STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **NELSON AND SUSAN TAXEL** for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2009 through 2012.	DECISION DTA NO. 828090

Petitioners, Nelson and Susan Taxel, filed an exception to the determination of the Administrative Law Judge issued on February 7, 2019. Petitioners appeared by Hutton and Solomon, LLP (Roger S. Blane, 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 in New York, New York, on January 9, 2020, 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.

ISSUES

I. Whether the Division of Tax Appeals may consider a challenge to the data used in establishing estimated effective full value tax rates used in determining the cap for qualified empire zone enterprise real property tax credits.

II. If so, whether the Division of Taxation correctly calculated the real property tax credit cap by utilizing the estimated effective full value tax rate within Suffolk County for the relevant tax years.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except we have added additional findings of fact 16 and 17 to more fully reflect the record. The facts as determined by the Administrative Law Judge, together with the additional findings of fact, appear below.

1. Petitioners, Nelson and Susan Taxel, were shareholders of Positive Promotions, Inc. (Positive Promotions), an S corporation during the tax years 2009 through 2012.

2. Positive Promotions was certified as a qualified empire zone enterprise (QEZE), effective June 28, 2008, and was a QEZE during the tax years 2009 through 2012.

3. On or about December 1, 2002, Positive Promotions entered into a payment in lieu of taxes (PILOT) agreement with J.S.B. Real Estate Company, LLC (JSB) and the Town of Islip Industrial Development Agency (Islip IDA).

4. The PILOT agreement provides that the Islip IDA agreed to acquire title to real property located at 15 Gilpin Avenue, Hauppauge, Town of Islip, Suffolk County (property), and that the property would be leased to JSB and subleased to Positive Promotions. In exchange, because the Islip IDA is exempt from real property taxes, JSB and Positive Promotions agreed to make PILOT payments in accordance with the terms set forth in the PILOT agreement.

5. Petitioners timely filed their New York State resident personal income tax return (form IT-201) for 2009, which included a Claim for QEZE Credit for Real Property Taxes (form IT-606) that claimed a $353,890.00 QEZE real property tax credit (RPTC) by virtue of pass-through taxation from Positive Promotions.

6. For tax year 2010, form IT-606, attached to petitioners' form IT-201, claimed a $369,279.00 QEZE RPTC by virtue of pass-through taxation from Positive Promotions.

7. For tax year 2011, form IT-606, attached to petitioners' form IT-201, claimed a $374,015.00 QEZE RPTC by virtue of pass-through taxation from Positive Promotions.

8. For tax year 2012, form IT-606, attached to petitioners' form IT-201, claimed a $391,192.00 QEZE RPTC by virtue of pass-through taxation from Positive Promotions.

9. The Division of Taxation (Division) performed an audit of petitioners' tax returns for the years 2009 through 2012. On July 29, 2016, the Division issued a notice of disallowance to petitioners partially disallowing their claims of RPTCs for the tax years 2009 through 2012.

10. Petitioners' claims for RPTCs were reduced to $351,195.00 for tax year 2009, $361,478.00 for the tax year 2010, $370,879.00 for the tax year 2011 and $387,227.00 for the tax year 2012. These adjustments are not in dispute.

11. The Division then calculated the RPTC allowable for the PILOT payments claimed by petitioners for the years 2009 through 2012. This calculation resulted in a portion of the claimed RPTC being disallowed pursuant to the cap on RPTCs.

12. The amount of RPTCs allowable pursuant to the cap was calculated by the Division to be as follows: $104,320.00 for the tax year 2009, $111,102.00 for the tax year 2010, $138,978.00 for the tax year 2011 and $158,102.00 for the tax year 2012.

13. Petitioners filed a timely petition with the Division of Tax Appeals on February 16, 2017, contesting the reduced amount of RPTC allowed by the Division for each of the tax years. Specifically, petitioners argue that the commissioner erred in imposing a limit on the RPTC claimed by a QEZE making PILOT payments and they contest the underlying estimated effective full value tax rate (EEFVTR) for Suffolk County.

14. The EEFVTRs for Suffolk County for the tax years at issue are as follows: 15.90 in 2009, 16.80 in 2010, 18.20 in 2011 and 20.20 in 2012. The EEFVTR within a county is given in dollars per $1,000.00 of full value, rounded to the nearest tenth of a dollar.

15. Based on the audit, and after review of any information provided by petitioners in support of their 2009 form IT-201, for purposes of calculating the RPTC PILOT cap, the applicable federal basis was $6,560,996.00 as reported by JSB.

16. The Division filed a motion on August 31, 2018 seeking dismissal of the petition or for summary determination pursuant to Tax Law § 2006 (5) and (6) and our rules of practice and procedure (***see*** 20 NYCRR 3000.5, 3000.9).

17. The Division's affidavit submitted in support of its motion included an affidavit of James McGovern, an employee of the Division's Office of Real Property Tax Services who is charged with annually calculating the full value tax rate within each county. According to Mr. McGovern, the Division determines the EEFVTR by adopting the prior year's overall full value tax rate for the county in question. There is only one effective full value tax rate within a county in any given year, which is determined by dividing the taxes levied by all municipal corporations in the county by the equalized value of all real property in the county, multiplying the result by 1000 and rounding to the nearest tenth of a dollar.

THE DETERMINATION OF THE ADMINSTRATIVE LAW JUDGE

The Administrative Law Judge began the determination in this matter by effectively denying the Division's motion to dismiss because she found that the Division of Tax Appeals has jurisdiction to consider the petition. Consequently, the Administrative Law Judge treated the Division's motion solely as a motion for summary determination.

The Administrative Law Judge continued by setting forth the standard for granting a motion for summary determination. Such a motion may be granted if the administrative law judge finds that there is no material and triable issue of fact presented so that an administrative law judge can, as a matter of law, issue a determination in favor of any party. Next, the Administrative Law Judge outlined the statutory provisions of the QEZE real property tax credits at issue. The Administrative Law Judge found that under established case law, a tax credit is considered an exemption from tax and, as such, taxpayers bear the burden of establishing an entitlement to the exemption. The Administrative Law Judge also noted that where a taxpayer challenges the Division's interpretation of a statute as incorrect, it is incumbent upon the taxpayer to demonstrate that his or her interpretation of the statute is the only reasonable interpretation.

The Administrative Law Judge next described the method for calculating the amount of the allowable QEZE real property tax credits as limited by the PILOT cap under Tax Law § 15. The Administrative Law Judge found that petitioners' argument that the Division erred by using the EEFVTR for Suffolk County in calculating the allowable tax credit to be without merit, concluding that the statute could not be interpreted otherwise. The Administrative Law Judge agreed with the Division that the Real Property Tax Law (RPTL) provides for a procedure to challenge a tentative equalization rate, but found that only municipalities have standing to challenge such equalization rate.

The Administrative Law Judge concluded that because petitioners challenged only the EEFVTR for Suffolk County and not any of the other numbers used in the calculation of the QEZE real property tax credit cap applicable to PILOTs, petitioners' argument must be rejected. Consequently, the Administrative Law Judge granted the Division's motion for summary determination and sustained the notice of disallowance.

ARGUMENTS ON EXCEPTION

Petitioners state that the Administrative Law Judge erred in granting the Division's motion for summary determination, arguing that they had presented material questions of fact that would require denying the Division's motion. Specifically, petitioners claim that the data used by the Division in establishing the EEFVTR for Suffolk County, which was used in calculating the amount of the QEZE real property tax credit cap applicable to PILOTs under Tax Law § 15, was flawed.

Petitioners claim that the Administrative Law Judge's conclusion that the Division of Tax Appeals did not have authority to consider a challenge to the accuracy of the EEFVTR was incorrect. Petitioners argue that their right to a hearing to challenge the notice of disallowance is provided by Tax Law § 689 because the QEZE real property tax credits passed through to them pursuant to Tax Law § 606 (i). According to petitioners, the fact that there is a separate procedure for challenging tentative state equalization rates provided in article 12 of the RPTL has no bearing on the reviewability of the data used in establishing those rates in a hearing before the Division of Tax Appeals.

Petitioners also argue that the statute, properly construed, requires the Division to establish multiple EEFVTRs for each county.

The Division urges this Tribunal to affirm the determination of the Administrative Law Judge. It states that petitioners' attempt to challenge the Division's partial disallowance of petitioners' refund claims amounts to an impermissible challenge to the equalization rates themselves. As a threshold issue, individual taxpayers have been held to not have standing to challenge state equalization rates under the procedures prescribed under article 12 of the RPTL for filing a complaint regarding tentative equalization rates; and secondly, even if petitioners

were deemed to have standing to file a complaint with the State Board of Real Property Tax Services, the time period in which to file such a complaint has long since expired.

The Division also argues that petitioners' argument that proper statutory construction requires the commissioner to establish multiple equalization rates in each county is unfounded. The Division claims that petitioners have failed to bear their burden of showing that their interpretation of the statute is the only reasonable construction.

OPINION

We begin with petitioners' argument that the Administrative Law Judge improperly granted the Division's motion for summary determination because of the existence of material issues of fact that would preclude summary determination as a matter of law. At the outset, considering the timely filing of the petition protesting the notice of disallowance, and in recognition that the QEZE real property tax credits here at issue arise under Tax Law § 15 (e) and are claimed by petitioners as shareholders of Positive Promotions (***see*** Tax Law § 606 [i]), we agree with the Administrative Law Judge's finding of jurisdiction over the instant matter and the subsequent deeming of the Division's motion to dismiss petition as one for summary determination (20 NYCRR 3000.9 [a] [2] [i]). Such a motion shall be granted:

> "if, upon all 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 " (Tax Law § 2006 [6]; 20 NYCRR 3000.9 [b] [1]).

Under our rules of practice and procedure, motions for summary determination are to be subject to the same provisions as motions for summary judgment (20 NYCRR 3000.9 [c]). The Court of Appeals has summarized the well-established standard for granting a motion for summary judgment as follows:

> "To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable. On summary judgment, 'facts must be viewed in the light most favorable to the non-moving party,' and 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 demonstrate the absence of any material issues of fact'" (***Matter of New York City Asbestos Litig.***, 33 NY3d 20, 25–26 [2019] [internal quotation marks and citation omitted]).

Here, petitioners argue that the Administrative Law Judge erred in granting the motion for summary determination because petitioners demonstrated existence of a material and triable issue of fact in their response showing that the data the Division used in determining the EEFVTR for Suffolk County was flawed. We do not agree.

As noted by the Administrative Law Judge in her determination, because tax credits are considered a "particularized species of exemption from tax" (***Matter of Grace v New York State Tax Commn.***, 37 NY2d 193, 197 [1975], ***rearg denied*** 37 NY2d 816 [1975], ***lv denied*** 338 NE2d 330 [1975]), taxpayers bear the burden of establishing their entitlement thereto (***Matter of Golub Serv. Sta. v Tax Appeals Trib. of State of N.Y.***, 181 AD2d 216 [3d Dept 1992]). Petitioners must establish that their interpretation of the statute is the only reasonable interpretation (***Matter of Hucko Trust***, Tax Appeals Tribunal, September 19, 2013).

Tax Law § 15 (e) states, in pertinent part, that:

> " . . . a payment in lieu of taxes made by the QEZE pursuant to a written agreement executed or amended on or after January first, two thousand one, shall not constitute eligible real property taxes in any taxable year to the extent that such payment exceeds the product of (A) the greater of (i) the basis for federal income tax purposes, calculated without regard to depreciation, determined as of the effective date of the QEZE's certification pursuant to article eighteen-B of the general municipal law of real property, including buildings and structural components of buildings, owned by the QEZE and located in empire zones with respect to which the QEZE is certified pursuant to such article eighteen-B of the general municipal law, . . . or (ii) the basis for federal income tax purposes of such real property described in clause (i) of this

> subparagraph, calculated without regard to depreciation, on the last day of the taxable year . . . and (B) *the estimated effective full value tax rate within the county in which such property is located, as most recently calculated by the commissioner. The commissioner shall annually calculate estimated effective full value tax rates within each county for this purpose based upon the most current information available to him or her in relation to county, city, town, village and school district taxes*." (emphasis added)

As noted, petitioners do not dispute that the Division used the Suffolk County EEFVTR in calculating the PILOT cap for their QEZE real property tax credits, as plainly required under Tax Law § 15 (e). Rather, petitioners argue that the data used in establishing the EEFVTR was flawed, and thus the Division erred in using the EEFVTR in this particular case in the calculation of the cap on the QEZE real property tax credit (Tax Law § 15 [e]).

Petitioners have not shown how their disagreement with the market survey data, as prepared to calculate state equalization rates, even if flawed as alleged, implicates an issue of fact that is material and triable in the present matter. We agree with the Division that petitioners' argument regarding alleged errors in market value surveys used in calculating full value tax rates cannot be distinguished from a challenge to the state equalization rates themselves. A brief review of how the EEFVTR is determined illustrates why the Division's use of the EEFVTR in this case was proper.

As noted, Tax Law § 15 (e) directs the commissioner to calculate the EEFVTR on an annual basis "based on the most current information available to him or her in relation to county, city, town, village and school district taxes" (***id.***). The McGovern affidavit indicates that the Division determines the EEFVTR by adopting the prior year's overall full value tax rate for the county in question (***see*** finding of fact 17). Overall full value tax rates are determined, in part, by dividing the taxes levied by all municipal corporations in a county by the equalized value of all real property in the county (***id.***). The RPTL, in turn, allows the commissioner to establish state

equalization rates based on market value surveys designated for such a purpose (RPTL § 1202 [5]). In the event that a county disagrees with a tentative equalization rate, a complaint may be made to the commissioner with an opportunity to present such complaint at a hearing (RPTL § 1206). Following the hearing, the commissioner establishes and certifies the final equalization rate (RPTL §§ 1210; 1212). Following certification of the final equalization rate, affected municipalities may appeal the final equalization rate by filing a special proceeding for review with the appellate division pursuant to article 78 of the CPLR (RPTL § 1218).

As New York courts have held that individual taxpayers lack standing to challenge the methodology used to calculate equalization rates (***Matter of Feiner v New York State Off. of Real Prop. Servs.***, 25 AD3d 1005, 1006-1007 [3d Dept 2006] ***lv denied*** 6 NY3d 712 [2006], ***citing Matter of Town of Riverhead v New York State Bd. of Real Prop. Servs.***, 7 AD3d 934 [3d Dept 2004], ***affd*** 5 NY3d 36 [2005]), we interpret Tax Law § 15 (e) to preclude a challenge to the data or methodology used to calculate the relevant county's EEFVTR. Accordingly, we conclude that the Administrative Law Judge properly granted the Division's motion for summary determination.

We have considered petitioners' argument that the Division waived its right to bring a motion to dismiss petition based on petitioners' lack of legal capacity to sue because it did not make the motion before serving a responsive pleading (***see*** CPLR § 3211 [e]), but deem it moot in light of the fact that the Administrative Law Judge ultimately found jurisdiction over the petition and treated the Division's motion as one for summary determination.

Lastly, we address petitioners' argument that the rules of statutory construction require the Division to establish multiple EEFVTRs in each county. In furtherance of this argument, petitioners point to the use of the word "rates," with particular emphasis on the plural form as

used in Tax Law § 15 (e) ("[t]he commissioner shall annually calculate estimated effective full value tax rates within each county for this purpose based upon the most current information available to him or her in relation to county, city, town, village and school district taxes").

We agree with the Division that petitioners' interpretation cannot be the only reasonable interpretation of the statute. This is due to the continued existence of special assessing units containing multiple classes of property (***see*** RPTL article 18) that are specifically permitted to continue to assess property according to various classes under RPTL § 305. While some counties under the same statutory scheme are permitted to continue to have multiple full value tax rates as a result of legislation granting them the ability to do so (***id.***), we do not find that the use of "rates" in Tax Law § 15 (e) compels us to accept petitioners' statutory interpretation as the only reasonable one.

In light of the foregoing discussion, Issue II is moot.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Nelson and Susan Taxel is denied;

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

3. The petition of Nelson and Susan Taxel is denied; and

4. The notice of disallowance dated July 29, 2016, is sustained.

DATED: Albany, New York
July 9, 2020

/s/ Roberta Moseley Nero____
Roberta Moseley Nero
President

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

/s/ Anthony Giardina________
Anthony Giardina
Commissioner