STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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. :

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. :

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. :

In the Matter of the Petition :

of :

HOWARD A. ZEMSKY :

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. :

DECISION
DTA NOS. 826618, 826619,
826620 AND 827773

Petitioners, William J. Jones, Joseph A. Petrella, Douglas G. Swift and Howard A. Zemsky, filed an exception to the determination of the Administrative Law Judge issued on September 14, 2017. 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 exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument was heard on May 24, 2018, in Albany, New York, which date began the six-month period for 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 a portion of the QEZE real property tax credits claimed by petitioners for the year 2010.

FINDINGS OF FACT[1]

We find the facts as determined by the Administrative Law Judge, except that we have modified finding of fact 15 to more fully reflect the record. As so modified, the Administrative Law Judge's findings of fact appear below.

1. Petitioners William J. Jones, Joseph A. Petrella, Douglas G. Swift and Howard A. Zemsky were members of 598 Main Street, LLC (the LLC).

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[1] We recite briefly the procedural history of this matter. Petitioners Jones, Petrella and Swift each filed a petition with the Division of Tax Appeals on November 4, 2014. These petitions were consolidated and soon became the subject of a Division of Taxation motion to dismiss or, alternatively, for summary determination. By determination dated September 24, 2015, the motion for summary determination was granted and the petitions were denied. On exception, this Tribunal reversed and remanded the matter in a decision dated December 20, 2016. In January 2017, at the request of the parties, the Zemsky petition, filed on July 22, 2016, was consolidated with the Jones, Petrella and Swift petitions. On March 24, 2017, the four petitioners brought a joint motion for summary determination. The Division of Taxation opposed petitioners' motion and requested that summary determination be granted in its favor. The Administrative Law Judge subsequently rendered the September 14, 2017 determination to which petitioners have taken an exception.

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. The LLC operates the following parcels of real property in the City of Buffalo that are relevant to this proceeding: (i) 598 Main Street; (ii) 421 Pearl Street; (iii) 618 Main Street; (iv) 425 Pearl Street; (v) 726 Exchange Street; (vi) 796 Exchange Street; (vii)105 Hydraulic Street; and (viii) 211 Van Rensselaer Street (the properties).

4. The LLC directly owns 598 Main Street, 421 Pearl Street, 618 Main Street and 425 Pearl Street. 726 Exchange Street, 796 Exchange Street, 105 Hydraulic Street and 211 Van Rensselaer Street are owned and operated through LCO Building, LLC, a wholly-owned limited liability company of the LLC. The LLC is the sole member of LCO Building, LLC.

5. Petitioners Jones, Petrella, Swift and Zemsky are all members of the LLC owning 1%, 1%, 24% and 69%, respectively. Another entity not a party to this proceeding owns the remaining 5% member interest in the LLC.

6. The Buffalo Sewer Authority (BSA) is a public benefit corporation created in 1935 by an act of the New York State Legislature. The BSA is managed by a five-member board appointed by the Mayor of the City of Buffalo, subject to confirmation by the Buffalo Common Council. The BSA provides sewage collection, treatment and disposal services for the City of Buffalo and neighboring communities.

7. The purposes, authority and powers of the BSA are set forth in the Public Authorities Law §§ 1175 through 1195.

8. In performing its responsibility to construct and operate a sewer system, the BSA performs an "essential governmental function" for the "improvement of [the people's] health, welfare and prosperity" (Public Authorities Law § 1177 [3]).

9. Among the powers granted to the BSA by its enabling legislation is the authority to establish "sewer rents to be collected from all real property to be served by its facilities" (Public Authorities Law § 1180).

10. On May 26, 2010, the BSA adopted by resolution a "Final Schedule of Sewer Rents and Other Charges for 2010-2011" (final schedule).

11. The final schedule provided for two distinct types of sewer rents for properties situated within the limits of the City of Buffalo: "Part la sewer rents" and "Part 1b sewer rents." The Part la and Part 1b nomenclature is used herein because those are the paragraph numbers of the BSA's final schedule in which the two types of sewer rent are established.

12. Both the BSA's 2009-10 report and the BSA's 2010-11 report describe the distinction between Part la and Part 1b sewer rents using identical language, as follows:

> "The Authority's primary source of revenues is derived from sewer rents. There are two types of sewer rents. Sewer rents based on assessed valuation of real estate [i.e., Part la rents] and the other based on the use of water [i.e., Part 1b rents]. All real property, both developed and undeveloped, must pay the sewer rent based on assessed valuation."

13. Part la sewer rents for the 2009-2010 fiscal year were approved so as to collect a total of $12,050,000.00 from "all real property in the City of Buffalo by apportioning the said amount upon such property within the City as the same is set down on the last completed annual assessment roll of the City."

14. As described by BSA management in the 2009-10 report:

> "The levy of Sewer Rents based on assessed value [i.e., the Part la sewer rents] will again remain $12,050,000 for the 2010-11 budget. This represents the amount of Sewer Rent that the Authority will collect from all real property in the City of Buffalo except those properties exempt by law. This amount, when spread over the total estimated assessment for sewer purposes from the Department of Assessment, will result in an annual sewer rent of $1.69730309 for each $1000 of assessed valuation."

15. The Part la sewer rents were collected by the City of Buffalo assessor on behalf of the BSA for the fiscal year July 1, 2010 through June 30, 2011, and invoiced as a separate line item on City of Buffalo tax bills, dated July 1, 2010, for each of the eight properties, along with the City of Buffalo taxes (tax bills). Although billed by the City of Buffalo Department of Assessment & Taxation along with City real property taxes, the sewer rents are separately itemized and property owners are provided with separate payment coupons. In addition, property owners are directed to make separate checks payable to "City of Buffalo - Sewer Rent" and "City of Buffalo - Tax," respectively.

16. The Part la sewer rents were calculated and charged to the properties by using the same assessment roll as was utilized by the City of Buffalo Assessor for imposition of the City's real property taxes.

17. The cumulative total of Part la sewer rents for the properties amounted to $73,353.38.

18. The tax bills received for the properties were all paid in full to the City of Buffalo in September 2010 by the LLC. The payment included payment in full of the Part la sewer rents assessed on the tax bills, which were due on or before September 30, 2010.

19. On its 2010 form IT-606 claim for QEZE credit for real property tax, the LLC claimed eligible real property taxes of $182,875.73, of which $73,353.38 represented the Part la sewer rents. On part 1 section D line 21 of the IT-206, the LLC reported that the QEZE credit for real property tax (the credit) was limited to $150,000.00.[2]

[2] The affidavit of Gray Kriner, which was submitted as part of petitioners' motion papers, explains that the $150,000.00 limitation was erroneously reported. Although the affidavit does not elaborate on or explain the error, it is noted that for an entity certified as a QEZE prior to August 1, 2002, the amount of QEZE real property tax credit was not subject to a credit limitation (***see*** Tax Law § 15 [f]). As noted in finding of fact 2, the LLC was certified as a QEZE on February 28, 2002.

20. 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.

21. On their individual New York State income tax returns for the 2010 tax year, each of the petitioners claimed the credit for his allocated share of the taxes paid with respect to the properties.

22. The second type of sewer rents (Part 1b) is a consumption charge based on the metered use of water (or a flat rate or minimum charge) at each specific property within the City of Buffalo that discharges waste water into the BSA's system. The Part 1b portion of the sewer rents is explained by the BSA in its 2009-10 report and 2010-11 report using identical language, as follows:

> "Sewer rents based on water use are billed as flat rate or metered accounts. Flat rate sewer rents continue to be charged based on property characteristics (i.e., number of stories, front footage, etc.). There will be no increases to those charges. The sewer rent meter charges will continue at the same rate of $11.09 per 1000 cubit feet. All flat and metered accounts will continue to be assessed a capacity/drainage charge at a minimum of $6.00 per month."

23. Unlike the Part la sewer rents, the Part 1b sewer rents are billed by the Buffalo Water Board on quarterly invoices. These quarterly invoices show the water meter readings at a particular property, and impose a charge for: (1) the water supply inflow to the property and (2) the Part 1b sewer rent for the waste water discharged to the BSA's system.

24. The Buffalo Water Board issued quarterly bills in 2010 with respect to each of the properties (water bills).

25. Although the LLC paid the water bills for the properties, no portion of the Part 1b sewer rents was claimed by the LLC or by the petitioners as an eligible real property tax credit.

26. The Division of Taxation (Division) audited the LLC's claim for the credit, as well as each of petitioners' claims for the credit for the 2010 tax year with respect to the properties.

27. When the Division concluded its audit, it disallowed the portion of petitioners' claims for the credit that was based on the Part la sewer rents paid for the properties on the basis that the Part la sewer rents were "local benefits" in the nature of "special assessments" and, therefore, did not qualify as "eligible real property taxes" as defined in Tax Law § 15 (e) for purposes of the credit.

28. On July 30, 2014, the Division issued to petitioner Howard A. Zemsky a letter adjusting his claim for refund for the tax year 2010 (notice of disallowance). The July 30, 2014 notice of disallowance provided, in part, that:

> "We have adjusted your claim for QEZE credit for real property taxes for the above referenced period. 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 the 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; therefore your claim of credit has been reduced from $121,932 to $90,884."

29. 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, in pertinent part:

> "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."

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed the statutory definition of taxes eligible for the QEZE real property tax credit under Tax Law § 15. The Administrative Law Judge determined that the Part 1a sewer rents at issue failed to meet the statutory definition in two respects, either one of which would be sufficient to disqualify petitioners' credit claims. First, the

Administrative Law Judge found that the sewer rents at issue were ineligible for the credit because such charges were made by or on behalf of the BSA and not by or on behalf of a county, city, town, village or school district as required under the definition in Tax Law § 15 (e). Citing the Public Authorities Law, the Administrative Law Judge found that, contrary to petitioners' contentions, the BSA is an entity separate and distinct from the City of Buffalo; that the BSA had authority to impose the sewer rents at issue; and that the City collected the sewer charges as the BSA's agent. Citing case law, the Administrative Law Judge found that the BSA was not a taxing jurisdiction. As a second basis for denying the claim, the Administrative Law Judge found that the term "charges for local benefits" often refers to charges for improvements, such as sewer systems. He thus determined that the Part 1a sewer rent was a charge for local benefits within the meaning of Tax Law § 15 (e) and therefore not an eligible tax under the statutory definition. Accordingly, the Administrative Law Judge denied petitioners' motion for summary determination and granted summary determination in the Division's favor.

ARGUMENTS ON EXCEPTION

Petitioners contend that the Part 1a sewer rents qualify as eligible real property taxes under Tax Law § 15 (e) because such sewer rents are charges upon real property; by or on behalf of the City of Buffalo; levied by the City of Buffalo for the public welfare; and at a like rate based upon assessed value. Petitioners also contend that the Part 1a sewer rents are not charges for local benefits because such sewer rents are imposed on all non-exempt properties in the City of Buffalo; are determined by the assessed value of the property and not by the benefit to the property; and do not tend to increase the value of the properties upon which they are assessed because all non-exempt properties in the City of Buffalo are similarly assessed.

Petitioners also renewed their motion to amend their petitions to correct the mistakenly reported $150,000.00 credit limitation on the LLC's 2010 partnership return (***see*** finding of fact

19) in order to claim QEZE credit for the full amount of assertedly eligible real property taxes paid by the LLC.

The Division contends that the BSA is an entity separate and independent from the City of Buffalo; that the Public Authorities Law authorizes the BSA to impose the sewer rents at issue; that the BSA imposed the sewer rents at issue pursuant to such authorization; and that, therefore, the sewer rents were not imposed by or on behalf of the City of Buffalo.

The Division also contends that, even if the sewer rents were imposed by the City of Buffalo, such rents still would not qualify as eligible real property taxes for purpose of the credit at issue because they are charges for local benefits and thus excluded from qualifying for the credit. The Division contends that the sewer rents are akin to an ad valorem charge where the cost of the charge is proportional to the benefit to the property for the service.

The Division also opposes petitioners' request to amend their petitions. The Division contends that petitioners' request is, in effect, a request to amend their income tax returns. The Division contends that the time within which to amend their returns or refund claims has expired. The Division also contends that it has not considered the full amount of petitioners' proposed revised claim; hence there is no refund claim denial, i.e., statutory notice, related to the revised amount. Accordingly, the Division asserts that there is no legal authority to grant petitioners' request.

OPINION

The question presented in this matter arises from a motion for summary determination. Such a motion "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" (20 NYCRR 3000.9 [b] [1]).

"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 (citations omitted)" (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853 [1985]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***see Gerard v Inglese***, 11 AD2d 381 [2d Dept 1960]; ***Matter of McNamara***, Tax Appeals Tribunal, January 30, 1997).

Summary determination may be granted in favor of the nonmoving party without a cross-motion (20 NYCRR 3000.9 [b] [1]).

Upon review of the record, we find that there are no material facts in dispute in the present matter. It was appropriate, therefore, for the Administrative Law Judge to render a determination on the motion.

Tax credit statutes, such as the QEZE real property tax credit at issue, are similar to, and should be construed in the same manner as, statutes creating tax exemptions (***see Matter of Piccolo v New York State Tax Appeals Trib.***, 108 AD3d 107 [3d Dept 2013]). That is, such statutes must be strictly construed against the taxpayer (***see e.g. Matter of Purcell***, Tax Appeals Tribunal, November 14, 2016). Petitioners have the burden to establish "a clearcut entitlement" to the statutory benefit (***Matter of Golub Serv. Sta. v Tax Appeals Trib. of State of N.Y.***, 181 AD2d 216, 219 [3d Dept 1992]). Indeed, petitioners must prove that the Division's interpretation is irrational and that their interpretation of the statute is the only reasonable construction (***Matter of Brooklyn Navy Yard Cogeneration Partners, L.P. v Tax Appeals Trib. of State of N.Y.***, 46 AD3d 1247 [3d Dept 2007], ***lv denied*** 10 NY3d 706 [2008]). However, construction of an exemption or credit statute should not be so narrow as to defeat the

provision's settled purpose (***Matter of Grace v New York State Tax Commn.***, 37 NY2d 193, 196 [1975], ***rearg denied*** 37 NY2d 816 [1975], ***lv denied*** 338 NE2d 330 [1975]).

Tax Law § 15 (a) provides that an individual taxpayer who is a member of a partnership that is a QEZE may receive a credit against personal income taxes for eligible real property taxes paid by the QEZE (***see also*** Tax Law § 606 [bb]). The LLC filed its tax returns as a partnership (***see*** finding of fact 20). Hence, petitioners were eligible to claim their pro rata shares of the LLC's QEZE real property tax credit.

Tax Law § 15 (b) provides that the amount of the QEZE real property credit shall be the product of the eligible real property taxes paid or incurred by the QEZE during the taxable year, a benefit period factor, and an employment increase factor.

The dispute in the present matter is whether the Part 1a sewer rents paid by the LLC during the year at issue were eligible real property taxes for purposes of the credit. That term is defined in Tax Law § 15 (e), in pertinent part, as follows:

> "For purposes of this subdivision, the term "tax" means a charge imposed upon real property by or on behalf of a county, city, town, village or school district for municipal or school district purposes, provided that the charge is levied for the general public welfare by the proper taxing authorities at a like rate against all property in the territory over which such authorities have jurisdiction, and provided that where taxes are levied pursuant to article eighteen or article nineteen of the real property tax law, the property must have been taxed at the rate determined for the class in which it is contained, as provided by such article eighteen or nineteen, whichever is applicable. The term "tax" does not include a charge for local benefits, including any portion of that charge that is properly allocated to the costs attributable to maintenance or interest, when (1) the property subject to the charge is limited to the property that benefits from the charge, or (2) the amount of the charge is determined by the benefit to the property assessed, or (3) the improvement for which the charge is assessed tends to increase the property value" (Tax Law § 15 [e]).

As noted, the Administrative Law Judge first determined that the Part 1a sewer rents failed to meet the definition of eligible real property taxes under Tax Law § 15 (e) because such charges were not imposed "by or on behalf of a county, city, town, village or school district," i.e., by or

on behalf of the City of Buffalo. Rather, the Administrative Law Judge found that such charges were imposed by the BSA. Pursuant to the following discussion, we agree.

The BSA is a public benefit corporation that acts through a majority of the members of its board (Public Authorities Law § 1177 [1]). As its enumerated powers make clear (***see*** Public Authorities Law § 1178), the BSA is legally and financially separate from and independent of the City of Buffalo, a municipal corporation (Real Property Tax Law § 102 [10], General Construction Law § 66 [2]). The BSA is charged with maintaining and operating the Buffalo sewer system (Public Authorities Law §§ 1177 [1], 1178). The BSA has complete "jurisdiction, control, possession and supervision" of the Buffalo sewer system (Public Authorities Law § 1178 [3]). Pursuant to its charge, the BSA is authorized to fix and collect rates, rentals and other charges, e.g., sewer rents, to be collected from all real property served by the sewer system (Public Authorities Law §§ 1178 [11], 1180). Such "rates, rentals and other charges" include the Part 1a sewer rents at issue (***see*** finding of fact 12). These sewer rents are used to maintain and operate the sewer system (***id***.). BSA regulations require that all sewer rents be paid to the BSA (21 NYCRR 10075.3 [a]). Furthermore, the BSA is authorized to "prescribe the manner in which and the time at which such sewer rents are to be paid" (Public Authorities Law § 1180). Unpaid sewer rents constitute a lien upon the real property that uses the system and if unpaid for 90 days, the BSA may bring an action in foreclosure (***id***.). Unpaid sewer rents thus become a debt owed to the BSA. This statutory and regulatory arrangement makes clear that the BSA, and not the City of Buffalo, is responsible for imposition of the Part 1a sewer rent on real property that uses the sewer system, including the real property owned by the LLC. Indeed, the BSA's authority to impose sewer rents pursuant to the Buffalo Sewer Authority Act (Public Authorities Law §§ 1175-1195) is well established (***see Robertson v Zimmerman***, 268 NY 52 [1935];

Watergate II Apts. v Buffalo Sewer Auth., 46 NY2d 52 [1978]; ***Elmwood-Utica Houses v Buffalo Sewer Auth.***, 65 NY2d 489 [1985]).

Although the Buffalo Sewer Authority Act assigns no responsibility to the City of Buffalo for the fixing of rates, the collection of sewer rents or the maintenance and operation of the Buffalo sewer system, petitioners note the City's participation in the collection of sewer rents by the issuance of bills and the receipt of payments. Petitioners contend that such assistance indicates that the City is actually imposing the Part 1a sewer rents or, at least, is "co-imposing" the sewer rents with the BSA. We disagree. The Buffalo Sewer Authority Act contemplates that the City may provide the BSA with some assistance in the operation and management of the sewer system. Public Authorities Law § 1186 provides that all BSA monies must be paid to the City of Buffalo's treasurer *as agent* of the BSA.[3] Additionally, Public Authorities Law § 1177 (1) states that the BSA may use the City's employees, records and equipment with the City's consent. The City's assistance notwithstanding, the BSA retains complete "jurisdiction, control, possession and supervision" of the system (Public Authorities Law § 1178 [3]) and thus does not cede responsibility for imposition or the collection of the Part 1a sewer rents. Hence, in our view, the City's participation in the billing and collection process does not indicate that the City imposes or "co-imposes" such sewer rents.

Petitioners also urge us to consider the circumstances surrounding the creation of the BSA. Petitioners observe that the BSA was formed because the City of Buffalo was at its constitutional debt limit at the time the State mandated improvements to the City's sewer system, and is thus something of an historical accident (***see Robertson v Zimmerman***, 268 NY at 57). Petitioners note that, in 1935, the BSA took over the then-existing sewer system, which had been owned and

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[3] That the treasurer collects the rents as the BSA's agent is shown by the BSA's regulations, which, as noted, provide that all sewer rents must be paid to the BSA (21 NYCRR 10075.3 [a]).

operated by the City (***see*** Public Authorities Law § 1179). Petitioners also note the City's influence over the BSA board by the power of appointment (***see*** Public Authorities Law § 1177 [1]). Petitioners assert that, while the BSA is a separate legal entity, it effectively functions as an arm of the City. Petitioners contend that the City has thus effectively "contracted out" its municipal sewer responsibility and that the City is not the agent of the BSA, but that the BSA is the agent of the City. Accordingly, petitioners assert that, at the very least, the BSA imposed the Part 1a sewer charges "on behalf of" the City of Buffalo.

We disagree with this assertion. Whatever the historical circumstances surrounding its enactment, the Buffalo Sewer Authority Act relieved the City of Buffalo of responsibility for the municipal sewer system. The City thus did not "contract out" this responsibility and the BSA is not an agent of the City in carrying out its duties and responsibilities under the Buffalo Sewer Authority Act. Additionally, no matter how the BSA and City departments operate on a day-to-day basis and notwithstanding the City's power to appoint BSA board members, the BSA is a separate legal entity that operates through its board (and not through the City) to meet its various obligations as set forth in the Buffalo Sewer Authority Act. We thus reject petitioners' assertion that the BSA imposed the Part 1a sewer charges "on behalf of" the City of Buffalo.

Petitioners also observe that, in contrast to Tax Law § 15 (e), the Buffalo Sewer Authority Act does not use the word "impose" in connection with sewer rents. Petitioners thus contend that the Act's authorization to fix and collect rates falls short of an authorization to impose such rates. Petitioners contend that the actual "imposition" of Part 1a sewer rents requires tax levying authority and hence, it is necessarily the City that imposes the Part 1a sewer rents on the properties that use the system. Again, we disagree. As noted previously, the statutory and

regulatory framework and relevant case law make clear that the BSA was authorized to and did impose the sewer rents at issue.

While our conclusion that the Part 1a sewer rents are imposed by the BSA and not the City of Buffalo is sufficient to deny petitioners' claims for QEZE real property tax credit, we also address whether the sewer rents are disqualified under the exclusionary criteria set forth in Tax Law § 15 (e) (i.e., "The term 'tax' does not include . . ."). As noted previously, the Administrative Law Judge found that the Part 1a sewer rents are a charge for local benefits and thus do not qualify as an eligible tax under such criteria. We agree with the Administrative Law Judge's conclusion on this point, but for different reasons.

Tax Law § 15 (e) disqualifies from eligibility for the QEZE credit for real property taxes any "charge for local benefits . . . when . . . the amount of the charge is determined by the benefit to the property assessed." In ***Watergate II Apts. v Buffalo Sewer Auth.***, the Court of Appeals determined that the BSA's charges were rents rather than taxes. In reaching this conclusion, the court noted the complexity of the BSA's services and the public benefit of many of those services (46 NY2d at 61). The court ultimately held that the combination of rents based on assessed value and consumption "bear a direct relationship to the broader reality of the services and benefits actually rendered to property owners as a whole" (***id.***). The court thus found that the BSA's sewer rents were a reasonable approximation of the services and benefits rendered to property owners. Pursuant to ***Watergate II Apts. v Buffalo Sewer Auth.***, then, we find that the Part 1a charges at issue were "determined by the benefit to the property assessed" (the LLC's property) and therefore do not qualify as eligible real property taxes under Tax Law § 15 (e).

Petitioners also note, correctly, that certain tax exempt properties are also exempt from the Part 1a sewer rents (***see*** Public Authorities Law § 1180). Petitioners contend that this provision

supports a finding that the Part 1a sewer rents are taxes. We disagree. The same public policy concerns that justify exemptions from real property taxes also justify exemptions from BSA sewer rents (***Elmwood-Utica Houses v Buffalo Sewer Auth.,*** 65 NY2d at 497). Accordingly, we see no inconsistency in our finding herein that the charges at issue are not taxes, but are rents, and the fact that certain entities that are exempt from real property taxes are also exempt from such rents.

Finally, we find that petitioners' request to amend their petitions to correct the mistakenly reported $150,000.00 credit limitation on the LLC's 2010 partnership return (***see*** finding of fact 19) in order to claim QEZE credit for the full amount of assertedly eligible real property taxes paid by the LLC is rendered moot by this decision.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of William J. Jones, Joseph A. Petrella, Douglas G. Swift and Howard A. Zemsky is denied;

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

3. The petitions of William J. Jones, Joseph A. Petrella, Douglas G. Swift and Howard A. Zemsky are denied; and

4. The notices of deficiency issued to petitioners William J. Jones, Joseph A. Petrella and Douglas G. Swift (***see*** finding of fact 29) and the notice of disallowance issued to petitioner Howard A. Zemsky (***see*** finding of fact 28) are sustained.

DATED: Albany, New York
November 21, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner