STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
SPENCER T. AND MELISSA LED DUKE **SCOTT AND LISA LED DUKE** **CHERI AND DONALD LED DUKE, JR.** **AVA LED DUKE** **ASHLEY LED DUKE** **SHAWN LED DUKE** **DONALD LED DUKE (DEC'D) AND MARY LOUISE LED DUKE** **SPENCER J. LED DUKE** **SLADE LED DUKE**	:	DETERMINATION DTA NOS. 825115, 825116, 825117, 825118, 825119, 825120, 825121, 825122, AND 825123
for Redetermination of Deficiencies or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2006, 2007 and 2008.	:	

Petitioners Spencer T. and Melissa Led Duke, Cheri and Donald Led Duke, Jr., and Donald (Dec'd) and Mary Louise Led Duke[1] filed petitions for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 2006 and 2007.

Petitioners Scott and Lisa Led Duke, Ava Led Duke, Ashley Led Duke, Shawn Led Duke, Spencer J. Led Duke, and Slade Led Duke filed petitions for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 2006, 2007 and 2008.

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[1]Donald Led Duke died on September 27, 2010. His widow, petitioner Mary Louise Led Duke is a fiduciary of his estate and filed joint returns with him for the years at issue.

A consolidated hearing was held before Administrative Law Judge Herbert M. Friedman, Jr., in Albany, New York, on May 19, 2014, at 10:30 A.M., with all briefs to be submitted by October 23, 2014, which date began the six-month period for the issuance of this determination. Petitioners appeared by Centolella Lynn D'Elia & Temes LLC (Timothy M. Lynn, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly disallowed petitioners' claims for qualified Empire Zone credits on the basis that certain payments in lieu of taxes were not "eligible real property taxes," as defined by Tax Law § 15(e).

FINDINGS OF FACT

The Findings of Fact herein include those contained in a Stipulation of Facts that was submitted by the parties and other relevant facts in the record.[2]

1. JMA Properties, LLC (JMA) is a New York limited liability company organized on September 14, 1999. At all relevant times, JMA was the owner of certain real property at 8 Empire Drive, East Greenbush, New York (the property).

2. Mannix Road Hotel, LLC (Mannix) is a New York limited liability company organized on October 18, 1999. At all relevant times, Mannix leased the property from JMA pursuant to the terms of two leases - the first, effective October 1, 2003, and the second, effective

[2]Petitioners also submitted 10 proposed findings of fact, all of which have been included in this determination. In addition, they submitted 7 proposed conclusions of law, which are not required to be addressed under the State Administrative Procedures Act.

January 1, 2007 (collectively, the Leases). JMA and Mannix, by their authorized agents, executed the Leases as landlord and tenant, respectively.

3. The nature of the project performed by JMA and Mannix on the property was construction and operation of a hotel.

4. On or about May 1, 2000, JMA, as owner of the property, entered into a Payment in Lieu of Tax Agreement (PILOT Agreement) with the Rensselaer County Industrial Development Agency (the IDA). Mannix was not a party or a signatory to the PILOT Agreement.

5. Pursuant to the PILOT Agreement, the property was exempt from real property taxation pursuant to section 412-a of the Real Property Tax Law. JMA agreed to make certain PILOT payments pursuant to the calculation determined in the PILOT Agreement.

6. JMA was certified as a Qualified Empire Zone Enterprise (QEZE) on March 19, 2004 and remained as such throughout the period in issue.

7. Mannix was certified as a QEZE on January 21, 2004 and remained as such throughout the period in issue.

8. Each of the Leases contained an identical section 3.04, which read:

> "Tenant (Mannix) shall pay when due all real estate taxes which shall be levied or assessed or which become liens upon the Project. Tenant shall provide Landlord (JMA) with proof of payment of taxes within 15 days following the date payment is due."

Thus, pursuant to the terms of the Leases, Mannix was responsible for, and in fact did pay, all real estate taxes, including any payments owed under the PILOT Agreement for the years 2006, 2007 and 2008. Mannix made all such payments directly to the taxing jurisdiction or IDA and provided JMA with proof that such payments were made. The receipt statements from the IDA for the PILOT payments by Mannix, however, were issued in the name of JMA.

9. The IDA was not a party or a signatory to the Leases.

10. On its New York State partnership returns (Form IT-204) filed with the Division of Taxation (Division) for each of the years 2006, 2007 and 2008, Mannix claimed real property tax credits for amounts including the payments made under the PILOT Agreement. Those amounts were allocated to the various petitioners as the partners of so-called upper-tier partnerships that were members of Mannix.[3]

11. At the relevant time, petitioners had the following indirect partnership percentages in Mannix:

MARY LOUISE LED DUKE	17.50000%
DONALD LED DUKE, JR.	17.29166%
SCOTT LED DUKE	20.62500%
SLADE LED DUKE	20.62500%
SPENCER LED DUKE	11.45833%
ASHLEY LED DUKE	3.33333%
SPENCER J. LED DUKE	2.91667%
AVA LED DUKE	3.33333%
SHAWN LED DUKE	2.91667%

12. At all relevant times, JMA and Mannix had identical ownership.

13. The Division denied petitioners' claims for the QEZE real property tax credit allocated to each petitioner by Mannix in the following amounts:

Petitioner	Tax Year	Amount of Credit Claimed
Mary Louise Led Duke	2007	$32,535.00
	2008	$34,304.00
Donald Led Duke, Jr.	2006	$29,372.72
	2007	$32,148.00
Scott Led Duke	2006	$35,034.86

[3]These partnerships included SWF, LP, and Columbia Hospitality, LLC.

	2007	$38,345.00
	2008	$32,343.00
Slade Led Duke	2006	$35,034.86
	2007	$38,345.00
	2008	$32,343.00
Spencer Led Duke	2006	$19,463.76
	2007	$21,303.00
Spencer J. Led Duke	2006	$4,954.48
	2007	$5,423.00
	2008	$5,717.00
Ashley Led Duke	2006	$5,661.63
	2007	$6,197.00
	2008	$6,533.95
Ava Led Duke	2006	$5,661.63
	2007	$6,197.00
	2008	$6,533.88
Shawn Led Duke	2006	$4,954.48
	2007	$5,423.00
	2008	$5,717.00

14. Based on the denial of the QEZE real property tax credits, on May 5 and June 27, 2011, the Division issued the following notices of deficiency to petitioners and, after conciliation conferences with the Bureau of Conciliation and Mediation Services (BCMS), the subject notices were adjusted as noted:[4]

[4] Each of the subject notices contained deficiencies attributable to the disallowance of certain credits claimed for various projects, including petitioners' interests in Mannix. The adjustments made at BCMS reflect a finding in favor of petitioners on issues involving projects unrelated to this determination, but sustaining the deficiencies relating to Mannix. In addition, each notice assessed interest, which was sustained by the conferee.

Petitioner	Notice Number	Year	Original Tax	Adjusted Tax
Donald (Dec'd) and Mary Louise Led Duke	L-035866417	2007	$35,159.79	$32,599.00
	L-035866420	2008	$34,304.00	$34,304.00
Donald Jr. and Cheri Led Duke	L-035866406	2006	$29,373.31	$29,373.31
	L-035866413	2007	$43,819.40	$33,464.00
Scott and Lisa Led Duke	L-035866399	2006	$35,035.19	$35,035.19
	L-035866407	2007	$52,265.00	$39,912.00
	L-035866397	2008	$32,707.67	$32,343.00
Slade Led Duke	L-035866416	2006	$35,034.93	$35,034.93
	L-035866398	2007	$52,265.00	$39,912.00
	L-035866414	2008	$32,707.81	$32,343.00
Spencer T. and Melissa Led Duke	L-035866395	2006	$19,464.00	$19,464.00
	L-035866410	2007	$29,037.00	$22,175.00
Spencer J. Led Duke	L-035866405	2006	$4,955.00	$4,955.00
	L-035866409	2007	$7,242.00	$5,645.00
	L-035866401	2008	$5,717.00	$5,717.00
Ashley Led Duke	L-035866408	2006	$5,662.00	$5,662.00
	L-035866415	2007	$8,276.00	$6,451.00
	L-035866411	2008	$6,533.95	$6,533.95
Ava Led Duke	L-035866404	2006	$5,662.00	$5,662.00
	L-035866412	2007	$8,276.00	$6,451.00
	L-035866400	2008	$6,533.88	$6,533.88
Shawn Led Duke	L-035866418	2006	$4,955.00	$4,955.00
	L-035866419	2007	$7,242.00	$5,645.00
	L-035866396	2008	$5,717.00	$5,717.00

15. In the subject notices, the Division explained that its adjustments were based on the fact that Mannix was not a party to the PILOT Agreement and, thus, the requisite eligible real property taxes required for the credit under Tax Law § 15(e) were missing.

SUMMARY OF THE PARTIES' POSITIONS

16. Petitioners maintain that Mannix had a fixed and absolute direct liability to the IDA under the PILOT Agreement, adding that the IDA could sue Mannix for nonpayment. On that basis, petitioners assert that the PILOT payments made by Mannix in the years at issue constituted eligible real property taxes under Tax Law § 15(e). Therefore, as petitioners were flow-through partners in Mannix, they were entitled to claim the QEZE real property tax credit.

17. The Division argues that Mannix was not a party to the PILOT Agreement, and therefore, the PILOT payments made for the years 2006, 2007 and 2008 are not eligible real property taxes that can be claimed for credit. The Division adds that, in fact, there was no written agreement whatsoever between Mannix and the IDA as prescribed by Tax Law § 15(e). Hence, the Division states that petitioners have not met their burden of demonstrating that the statutory notices are incorrect.

CONCLUSIONS OF LAW

A. During the years in issue, Tax Law § 15 provided for a credit for the taxes imposed pursuant to Tax Law Articles 9-A, 22, 32 and 33 for "eligible real property taxes" paid or incurred by a QEZE. Tax Law § 15(b) states that the amount of the credit is the product of the benefit period factor, the employment increase factor and the eligible real property taxes paid or incurred by the QEZE during the taxable year. Pursuant to Tax Law § 606(bb), a taxpayer who is a partner in a partnership that is a QEZE, such as petitioners are with Mannix, is allowed an eligible credit.

B. The instant matter involves whether Mannix's PILOT payments constitute "eligible real property taxes" as described in Tax Law § 15(e). During the period in issue, this section provided, in part:

> "Eligible real property taxes. The term 'eligible real property taxes' means 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 or are paid by a tenant which either (i) does not meet the eligibility requirements under section fourteen of this article to be a QEZE or (ii) cannot treat such payment as eligible real property taxes pursuant to this paragraph 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. In addition, 'eligible real property taxes' shall include taxes paid by a QEZE which is a lessee of real property if the following conditions are satisfied: (1) the taxes must be paid by the lessee pursuant to explicit requirements in a written lease executed or amended on or after June first, two thousand five, (2) such taxes become a lien on the real property during a taxable year in which the lessee of the real property is both certified pursuant to article eighteen-B of the general municipal law and a qualified empire zone enterprise and (3) the lessee has made direct payment of such taxes to the taxing authority and has received a receipt for such payment of taxes from the taxing authority. In addition, the term 'eligible real property taxes' *includes payments in lieu of taxes made by the QEZE* to the state, a municipal corporation or a public benefit corporation *pursuant to a written agreement entered into between the QEZE and the state, municipal corporation, or public benefit corporation*" (emphasis added).

C. Since petitioners are seeking tax credits, they bear the burden of proof of establishing through clear and convincing evidence that the exemption applies and that they are entitled to the statutory benefit (***see e.g. Matter of Golub Serv. Sta. v. Tax Appeals Trib.***, 181 AD2d 216 [1992]). Tax credits, such as those at issue, are a particularized species of exemption from tax (***Matter of Marriott Family Rests. v. Tax Appeals Trib. of State of N.Y.***, 174 AD2d 805 [1991], ***lv denied*** 78 NY2d 863 [1991]). "Statutes creating tax exemptions must be construed against the taxpayer" (***Matter of Federal Deposit Ins. Corp. v. Commissioner of Taxation & Fin.***, 83 NY2d 44, 49 [1993] [internal quotation marks and citation omitted]; ***Matter of Grace v. New York***

State Tax Commn., 37 NY2d 193 [1975], ***rearg denied*** 37 NY2d 816 [1975]). It must be noted that in matters of statutory interpretation, our cardinal function is to effectuate the intent of the Legislature (***see Matter of Yellow Book of N.Y., Inc. v. Commissioner of Taxation & Fin.***, 75 AD3d 931 [2010], ***lv denied*** 16 NY3d 704 [2011]). The statutory language is the clearest indicator of legislative intent (***Matter of Lewis Family Farm, Inc. v. New York State Adirondack Park Agency***, 64 AD3d 1009 [2009]).

D. The issue in this case, i.e, the eligibility of certain real property tax payments made pursuant to a lease, was the exact issue considered in ***Matter of The Golub Corporation*** (Tax Appeals Tribunal, May 31, 2012, ***confirmed*** 116 AD3d 1261 [2014]). In ***Golub***, the administrative law judge determined that PILOT payments qualify only if such payments were made pursuant to a written agreement between the QEZE and the taxing governmental bodies. Moreover, the administrative law judge in ***Golub*** found that petitioner's obligation to make the PILOT payments arose solely from its sublease, and not a PILOT agreement, and therefore the payments could not be considered "eligible real property taxes" under Tax Law former §15(e).

In affirming the determination of the administrative law judge, the Tribunal noted that there are three situations wherein a levy constitutes "eligible real property taxes":

> "1) *taxes* paid by a certified and qualified QEZE *owner* of property;
>
> 2) *payments in lieu of taxes* by a certified and qualified QEZE when made directly to the state, a municipal corporation or a public benefit corporation 'pursuant to a written agreement entered into between the QEZE and the state, municipal corporation or public benefit corporation'; or
>
> 3) *taxes* paid by a certified and qualified QEZE *lessee* (Tax Law former § 15 [e])."

Subsequently, in confirming the Tribunal's decision, the Appellate Division unequivocally stated that "[t]he pertinent language [in Tax Law § 15(e)] affirmatively requires in

clear terms that, to qualify for the credit under such provision, the PILOT payments must be made pursuant to a written agreement between the QEZE and the appropriate entity" (***Golub*** at 1262). Additionally, neither the Tribunal nor the Appellate Division viewed the petitioner in ***Golub*** as a direct obligor with respect to the PILOT Agreement between its landlord and the IDA. As a result, it was concluded in ***Golub*** that the petitioner's payments did not constitute "eligible real property taxes" because they did not meet the PILOT payment requirements listed in the second situation presented above. Simply put, the petitioner in ***Golub*** was not a party to the requisite written agreement. The court added that "[w]e cannot, under long settled principles of statutory interpretation, essentially rewrite an unambiguous provision of a statute by ignoring explicit language, no matter how equitable such a result may appear" (***Id.*** at 1263; ***see e.g. Matter of Daimler Chrysler Corp. v. Spitzer***, 7 NY3d 653 [2006]).

Like ***Golub***, the record here lacks a written agreement between Mannix and either a taxing jurisdiction or a public benefit corporation that required Mannix to remit payments in lieu of taxes. Mannix's obligation to make PILOT payments solely arose from the Leases and not from any participation in the PILOT Agreement. Hence, as was the case with the petitioner in ***Golub***, Mannix's payments did not constitute eligible real property taxes under Tax Law § 15(e).

E. Here, petitioners' primary argument is that Mannix was a direct obligor to the IDA with respect to the PILOT payments and, thus, their case is distinguishable from ***Golub***. Further, petitioners maintain that their case is more in line with two Tribunal cases that found the existence of eligible real property taxes under similar circumstances - ***Matter of Bombardier Mass Transit Corporation*** (Tax Appeals Tribunal, June 7, 2012) and ***Matter of Falso*** (Tax Appeals Tribunal, May 23, 2013). Review of these two decisions and the record as a whole evidences that petitioners' reasoning is faulty for several reasons.

First, Mannix was not a party or a signatory to the PILOT Agreement giving rise to the PILOT payment obligation. Mannix may have had a direct contractual obligation to make the PILOT or other real estate tax payments, as is asserted by petitioners, but that obligation was to JMA under the Leases, and not to the IDA. The IDA was neither a party nor a signatory to the Leases, and the relevant language in those documents, as well as in the IDA Agreement, does not give the IDA any rights of enforcement directly against Mannix. Hence, petitioners' argument that Mannix was directly obligated to the IDA is not supported by the documents in the record.[5]

Additionally, petitioners' reliance on the Tribunal's decisions in ***Falso*** and ***Bombardier*** is misplaced. In both ***Bombardier*** and ***Falso***, the document requiring payment of the requisite PILOT payments was signed by all relevant entities, including the taxing authority. As a result, the Tribunal held that the requirements of Tax Law § 15(e), including the need for a written agreement, were met despite the fact that the lessee was not a party to the PILOT agreement in each case. Conversely, in the instant case, there is no such document signed by Mannix, JMA and the IDA. Without such a document, the rationale of ***Falso*** and ***Bombardier*** does not support petitioners' case.

F. In attempting to distinguish their case from ***Golub***, petitioners correctly note that the lessee in that case had an opt-out right with respect to the responsibility for PILOT payments and such was clearly an important consideration of the Tribunal in reaching its conclusion that the requirements of Tax Law § 15(e) were not met. Thus, petitioners maintain, their case is different

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[5]Petitioners cite several federal cases to support their proposition that by reason of the absolute nature of Mannix's obligation under the Leases to make the PILOT payments, the IDA had a direct cause of action against Mannix for any nonpayment (***i.e.***, ***United States v. Warren Railroad Co.***, 127 F2d 134 [2d Cir 1942]; ***United States v. Industrial Crane and Manufacturing Corp.***, 492 F2d 772 [5th Cir 1974]; ***United States v. Phoenix Indemnity Co.***, 231 F2d 573 [4th Cir 1956]; ***Island Insurance Co. v. Hawaiian Foliage & Landscape, Inc.***, 288 F3d 1161 [9th Cir 2002]; ***United States v. Wood***, 658 F Supp 1561 [WD Ky 1987]). However, the cited cases do not involve Tax Law § 15, are at best tangentially related to the instant matter, and are not persuasive authority.

from ***Golub*** as no such opt-out clause was present in the Leases and Mannix had an absolute obligation to make the PILOT payments. However, the opt-out provision was not the only factor upon which the ***Golub*** decision was based. Indeed, as the Tribunal held, and Appellate Division confirmed, the paramount factor for denial of the credit was the absence of a written agreement between the petitioner in ***Golub*** and a statutorily described authority, an agreement that is likewise missing here.

G. In sum, the Tribunal's decision in ***Golub*** is directly applicable to the instant matter. Tax Law § 15(e) unambiguously states that the PILOT payments must be pursuant to a written agreement between a QEZE and an eligible entity. Relying upon the plain language of the statute, the Tribunal and Appellate Division in ***Golub*** expressly rejected any suggestion that it is unnecessary to produce a written PILOT agreement between the entity making the PILOT payments and the taxing jurisdictions or a public benefit corporation. The determinative fact in this case, like ***Golub***, is that at the time the PILOT payments were made, they were tendered pursuant to the obligations of a lease that was unsigned by the IDA, and not a PILOT agreement. This obligation does not satisfy the statutory requirement of Tax Law § 15(e) and the credits were properly disallowed by the Division.

H. Finally, it must be noted that the Division makes two alternative arguments in support of the subject notices that are disputed by petitioners. First, the Division maintains that if the PILOT payments are determined to be eligible real property taxes, they are subject to the PILOT limitation under Tax Law § 15(e), and as Mannix has no basis in the property, the PILOT limitation would be zero. Additionally, the Division asserts that Mannix made PILOT payments and not payments of real property taxes pursuant to a written lease executed or amended on or after June 1, 2005. However, as it is concluded that the PILOT payments made by Mannix were

not "eligible real property taxes" under the statute (see Conclusion of Law G), the Division's alternate arguments are moot and will not be addressed.

I. The petitions of Donald (Dec'd) and Mary Louise Led Duke, Scott and Lisa Led Duke, Cheri and Donald Led Duke, Jr., Ashley Led Duke, Spencer J. Led Duke, Shawn Led Duke, Slade Led Duke, Ava Led Duke, and Spencer T. and Melissa Led Duke are denied and the notices of deficiency are sustained.

DATED: Albany, New York
March 26, 2015

/s/ Herbert M. Friedman
ADMINISTRATIVE LAW JUDGE