STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
SPENCER T. AND MELISSA LED DUKE **SCOTT AND LISA LED DUKE** **CHERI AND DONALD LED DUKE, JR.** **AVA LED DUKE** **ASHLEY LED DUKE** **SHAWN LED DUKE** **DONALD LED DUKE (DEC'D) AND MARY LOUISE LED DUKE** **SPENCER J. LED DUKE** **SLADE LED DUKE**	:	DECISION DTA NOS. 825115, 825116, 825117, 825118, 825119 825120, 825121, 825122 AND 825123
for Redetermination of Deficiencies or for Refunds of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2006, 2007 and 2008.	:	

Petitioners, Spencer T. and Melissa Led Duke, Scott and Lisa Led Duke, Cheri and Donald Led Duke, Jr., Ava Led Duke, Ashley Led Duke, Shawn Led Duke, Donald (Dec'd) and Mary Louise Led Duke,[1] Spencer J. Led Duke, and Slade Led Duke filed an exception to the determination of the Administrative Law Judge issued on March 26, 2015. Petitioners appeared by Centolella Lynn D'Elia & Temes LLC (Timothy M. Lynn, 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 the exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument, at petitioners' request, was heard in

[1] Donald Led Duke died on September 27, 2010. His widow, petitioner Mary Louise Led Duke, is a fiduciary of his estate and filed joint returns with him for the years at issue.

Albany, New York, on November 19, 2015, 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 Division of Taxation properly disallowed petitioners' claims for QEZE real property tax credits on the basis that certain payments in lieu of taxes were not eligible real property taxes as defined by Tax Law former § 15 (e).

FINDINGS OF FACT

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

1. JMA Properties, LLC (JMA) is a New York limited liability company organized on September 14, 1999. At all relevant times, JMA was the owner of certain real property at 8 Empire Drive, East Greenbush, New York (the property).

2. Mannix Road Hotel, LLC (Mannix) is a New York limited liability company organized on October 18, 1999. At all relevant times, Mannix leased the property from JMA pursuant to the terms of two leases - the first, effective October 1, 2003, and the second, effective January 1, 2007 (collectively, the Leases). JMA and Mannix, by their authorized agents, executed the Leases as landlord and tenant, respectively.

3. The nature of the project performed by JMA and Mannix on the property was construction and operation of a hotel.

4. On or about May 1, 2000, JMA, as owner of the property, entered into a Payment in Lieu of Tax Agreement (PILOT Agreement) with the Rensselaer County Industrial Development Agency (the IDA). Mannix was not a party or a signatory to the PILOT Agreement.

5. Pursuant to the PILOT Agreement, the property was exempt from real property taxation pursuant to section 412-a of the Real Property Tax Law. JMA agreed to make certain PILOT payments pursuant to the calculation determined in the PILOT Agreement.

6. JMA was certified as a Qualified Empire Zone Enterprise (QEZE) on March 19, 2004 and remained as such throughout the period in issue.

7. Mannix was certified as a QEZE on January 21, 2004 and remained as such throughout the period in issue.

8. Each of the Leases contained an identical section 3.04, which read:

> "Tenant (Mannix) shall pay when due all real estate taxes which shall be levied or assessed or which become liens upon the Project. Tenant shall provide Landlord (JMA) with proof of payment of taxes within 15 days following the date payment is due."

Thus, pursuant to the terms of the Leases, Mannix was responsible for, and in fact did pay, all real estate taxes, including any payments owed under the PILOT Agreement for the years 2006, 2007 and 2008. Mannix made all such payments directly to the taxing jurisdiction or IDA and provided JMA with proof that such payments were made. The receipt statements from the IDA for the PILOT payments by Mannix, however, were issued in the name of JMA.

9. The IDA was not a party or a signatory to the Leases.

10. On its New York State partnership returns (Form IT-204) filed with the Division of Taxation (Division) for each of the years 2006, 2007 and 2008, Mannix claimed real property tax credits for amounts including the payments made under the PILOT Agreement. Those amounts

were allocated to the various petitioners as the partners of so-called upper-tier partnerships that were members of Mannix.[2]

11. At the relevant time, petitioners had the following indirect partnership percentages in Mannix:

Mary Louise Led Duke	17.50000%
Donald Led Duke, Jr.	17.29166%
Scott Led Duke	20.62500%
Slade Led Duke	20.62500%
Spencer T. Led Duke	11.45833%
Ashley Led Duke	3.33333%
Spencer J. Led Duke	2.91667%
Ava Led Duke	3.33333%
Shawn Led Duke	2.91667%

12. At all relevant times, JMA and Mannix had identical ownership.

13. The Division denied petitioners' claims for the QEZE real property tax credit allocated to each petitioner by Mannix in the following amounts:

Petitioner	Tax Year	Amount of Credit Claimed
Mary Louise Led Duke	2007	$32,535.00
	2008	$34,304.00
Donald Led Duke, Jr.	2006	$29,372.72
	2007	$32,148.00
Scott Led Duke	2006	$35,034.86
	2007	$38,345.00
	2008	$32,343.00
Slade Led Duke	2006	$35,034.86
	2007	$38,345.00
	2008	$32,343.00

[2] These partnerships included SWF, LP, and Columbia Hospitality, LLC.

Spencer T. Led Duke	2006	$19,463.76
	2007	$21,303.00
Spencer J. Led Duke	2006	$4,954.48
	2007	$5,423.00
	2008	$5,717.00
Ashley Led Duke	2006	$5,661.63
	2007	$6,197.00
	2008	$6,533.95
Ava Led Duke	2006	$5,661.63
	2007	$6,197.00
	2008	$6,533.88
Shawn Led Duke	2006	$4,954.48
	2007	$5,423.00
	2008	$5,717.00

14. Based on the denial of the QEZE real property tax credits, on May 5 and June 27, 2011, the Division issued the following notices of deficiency to petitioners and, after conciliation conferences with the Bureau of Conciliation and Mediation Services (BCMS), the subject notices were adjusted as noted:[3]

Petitioner	**Notice Number**	**Year**	**Original Tax**	**Adjusted Tax**
Donald (Dec'd) and Mary Louise Led Duke	L-035866417	2007	$35,159.79	$32,599.00
	L-035866420	2008	$34,304.00	$34,304.00
Donald Jr. and Cheri Led Duke	L-035866406	2006	$29,373.31	$29,373.31

[3] Each of the subject notices contained deficiencies attributable to the disallowance of certain credits claimed for various projects, including petitioners' interests in Mannix. The adjustments made at BCMS reflect a finding in favor of petitioners on issues involving projects unrelated to this determination, but sustaining the deficiencies relating to Mannix. In addition, each notice assessed interest, which was sustained by the conferee.

	L-035866413	2007	$43,819.40	$33,464.00
Scott and Lisa Led Duke	L-035866399	2006	$35,035.19	$35,035.19
	L-035866407	2007	$52,265.00	$39,912.00
	L-035866397	2008	$32,707.67	$32,343.00
Slade Led Duke	L-035866416	2006	$35,034.93	$35,034.93
	L-035866398	2007	$52,265.00	$39,912.00
	L-035866414	2008	$32,707.81	$32,343.00
Spencer T. and Melissa Led Duke	L-035866395	2006	$19,464.00	$19,464.00
	L-035866410	2007	$29,037.00	$22,175.00
Spencer J. Led Duke	L-035866405	2006	$4,955.00	$4,955.00
	L-035866409	2007	$7,242.00	$5,645.00
	L-035866401	2008	$5,717.00	$5,717.00
Ashley Led Duke	L-035866408	2006	$5,662.00	$5,662.00
	L-035866415	2007	$8,276.00	$6,451.00
	L-035866411	2008	$6,533.95	$6,533.95
Ava Led Duke	L-035866404	2006	$5,662.00	$5,662.00
	L-035866412	2007	$8,276.00	$6,451.00
	L-035866400	2008	$6,533.88	$6,533.88
Shawn Led Duke	L-035866418	2006	$4,955.00	$4,955.00
	L-035866419	2007	$7,242.00	$5,645.00
	L-035866396	2008	$5,717.00	$5,717.00

15. In the subject notices, the Division explained that its adjustments were based on the fact that Mannix was not a party to the PILOT Agreement and, thus, the requisite eligible real property taxes required for the credit under Tax Law former § 15 (e) were missing.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that, under Tax Law former § 15 (e), PILOT payments qualify for the QEZE real property tax credit only where such payments are made by the QEZE pursuant to a written agreement between the QEZE and an appropriate governmental entity. The Administrative Law Judge found that there was no such written agreement between Mannix and either a taxing jurisdiction or a public benefit corporation that required Mannix to remit PILOT payments. Rather, the Administrative Law Judge determined that Mannix's obligation to make the PILOT payments arose solely from the Leases and not from any participation in the PILOT agreement between JMA and the IDA. The Administrative Law Judge cited ***Matter of The Golub Corp***. (Tax Appeals Tribunal, May 31, 2012) ***confirmed sub nom. Matter of Golub Corp. v New York State Tax Appeals Trib.*** (116 AD3d 1261 [2014]) in support of this conclusion. The Administrative Law Judge rejected petitioners' efforts to distinguish ***Golub*** and he distinguished ***Matter of Falso*** (Tax Appeals Tribunal, May 23, 2013) and ***Matter of Bombardier Mass Transit Corp.*** (Tax Appeals Tribunal, June 7, 2012), two cases cited by petitioners in support of their position. Accordingly, the Administrative Law Judge concluded that the PILOT payments at issue did not meet the definition of eligible real property taxes under the statute and therefore denied petitioners' claims for credit.

Given the foregoing conclusion, the Administrative Law Judge did not address alternate theories in support of the statutory notices advanced by the Division for the first time in its post-hearing brief.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioners contend that the PILOT payments made by Mannix qualify as eligible real property taxes because Mannix had a direct and absolute obligation to make such payments.

Petitioners argue that the terms of the Leases requiring Mannix to pay taxes served to obligate Mannix directly to the IDA under the PILOT agreement. Petitioners further assert that the PILOT agreement itself set the terms and conditions of Mannix's obligation to the IDA. Hence, according to petitioners, the Administrative Law Judge's finding, and the Division's contention herein, that Mannix's obligation arises solely from the Leases is erroneous. Given the terms of the PILOT agreement and the Leases, petitioners contend that the IDA had a direct cause of action against Mannix for nonpayment and that Mannix had a cause of action against the IDA in connection with disputes regarding the amount of the PILOT payments.

Petitioners thus argue that the PILOT agreement and the Leases should be construed together and, as such, the two writings establish that the payments by Mannix were made pursuant to a written agreement with the IDA as required under Tax Law former § 15 (e). Petitioners contend that this Tribunal so construed multiple writings to find that PILOT payments by a QEZE were eligible real property taxes in ***Matter of Falso*** and ***Matter of Bombardier Mass Transit Corp.***

Petitioners also continue to argue that ***Golub*** is factually distinguishable from the instant matter. Specifically, petitioners note that the QEZE-lessee in ***Golub*** had an option under that lease that allowed it to make the PILOT payments either directly to the taxing authorities or, if it so chose, to the lessor. Hence, according to petitioners, unlike the situation here, the QEZE's obligation to make PILOT payments in ***Golub*** was neither direct nor absolute.

The Division contends that the Administrative Law Judge properly held that the PILOT payments at issue were not eligible real property taxes under Tax Law former § 15 (e). The Division agrees with the Administrative Law Judge's finding that the lack of an agreement between Mannix and the IDA compels this conclusion. The Division further agrees with the

Administrative Law Judge that ***Golub*** supports the determination and that ***Matter of Falso*** and ***Matter of Bombardier Mass Transit Corp.*** are distinguishable.

The Division also asserts alternate theories in support of the statutory notices. As noted, the Division raised these alternate theories in its post-hearing brief to the Administrative Law Judge. First, the Division maintains that if the PILOT payments are determined to be eligible real property taxes, they are subject to the PILOT limitation under Tax Law § 15 (e), which caps the amount of the PILOT payment available for the credit pursuant to a calculation using the QEZE's basis in the real property. The Division contends that Mannix had no basis in the real property and that, accordingly, the PILOT limitation would result in zero allowable credit. The Division also asserts that the capital investment limitation on Mannix's real property tax credit (Tax Law § 15 [f]) would be similarly affected. The Division further asserts that, for the tax year 2006, Mannix made payments pursuant to the lease effective October 1, 2003, and contends that, in order to qualify as eligible real property taxes, a QEZE-lessee's payment of real property taxes must be made pursuant to a lease executed or amended on or after June 1, 2005. The Division thus contends that Mannix's PILOT payments with respect to 2006 do not qualify for the credit at issue on this basis. The Division also contends that the Leases state that Mannix is responsible for the payment of real estate taxes, not payments in lieu of such taxes. Accordingly, the Division asserts that the PILOT payments made by Mannix were not made pursuant to such agreements.

As they did below, petitioners continue to oppose the Division's assertion of such alternate theories of liability for the first time post-hearing.

OPINION

As petitioners claim tax credits, we note, preliminarily, that "statutes that create tax credits are construed against the taxpayer, and, in addition to establishing its entitlement to the credits, the taxpayer must also demonstrate that its own reading is the only reasonable construction of the statute" (***Matter of Constellation Nuclear Power Plants LLC v Tax Appeals Trib. of the State of N.Y.***, 131 AD3d 185, 190 [2015] [internal quotation marks and citations omitted], ***lv denied*** 26 NY3d 996 [2015]). Nevertheless, construction of a credit statute should not be so narrow as to defeat the provision's settled purpose (***see Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193, 196 [1975], ***lv denied*** 338 NE2d 330 [1975]).

Tax Law § 15 permits a business enterprise certified as a QEZE to claim a credit against tax for eligible real property taxes paid or incurred by the QEZE. The manner by which a QEZE may claim such credit depends on its classification for tax reporting purposes (***see*** Tax Law § 15 [h]). Where, as here, the certified QEZE is a partnership,[4] the credit flows through to the members of the partnership, who may claim their proportionate share of such credit on their New York income tax returns (***see*** Tax Law § 606 [bb]). As members of Mannix, petitioners claimed their respective proportionate shares of Mannix's asserted QEZE real property tax credit for the years in question.

Subject to certain limitations not at issue, the amount of QEZE real property tax credit available in a given tax year is the product of three factors: (i) the benefit period factor; (ii) the employment increase factor; and (iii) the eligible real property taxes paid or incurred by the QEZE during the taxable year (Tax Law § 15 [b]).

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[4] A limited liability company that is classified as a partnership for federal income tax purposes, such as Mannix, is a partnership under Article 22 (Tax Law § 601 [f]).

As noted, the issue presented is whether the PILOT payments made by Mannix to the taxing jurisdiction or the IDA met the definition of eligible real property taxes as required in order to qualify for the subject credit. During the years at issue, Tax Law former § 15 (e) set forth three types of payments that could constitute eligible real property taxes for purposes of the QEZE credit: 1) taxes paid by a QEZE-owner of property; 2) taxes paid by a QEZE-lessee of property; and 3) payments in lieu of taxes by a QEZE (***see Matter of The Golub Corp***.). This third situation is applicable in the present matter. Specifically, with respect to payments in lieu of taxes, the statute provided: "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" (Tax Law former § 15 [e]).

As the Administrative Law Judge noted, the issue presented is identical to the issue addressed by the Appellate Division in ***Matter of The Golub Corp. v New York State Tax Appeals Tribunal***. In that case, as in the present matter, a QEZE-lessee that was not a party to a PILOT agreement made PILOT payments directly to the appropriate governmental entities pursuant to the terms of a lease. In confirming the decision of this Tribunal that denied the claimed QEZE real property tax credits, the court stated:

> "The pertinent [statutory] language affirmatively requires in clear terms that, to qualify for the credit under such provision, the PILOT payments must be made pursuant to *a written agreement between the QEZE and the appropriate entity* . . . . Petitioner was not a party to [the PILOT] agreement. Although petitioner's separate agreement [the lease] . . . provided that petitioner would make the payments and the various entities may have desired to structure the transactions so that petitioner could receive the empire zone tax credit, unfortunately petitioner's PILOT payments do not qualify for such credit under the statutory language. It was petitioner's burden to show that it was clearly entitled to the credit and, in fact, the statute manifestly provides otherwise. We cannot, under long settled principles of statutory interpretation, essentially rewrite

> an unambiguous provision of a statute by ignoring explicit language, no matter how equitable such a result may appear (citations omitted)" (emphasis added) (116 AD3d at 1262, 1263).

Given the similarity of circumstances between the present matter and ***Golub***, the same result must follow. That is, petitioners' claims for QEZE real property tax credit must fail because Mannix was not a party to the PILOT agreement between JMA and the IDA and, in fact, Mannix did not enter into any written agreement with the IDA regarding the PILOT payments. As noted by the Administrative Law Judge, Mannix's liability for the PILOT payments arose through the Leases with JMA. Accordingly, notwithstanding the apparent intent of JMA, Mannix and their respective members to have Mannix receive the tax credit at issue, under the clear statutory language of Tax Law former § 15 (e), and the court's interpretation thereof in ***Golub***, the lack of a written agreement between Mannix and the IDA necessarily frustrates that intent.

As noted, petitioners seek to distinguish ***Golub*** because the QEZE-lessee in ***Golub*** had an option under that lease that allowed it to make the PILOT payments either directly to the taxing authorities or, if it so chose, to the lessor. Hence, according to petitioners, the QEZE's obligation to make PILOT payments in ***Golub*** was neither direct nor absolute. In contrast, the Leases between Mannix and JMA contain no such opt-out clauses. Petitioners thus assert that Mannix was a direct obligor with respect to the PILOT agreement, and that, accordingly, the IDA and Mannix had direct causes of action against one another for any breach of the terms of the PILOT Agreement.

The Appellate Division's decision in ***Golub***, however, makes no reference to any opt-out clause. Rather, that decision states that the QEZE's lease "obligated it to make the PILOT payments" and that the lease "provided that petitioner would make the payments" (116 AD3d at

1261 and 1262). The court thus apparently did not consider the opt-out clause significant and premised its decision solely on the fact that the QEZE was not a party to the PILOT agreement. Accordingly, petitioners' effort to distinguish ***Golub*** based on the absence of any similar opt-out clause in the Leases simply misses the holding of ***Golub***, which, as noted, is that the statute requires a written agreement between the QEZE and the appropriate governmental entity in order for PILOT payments to be considered eligible real property taxes.

Additionally, we disagree with petitioners' contention that our decisions in ***Falso*** and ***Bombadier*** support its claim of entitlement to the credits at issue. As the Administrative Law Judge correctly noted, in each of those cases, a document requiring PILOT payments by the QEZE was signed by all relevant entities, including the appropriate governmental authority. Specifically, in ***Bombardier***, such document expressly incorporated prior PILOT agreements; was consented to and signed by all of the obligors and obligees of such prior agreements; and expressly obligated the QEZE-petitioner to make PILOT payments. In ***Falso***, such document confirmed an assignment of obligations and duties under the original PILOT agreement to the QEZE-petitioner and was signed by the relevant IDA under the heading "accepted and consented." As a consequence, in each of those cases, this Tribunal determined that the written agreement requirement of Tax Law former § 15 (e) was met, despite the fact that the petitioner was not a party to the original PILOT agreement in either case. In the instant matter, there is no document signed by both Mannix and the IDA. Contrary to petitioners' contention, we did not construe multiple writings together to find an agreement in those cases. Rather, as noted, in each of those cases, our decision was premised on the existence of a writing signed by all relevant parties, pursuant to which the QEZE and the appropriate governmental entity expressly agreed to

PILOT payments to be made by the QEZE. The absence of any similar document here distinguishes the instant matter from ***Falso*** and ***Bombardier***.

As we have concluded that Mannix's PILOT payments to the IDA are not eligible real property taxes under the statute, the Division's alternate arguments, as well as the question of whether such issues may be raised post-hearing, need not be addressed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Spencer T. and Melissa Led Duke, Scott and Lisa Led Duke, Cheri and Donald Led Duke, Jr., Ava Led Duke, Ashley Led Duke, Shawn Led Duke, Donald (Dec'd) and Mary Louise Led Duke, Spencer J. Led Duke, and Slade Led Duke is denied;

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

3. The petitions of Spencer T. and Melissa Led Duke, Scott and Lisa Led Duke, Cheri and Donald Led Duke, Jr., Ava Led Duke, Ashley Led Duke, Shawn Led Duke, Donald (Dec'd) and Mary Louise Led Duke, Spencer J. Led Duke, and Slade Led Duke are denied; and

4. The notices of deficiency, dated May 5, 2011 and June 27, 2011, adjusted as indicated herein (***see*** finding of fact 14), are sustained.

DATED: Albany, New York
May 12, 2016

/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