reflected the benefits accruing to the various properties in the district by reason of the improvements. Each property is assessed based on the zone in which the property is located, its percentage share of total assessed value, its exempt status and each property's share of the district front footage. This is precisely the type of proportional benefit formula RPTL § 102(15) was describing and mandates a conclusion that the Downtown Syracuse Special Assessment District charge was a special assessment.

Petitioner argues that the tax imposed on property owners within the special assessment district cannot be a special assessment because the charges are not, or have not been shown to be, proportional to the benefits received. However, this argument has been raised and rejected by the courts. In ***Watergate II Apartments v. Buffalo Sewer Authority*** (46 NY2d 52, 412 NYS2d 821 [1978]), the Court of Appeals addressed the formula used to fix water charges, concluding that there need not be exact congruence between the cost of the services provided and the rates charged to particular customers. The Court noted the obvious relationship between the sewer authority's costs and the services rendered and opined that this could be viewed in two broad categories: the provision of water for current and predictable use and also supplying an essential service, which entails responsibilities of a far more complex nature. The sewer authority was

obligated to look beyond meeting current usage requirements and needed to constantly plan for future development to keep pace with projected societal changes and growth. The Court concluded that the cost of these activities bore only a limited direct relationship to the volume of water utilized by a particular customer. Whereas, the Authority's function of filling the overall community needs relating to health and safety for the benefit of present and future inhabitants of the service area "may not admit of complete correlation between consumption and cost."

In ***Town of Cheektowaga v. Niagara Frontier Transportation Authority*** (82 AD2d 175, 442 NYS2d 322 [1981]), the Transportation Authority, which was exempt from real property tax and special ad valorem levies pursuant to the Real Property Tax Law, challenged its responsibility for a special assessment levy on the grounds that it was not a special assessment because a portion of the charge was based on assessed value and land area, which it claimed were not proportional to the benefit received. Citing the very reasoning of ***Watergate II Apartments v. Buffalo Sewer Authority*** noted above, the Court found the tripartite calculation of charges to be directly related to the benefit to the real property and thus constituted special assessments.

In the instant matter, the proportionate benefit to each property in the district defied an exact mathematical formula that matched the services and improvement to each property. However, as stated in ***Watergate II Apartments***, filling the overall community needs relating to health and safety for the benefit of present and future inhabitants of the service area "may not admit of complete correlation between consumption and cost." It is determined that the City of Syracuse was doing just that in the Downtown Special Assessment District - - meeting overlying community needs relating to health and safety - - and the charges were properly considered special assessments.

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

F. 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 that 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.

G. In 2010, Tax Law § 15(e) was amended and the definition of "eligible real property taxes" was clarified. In particular, special assessments were definitively excluded from the term "tax" and, therefore, did not qualify as a real property tax for the QEZE Real Property Tax Credit.

This amendment would be very helpful if effective for the years in issue, 2006 and 2007. Unfortunately, it is determined that it is not. The amendment's effective date was set forth in detail in the Laws of 2010 (ch 57, pt R, § 18), where it provided, in part, 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 and interest charges*, to all taxable years for which the statute of limitations for seeking a refund or assessing additional tax are still open.

Since the City of Syracuse General Ordinance Number 53 specifically provided for maintenance as part of the special assessment and that maintenance of improvements "shall" be assessed to the properties within the district, the retroactive effective date provided for in Laws of 2010 (ch 57, pt R, § 18) does not apply and the amendment is not applicable to the years 2006

and 2007 in this matter. However, this conclusion does not alter the rationale used or the conclusions reached in Conclusion of Law C through E above.

H. A tax credit is a particularized species of exemption from tax (***Matter of New York Fuel Terminal Corp.***, Tax Appeals Tribunal, August 27, 1998). Petitioner herein bears 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, 909-10, 867 NYS2d 270, 273 [2008], ***lv denied*** 12 NY3d 703, 816 NYS2d 704 [2009].) It is determined that petitioner has not met its burden given the rationale set forth above.

I. The petition of Landmark Tri-State, Inc. is denied and the Division's account adjustment notices for the years 2006 and 2007, dated October 4, 2007 and April 16, 2009, respectively, are sustained.

DATED: Troy, New York
June 16, 2011

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