

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WILMORITE, INC.	:	DETERMINATION
	:	DTA NO. 823537
for Redetermination of a Deficiency or for Refund of	:	
Corporation Franchise Tax under Article 9-A of the Tax	:	
Law for the Fiscal Years Ended April 30, 2003,	:	
April 30, 2004 and April 30, 2005.	:	

Petitioner, Wilmorite, 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 fiscal years ended April 30, 2003, April 30, 2004, and April 30, 2005.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 3, 2011 at 11:00 A.M., with all briefs to be submitted by March 15, 2012, which date began the six-month period for the issuance of this determination. Petitioner appeared by David M. Stone, CPA. The Division of Taxation appeared by Mark F. Volk, Esq. (Robert Tompkins, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly disallowed petitioner's requests for refund of unused tax credits, consisting of a wholly-owned subsidiary Rocter Property, Inc.'s claims for qualified empire zone enterprise (QEZE) credits for real property taxes obtained from its interest in Rochwil Associates, a QEZE partnership, for the fiscal years at issue because Rochwil Associates had not made the payments in lieu of taxes for the years 2002, 2003 and 2004.

II. Whether the Division of Taxation is precluded from disallowing petitioner's requests for refund of the unused tax credits, consisting of Roter Property, Inc.'s claims for QEZE credits for real property taxes, because it failed to formally audit and adjust Rochwil Associates' New York partnership returns for the years 2002, 2003 and 2004 within the three-year statute of limitations for assessment.

FINDINGS OF FACT

1. Rochwil Associates (Rochwil), a New York limited liability partnership engaged in real estate rental, has two partners - Roter Property, Inc. (Roter), the 1% general partner, and Freemall Holdings, LP, the 99% limited partner. Rochwil files a federal U.S. Return of Partnership Income, Form 1065, and a New York State Partnership Return, Form IT-204, on a calendar year basis.

2. Roter is a New York corporation that is wholly-owned by petitioner, Wilmorite, Inc. (petitioner or Wilmorite), a New York corporation located in Rochester, New York. Wilmorite files a General Business Corporation Combined Franchise Tax Return (Form CT-3-A) on a fiscal year-ended April 30th basis. Documents in the record indicate that Wilmorite, Roter, Freemall Holdings, LP, and Rochwil are all located at the same Rochester, New York, address.

3. On or about January 2, 1992, the County of Monroe Industrial Development Agency (County of Monroe IDA or COMIDA), a public benefit corporation of the State of New York, and Rochwil entered into a Payment In Lieu of Tax (PILOT) Agreement. Under the terms of that PILOT Agreement, the County of Monroe IDA agreed to acquire the Sibley Building located at 228 - 280 East Main Street, Rochester, New York, and to construct and equip a commercial development facility (the facility). The County of Monroe IDA further agreed to lease the facility to Rochwil and to grant Rochwil an option to purchase the facility. According to the PILOT

agreement, Rochwil was responsible for the PILOT payments and agreed to make said payments to the County of Monroe and the City of Rochester.¹ The agreement was signed by the chairman of the County of Monroe IDA, and the vice president of Rocter, general partner, on behalf of Rochwil.

4. Pursuant to a Certificate of Eligibility issued on November 6, 2002, but effective as of July 16, 2002, Rochwil became certified as eligible to access Empire Zone Benefits, effective July 16, 2002 for the property located at 228 East Main Street/25 Franklin Street, Rochester, New York, within the boundaries of the Rochester Empire Zone.

5. On October 13, 2003, the general partner signed and dated Rochwil's Amended New York Partnership Return for the year 2002.² Review of Schedule B - Partners' New York modifications, credits, etc. of this amended return reveals that the following items were reported on Part II - Partners' credit information: on line 29 an EZ wage tax credit in the amount of \$2,250.00 (per the attached Form IT-601, Claim for EZ Wage Tax Credit, related to QEZE business Rochwil Associates); on line 35 a QEZE credit for real property taxes in the amount of \$462,012.00 (per the attached Form IT-604, Claim for QEZE Credit for Real Property Taxes and QEZE Tax Reduction Credit, related to QEZE business Rochwil Associates); on line 36 a QEZE employment increase factor of 1; on line 37 a QEZE zone allocation factor of 100; on line 38 a QEZE benefit period factor of 1, and on line 39 an Add-back of QEZE credit for real property taxes of "NONE" (per the attached Form IT-604, Claim for QEZE Credit for Real Property

¹ Paragraph 1(a) required Rochwil to annually pay to Monroe County and the City of Rochester, as a payment in lieu of taxes, an amount equal to 100% of the taxes, service charges, special ad valorem levies, or similar tax equivalents that Rochwil would be liable to pay, if it were the owner of the facility. Paragraph 1(d) required Rochwil to pay in full special assessments and special district charges, including Monroe County Pure Waters charges, unless Rochwil would be exempt from such charges if it were the owner of the facility.

² The record does not include the original New York Partnership Return, including any attachments, that Rochwil filed for the year 2002.

Taxes and QEZE Tax Reduction Credit related to the QEZE business, Rochwil Associates). An attachment to the Form IT-604, entitled “New York State Property Tax Credit,” listed the following: “City of Rochester Comida” in the amount of \$348,804.72; “Monroe County Comida” in the amount of \$66,211.20; “City Services” in the amount of \$33,177.79, and “County Pure Water” in the amount of \$13,818.45 for “Total Property Tax Incurred” in the amount of \$462,012.16. Rochwil issued Amended New York Schedule K-1 Equivalent, Partner’s Share of Income Deductions, etc., forms to Racter and Freemall Holdings, L.P. The Amended Schedule K-1 Equivalent issued to Racter reported an EZ wage tax credit in the amount of \$2,250.00 and a QEZE credit for real property taxes in the amount of \$462,012.00. The record is silent as to when this amended partnership return was filed with the Division of Taxation (the Division).

6. On September 29, 2004, Rochwil filed its New York Partnership Return for the year 2003. Review of Schedule B - Partners’ New York modifications, credits, etc. of this return reveals that the following items were reported on Part II - Partners’ credit information: on line 29 an EZ wage tax credit in the amount of \$2,250.00 (per the attached Form IT-601, Claim for EZ Wage Tax Credit, related to QEZE business Rochwil Associates); on line 35 a QEZE credit for real property taxes in the amount of \$490,995.00 (per the attached Form IT-604, Claim for QEZE Credit for Real Property Taxes and QEZE Tax Reduction Credit, related to QEZE business Rochwil Associates); on line 36 a QEZE employment increase factor of 1.0000; on line 37 a QEZE zone allocation factor of 100.0000, and on line 38 a QEZE benefit period factor of 1.0. An attachment to the Form IT-604, entitled “New York State Property Tax Credit,” listed the following: “City of Rochester Comida” in the amount of \$376,434.74; “Monroe County Comida” in the amount of \$67,795.20; “City Services” in the amount of \$34,136.48 and “County Pure Water” in the amount of \$12,628.18 for “Total Property Tax Incurred” in the amount of

\$490,994.60. Rochwil issued New York Schedule K-1 Equivalent Partner's Share of Income Deductions, etc. forms to Rocter and Freemall Holdings, L.P. The Schedule K-1 Equivalent issued to Rocter reported an EZ wage tax credit in the amount of \$2,250.00 and a QEZE credit for real property taxes in the amount of \$490,995.00.

7. On July 1, 2005, Rochwil filed its New York Partnership Return for the year 2004. Review of Schedule B - Partners' New York modifications, credits, etc. of this return reveals that the following items were reported on Part II - Partners' credit information: on line 29 an EZ wage tax credit in the amount of \$2,625.00 (per the attached Form IT-601, Claim for EZ Wage Tax Credit, related to QEZE business Rochwil Associates); on line 35 a QEZE credit for real property taxes in the amount of \$490,698.00 (per the attached Form IT-604, Claim for QEZE Credit for Real Property Taxes and QEZE Tax Reduction Credit, related to QEZE business Rochwil Associates); on line 36 a QEZE employment increase factor of 1.0000; on line 37 a QEZE zone allocation factor of 1.0000, and on line 38 a QEZE benefit period factor of 1.0. An attachment to the Form IT-604, entitled "New York State Property Tax Credit," listed the following: "City of Rochester Comida" in the amount of \$355,422.34; "Monroe County Comida" in the amount of \$86,670.00; "City Services" in the amount of \$36,411.40, and "County Pure Water" in the amount of \$12,193.87 for "Total Property Tax Incurred" in the amount of \$490,697.61. Rochwil issued New York Schedule K-1 Equivalent Partner's Share of Income Deductions, etc., forms to Rocter and Freemall Holdings, L.P. The Schedule K-1 Equivalent issued to Rocter reported an EZ wage tax credit in the amount of \$2,625.00 and a QEZE credit for real property taxes in the amount of \$490,698.00.

8. On January 15, 2004, petitioner and its subsidiaries filed a CT-3-A General Business Corporation Combined Franchise Tax Return for fiscal year ended April 30, 2003. On line 100

of that combined franchise tax return, Wilmorite claimed a refund of unused tax credits in the amount of \$886,423.00. These unused tax credits consisted of QEZE real property tax credits claimed by, among other members of the combined group, Rocter. Included in the combined franchise tax return is the Form CT-604-CP, Claim for QEZE Credit for Real Property Taxes and QEZE Tax Reduction Credit for Corporate Partners that Rocter filed for the tax period May 1, 2002 through April 30, 2003, on which Rocter claimed a QEZE credit for real property taxes in the amount of \$462,012.00 obtained from its 1% interest in Rochwil.

9. On January 18, 2005, petitioner and its subsidiaries filed a CT-3-A General Business Corporation Combined Franchise Tax Return for the fiscal year ended April 30, 2004. On line 100 of that combined franchise tax return, Wilmorite claimed a refund of unused tax credits in the amount of \$960,266.00. These unused tax credits consisted of QEZE real property tax credits claimed by, among other members of the combined group, Rocter. Included in the combined franchise tax return is the Form CT-604-CP, Claim for QEZE Credit for Real Property Taxes and QEZE Tax Reduction Credit for Corporate Partners that Rocter filed for the tax period May 1, 2003 through April 30, 2004, on which Rocter claimed a QEZE credit for real property taxes in the amount of \$490,995.00 obtained from its 1% interest in Rochwil.

10. On January 17, 2006, petitioner and its subsidiaries filed a CT-3-A General Business Corporation Combined Franchise Tax Return for the fiscal year ended April 30, 2005. On line 100 of that combined franchise tax return, Wilmorite claimed a refund of unused tax credits in the amount of \$1,026,902.00.³ These unused tax credits consisted of QEZE real property tax credits claimed by, among other members of the combined group, Rocter. Included in the

³ Subsequently, Wilmorite filed an amended combined franchise tax return for the tax period ended April 30, 2005, on which a refund of unused tax credits in the amount of \$1,029,204.00 was claimed.

combined franchise tax return is the Form CT-604-CP, Claim for QEZE Credit for Real Property Taxes and QEZE Tax Reduction Credit for Corporate Partners that Racter filed for the tax period May 1, 2004 through April 30, 2005, on which Racter claimed a QEZE credit for real property taxes in the amount of \$490,698.00 obtained from its 1% interest in Rochwil.

11. As part of the Division's review of Wilmorite's requests for refund of unused tax credits claimed on its combined franchise tax returns filed for the fiscal years ended April 30, 2003 and April 30, 2004, Diane Houck, a tax technician in the Division's Income/Franchise Desk Audit Bureau, sent a letter dated April 24, 2006 to Nancy Haney, CPA, a former employee of Wilmorite. In her letter, Ms. Houck wrote, in pertinent part, as follows:

After reviewing the information concerning your Claims for QEZE Credit for Real Property Taxes for the tax periods ended 04/30/03 and 04/30/04, additional information is necessary to finalize the refund case.

With regards to the credit from Rochwil Associates, the following information is requested:

1. Indicate where the special allocation for real estate taxes is reported on the federal partnership return, Schedule K-1, Partner's Share of Income, Credits, Deductions, etc., for the periods ended 12/31/02 and 12/31/03.
2. Copies of documentation to support your basis for claiming the City of Rochester and Monroe County Comida payments for the real property tax credit.
3. An explanation for the difference in the amount of the real property tax deduction reported on the partnership returns and the amount of the credits claimed.
4. The date of hire, date of termination (if applicable), and the number of hours worked each quarter, for the employees listed on the Claim for QEZE Credit, form IT-604, for tax periods ended 12/31/02 and 12/31/03.

12. In response to Ms. Houck's April 24, 2006 letter, Ms. Haney sent a letter dated May 16, 2006, along with enclosed documentation. The letter stated, in pertinent part, as follows:

Item 1 requests where / how the special allocation for real property taxes was reported on the federal partnership returns for 2002 and 2003. Section 4.2.4 of the Amended and Restated Partnership Agreement states that the General Partner may elect to allocate any / all of the real property taxes to the General Partner for any such Fiscal Year. Thus, while the General Partner elected a 100% allocation of such, as evidenced by its receipt of 100% of the NYS credit-related information, the allocation of the underlying deduction is not as apparent. That is, based on the rules contained in Internal Revenue Code (“IRC”) §461, the accrued taxes are not immediately deductible to the partners. Even though the special allocation has taken place, with each partner responsible for its economic share, the partners are able to deduct when the partnership pays the liability.

During 2002, the real property taxes paid by the partnership related to the 2000 tax year, which is a tax year that precedes the effective date of the current Partnership Agreement permitting the special allocation. During 2003, the real property taxes paid covered the periods 2001/2002 and 2002/2003. Only the 2002/2003 tax payment(s) were specially allocated as per the Amended and Restated Partnership Agreement.

* * *

Item #3 requested an explanation of the difference between the amount of the real property tax deduction and the credit amount. As discussed for Item 1, real property taxes are deducted subject to the federal rules of IRC §461, which in effect dictates the timing of deduction to coincide with the payment of liability. The QEZE credit for real property taxes for both 2002 and 2003 represent the real property taxes accrued / incurred during the tax years in which the real property taxes were levied, which is consistent with New York State law.

13. The Division also conducted a review of petitioner’s request for refund of unused tax credits claimed on its combined franchise tax return filed for the fiscal year ended April 30, 2005.

14. On November 22, 2006, the Division issued to petitioner a Statement of Tax Reduction or Overpayment, pertaining to petitioner’s fiscal year ended April 30, 2003 and disallowing petitioner’s request for refund of unused tax credits for such fiscal year in the amounts of \$27,826.00, pertaining to special assessment charges included in a different subsidiary’s Claim for QEZE Credit for Real Property Taxes, and \$462,012.00, pertaining to

Rocster's Claim for QEZE Credit for Real Property Taxes obtained from its interest in Rochwil. On the same date, the Division issued to petitioner a Statement of Tax Reduction or Overpayment, pertaining to petitioner's fiscal year ended April 30, 2004 and disallowing petitioner's request for refund of unused tax credits for such fiscal year in the amounts of \$27,347.00, pertaining to special assessment charges included in a different subsidiary's Claim for QEZE Credit for Real Property Taxes, and \$490,995.00, pertaining to Rocster's Claim for QEZE Credit for Real Property Taxes obtained from its interest in Rochwil. On March 12, 2007, the Division issued to petitioner a Statement of Tax Reduction or Overpayment, pertaining to petitioner's fiscal year ended April 30, 2005 and disallowing petitioner's claim for refund of unused tax credits for such fiscal year in the amounts of \$27,501.00, pertaining to special assessment charges included in a different subsidiary's Claim for QEZE Credit for Real Property Taxes, and \$490,698.00, pertaining to Rocster's Claim for QEZE Credit for Real Property Taxes obtained from its interest in Rochwil.⁴

15. All three statements of tax reduction or overpayment contained the following reason for the disallowance of petitioner's request for refund of the unused tax credits consisting of Rocster's Claim for QEZE Credit for 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, a municipal corporation, or a public benefit corporation. Provided, however, a

⁴ Petitioner is not challenging the disallowance of credits related to a different subsidiary's claims for QEZE credit for real property taxes for fiscal years ended April 30, 2003, April 30, 2004 and April 30, 2005.

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 appraisals [NYS Tax Law Section 15(e), applicable to taxable years beginning on and after January 1, 2001, through December 31, 2004].

Based on the above, in order to meet the definition of “eligible real property taxes”, the taxes must be paid. Since the empire zone real property taxes were not paid, the QEZE credit for real property taxes claimed as a pass-thru [*sic*] from the QEZE Rochwil Associates LP, is disallowed.

16. Petitioner filed a petition protesting the denial of its claims for refund of the unused tax credits, consisting of Rocter’s claims for QEZE Credit for Real Property Taxes obtained from its interest in Rochwil, for the fiscal years ended April 30, 2003, April 30, 2004 and April 30, 2005. In its petition, petitioner admitted that the payments in lieu of taxes were not paid by Rochwil in the years in which they were incurred because of financial difficulties. However, petitioner asserted that for the years 2001 through 2004, Tax Law former §15(e) did not require payment of either the real property taxes or the payments in lieu of taxes by the QEZE in order to qualify as eligible real property taxes.

17. On December 13, 2010, petitioner provided documentation to the Division indicating that some payments of the PILOT obligations totaling \$363,042.55 were made as follows:

For fiscal year ended April 30, 2003:

COMIDA	\$66,211.20	paid on August 24, 2004
City Services	\$33,177.79	paid on November 18, 2003
County Pure Waters	<u>\$13,818.45</u>	paid on August 23, 2004
Total	\$113,207.44	

For fiscal year ended April 30, 2004:

COMIDA	\$67,795.20	paid on September 26, 2006
City Services	\$34,136.47	paid on November 16, 2004
County Pure Waters	<u>\$12,628.18</u>	paid on June 3, 2005

Total	\$114,559.85
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For fiscal year ended April 30, 2005:

COMIDA	\$86,670.00	paid on May 27, 2008
City Services	\$36,411.39	paid on July 26, 2005, November 17, 2005
County Pure Waters	<u>\$12,193.87</u>	paid on June 6, 2007
Total	\$135,275.26	

18. After reviewing the documentation provided, the Division agreed to allow a refund of corporation franchise tax in the total amount of \$220,676.40 (i.e., the COMIDA late payments in the amounts of \$66,211.20, \$67,795.20 and \$86,670.00 included in Rocter's claims for QEZE Credit for Real Property Taxes for the fiscal years ended April 30, 2003, April 30, 2004 and April 30, 2005), which was a portion of the total amount of unused tax credits that petitioner requested to be refunded on its combined franchise tax returns for the fiscal years ended April 30, 2003, April 30, 2004 and April 30, 2005. At the hearing, auditor Mark Husted explained that the Division would allow Rocter's Claim for QEZE Credit for Real Property Taxes for the late payments for each of the fiscal years at issue except for the following late payments of special assessments and water bills: City Services charges in the amounts of \$33,177.79, \$34,136.47 and \$36,411.39; and County Pure Waters charges in the amounts of \$13,818.45, \$12,628.18 and \$12,193.87.

19. The record includes copies of the City of Rochester, New York, tax bills issued to "COMIDA - Rochwil Associates" for the years 2002-2003, 2003-2004 and 2004-2005, on which the following "Other City Charges"⁵ are listed: sidewalk snow plow; street cleaning full; roadway snow plow, downtown zone 1; "HAZARD SDWLK REPLACE"; downtown guide and encroachments.

⁵ In documents prepared by petitioner and Rochwil, the "Other City Charges" were called "City Services."

20. The Rochester Downtown Enhancement District was created pursuant to Local Improvement Ordinance No. 1291 of 1989 of the Council of the City of Rochester. The Rochester Downtown Enhancement District (District) was created to provide a special enhanced level of care and maintenance of the special amenities installed as part of the Main Street improvement projects,⁶ and included all properties located within the boundaries of the District. All enhanced services provided within the District were in addition to, and not a substitute for, basic services provided by the City of Rochester. Property owners within the District receive a special assessment that is based upon a two-factor, two-zone formula. With respect to the factors, a property's assessed value and gross area are equally weighted. Zone 1 properties are comprised of all properties that front on the Main Street improvements or that are located within the primary district boundaries and have enclosed walkway access to Main Street. Zone 2 properties are comprised of all other properties within the boundaries of the District. The special assessment charge for Zone 2 properties and all parking facilities is half that charged to Zone 1 properties.

21. At the time of the hearing, City of Rochester COMIDA PILOT obligations, totaling \$1,080,661.80, for the years 2002, 2003 and 2004 were unpaid.

22. The record does not include copies of the federal partnership returns filed by Rochwil for the years 2002, 2003 and 2004. It also does not include a copy of Rochwil's Amended and Restated Partnership Agreement.

CONCLUSIONS OF LAW

A. Chapter 63 of the Laws of 2000 amended the Tax Law to provide benefits under the

⁶ The Main Street and West Main Street improvement projects involved the installation of special amenities, such as decorative pavers, special street lights, benches, bus shelters, trees and planters.

Empire Zones Program Act, specifically by amending articles 9-A, 22, 32 and 33 of the Tax Law to provide new tax credits applicable to taxable years beginning on or after January 1, 2001. Tax Law § 15 provides for a credit against the taxes imposed pursuant to Tax Law articles 9-A, 22, 32 and 33 for “eligible real property taxes” paid or incurred by a QEZE. 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.⁷ Any amount of the real property tax credit (RPTC) which is not used to reduce tax liability is treated as an overpayment of tax to be credited or refunded (Tax Law § 210[27][b]).

B. Tax Law former § 15(e), as first enacted, defined “eligible real property taxes” to mean “taxes imposed on real property which is owned by the taxpayer and located in empire zones with respect to which the taxpayer is certified pursuant to article eighteen-B of the general municipal law for the taxable year” (*see* L 2000, ch 63, effective May 15, 2000 and applicable to taxable years beginning on or after January 1, 2001).

C. Tax Law former § 15(e), in effect for the period at issue,⁸ defined “eligible real property taxes” as follows:

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*

⁷ The Division of Taxation does not dispute Rochwil’s benefit period factor or employment increase factor.

⁸ Tax Law § 15(e), in effect for the period in issue, was amended in 2002 (*see* L 2002, ch 85, effective May 29, 2002 and applicable to taxable years beginning on or after January 1, 2001).

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. (Emphasis added.)

D. As noted above, the Division disallowed petitioner's requests for refund of unused tax credits, consisting of Rocter's claims for QEZE credit for real property taxes obtained from its interest in Rochwil, a QEZE partnership, because Rochwil had not made the PILOT payments for the years 2002, 2003 and 2004. The Division asserts that the critical words of the statute at issue are "payments . . . made" and the plain meaning of these two words is that the obligations under the written PILOT agreement must have been paid. It further contends that payment made does not mean "the mere incurrence of an obligation without ever paying an obligation." Because the plain meaning of the words "payments made" is clear in the statute, the Division maintains that the payments must be made in order for payments in lieu of taxes to qualify as eligible real property taxes. Petitioner asserts that the Division's interpretation of the statute is incorrect and is in complete contravention of the wording contained within Tax Law former § 15(e) regarding taxes on real property owned by a QEZE. It points out that the Division admitted that, for the years 2002, 2003 and 2004, payment was not required for eligibility purposes in cases where the QEZE property was held in fee. Petitioner maintains that the Legislature clearly intended to treat the QEZE PILOT operator as an owner of real property for purposes of the QEZE credit for real property taxes when in 2002, it amended Tax Law former § 15(e)'s definition of eligible real property taxes to include payments in lieu of taxes made by a QEZE. It further maintains that Tax Law former § 15(e), in effect for the period at issue, did not require, nor did the Legislature

intend to require, payments in lieu of taxes to be treated any differently than other real property taxes. As such, for the years 2002, 2003 and 2004, petitioner claims that neither real property taxes nor payments in lieu of taxes were required to be paid as a condition of eligibility to receive and utilize the QEZE credit for real property taxes.

E. A tax credit is a particularized species of exemption from tax (*Matter of New York Fuel Terminal Corp.*, Tax Appeals Tribunal, August 27, 1998). Statutes creating exemptions from tax are to strictly construed (see *Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193, 371 NYS2d 715 [1975], *lv denied* 37 NY2d 708, 375 NYS2d 1027 [1975]; *Matter of Blue Spruce Farms v. New York State Tax Commn.*, 99 AD2d 867, 472 NYS2d 744 [1984], *affd* 64 NY2d 682, 485 NYS2d 526 [1984]). In addition, the statutory language providing the exemption must be construed in a practical fashion with deference to the legislative intent behind the exemption (see *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 673 NYS2d 966 [1998]; *Matter of Qualex, Inc.*, Tax Appeals Tribunal, February 23, 1995). To determine legislative intent, courts must first look at the literal reading of the act itself (see McKinney's Cons Laws of NY, Book 1, Statutes § 92).

Statutory rules of construction provide that “[t]he legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction” (McKinney's Cons Laws of NY, Book 1, Statutes § 94). Where the statute is clear, the courts must follow the plain meaning of its words, and “there is no occasion for examination into extrinsic evidence to discover legislative intent . . .” (McKinney's Cons Laws of NY, Book 1, Statutes § 120; see *Matter of Raritan Dev. Corp. v. Silva*, 91 NY2d 98, 667 NYS2d 327 [1997]; *Matter of Schein*, Tax Appeals Tribunal, November 6, 2003). Where, as here, words of a statute

have a definite and precise meaning, it is not necessary to look elsewhere in search of conjecture so as to restrict or extend that meaning (*Matter of Erie County Agricultural Society v. Cluchey*, 40 NY2d 194, 386 NYS2d 366 [1976]). As the language of the statute is clear, it is appropriate to interpret its phrases in their ordinary, everyday sense (*Matter of Automatique v. Bouchard*, 97 AD2d 183, 470 NYS2d 791 [1983]).

F. The language of Tax Law former § 15(e), in effect for the period at issue, was clear and unambiguous and therefore can and should be read literally, where it states, in part, that

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.

G. Tax Law § former 15(e) clearly states that, in order for payments in lieu of taxes to be considered “eligible real property taxes,” such payments must be made pursuant to a written agreement between the QEZE and the state, municipal corporation, or public benefit corporation. In the instant case, Rochwil, a QEZE partnership, was obligated to make PILOT payments to the County of Monroe and the City of Rochester pursuant to a written PILOT agreement entered into by and between Rochwil and the County of Monroe IDA in 1992. However, Rochwil did not make the PILOT payments due for the years 2002, 2003 and 2004 due to financial difficulties. Because Rochwil did not pay the PILOT obligations for the years 2002, 2003 and 2004, it did not pay “eligible real property taxes” for purposes of Tax Law § 15(e). As such, the Division properly disallowed petitioner’s requests for refund of unused tax credits, consisting of Rocter’s claims for QEZE credit for real property taxes obtained from its interest in Rochwil, for the fiscal years ended April 30, 2003, April 30, 2004 and April 30, 2005.

H. As noted in Findings of Fact 17 and 18, in December 2010, petitioner provided documentation to the Division indicating that Rochwil had made late payments of the PILOT obligations, totaling \$363,042.55, for the years 2002, 2003 and 2004. At the hearing, the Division indicated that based upon the documentation provided, it was allowing a refund of corporation franchise tax in the total amount of \$220,676.40, (i.e., the Monroe County COMIDA late payments in the amounts of \$66,211.20, \$67,795.20 and \$86,670.00 included in Rocter's claims for QEZE credit for real property taxes for the fiscal years ended April 30, 2003, April 30, 2004 and April 30, 2005), which was a portion of the total amount of unused tax credits that petitioner requested to be refunded on its combined franchise tax returns for the fiscal years ended April 30, 2003, April 30, 2004 and April 30, 2005. With respect to the remaining late payments totaling \$142,366.15 for the years 2002, 2003 and 2004, the Division indicated that it would not allow them as QEZE credits for real property taxes because those payments of City Services charges and County Pure Waters charges were special assessments and water bills, which do not qualify as eligible real property taxes for the QEZE credit for real property taxes. Petitioner is not challenging the Division's disallowance of Rocter's claims for QEZE credit for real property taxes related to the City Services charges and County Pure Waters charges. It is noted that Rochwil has not paid the City of Rochester COMIDA PILOT obligations, totaling \$1,080,661.80, for the years 2002, 2003 and 2004 - the remainder of Rocter's claims for QEZE Credit for Real Property Taxes included in petitioner's requests for refund of unused tax credits at issue in this matter.

I. Petitioner maintains that the Division is precluded from disallowing its requests for refund of the unused tax credits consisting of Rocter Property, Inc.'s claims for QEZE

credits for real property taxes because it failed to formally audit and adjust Rochwil Associates' New York partnership returns for the years 2002, 2003 and 2004 within the three-year statute of limitations on assessment. It asserts that, as a result of the adoption of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) at the federal level, a single unified procedure was created for determining the tax treatment of all partnership items at the partnership level, rather than separately at the level of each individual partner. Petitioner further asserts that any objections to the accounting for a partnership item from a partnership subject to the unified audit procedures must be addressed at the partnership level versus the partner level. Notwithstanding the fact that it provided the Division with all requested information related to the refunds of the QEZE credits for real property taxes claimed on its combined franchise tax returns for the periods at issue, Wilmore maintains that the only items that it technically needed to provide were the Schedule K-1's that were issued by Rochwil to it, which reflected the latter's income, gains, losses, deductions and/or credits, i.e., partnership items, from its investment in the former. Petitioner further maintains that if the Division took exception to the information provided during the desk audit of its combined corporation franchise tax returns, the Division should have initiated timely proceedings at the Rochwil partnership level, which it failed to do.

Petitioner's arguments are without merit. Tax Law § 15(a) provides that a taxpayer that is a member of a QEZE partnership and that is subject to tax under Article 9-A of the Tax Law shall be allowed a credit against such tax for eligible real property taxes. Tax Law § 15(h) specifically references Article 9-A, § 210(27) for the application of the credit. Any amount of the QEZE credit for real property taxes which is not used to

reduce the corporation franchise tax liability is treated as an overpayment of the corporation franchise tax to be credited or refunded (Tax Law § 210[27][b]). On the combined franchise tax returns filed by Wilmorite for the fiscal years at issue, Wilmorite claimed refunds of unused tax credits consisting of QEZE real property tax credits claimed by, among other members of the combined group, Rocter, the corporate partner of the QEZE partnership Rochwil. Each of these combined franchise tax returns included the Form CT-604-CP, Claim for QEZE Credit for Real Property Taxes and QEZE Tax Reduction Credit for Corporate Partners, on which Rocter, the sole general partner, claimed its share of the QEZE credit for real property taxes obtained from its 1% interest in Rochwil. The Division conducted a review of petitioner's requests for refund of the unused tax credits claimed on those combined franchise tax returns. In conjunction with that review, the Division requested information to support petitioner's wholly-owned subsidiary Rocter's claims for the QEZE credit for real property taxes (Tax Law § 1096[b][1]). Petitioner supplied the requested information to the Division. Based upon the documentation supplied, the Division determined that the QEZE Rochwil had not made PILOT payments for the years 2002, 2003 and 2004, as required by Tax Law former § 15(e). As a result, the Division disallowed petitioner's requests for refund of the unused tax credits claimed on its combined franchise tax returns for the fiscal years ended April 30, 2003, April 30, 2004 and April 30, 2005, related to Rocter's claims for QEZE credit for real property taxes for the same fiscal years. Because Rocter's claims for QEZE credit for real property taxes were included in petitioner's combined franchise tax returns and petitioner requested refunds of those QEZE credits for real property taxes, petitioner bore the burden of proving entitlement to same. Petitioner failed to do so. As such, the

Division's disallowance of petitioner's requests for refund of unused tax credits, pertaining to Racter's claims for QEZE credit for real property taxes obtained from its 1% interest in the QEZE partnership Rochwil Associates, for the fiscal years ended April 30, 2003, April 30, 2004 and April 30, 2005, was proper.

J. The petition of Wilmorite, Inc., is granted to the extent indicated in Conclusion of Law H, but in all other respects is denied, and the reductions set forth by the Division on its statements of tax reduction or overpayment dated November 22, 2006 (pertaining to petitioner's fiscal years ended April 30, 2003 and April 30, 2004) and its Statement of Tax Reduction or Overpayment dated March 12, 2007 (pertaining to petitioner's fiscal year ended April 30, 2005), except as modified in accordance with Conclusion of Law H, are sustained.

DATED: Albany, New York
September 6, 2012

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE