STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOSEPH R. NICOLLA	:	
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2011 and 2012.	:	DECISION DTA NOS. 828238 AND 828239
In the Matter of the Petition	:	
of	:	
RICHARD A. ROSEN AND CHERI ROSEN	:	
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2011 and 2012.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on February 20, 2020. Petitioners appeared by Lynn D'Elia Temes & Stanczyk (Timothy M. Lynn, Esq., and Michael T. Stanczyk, Esq. of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioners filed a brief in opposition. The Division of Taxation filed a letter brief in reply. Oral argument was heard by teleconference on January 28, 2021, 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. Commissioner Monaco took no part in the consideration of this matter.

ISSUE

Whether the Division of Taxation properly disallowed a portion of petitioners' empire zone real property tax credits claimed as a pass-through via Columbia Lodge, LLC for the tax year 2012 on the ground that the LLC sold the real property giving rise to the credit during that year.

FINDINGS OF FACT

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

1. Petitioner Joseph Nicolla filed a resident income tax return (form IT-201) for the tax year 2012, while petitioners Richard Rosen and Cheri Rosen filed a joint form IT-201 for that year. Line 71 of Mr. Nicolla's return showed "other refundable credits" of $783,807.00. The Rosens' joint return showed other refundable credits of $83,662.00 on line 71. The copies of the two returns in the record do not have form IT-201-ATT attached, as required by line 71 of the returns.

2. In 2012, Mr. Nicolla owned both a direct interest in Columbia Lodge, LLC (Columbia Lodge) and an indirect interest in that entity through an ownership interest in Lodge Street, LLC, for a total ownership interest of 42.575%, while the Rosens owned a 4.95% interest in Columbia Lodge through an ownership interest in Lodge Street, LLC. Petitioners also owned separate interests in other LLCs, including 25 Monroe Street, LLC.

3. For tax year 2012, Columbia Lodge owned real property at 30 Clinton Avenue in the City of Albany, County of Albany, New York State from January 1, 2012 to August 29, 2012.

4. By certificate of eligibility dated April 28, 2004, Columbia Lodge was certified as a qualified empire zone enterprise (QEZE) for, among other properties, 30 Clinton Avenue within

the boundaries of the City of Albany's empire zone, which certificate of eligibility remained in effect for 2012.

5. Columbia Lodge's 2012 property tax bill for real property taxes imposed by the City and County of Albany for 30 Clinton Avenue has a warrant date of December 31, 2011 and states that payment was due by January 31, 2012.

6. Columbia Lodge paid the full amount of the City and County taxes due for 2012, in the amount of $150,070.00, on January 24, 2012.

7. Columbia Lodge sold 30 Clinton Avenue to the County of Albany and closed on such sale on August 29, 2012. While the closing statement does not show any amount being credited to Columbia Lodge for the real property taxes it paid on the property in 2012, petitioners concede in their proposed findings of fact that at the sale, "the purchase price of [30 Clinton Avenue] was increased to credit Columbia Lodge for the payment of taxes earlier in 2012."

8. The Division of Taxation (Division) performed an audit of petitioners' respective income tax returns for the years 2010 through 2012. By separate letters dated June 25, 2015, the Division's auditor advised petitioners that the Division was making a number of adjustments to the flow-through qualified empire zone enterprise (QEZE) credits they reported on their respective form IT-201 returns, including, as relevant here: (i) disallowing the full amount of the QEZE credit for real property taxes flowing through to them from 25 Monroe Street LLC; and (ii) reducing the real property tax credit (RPTC) flowing through to them from Columbia Lodge based on that LLC's sale of the 30 Clinton Avenue property on August 29, 2012. With regard to the second adjustment, the letters noted that petitioners had not supplied a copy of the closing statement on audit, showing the portion of the taxes reimbursed to Columbia Lodge, so the auditor prorated the amount of the credit based on the portion of 2012 for which Columbia

Lodge owned the property (eight months), which had the effect of reducing the amount of the RPTC for which Columbia Lodge was eligible from $150,070.00 claimed by the LLC to $100,047.00. According to their respective June 25, 2015 letters, the effect of the decreased amount of the RPTC earned by Columbia Lodge was to reduce the credit from that source to which Mr. Nicolla was otherwise entitled to $42,595.00 and the credit to which the Rosens were otherwise entitled to $4,952.00.

9. In their petitions, petitioners objected to both of the above adjustments. However, in their brief on submission to the Administrative Law Judge, petitioners withdrew their protest of the denial of the RPTC flow through from 25 Monroe St. LLC.

THE DETERMINATION OF THE ADMINISTRTIVE LAW JUDGE

Noting that the sole remaining issue to be decided was the amount of the RPTC due petitioners as a flow-through from Columbia Lodge, the Administrative Law Judge reviewed the Tax Law provisions relating to the empire zone RPTC and the criteria that must be met for a QEZE to be entitled to the RPTC in 2012. The Administrative Law Judge observed that the Division did not dispute that Columbia Lodge met the criteria and was entitled to the credit for 2012 and that petitioners, through Columbia Lodge, qualify for the credit. He further observed that the only question is the amount of the RPTC that is due Columbia Lodge.

The Administrative Law Judge rejected the Division's argument, premised on Internal Revenue Code (IRC) (26 USC) § 164, that the RPTC to which Columbia Lodge is entitled must be reduced due to the fact that Columbia Lodge sold the subject property during the tax year. The Administrative Law Judge determined that the federal conformity doctrine applies only when the federal and state provisions are substantially similar. He found that, here, the contexts of the Tax Law and IRC provisions are significantly different and have distinct purposes. The

Administrative Law Judge found that, while IRC (26 USC) § 164 applies to apportion the deduction from income tax for real estate taxes paid when real property is sold, the Tax Law provisions here relate to the empire zone QEZE RPTC. The Administrative Law Judge opined that under Tax Law § 15, a buyer of real property would not be eligible for the RPTC even if the property taxes were apportioned because the buyer would not have paid the taxes directly to the municipality. Thus, he found the application of the federal conformity principle to import the pro-rata apportionment rule found in IRC (26 USC) § 164 into the Tax Law would have the effect of reducing the total amount of the credit that the Division must afford the QEZE in the year of sale. He determined that it would inappropriately lessen the value of the QEZE designation and would not be consistent with the economic development rationale underlying the empire zones program.

The Administrative Law Judge found that the clear language of Tax Law § 15 supports petitioners' view that the amount of the RPTC to which petitioners are entitled in 2012 may not be reduced merely because Columbia Lodge sold the real property that triggered the credit in 2012 and that the Division's attempt to interpret the provision to reach a contrary conclusion is unreasonable and must be rejected.

ARGUMENTS ON EXCEPTION

The Division argues on exception, as it did below, that petitioner must show that the taxes met the definition of "eligible real property taxes" pursuant to Tax Law § 15 (e) and that they were paid or incurred by the QEZE during the taxable year as required by Tax Law § 15 (b). The Division contends that the amount of the eligible real property taxes claimed by petitioners must be reduced because the taxes paid for the part of the year after the date of sale are not

considered imposed on the seller Columbia Lodge and therefore are not eligible real property taxes paid or incurred.

The Division asserts that the amount of real property taxes paid or incurred by a QEZE in the year a property is sold is properly determined under IRC (26 USC) § 164 (d). The Division claims that, since New York adheres to the principle of federal conformity and the deduction for real estate taxes is defined under the federal provision, it is rational to use the allocability provision of IRC (26 USC) § 164 in transactions involving the RPTC. The Division contends that the proration of the RPTC in this case is the only reasonable construction under the plain language of Tax Law § 15. It argues that, here, the QEZE could benefit from the full credit only if it paid the taxes in full and that it is not a reasonable interpretation to allow petitioners to take the full credit when they paid only a portion of the taxes.

The Division argues that its position is further supported by generally accepted accounting principles (GAAP), under which the amount "paid or incurred" is the net amount of expenses after reimbursement. The Division maintains that the denial of the RPTC to the buyer in this case affords no incentive to invest in the QEZE property. Contrary to what was determined by the Administrative Law Judge, the Division contends that it would provide the credit to a buyer that reimbursed a seller for the taxes paid. The Division argues that there is no requirement that the payment for taxes be made directly to the taxing entity.

Petitioners argue that the Administrative Law Judge correctly determined that the Division erred in adjusting the credit allowed. Petitioners contend that there are no issues of fact and that the only matter at issue is one of pure statutory interpretation and legislative intent. Therefore, they argue, deference to the Division's position is not required.

Petitioners assert that the language of Tax Law § 15 is not ambiguous and that the statute clearly provides that petitioners are entitled to a credit in the amount of real property taxes paid in 2012. They argue that there is no language in Tax Law § 15 that limits or modifies the tax credit at issue due to the subsequent sale of the property. They assert that nothing in the statute addresses ownership other than at the time of the tax levy and that the Legislature did not insert any minimum time period for ownership into the statute.

Petitioners maintain that Columbia Lodge was a QEZE, certified in the Albany Empire Zone, which owned property located in the Zone. The 2012 County and City real property taxes became a lien on the property on January 1, 2012 and Columbia Lodge made direct payment for the real property taxes to the respective taxing jurisdictions. Therefore, such payments constitute eligible real property taxes paid under Tax Law § 15. Petitioners argue that they met all the requirements of the statute and should enjoy the benefits of the statute to fulfill the Legislature's intent.

Petitioners further assert that the federal conformity principle is inapplicable and that it would be unreasonable and impractical to apply the construction of IRC (26 USC) § 164 in this instance. They argue that IRC (26 USC) § 164 and Tax Law § 15 are not substantially similar and that the Division is attempting to improperly import additional requirements into the Tax Law that are contrary to legislative intent.

OPINION

The empire zones program is an economic development program created by the Legislature to provide tax benefits to qualified business enterprises in order to promote economic development and job creation in areas of the state that are deemed to be in need of such assistance (***see*** General Municipal Law § 956). As relevant here, the RPTC under Tax Law § 15

is one of the empire zone credits created by chapter 63 of the Laws of 2000 and most recently amended by chapter 59 of the Laws of 2014.

Tax Law § 15 (b) (1), provides that for an enterprise certified before April 1, 2005, such as Columbia Lodge, the amount of the credit shall be equal to the product of "(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*" (emphasis added).

Tax Law § 15 (e) defines "eligible real property taxes" in relevant part as:

> "taxes imposed on real property which is owned by the QEZE and located in an empire zone with respect to which the QEZE is certified pursuant to article eighteen-B of the general municipal law, provided such taxes are paid by the QEZE which is the owner of the real property . . . and such taxes become a lien on the real property during a taxable year in which the owner of the real property is both certified pursuant to article eighteen-B of the general municipal law and a qualified empire zone enterprise."

It is undisputed that Columbia Lodge is an eligible QEZE and was the owner of the property at 30 Clinton Avenue in the Albany empire zone when the tax bill was issued and became a lien on the premises on January 1, 2012. As owner, Columbia Lodge paid the taxes in full on January 24, 2012 (***see*** finding of fact 6). The Division does not dispute that Columbia Lodge qualifies for the RPTC in 2012 and that, through Columbia Lodge, petitioners qualify under Tax Law § 606 (bb) for that credit (***see*** Tax Law § 2 [6]). The only question is the amount of the RPTC that is due Columbia Lodge for 2012. Columbia Lodge sold the subject property to the County of Albany on August 29, 2012. Petitioners claimed a credit on their 2012 income tax returns for the full amount of the real property taxes paid. Upon audit, the Division reduced the RPTC flowing to petitioners from Columbia Lodge by prorating the amount of the credit based on the length of time that Columbia Lodge owned the property (***see*** finding of fact 8). Petitioners assert that under the plain language of Tax Law § 15, Columbia

Lodge is entitled to a credit in the full amount of the taxes paid and the sale of the property should not result in a reduction in the amount of the credit that they claimed as a flow-through in 2012.

Tax credit statutes, such as the one at issue, are similar to and should be construed in the same manner as statutes creating tax exemptions (***see Matter of Purcell v New York State Tax Appeals Trib.***, 167 AD3d 1101, 1103 [3d Dept 2018], ***lv denied*** 33 NY3d 2019. That is, such statutes must be "strictly construed against the taxpayer and, if ambiguity arises, against the exemption, although such statutes should not be interpreted so narrowly as to defeat their settled purposes. A taxpayer seeking an exemption from taxation bears the burden of proving an unambiguous entitlement thereto, showing that the proffered interpretation of the statute is not only plausible, but also that it is the only reasonable construction" (Tax Law § 1089 [e]; ***Matter of Piccolo v New York State Tax Appeals Trib.***, 108 AD3d 107, 111–112, [3d Dept 2013] [internal quotation marks and citations omitted]).

In general, "[t]he construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld" (***Matter of Astoria Gas Turbine Power, LLC v Tax Commn. of City of N.Y.***, 14 AD3d 553, 556 [2d Dept 2005], ***affd*** 7 NY3d 451 [2006], ***lv denied*** 35 NY3d 906 [2020], quoting ***Matter of Howard v Wyman***, 28 NY2d 434, 438 [1971]). The disagreement here, however, centers on the amount of "eligible real property taxes" that were imposed on the subject property and that were "paid or incurred" by Columbia Lodge in 2012. The meaning of these terms present a question "of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent" and thus agency deference in this proceeding is not warranted (***Matter of Level 3 Communications, LLC v Erie County***, 174 AD3d 1497, 1500 [4th Dept 2019], ***rearg denied*** 177 AD3d 1346 [4th Dept

2019], quoting ***Lorillard Tobacco Co. v Roth***, 99 NY2d 316, 322 [2003]). When interpreting Tax Law provisions, we are guided by the fundamental rule of statutory construction, which is to effectuate the intent of the Legislature (***Matter of 1605 Book Ctr. v Tax Appeals Trib. of State of N.Y.***, 83 NY2d 240, 244 [1994] ***cert denied*** 513 US 811 [1994]). "[W]hen the language of a tax statute is unambiguous, it should be construed so as to give effect to the plain meaning of the words used (citation omitted)" (***New York State Assn. of Counties v Axelrod***, 213 AD2d 18, 24 [3d Dept 1995], ***lv dismissed*** 87 NY2d 918 [1996]). Every word must, if possible, be given meaning (***Sanders v Winship***, 57 NY2d 391, 396 [1982]). This is because "[t]he statutory text is the clearest indicator of legislative intent" (***Matter of DaimlerChrysler Corp. v Spitzer***, 7 NY3d 653, 660 [2006]).

The Division maintains that, in order to be entitled to the RPTC, petitioners must meet all the requirements of Tax Law § 15 by showing that the taxes met the definition of "eligible real property taxes" under Tax Law § 15 (e) and that they were "paid or incurred" during the taxable year under Tax Law § 15 (b). The Division's rationale in reducing the credit is that the taxes paid for the part of the year after the sale are not considered imposed on the seller Columbia Lodge and therefore are not eligible real property taxes pursuant to Tax Law § 15 (e). The Division does not point to any language in Tax Law § 15 that explicitly limits the RPTC in this manner. Instead, it bases its position on the apportionment rule in IRC (26 USC) § 164, which it alleges is applicable here under the doctrine of federal conformity.

IRC (26 USC) § 164 pertains to itemized deductions for individuals and corporations in computing taxable income and provides that state and local real property taxes shall be allowed as a deduction for the taxable year within which paid or accrued (***see*** IRC [26 USC] § 164 [a]). IRC (26 USC) § 164 (d) provides:

"Apportionment of taxes on real property between seller and purchaser.--

(1) General Rule. – For purposes of subsection (a), if real property is sold during any real property tax year, then –

(A) so much of the real property tax as is properly allocable to that part of such year which ends on the day before the date of the sale shall be treated as a tax imposed on the seller, and

(B) so much of such tax as is properly allocable to that part of such year which begins on the date of the sale shall be treated as a tax imposed on the purchaser."

The Division asserts that its reliance on the provisions of the IRC is consistent with New York's policy of conformity of the Tax Law with federal tax law (***see Burton v New York State Dept. of Taxation & Fin.***, 25 NY3d 732, 737 [2015]). Pursuant to that doctrine, "courts [should] adopt, whenever reasonable and practical, the [f]ederal construction of substantially similar tax provisions, particularly where the state statute is modeled on [the] federal law" (***Matter of Astoria Fin. Corp. v Tax Appeals Trib. of State of N.Y.***, 63 AD3d 1316, 1319 [3d Dept 2009] [internal quotation marks and citations omitted]; ***accord Matter of Marx v Bragalini***, 6 NY2d 322, 333 [1959]; ***Matter of Delese v Tax Appeals Trib. of State of N.Y.***, 3 AD3d 612, 613 [3d Dept 2004], ***appeal dismissed*** 2 NY3d 793 [2004]; ***Matter of Karlsberg v Tax Appeals Trib. of State of N.Y.***, 85 AD3d 1347 [3d Dept 2011], ***appeal dismissed*** 17 NY3d 900 [2011]; ***see also*** Tax Law § 607). The doctrine is in furtherance of the state legislative policy of maintaining uniformity in the administration of the federal and state tax laws (***Matter of Delese***).

In support of its position, the Division argues that the Tax Law relies on federal adjusted gross income as the starting point for a New York resident's adjusted gross income (***see*** Tax Law § 612 [a]). It further notes that IRC (26 USC) § 164 governs to determine the portion of the real property taxes that are properly deductible by a New York resident in computing its taxable income for both federal and state income tax purposes. The Division claims that since the

deductions for real estate taxes are defined under the federal provisions, it is, therefore, rational to use the apportionment rule of IRC (26 USC) § 164 in determining the amount of credit that should be allowed in the year of a property sale. The Division argues that the contexts of Tax Law § 15 and IRC (26 USC) § 164 are "similar enough" to invoke the doctrine of federal conformity.

In further support of its determination to reduce the credit flowing to petitioners, the Division claims that under GAAP and for tax accounting purposes, the amount "paid or incurred" is the net amount of expenses after reimbursement. It alleges that the amount paid or incurred is the unreimbursed amount at the time of the sale. The Division also claims that it would be unfair and a disincentive to a buyer of a QEZE-eligible property to give the entire year's credit to a seller who may own the property for only one day. The Division contends that the denial of the RPTC to a buyer is contrary to the purposes of the empire zones program. It alleges that a QEZE-certified buyer of QEZE property would be eligible for a credit in the amount that it reimbursed a seller. Contrary to the Administrative Law Judge's determination, the Division contends that there is no requirement that the payment for real property taxes be made directly to the taxing entity by the owner of the premises.

Initially, we find that the Division's actions in this matter rely on a misapplication of the federal conformity doctrine. We agree that the courts of New York have long employed a policy of adopting the federal construction of substantially similar Tax Law provisions under that doctrine (***see Matter of Delese***; ***Matter of Dreyfus Special Income Fund v New York State Tax Commn.***, 126 AD2d 368 [3d Dept 1987], ***affd*** 72 NY2d 874 [1988]). The Court of Appeals has stated that arguments in favor of applying the doctrine are particularly strong and persuasive where "the State act and regulations were modeled upon the Federal law and regulations and

both statutes and regulations closely resemble each other" (***Matter of Marx***, 6 NY2d at 333-334). Contrary to the Division's position, however, neither the doctrine of federal conformity nor any provision of the Tax Law sanction the importation of federal laws into New York law. Rather, the doctrine permits construing terms in New York tax laws with the same meanings as terms in parallel federal statutes to avoid conflicts, provided that such constructions are reasonable or not precluded by other sections of the Tax Law (***see Matter of Wilmorite, Inc.,*** Tax Appeals Tribunal, November 14, 2013, ***confirmed*** 130 AD3d 1388 [3d Dept 2015]).

The apportionment rule of IRC (26 USC) § 164 performs two functions. First, it provides a method by which portions of the real estate taxes on a piece of property for the year of sale may be deducted by the seller and by the purchaser. Second, it limits the deduction of the parties to the portion of the tax corresponding to the part of the real property tax year during which each was the owner of the property (***see*** 7 Mertens Law of Federal Income Taxation § 27:49). In contrast, the language in Tax Law § 15 relates to the calculation of a tax credit that is a part of a legislatively designed economic development incentive program to promote job creation and economic growth in designated areas of the state. Neither the purpose nor context of the statutes are similar or parallel, yet the Division imports the concept of apportionment from the federal law to accomplish a purpose that it deems appropriate but one that the Legislature did not prescribe.

Tax Law § 15 is specific in terms of defining the requirements for eligibility for the RPTC. The legislature did not include any language or procedure for when QEZE-eligible property is sold during the tax year. Further, the Legislature did not provide for any limitation of the credit based on the length of ownership even though Tax Law § 15 has been amended multiple times since it was first enacted. In contrast, the Legislature did include a credit

recapture provision in Tax Law § 15 (g). That provision requires that where a QEZE's eligible real property taxes that were the basis for the allowance of the credit are subsequently reduced as a result of a proceeding under article seven of the real property tax law, the taxpayer must add back the excess of the amount of credit originally allowed for a taxable year over the amount of credit determined based upon the reduced eligible real property taxes. Under that provision, since the tax is reduced, the credit must also be reduced.

Further, we note that the Legislature has specifically limited the amount of a tax credit or benefit based on the length of ownership in a taxable year or where it gave the Commissioner authority to prescribe how the allowable credit will be computed to properly reflect the credit. For example, the real property tax circuit breaker credit in Tax Law § 606 (e) (4) provides that if a qualified taxpayer occupies a residence for a period of less than twelve months during the taxable year, the credit allowed "shall be computed in such manner as the tax commission may, by regulation, prescribe in order to properly reflect the credit or portion thereof attributable to such residence and such period." The Legislature has also expressly directed adjustments in the amount of allowable credit under article 22, based on the number of months of qualified use, where the subject property is disposed of prior to the end of the taxable year in which the credit is taken (***see*** Tax Law § 606 [a] [7] [D], [j] [6] [A]). Tax Law § 15 contains no similar language.

Petitioners met all the requirements of Tax Law § 15 in order to qualify for a credit in the full amount of the property taxes paid by Columbia Lodge in 2012. We find that the statutory language of Tax Law § 15 is unambiguous and includes no requirement, or authorization to the Commissioner, to apportion the RPTC allowed based on the length of ownership during the year of a sale. We concur with the determination of the Administrative Law Judge that the purpose

of Tax Law § 15 it is not substantially similar to IRC (26 USC) § 164, and there is no requirement that we "strain" to construe those statutes as substantially similar when they are not (***Matter of CoData Corp. v Commissioner of Taxation & Fin.***, 163 AD2d 755, 756 [3d Dept 1990]). To extend the provisions of IRC (26 USC) § 164 to Tax Law § 15, particularly where the Legislature gave no indication of that desire, is not reasonable or rational. We have considered the policy arguments made by the Division and find them unavailing in the face of clear and unambiguous statutory language.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

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

3. The petition is granted to the extent indicated in the determination; and

4. The notices of disallowance, dated June 25, 2015 (***see*** finding of fact 8), are modified to allow the full amount of petitioners' claims for RPTC flowing to them from Colombia Lodge based on that LLC's sale of the 30 Clinton Avenue property on August 29, 2012. As so modified, such notices of disallowance are sustained.

DATED: Albany, New York
July 28, 2021

/s/ Anthony Giardina________
Anthony Giardina
President

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