

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :

of :

**STEVEN AND ANNETTE ISRAELSEN** :

for Redetermination of a Deficiency or for Refund of :  
New York State Personal Income Tax under Article 22  
of the Tax Law for the Years 2006 and 2007. :

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In the Matter of the Petition :

of :

**RANDY AND LAURA HAYES** :

for Redetermination of a Deficiency or for Refund of :  
New York State Personal Income Tax under Article 22  
of the Tax Law for the Years 2006 and 2007. :

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In the Matter of the Petition :

of :

**STEVEN AND KATHLEEN SMOOT** :

for Redetermination of a Deficiency or for Refund of :  
New York State Personal Income Tax under Article 22  
of the Tax Law for the Years 2006 and 2007. :

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In the Matter of the Petition :

of :

**W. SCOTT AND STANA KJAR** :

for Redetermination of a Deficiency or for Refund of :  
New York State Personal Income Tax under Article 22  
of the Tax Law for the Years 2006 and 2007. :

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DETERMINATION  
DTA NOS. 823635,  
823636, 823637 AND  
823638

Petitioners, Steven and Annette Israelsen, Randy and Laura Hayes, Steven and Kathleen Smoot, and W. Scott and Stana Kjar, each filed a petition for redetermination of a deficiency or for refund of New York State personal income taxes under Article 22 of the Tax Law for the years 2006 and 2007.

On February 14, 2011, petitioners, by their representative, Bond, Schoeneck & King, PLLC (Frank J. Patyi, Esq., of counsel), filed motions seeking summary determination in their favor pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b). Accompanying each motion was the affirmation of Mr. Patyi, dated February 11, 2011, the affidavit of the respective petitioners, and other exhibits in support of the motions. On April 14, 2011, the Division of Taxation, by Mark F. Volk, Esq. (David Gannon, Esq., of counsel), submitted an affirmation in opposition to the motions along with exhibits. The 90-day period for issuance of this determination was extended an additional 90 days by the Administrative Law Judge from July 11, 2011 to October 11, 2011. After due consideration of the affirmations, affidavits, annexed exhibits, and all pleadings and proceedings had herein, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

### ***ISSUE***

Whether petitioners, as lessees, are precluded from receiving the benefit of a QEZE real property tax credit for their PILOT payments based upon the capping provision of Tax Law § 15(e).

### ***FINDINGS OF FACT***

1. In 2004, Palmyra Investment, LLC, began construction on a hotel called the Palmyra Inn (the Hotel) in Palmyra, New York. Palmyra is home to several historical sites that figured prominently in the organization of the Church of Jesus Christ of Latter-day Saints. However,

prior to the construction of the Hotel, there were no hotels located in Palmyra for those who desired to travel to Palmyra to visit the area.

2. Palmyra Inn Investment, LLC, is a Utah limited liability company formed for the purpose of the construction of the Hotel.

3. Another Utah limited liability company, Palmyra Inn, LLC, was formed in conjunction with Palmyra Inn Investment, LLC, for the purpose of operating the Hotel following construction.

4. Steven and Annette Israelsen, Randy and Laura Hayes, Steven and Kathleen Smoot, and W. Scott and Stana Kjar (petitioners) are all members of Palmyra Inn, LLC.

5. The Hotel was completed in 2005 and has since been owned by Palmyra Inn Investment, LLC (the Owner) and leased by Palmyra Inn, LLC (the Lessee). The Lessee operates and manages the Hotel pursuant to a lease agreement between the Owner and Lessee.

6. Although the Owner and the Lessee are from Utah, they decided to build and operate the Hotel in Palmyra, New York, in large part to take advantage of the benefits offered by New York State's business development incentive program for qualified empire zone enterprises (the Empire Zone Program) which offers significant tax incentives to entities that develop businesses in impoverished or economically challenged areas of the state that are designated as "Empire Zones." Both the Owner and Lessee applied for and received Qualified Empire Zone Enterprise (QEZE) certification from the Wayne County Industrial Development Agency (the IDA).

7. The Owner and Lessee entered into a payment in lieu of tax (PILOT) agreement with the IDA. The Owner and Lessee also executed an amendment to their lease agreement on or about September 1, 2005, which provided that the Lessee was required to make payment of all taxes assessed with respect to the Hotel directly to the taxing authorities and receive receipts as proof of payment. Pursuant to these agreements, the Lessee made all PILOT payments due for

the Hotel directly to the taxing authorities for the years 2006 and 2007 and received receipts as proof of payment.

8. Petitioners, as members of the Lessee, each filed their respective individual tax returns for the years 2006 and 2007 indicating that the PILOT payments made by the Lessee constituted “eligible real property taxes” for which they were entitled to QEZE pass-through credits.

9. The Division of Taxation (Division) issued notices of deficiency and/or statements of proposed audit changes for one or both of those tax years. The basis for the notices was that the QEZE real property tax pass-through credits claimed by petitioners were disallowed resulting in additional tax due.

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

A. Pursuant to the Rules of Practice and Procedure of the Tax Appeals Tribunal, a motion for summary determination “shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9[b][1]). The Rules of Practice further provide that CPLR 3212 is applicable to motions for summary determination where not otherwise in conflict with the Rules (20 NYCRR 3000.9[c]). To satisfy CPLR 3212, “[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). This case does not present any material or triable issues of fact. Therefore, disposition of this case by summary determination is appropriate.

B. As set forth, this case involves the interpretation of Tax Law § 15(e). It is the position of petitioners that, as members of the Lessee, they should be entitled to the tax credit for the

PILOT payments made despite the capping provision set forth in the statute. The Division opposes such interpretation stating that the Lessee, as tenant, does not own the property.

Therefore, the Division notes that petitioners do not have a basis in the real property from which a credit could be taken. Thus, the Division argues that petitioners are not entitled to any credits for eligible real property taxes paid since they have no basis in the property.

C. Tax Law § 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 and after January 1, 2001; emphasis added).

D. In 2002, Tax Law § 15(e) and its definition of “eligible real property taxes” was amended. Specifically, the term “taxpayer” therein was changed to “QEZE,” a requirement was added that the “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, and the definition of the payments that comprised “eligible real property taxes” for purposes of the credit was expanded as follows:

In addition, the term “eligible real property taxes” includes payments in lieu of taxes made by the QEZE to the state, a municipal corporation or a public benefit corporation pursuant to a written agreement entered into between the QEZE and the state, municipal corporation, or public benefit corporation.

By this amendment to Tax Law § 15(e), the Legislature recognized that both PILOT payments and payments of real property taxes, made by a certified and qualified QEZE owner of the property, constituted “eligible real property taxes” (L 2002, ch 85, effective May 29, 2002 and applicable to taxable years beginning on and after January 1, 2001).

E. In 2005, Tax Law § 15(e) and its definition of “eligible real property taxes” was again amended. Specifically, the definition of the payments that comprised “eligible real property taxes” for purposes of the credit was further expanded as follows:

In addition, “eligible real property taxes” shall include taxes paid by a QEZE which is lessee of real property if the following conditions are satisfied: (1) the taxes must be paid by the lessee pursuant to explicit requirements in a written lease executed or amended on or after June first, two thousand five, (2) such taxes become a lien on the real property during a taxable year in which the lessee of the real property is both certified pursuant to article eighteen-B of the general municipal law and a qualified empire zone enterprise, and (3) the lessee has made direct payment of such taxes to the taxing authority and has received a receipt for such payment of taxes from the taxing authority.

By this amendment, the Legislature recognized that, in addition to PILOT payments and taxes paid by a certified and qualified QEZE owner of property, taxes paid directly by a certified and qualified QEZE tenant to a taxing authority under an explicit written lease obligation to make such tax payments constituted “eligible real property taxes” (*see* L 2005, ch 61, pt W, § 16, eff April 12, 2005, as added by L 2005, ch 63, pt A, § 5 eff April 12, 2005).

F. As demonstrated by the facts of this case, the Owner and the Lessee are both certified QEZEs; the lessee was responsible for paying all real property taxes with respect to the Hotel, which Hotel is located in the Wayne County Empire Zone, pursuant to an amendment of the lease agreement with the Owner, which was executed on September 1, 2005. Those taxes became a lien on the property in tax years 2006 and 2007 at which time the Lessee was certified pursuant to Article 18-B of the General Municipal Law as a QEZE. The Owner and Lessee entered into a PILOT agreement with the Wayne County IDA; the Lessee paid all required payments in lieu of taxes pursuant to the PILOT agreement for the years 2006 and 2007, and petitioners are all members of the Lessee.

G. As petitioners properly point out, by definition, a lessee never has a tax basis in the property that it leases. Therefore, under the interpretation of the statute as argued by the Division,

a lessee will never be entitled to receive any credits. This result would render the statute meaningless with respect to the Lessee's receiving tax credits for payments under the PILOT agreement.

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). Statutes creating exemptions from tax are to be strictly construed (*see Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193 [1975], *lv denied* 37 NY2d 708 [1975]; *Matter of Blue Spruce Farms v. New York State Tax Commn.*, 99 AD2d 867 [1984], *affd* 64 NY2d 682 [1984]). In addition, it is well established that the interpretation given a statute by the agency authorized with its enforcement should generally be given weight and judicial deference if the interpretation is not irrational, unreasonable or inconsistent with the statute (*Matter of Trump-Equitable Fifth Ave. Co. v. Gliedman*, 62 NY2d 539 [1984]). However, 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 [1988]; *Matter of Qualex, Inc.*, Tax Appeals Tribunal, February 23, 1995). When construing a statute the primary focus is on the intent of the Legislature in enacting the statute (McKinney's Cons Laws of NY, Book 1, Statutes § 92[a]).

I. Notably, the statute at issue does not exclude PILOT payments made by lessee-QEZE from the definition of "eligible real property taxes." The statute states that "the term 'eligible real property taxes' includes payments in lieu of taxes paid by the QEZE" (*see* Tax Law § 15[e]). The Tax Law limits the amount of a PILOT payment that qualifies for the QEZE real property tax credit as a sum equal to the product of the "the basis for federal income tax purposes . . . of real property . . . owned by the QEZE" and "the estimated effective full value tax rate" (*id*). In the absence of any language that differentiates between QEZE owners and QEZE tenants that are

lessees, a reasonable interpretation of the statute cannot treat owners and lessees differently. To do so would render the statute meaningless with respect to lessee-QEZEs who have made qualifying PILOT payments. Therefore, the Division's narrow interpretation of Tax Law § 15(e) that allows only owner-QEZEs to entitlement of the tax credits for eligible real property taxes paid is unreasonable.

J. Petitioners' argument, in the alternative, that the Division should be estopped from assessing petitioners based upon detrimental reliance has been rendered moot.

K. The motions for summary determination are granted, the petitions of Steven and Annette Israelsen, Randy and Laura Hayes, Steven and Kathleen Smoot, and W. Scott and Stana Kjar are granted, and the notices of deficiency are hereby cancelled.

DATED: Troy, New York  
September 15, 2011

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE