STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WILLIAM AND ANDREA MCNEARY	:	DECISION DTA NO. 825093
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2007.	:	

Petitioners, William and Andrea McNeary, filed an exception to the determination of the Administrative Law Judge issued on June 19, 2014. Petitioners appeared by Driver Greene, LLP (Patrick K. Greene, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel). Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a reply brief. Oral argument was heard on February 5, 2015, in Albany, New York, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Qualified Empire Zone Enterprise credit for real property taxes claimed by petitioners in their 2007 resident income tax return was properly disallowed by the Division of Taxation pursuant to Tax Law § 15 (e).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. During 2007, petitioner, William McNeary,[1] was the sole shareholder of Logistics One, Inc., f/k/a Integrated Logistics Corporation (Logistics One), and Logistics One Holding, Inc. (LOH).

2. LOH was the sole shareholder of McNeary, Inc.

3. Logistics One, LOH, and McNeary, Inc., were all flow-through subchapter S corporations pursuant to Internal Revenue Code (IRC) § 1362, allowing for the pass-through of items of income, loss, deduction and credit to petitioner as the sole shareholder.

4. Logistics One became certified under Article 18-B of the General Municipal Law as a Qualified Empire Zone Enterprise (QEZE) within the Saratoga County Empire Zone as of December 27, 2004 and remained certified up to and during the year at issue.

5. On December 28, 2001, McNeary, Inc., as landlord, and Integrated Logistics Corporation[2] and Saratoga Warehouse Associates, Inc., collectively, as tenant, executed a lease agreement for the premises at 29 and 33 Cady Hill Boulevard, Saratoga Springs, New York (2001 Lease Agreement). The two leased buildings were to be used as a public warehouse and transportation facility. The 2001 Lease Agreement, by its terms, was effective January 1, 2002, and had a duration of ten years.

6. The rental provision of the 2001 Lease Agreement called for the tenant to pay the annual rent on a "triple net" basis. This provision made the tenant responsible for the payment of

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[1] Petitioner Andrea McNeary's name appears herein by virtue of having filed joint federal and New York State personal income tax returns with her husband, William McNeary. Unless otherwise specified or required by context, references to "petitioner" shall mean petitioner William McNeary.

[2] Integrated Logistics Corporation was the prior name of Logistics One (***see*** Finding of Fact 1). The difference in names is immaterial to this decision.

all taxes, utilities and insurance. It did not, however, expressly state to whom such payments were to be made.

7. The parties do not dispute that all required real estate taxes for 2007 were timely paid by Logistics One to the applicable taxing authorities during that year.[3]

8. On June 27, 2008, McNeary, Inc., as landlord, and Logistics One, as tenant, executed a lease agreement, with a retroactive effective date of June 1, 2005, for the premises at 29 and 33 Cady Hill Boulevard, Saratoga Springs (2008 Lease Agreement). By its terms, the 2008 Lease Agreement amended, restated, and replaced the 2001 Lease Agreement.

9. The cover page of the 2008 Lease Agreement specifically states that it is dated "as of" June 1, 2005. In the body of the agreement, it goes on to state that it is made "as of the 1st day of June, 2005," and identifies its commencement date as June 1, 2005. The term of the 2008 Lease Agreement is stated as June 1, 2005 through May 31, 2018.

10. The 2008 Lease Agreement is also identified as a "triple net" lease and explicitly requires Logistics One to pay all real estate taxes "directly to the applicable taxing authorities on or prior to the date such [taxes] are due."

11. Petitioners timely filed their joint 2007 New York resident income tax return in August 2008. As sole shareholder of Logistics One, petitioner claimed a QEZE credit for real property taxes of $72,500.00 on the return attributable to Logistics One's payments in 2007 of real estate taxes for the Cady Hill Boulevard property.

12. The Division of Taxation (Division) subsequently reviewed petitioners' 2007 return and disallowed the QEZE real property tax credit attributable to Logistics One. As a result, on May 26, 2011, the Division issued to petitioners notice of deficiency number L-036034652-3,

[3] The record does not reflect the actual date in 2007 on which the real estate taxes were paid.

asserting a tax deficiency of $71,330.00,[4] plus interest. The Division explained its position in the notice of deficiency by stating that Logistics One was not eligible for the QEZE real property tax credit because the eligible real property taxes were not paid under a written lease agreement executed or amended on or after June 1, 2005, as required by law.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge described the issue in the present matter as whether petitioners paid the real property taxes in 2007 "pursuant to explicit requirements in a written lease executed or amended on or after June first, two thousand five" (Tax Law § 15 [e]). The Administrative Law Judge then explained that tax credits are a particularized species of exemption from tax, statutes creating exemptions are to be strictly construed (***see Matter of Grace v New York State Tax Commn***., 37 NY2d 193 [1975], ***rearg denied*** 37 NY2d 816 [1975], ***lv denied*** 338 NE2d 330 [1975]), and the language providing such credits must be construed in a practical fashion with deference to the intent of the Legislature (***see Majewski v Broadalbin-Perth Cent. School Dist.***, 91 NY2d 577 [1998]; ***Matter of Qualex, Inc.***, Tax Appeals Tribunal, February 23, 1995).

The Administrative Law Judge concluded that petitioners were not entitled to the credit because, even though the payments of real estate taxes at issue were made pursuant to a written lease executed after 2005, the written lease was not executed until 2008 and therefore was not in effect in 2007. Furthermore, the Administrative Law Judge, relying on ***Pacific Carlton Dev. Corp. v 752 Pac., LLC***, 62 AD3d 677 (2009) and ***Bartsch v Bartsch***, 54 AD2d 940 (1976), determined that while the 2005 effective date provided for in the 2008 Lease Agreement might

[4] The difference between the $72,500.00 credit claimed on petitioners' return and the $71,330.00 liability in the notice of deficiency reflects credit for an interim tax payment for 2007 of $1,170.00 made by petitioners on July 14, 2010.

apply to the parties to the contract, it could not bind a third party such as the Division to its detriment.

ARGUMENTS ON EXCEPTION

Petitioners contend that Logistics One was a certified QEZE that met all of the requirements of Tax Law § 15 (e) for a QEZE credit for real property taxes regarding its payments of the 2007 real property taxes for the premises at 29 and 33 Cady Hill Boulevard in Saratoga Springs.

Relying on cases such as ***Colello v Colello*** (9 AD3d 855 [2004], ***rearg denied*** 11 AD3d 1053 [2004]) and ***Matter of Strausman v Herman***, (56 AD2d 578 [1977]), among others, petitioners aver that New York law recognizes and enforces retroactive effective dates agreed to by the parties to an agreement. Petitioners contend that as the 2008 Lease Agreement was, by its explicit terms, effective as of June 1, 2005, it was in effect during 2007. Thus, petitioners maintain that petitioner, the sole shareholder of Logistics One, a subchapter S corporation, was entitled to and properly claimed the QEZE credit for real property taxes for that year.

The Division, quoting the Administrative Law Judge, argues that while under New York law, parties to an agreement are bound by an explicitly stated "as of" or effective date that is earlier than the date the contract was executed, third parties cannot be bound by such a provision to their detriment. The Division thus contends that, as it is not a party to the 2008 Lease Agreement, it is not bound by the 2005 effective date set forth therein. The Division further contends that the 2007 real estate taxes were paid pursuant to a lease that was neither executed nor amended on or after June 1, 2005 as required by Tax Law § 15 (e) and that the 2008 Lease Agreement was not in effect in 2007 for purposes of meeting the requirements of Tax Law § 15 (e).

Petitioners also address on exception the question of whether Logistics One was explicitly required to pay the real estate taxes at issue in this proceeding. This issue was not addressed by the Administrative Law Judge in the determination, nor by the Division on exception. Therefore, we agree with the assertion in petitioners' reply brief that the only issue on exception is whether such real estate taxes were paid "pursuant to . . . a written lease executed or amended on or after June first, two thousand five," as required by Tax Law § 15 (e).

OPINION

Tax Law § 15 (e) was amended in 2005, effective April 12, 2005, to expand the definition of "eligible real property taxes." The relevant language is 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."

We need only determine whether the 2008 Lease Agreement was executed and in effect after June 1, 2005, as no question has been presented regarding the adequacy of Logistics One's compliance with the remainder of the requirements of Tax Law § 15 (e). Despite the arguments of the Division to the contrary, the 2008 Lease Agreement, executed on June 27, 2008, was obviously executed after June 1, 2005. Thus, the real question is whether the 2008 Lease Agreement was in effect in 2007 so that the payments of real estate taxes made by Logistics One that year were made pursuant to the 2008 Lease Agreement.

The Administrative Law Judge acknowledged that under New York law:

> "it is fundamental that where the parties to an agreement expressly provide that a written contract be entered into 'as of' an earlier date than that on which it was

> executed, the agreement is effective retroactively 'as of' the earlier date and the parties are bound thereby accordingly" (***Colello v Colello***, 9 AD3d 855, 857 [2004], ***quoting Matthews v Burns, Inc.***, 205 Misc 1006, 1013 [1954]).

However, the Administrative Law Judge concluded, and the Division continues to argue on exception, that although the effective date of the 2008 Lease Agreement is binding on the parties, it is not binding on a third party, the Division, to its detriment. We disagree on several grounds.

First, we find that the cases relied upon by the Administrative Law Judge and the Division are not relevant to the case before us. ***Pacific Carlton Dev. Corp. v 752 Pac., LLC*** dismissed a claim of breach of contract asserted against someone who was not a party to the contract and therefore could not breach it. ***Bartsch v Bartsch*** found that a party to a separation agreement could not impose the provisions of that agreement, or any liabilities allegedly arising thereunder, upon someone not a party to the agreement. Petitioners in the present matter do not seek to impose any obligations or liabilities upon the Division based upon the terms of the 2008 Lease Agreement. Rather, petitioners are asserting that the Division, as a third party, must recognize the valid contract between the parties and the effective date of that contract. We agree. To hold otherwise would produce the undesirable result of the 2008 Lease Agreement having multiple effective dates, and would be in contravention of the aforementioned New York law allowing parties to an agreement to establish the effective dates of the agreement (***see Strausman v Herman*** at 578 [held that "a lease is effective on the date the lease term commences" not the date of its execution]).

Second, we fail to see the detriment to the Division to which the Administrative Law Judge and the Division are referring, nor did the Division identify on exception what that detriment might be. Logistics One complied with all of the requirements of Tax Law § 15 (e),

thus otherwise clearly entitling petitioners to the QEZE credit for real property taxes, with the exception of the questions regarding whether the 2008 Lease Agreement was effective in 2007. We find no detriment to the Division in its being required to recognize the June 1, 2005 effective date of the 2008 Lease Agreement as agreed upon by the parties in accordance with New York law.

Finally, we do not agree with the Administrative Law Judge's assessment that respecting the effective date of the 2008 Lease Agreement determined by the parties circumvents the clear language of the statute and allows for "innumerable" QEZEs to amend current lease agreements or enter into new lease agreements with a 2005 effective date "in an attempt to back into the credit." It is clear from the statutory language alone that the amendments to Tax Law § 15 (e) were intended to allow for the QEZE credit for real property taxes to apply in situations where the taxes were paid by a lessee, as opposed to only situations where the taxes were paid by the owner of the property. The statute is specifically applicable to lessees only where there is a written lease agreement or amendment entered into after June 1, 2005. New York law allows the parties to an agreement to establish the effective date of that agreement. Therefore, only those with a valid claim to the QEZE credit for real property taxes are entitled to such credit under the holding herein respecting the effective date chosen by the parties to the 2008 Lease Agreement.

In sum, our holding that the 2008 Lease Agreement was in effect in 2007, resulting in the conclusion that petitioners are entitled to the QEZE credit for real property taxes paid for that year, is a practical application of the statute that accords deference to the intent of the Legislature (***see Majewski v Broadalbin-Perth Cent. School Dist.***; ***Matter of Qualex, Inc.***).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of William and Andrea McNeary is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of William and Andrea McNeary is granted; and

4. The notice of deficiency, dated May 26, 2011, is canceled.

DATED: Albany, New York
August 3, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner