

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :

of :

**WILLIAM J. JONES** :

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. :

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In the Matter of the Petition :

of :

**JOSEPH A. PETRELLA** :

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. :

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In the Matter of the Petition :

of :

**DOUGLAS G. SWIFT** :

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. :

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DECISION  
DTA NOS. 826618,  
826619 AND 826620

Petitioners, William J. Jones, Joseph A. Petrella and Douglas G. Swift, filed exceptions to the determination of the Administrative Law Judge issued on September 24, 2015. Petitioners appeared by McConville, Considine, Cooman & Morin, PC (Kevin S. Cooman, Esq. and Edward

C. Daniel, III, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Tobias A. Lake, Esq., of counsel).

Petitioners filed a brief in support of their exceptions. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument was heard on May 12, 2016, in Albany, New York. Following oral argument and with the Tribunal's permission, the parties filed additional written arguments. The six-month period for issuance of this decision began on June 20, 2016, the date that petitioners' final written submission was filed.

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

#### ***ISSUE***

Whether the Division of Taxation properly disallowed a portion of the QEZE real property tax credits claimed by petitioners for the year 2010.

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

We find the facts as determined by the Administrative Law Judge. We have also added additional findings of fact, numbered 7 and 8 herein, to more fully reflect the record. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

1. Petitioners, William J. Jones, Joseph A. Petrella and Douglas G. Swift, were members of 598 Main Street, LLC (the LLC).
2. The LLC was formed on February 22, 2000 and was certified as a Qualified Empire Zone Enterprise (QEZE) with an effective date of February 28, 2002 pursuant to Article 18-B of the General Municipal Law.

3. Because the LLC elected to be treated as a partnership for federal and state income tax purposes, its items of income, loss, deduction and credit passed through to petitioners and were reported on petitioners' income tax returns for the year at issue.

4. In computing its QEZE credits for the year 2010, the LLC included charges imposed by the Buffalo Sewer Authority as part of its eligible real property taxes.

5. Upon audit of the LLC and petitioners, the Division disallowed the charges imposed by the Buffalo Sewer Authority in determining the amount of credit attributable to real property taxes.

6. On August 6, 2014, August 7, 2014 and September 3, 2014, the Division issued notices of deficiency to petitioners Douglas G. Swift, William J. Jones and Joseph A. Petrella, respectively. Each of the notices provided the following explanation:

“We have adjusted your claim for credit for real property taxes for [2010]. After a review of the IT-606, Claim for QEZE Credit for Real Property Taxes, filed by 598 Main St, LLC; we have removed the claim for special assessments, ‘Sewer Rent’, from the claim for credit. It is the Department’s position that special assessments are not eligible real property taxes and cannot be claimed for the QEZE credit for real property taxes. As a result we have reduced 598 Main St, LLC’s claim of credit from \$150,000 to \$109,522.”

7. The instant matter came before the Administrative Law Judge as motions brought by the Division to dismiss the petitions, or alternatively, for summary determination. The Division’s motion papers did not include any copies of the Buffalo Sewer Authority bills for the disallowed charges at issue; any copies of petitioners’ tax returns or QEZE real property tax credit claim forms for the year at issue. The Division’s motion papers included an affidavit of an employee of the Division’s Income Franchise Tax Desk Audit Bureau explaining the basis for the disallowance at issue. The Division’s motion papers also included an affirmation by the Division’s representative that makes a brief legal argument in support of the Division’s position.

8. Petitioners responded to the Division's motions by a letter from their representative to the Supervising Administrative Law Judge dated July 9, 2015. The letter summarily states petitioners' opposition to the motions and further states that the case law cited in the affirmation is not dispositive. The letter also requests a hearing and a briefing schedule. Petitioners thus submitted no evidence in response to the Division's motions.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge treated the subject motions as summary determination motions. The Administrative Law Judge then reviewed the evidentiary standards for granting such motions. Next, the Administrative Law Judge noted that the issue in the present matter is whether charges assessed by the Buffalo Sewer Authority are eligible real property taxes as that term is defined in Tax Law § 15 (e). The Administrative Law Judge found that such term does not include ad valorem levies and special assessments. While acknowledging that the Division did not introduce any direct evidence as to the nature of the Buffalo Sewer Authority charges at issue, he noted that the Court of Appeals has specifically held that sewer rents imposed by the Buffalo Sewer Authority are not taxes, but instead constitute ad valorem levies or special assessments. He noted further that petitioners offered nothing to contradict such case law other than their representative's conclusory statement that the charges imposed by the Buffalo Sewer Authority are taxes rather than fees. The Administrative Law Judge determined that this statement was insufficient to raise an issue of fact and granted the Division's motion for summary determination. He thus denied the petitions and sustained the notices of deficiency.

***SUMMARY OF ARGUMENTS ON EXCEPTION***

Petitioners argue that they were denied their right to a hearing and they further object to the Division of Tax Appeals' failure to set a briefing schedule with respect to the motion.

Petitioners also complain that they had no opportunity to present any evidence bearing on the factual issues presented in this matter because no hearing was scheduled.

As to the merits of the determination, petitioners contend that there are facts in dispute in this case and that the presence of such disputed facts precludes the granting of the Division's summary determination motion. Specifically, petitioners assert that the nature and character of the subject sewer rents as charged in 2010 remain undetermined. Petitioners contend that there is no evidence in the record showing exactly what the sewer rents were for or how they were determined during 2010. Petitioners note, correctly, that the record contains neither the bills that are the subject of the disputed credit claim nor any affidavit from a person knowledgeable about the nature of the subject sewer rents as charged in 2010.

Alternatively, petitioners contend that the sewer rents at issue meet the definition of eligible real property taxes under Tax Law § 15 (e) as in effect for 2010.

Petitioners also argue that the cases relied on by the Division in its motion, and by the Administrative Law Judge in the determination, do not support the contention that the sewer rents at issue were not eligible real property taxes for the 2010 tax year.

The Division contends that eligible real property taxes under Tax Law § 15 (e) excludes ad valorem levies or special assessments. The Division asserts that the Court of Appeals has determined in two separate cases that charges imposed by the Buffalo Sewer Authority are such ad valorem levies or special assessments (*see Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52 [1978]; *Elmwood-Utica Houses v Buffalo Sewer Auth.*, 65 NY2d 489 [1985]). The Division argues that these cases are documentary evidence that removes any question of fact regarding the nature of the charges at issue. The Division further notes that petitioners have not offered any evidence of any change in the nature of the charges since the cited cases were issued.

Accordingly, the Division argues that the Administrative Law Judge properly granted its motions for summary determination.

On exception, the Division requests that this Tribunal take official notice of the Buffalo Sewer Authority Schedule of Sewer Rents applicable to 2010. In response, petitioners request that this Tribunal take official notice of a real property tax and sewer rent bill for the year at issue; a water bill for the year at issue; and an excerpt from the Buffalo Sewer Authority's annual report for its fiscal year ended June 30, 2011.

### ***OPINION***

We reject the requests by both parties to take official notice of certain documents and thereby add to the evidentiary record. This Tribunal has long and consistently held that we do not consider evidence offered for the first time on exception (*see e.g. Matter of Katz*, Tax Appeals Tribunal, September 29, 2016). Our statutory obligation to provide taxpayers with a fair and efficient system for resolving controversies with the Division requires that such system be both defined and final and the consideration of additional evidentiary material on exception is not conducive to this obligation (*see e.g. Matter of Laham*, Tax Appeals Tribunal, October 27, 2016). We have specifically applied these principles in the context of an attempt to submit additional evidence subsequent to the granting of a motion for summary determination (*see Matter of Schnell*, Tax Appeals Tribunal, March 17, 2005). Hence, we do not take official notice as requested by the parties.

We also reject petitioners' claim that they were denied their due process rights. The Tax Appeals Tribunal's Rules of Practice and Procedure permit any party to bring a motion for summary determination (20 NYCRR 3000.9 [b]). The Division brought such a motion here. Our rules further permit the party opposing the motion to submit evidence in the form of affidavits

and other available proof (*see* 20 NYCRR 3000.5 and 3000.9 [b] [1]). Petitioners thus had the opportunity to submit evidence in opposition to the motion. Additionally, our rules allow the party opposing a motion to submit an answering brief with its response (20 NYCRR 3000.5 [c]). Petitioners thus had the opportunity to respond, and did respond, albeit summarily, to the terse legal argument contained in the Division's motion papers.

As to whether the Administrative Law Judge properly granted the Division's motion for summary determination,<sup>1</sup> our rules provide that such a motion may 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]).

A motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (20 NYCRR 3000.9 [c]).

It is well established that, as the procedural equivalent of a trial, summary judgment is a drastic remedy that should be denied if there is any doubt as to the existence of a triable issue or where a material issue of fact is arguable (*see Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572 [1989]).

Consistent with this principle, the party bringing such a motion bears the following burden:

“The 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 (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Matter of Redemption Church of Christ v Williams*, 84 AD2d 648, 649 [1981]; *Greenberg*

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<sup>1</sup> We agree with the Administrative Law Judge that the Division's motion to dismiss/motion for summary determination was properly treated as motion for summary determination.

*v Manlon Realty*, 43 AD2d 968, 969 [1974])” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The ultimate issue in the present matter is whether the Division properly disallowed the portion of petitioners’ claimed QEZE credit for real property taxes under Tax Law § 15 attributable to the sewer rent charges imposed by the Buffalo Sewer Authority. Resolution of this issue turns on whether such Buffalo Sewer Authority charges fall within the definition of eligible real property taxes set forth in Tax Law § 15 (e). Accordingly, in order to prevail on its summary determination motion, the Division was required to make a prima facie showing that the subject charges were not eligible real property taxes under the statutory definition. In other words, it was incumbent upon the Division to introduce evidence as to the nature of those charges so as to eliminate any material factual issues from the case.

The Division’s motion papers provide no evidence of the nature of the Buffalo Sewer Authority charges at issue. As petitioners correctly note, the LLC’s Buffalo Sewer Authority bills which gave rise to the disputed credit claims are not included in the Division’s motion papers. Furthermore, neither the affidavit nor the affirmation submitted in support of the Division’s motion discuss the nature of the sewer rent charges at issue (*see* finding of fact 7). Rather, to meet its burden as the proponent of a summary determination motion, the Division relies solely on *Watergate II Apts. v Buffalo Sewer Auth* and *Elmwood-Utica Houses v Buffalo Sewer Auth.* to support its contention that the charges at issue do not qualify for the QEZE real property tax credit.

While those cases make specific findings regarding the nature of Buffalo Sewer Authority sewer rents, they were issued in 1978 and 1985, respectively. There is no evidence in the record linking the findings of the court in those cases to Buffalo Sewer Authority sewer rents in 2010.



We conclude, therefore, that the Division's motion papers fail to eliminate a material issue of fact, i.e., the nature of Buffalo Sewer Authority sewer rent charges during the year at issue. The determination granting the Division's motion was thus in error.

We note our agreement with the Administrative Law Judge's finding that petitioners' response to the motion, i.e., the July 9, 2015 letter from their representative (*see* finding of fact 8), lacks evidentiary value and is insufficient to raise an issue of fact (*see Zuckerman v City of New York; Columbia Ribbon & Carbon Mfg. Co. v A-I-A Corp.*, 42 NY2d 496, 500 [1977]). The probative value of such response notwithstanding, the Division's failure to make a prima facie showing of entitlement to judgment as a matter of law requires denial of its motion (*Winegrad v New York Univ. Med. Ctr.*).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of William J. Jones, Joseph A. Petrella and Douglas G. Swift are granted;
2. The determination of the Administrative Law Judge granting summary determination is reversed;
3. The Division of Taxation's motion for summary determination is denied; and

4. This matter is remanded to the Administrative Law Judge for further proceedings consistent with this decision.

DATED: Albany, New York  
December 20, 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  
JAM with permission