STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN CIPOLLA	:	DECISION DTA NO. 825961
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 2010.	:	

Petitioner, John Cipolla, filed an exception to the determination of the Administrative Law Judge issued on October 29, 2015. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

Petitioner filed a letter brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument was not requested. The six-month period for the issuance of this decision began on April 4, 2016, the date petitioner's letter brief in reply was received.

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

ISSUE

Whether the Division of Taxation properly disallowed petitioner's claim for a refund of personal income tax on the ground that he did not have an ownership interest in an entity that claimed the qualified empire zone enterprise real property tax credit.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. We have also added an additional finding of fact, numbered 11 herein, to more fully reflect the record. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

1. On or about January 20, 2011, petitioner, John Cipolla, filed a form IT-203, nonresident and part-year resident income tax return, for the year 2010, wherein he claimed a qualified empire zone enterprise (QEZE) credit for real property taxes in the amount of $11,606.00. The inclusion of the credit resulted in an overpayment and a claim for a refund of $11,606.00.

2. In a letter dated March 21, 2011, the Division of Taxation (Division) advised petitioner, among other things, that before it could consider the refund claimed on the income tax return, petitioner would need to submit a copy of his federal schedule E. The Division also noted that it had not received a partnership return for the entity through which petitioner had claimed the credit. Consequently, the Division could not verify, at that time, the QEZE credit claimed on the return. The letter pointed out that the inability to verify the QEZE credit might also result in a delay in the processing of the return.

3. On April 8, 2011, Niagara & Ontario Plaza (Niagara & Ontario) filed an IT-204, partnership return, for the year 2010 claiming a QEZE credit for real property taxes in the amount of $56,308.00 for the period ending December 31, 2010. According to the return, the partners of Niagara & Ontario included an S corporation, 81 and 3 of Florida, Inc. (81 and 3), with a 99 percent ownership interest, and a corporation with a 1 percent ownership interest. The Division conducted an audit of the QEZE credit that included a review of the tax bills and employee information. Following its review, the credit was adjusted to $54,577.00.

4. 81 and 3 filed a form CT-3-S, New York S corporation franchise tax return, for the fiscal year ending December 31, 2010. Schedule B of the return, which asks for a list of the shareholders' identifying information, named four shareholders and the corresponding percentages of ownership as follows:

Shareholder	Percentage of Ownership
Joseph A. Cipolla	0.333333
Penny D. Cipolla	0.333333
John Cipolla	0
Mary Ripper	0.333333

5. 81 and 3 also filed a Form 1120S, U.S. income tax return for an S corporation, for the year 2010. The schedules K-1, included with the return, reported that petitioner did not have any percentage of the stock ownership for the tax year. However, each of the remaining shareholders was reported to have a stock ownership interest of 33.333 percent.

6. On April 4, 2012, the Division issued a notice of disallowance to petitioner, which advised that the Division was disallowing the claim for a refund because petitioner's share of the ownership in 81 and 3 was zero percent according to the 2010 New York S corporation CT-34-SH Form filed by 81 and 3.

7. 81 and 3 began its operations as a closely-held firm that engaged in developing real estate. It also acted as a holding company for other entities. Prior to 2010, there were four shareholders of 81 and 3 consisting of petitioner and petitioner's sister, brother and stepmother. Each shareholder owned 25 percent of the firm.

8. Petitioner received an undated email from the attorney for 81 and 3 asking petitioner to sign an agreement that proposed that he surrender his stock in 81 and 3 in exchange for the

termination of any personal obligation to the firm. The email noted that petitioner's father informed the attorney that, upon signing the agreement, petitioner would have no further obligation on any other loan. The email was accompanied by a share surrender agreement, bearing an unspecified date in July 2010, stating that petitioner owned 25 shares of common stock of the company and that this constituted 25 percent of the issued and outstanding stock of the company as of the closing date. Petitioner refused to sign the share surrender agreement without an accounting.

9. In December 2010, petitioner commenced a proceeding in the Supreme Court, Erie County, for poor person relief and an accounting. Petitioner alleged that he has a good cause of action based upon the fact that he is an officer and 25 percent shareholder of 81 and 3 and that the defendants breached their fiduciary duty by not providing an accounting or financial records. In an order dated December 22, 2010, the motion was denied on the grounds that petitioner failed to make:

> "1. A sufficient showing of a meritorious cause of action/defense and/or
> 2. A sufficient showing of indigence. . . ."

10. At the hearing, petitioner presented one page of a Form 1040, Schedule E, for the year 2010 reporting that he had an interest in 81 and 3. According to the schedule E, petitioner received nonpassive income of $86,000.00 and a nonpassive loss of $60,000.00 for a total income of $26,000.00.

11. Prior to the 2010 tax year, the returns of 81 and 3 indicate that petitioner was a 25% shareholder.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that petitioner failed to establish that he was a shareholder of 81 and 3 in 2010 and he concluded, therefore, that the Division properly disallowed petitioner's claim for a refund of the QEZE credit at issue. In reaching this conclusion, the Administrative Law Judge noted that the 2010 S corporation tax return of 81 and 3 indicates that petitioner was not a shareholder (***see*** finding of fact 4).

The Administrative Law Judge declined to give any weight to the schedule E submitted by petitioner (***see*** finding of fact 10) because petitioner failed to establish the source of the information reported on the schedule E. On this point, the Administrative Law Judge noted that petitioner admittedly did not have access to 81 and 3's books and records. Additionally, although he found that the undated email from 81 and 3's attorney and the unsigned share surrender agreement support an inference that petitioner was, at some point in time, a shareholder of 81 and 3 (***see*** finding of fact 8), the Administrative Law Judge nonetheless concluded that such email and unsigned document were insufficient to establish entitlement to the credit at issue. Finally, the Administrative Law Judge determined that the court order submitted by petitioner provided no support to his position because that order determined that petitioner did not prove a meritorious cause of action (***see*** finding of fact 9).

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner continues to assert that he was a shareholder of 81 and 3 during 2010 and therefore entitled to the claimed refund. In support of his position, petitioner submitted documents with his exception that are not part of the record below. Such documents consist of corporate records and corporate minutes of 81 and 3 that, according to petitioner, show that he was a 25% shareholder of that entity until December 21, 2010. Petitioner argues that the

additional evidence clearly establishes his right to the claimed refund. Petitioner asserts that he diligently sought to obtain these documents prior to the hearing below, but was unable to do so. Petitioner contends that he was able to obtain such documents only after the September 2015 death of his brother, who, according to petitioner, controlled 81 and 3. Given such circumstances, petitioner requests that this Tribunal consider the evidence submitted with his exception.

The Division contends that the Administrative Law Judge properly determined that petitioner failed to establish entitlement to the claimed refund. The Division asserts that the schedule B of 81 and 3's New York S corporation return and K-1 schedules filed with 81 and 3's federal S corporation return provide substantive evidence that petitioner was not a shareholder of that corporation in 2010. Additionally, the Division echoes the Administrative Law Judge's conclusions regarding the lack of probative value of the documents submitted by petitioner at the hearing.

OPINION

We first address petitioner's request that we consider the evidence presented for the first time on exception. This Tribunal has long declined to consider evidence that was not made part of the record before the Administrative Law Judge (***see e.g. Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991). This is because accepting evidence after the record is closed is inconsistent with a fair and efficient hearing process (***see Matter of Ippolito***, Tax Appeals Tribunal, August 23, 2012, ***affd sub nom Matter of Ippolito v Commissioner of N.Y. State Dept. of Taxation & Fin.*** 116 AD3d 1176 [2014]). Such a process must be "defined and final" and must "provide an opportunity for the adversary to question the evidence on the record" (***id***.). Acceptance of the evidence first presented by petitioner on exception is plainly contrary to these

principles. Accordingly, we do not accept such evidence into the record herein and have not considered such evidence in rendering this decision.[1]

Turning now to whether petitioner has established entitlement to his claimed refund based on the record established below, Tax Law § 15 (a) provides for a credit against personal income or franchise taxes for eligible real property taxes paid by a QEZE. The QEZE in the present matter is Niagara & Ontario, a partnership. 81 and 3 is a member of the partnership. Accordingly, 81 and 3 was entitled to claim its share of Niagara & Ontario's real property tax credit pursuant to Tax Law § 15 (a). As an S corporation, 81 and 3's share of the credit flowed to its shareholders, who could claim their proportionate share of the credit against their personal income tax liability pursuant Tax Law § 606 (i) (1) (B) (xv). Petitioner claims that he was a shareholder of 81 and 3 and that, accordingly, he is entitled to a share of 81 and 3's credit to the extent of his ownership interest.

Upon review of the record, we agree with the Administrative Law Judge's conclusion that petitioner has not proven that he was a shareholder of 81 and 3 during the tax year at issue. In reaching this conclusion, we note first that both the federal and New York S corporation returns of 81 and 3 indicate that petitioner did not have an ownership interest in that entity as of the end of the 2010 tax year (***compare*** findings of fact 4 and 5 ***with*** finding of fact 11). Furthermore, we agree with the Administrative Law Judge's conclusion that the evidence submitted by petitioner at the hearing fails to establish petitioner's claim. Specifically, we agree that the schedule E submitted by petitioner is properly accorded little weight because petitioner did not establish the

[1] Our rules of practice and procedure allow a party to make a motion to the Administrative Law Judge to reopen the record upon the grounds of newly discovered evidence (***see*** 20 NYCRR 3000.16). While we take no position as to whether he would have prevailed on such a motion, this would have been the appropriate procedure for petitioner to offer the additional evidence into the record.

source of the information reported thereon (***see*** finding of fact 10). We also agree with the Administrative Law Judge's conclusion that the undated email from 81 and 3's attorney and the unsigned share surrender agreement are insufficient to establish that petitioner was a shareholder during the year at issue (***see*** finding of fact 8). Finally, we agree that the court order submitted by petitioner provides little support to his position because that order did not find that petitioner had a meritorious cause of action (***see*** finding of fact 9). We thus concur in the Administrative Law Judge's finding that petitioner has not met his burden of proof to show that he was entitled to the credit and the resulting refund at issue (***see*** Tax Law § 689 [e]).[2]

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of John Cipolla is denied;

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

3. The petition of John Cipolla is denied; and

4. The notice of disallowance, dated April 4, 2012, is sustained.

DATED: Albany, New York
September 29, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

[2] The parties did not address the question of whether petitioner would prevail in the present matter even if the facts were as petitioner claims on exception (that is, even if petitioner proved that he was a shareholder until December 21, 2010). Accordingly, we do not consider this issue.