STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FOREST CITY ENTERPRISES, INC.	:	AMENDED DETERMINATION ON REMAND
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Period February 1, 2008 through January 31, 2009.	:	DTA NO. 825157

Petitioner, Forest City Enterprises, Inc., filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the period February 1, 2008 through January 31, 2009.

Following a hearing held before Timothy J. Alston, Administrative Law Judge, on December 18, 2013 and continued to completion on December 19, 2013, and the submission of briefs, Winifred M. Maloney, Administrative Law Judge,[1] issued a determination dated February 13, 2015, which denied the petition and sustained the Notice of Disallowance dated March 28, 2012.

Petitioner and the Division of Taxation timely filed exceptions[2] to the determination and in a decision dated May 19, 2016, the Tax Appeals Tribunal reversed the Administrative Law

[1] This matter was reassigned to Administrative Law Judge Maloney, pursuant to the authority of section 3000.15(f) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.15[f]).

[2] At the hearing, petitioner appeared by McConville Considine Cooman & Moran PC (Kevin S. Cooman, Esq. and Edward C. Daniel, Esq., of counsel). On exception to the Tax Appeals Tribunal, petitioner appeared by Hodgson Russ LLP (Christopher L. Doyle, Esq. and Andrew W. Wright, Esq., of counsel). At the hearing and on exception, the Division of Taxation appeared by Clifford M. Peterson, Esq., of counsel).

Judge's determination with respect to the issue of whether the Division of Taxation's failure to timely serve and file its answer results in a deemed admittance of the allegation in the petition that FC Yonkers Associates, LLC (FC Yonkers) had an employment number of at least one for purposes of Tax Law §§ 14 and 15. The Tax Appeals Tribunal concluded that the allegation that FC Yonkers "has an 'Employment Number' (as that term is defined in § 14(g) of the New York Tax Law) of at least 1.0 for the Taxable Year" is a material allegation of fact, and is deemed admitted; and as FC Yonkers had a test year employment number of zero and an employment number of at least one, FC Yonkers had an employment increase factor of one. The Tax Appeals Tribunal further concluded that:

> "The only contested factor remaining concerns the determination of the eligible real property taxes paid or incurred by FC Yonkers during the year in issue (Tax Law § 15[b]). The Administrative Law Judge, based upon her determination that petitioner had not proven that its employment number and corresponding employment increase factor were anything other than zero, concluded that the issue of whether the payments made by FC Yonkers were "eligible real property taxes" was moot.
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> We believe that "[T]he fullest possible development of an issue occurs in our two-stage hearing exception process when an Administrative Law Judge renders a determination on an issue stating a complete rationale for the conclusion and the litigants debate the correctness of the Administrative Law Judge's rationale and conclusion on exception" (***Matter of United States Life Ins. Co.***, Tax Appeals Tribunal, March 24, 1994). When an issue that was explicitly raised by the parties is not addressed in a determination, we are deprived of the research and analysis of both the Administrative Law Judge and the parties on exception. As the determination does not address the issue raised by the Division regarding "eligible real property taxes," nor petitioner's procedural objections to the Division's raising of the issue, we remand this matter to the Administrative Law Judge for a supplemental determination.
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> Accordingly, it is ORDERED, ADJUDGED and DECREED that this matter is remanded to the Administrative Law Judge for the issuance of a supplemental determination in accordance with the foregoing decision."

ISSUES

I. Whether petitioner's claim for a qualified empire zone enterprise (QEZE) credit for real property taxes passed through from FC Yonkers Associates, LLC, should be denied because the payments made by FC Yonkers Associates, LLC, did not qualify as "eligible real property taxes" for purposes of Tax Law § 15(e).

II. Whether the Division of Taxation properly asserted an alternative basis for its denial of petitioner's claim for a QEZE credit for real property taxes passed through from FC Yonkers Associates, LLC, when the alternative basis for denial was raised for the first time in its hearing memorandum.

FINDINGS OF FACT

Findings of Fact 1 through 78 in the February 13, 2015 determination are incorporated herein by reference. In addition, Findings of Fact 51 and 53 from the February 13, 2015 determination as modified by the Tax Appeals Tribunal, are also incorporated by reference.

Additionally, this determination makes the following Findings of Fact based upon the existing record.

1. On its federal U.S. Return of Partnership Income, form 1065, filed for the fiscal year February 1, 2008 through January 31, 2009 (2008 tax year form 1065), FC Yonkers listed its principal business activity as development and its principal product or service as real estate. On its 2008 tax year form 1065, in Schedule L, Balance Sheets per Books, FC Yonkers reported the following end of year balances for its assets: "Cash" (line 1) in the amount of $350,277.00; "Trade notes and accounts receivable" (line 2 a) in the amount of $52,608.00; "Other current assets (attach statement)" (line 6), listed as "Reserves, Escrows, Intercompany Accounts Rec., and Prepaid Expenses" on the attached statement 2, in the amount of $7,981,308.00; "Intangible

assets (amortizable only)" (line 12 a) "Less accumulated amortization" (line 12 b) in the amount of $6,502,407.00; and "Other assets (attach statement)" (line 13), listed as "Construction in Progress" on the attached statement 2, in the amount of $373,485,202.00.

2. On its New York Partnership Return (IT-204) filed for the fiscal year February 1, 2008 through January 31, 2009 (2008 tax year form IT-204), FC Yonkers listed its principal business activity as development and its principal product or service as real estate. On its 2009 tax year form IT-204, in Section 4 - Balance sheets per books (from federal Form 1065, Schedule L), FC Yonkers reported an end of tax year balance in the amount of $373,485,202.00 on line 56 entitled "Other assets."

3. In January 2008, a Memorandum of Understanding between the City of Yonkers and FC Yonkers was executed by Frank J. Rubino, Corporation Counsel, on behalf of the City of Yonkers, and by David Berliner, Senior Vice President of RRG Yonkers, LLC, on behalf of FC Yonkers.

4. In its late-filed answer, the Division of Taxation (Division) did not raise, either as a disputed issue of fact or one of its affirmative statements, that the $7,131,130.00 payment made by FC Yonkers to the City of Yonkers did not qualify as "eligible real property taxes" for purposes of Tax Law § 15(e). However, in paragraph 29 of its answer, the Division affirmatively stated that "Yonkers LLC paid real property taxes for the year ended January 31, 2009." The Division never sought permission to amend its answer.

5. On December 6, 2012, petitioner filed a Reply to the Division's answer. In paragraph 5 of its reply, petitioner admitted the Division's assertion in paragraph 29 of its answer.

6. In its hearing memorandum, dated and mailed December 9, 2013, the Division raised an alternative basis for its denial of petitioner's claim for pass through of the QEZE credit for real

property taxes from FC Yonkers. Specifically, the Division asserted that the $7,158,810.00 payment made by FC Yonkers did not qualify as "eligible real property taxes" for purposes of Tax Law § 15(e). The Division, in its hearing memorandum, listed 18 exhibits, labeled "A" through "R," to be introduced at the hearing including the following:

> "(F) Forest City Enterprises, Inc. and subsidiaries' New York Form CT-3-A for the 2008 Tax Year;
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> (G) Forest City Enterprises, Inc.'s consolidated federal tax return, entitled Form 1120, for the year at issue;
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> (H) FC Yonkers Associates, Inc.'s [sic] federal partnership return, entitled Form 1065, for the year at issue;
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> (I) FC Yonkers, Associates, Inc.'s [sic] New York partnership return, entitled Form IT-204, for the year at issue;
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> (J) FC Yonkers Associates, Inc.'s [sic] New York Form IT-606 Claim for QEZE credit for real property taxes;
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> (K) Copy of City of Yonkers' Resolution No. 137-2006;
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> (L) Sale and Purchase Agreement between Ridge Hill Development Corporation and FC Yonkers, Associates, LLC, dated May 12, 2005;
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> (M) Certificate of Merger of FC Yonkers Commercial, LLC and FC Yonkers Associates, LLC into FC Yonkers Associates, LLC, dated August 2, 2007;
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> (N) City of Yonkers Industrial Development Agency Form RP-412-a, entitled "Application for Real Property Tax Exemption";
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> (O) Tax Benefit Leaseback Agreement between City of Yonkers Industrial Development Agency and FC Yonkers Associates, LLC, dated August 2, 2007;
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> (P) Memorandum of Understanding between City of Yonkers and FC Yonkers Associates, Inc. [sic], dated January 2008;
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> (Q) City of Yonkers Industrial Development Agency invoice to FC Yonkers for $7,131,130.00; and
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> (R) Any other relevant documentation."

7. As part of his statement of the issues at the beginning of the hearing on December 18, 2013, the Division's representative indicated that "[F]or purposes of the hearing, the Division is also asserting an alternative basis for the denial for refund," which was that "the $7 million payment does not qualify as eligible real property taxes as that term is defined in section 15(e) of the Tax Law." The Division's representative further indicated that the Division would make that case based upon the documents that it would be "entering into the record today."

8. At the conclusion of the Division's statement of the issues, Administrative Law Judge Alston asked the Division's representative whether the alternative basis for the denial of the refund was in the Division's answer. Mr. Peterson responded that it was not in the answer, but was in the hearing memorandum. Judge Alston then asked "[I]t is in the hearing memo?" to which Mr. Peterson responded "[Y]es." At that time, petitioner's representative did not raise any objection or claim of surprise regarding the Division's alternative basis for the denial of petitioner's claim for refund of the pass-through QEZE credit for real property taxes from FC Yonkers for the fiscal year February 1, 2008 through January 31, 2009 (the 2008 tax year).

9. During the December 18, 2013 testimony of the Division's sole witness, Diane Houck, a Tax Technician in the Division's Income/Franchise Desk Audit Bureau, the documents listed on the Division's hearing memorandum were received into evidence, without objection by petitioner's representative. With respect to these documents, Ms. Houck's testimony was limited to explaining that each one was found in and printed from the Division's audit records for petitioner's claim for the pass through of a QEZE credit for real property taxes from FC Yonkers for a prior fiscal year.

10. After the completion of the testimony of petitioner's fourth and last witness on December 19, 2013, petitioner's representative, Kevin S. Cooman, Esq., offered into evidence a

second affidavit of Lauren Du, dated December 18, 2013, "addressed to the separate issue that has been raised by the State Tax Department in this matter concerning the payment of the PILOTs." Mr. Cooman further stated that "[T]his affidavit demonstrates, in conjunction with the other piece of evidence that was put in by the State yesterday, that, in fact, those PILOT payments were paid for 2008 and it attaches a wire transfer showing that payment to the City of Yonkers." The Division did not object to this exhibit and it was received into evidence as petitioner's Exhibit 16.

11. After Ms. Du's affidavit, dated December 18, 2013, was admitted into evidence, Mr. Cooman pointed out that under Tax Law § 15(e), a payment in lieu of taxes (PILOT) payment has to be made pursuant to an agreement between the QEZE and a municipal corporation or a public benefit corporation, which, in this case, was the Tax Benefit Leaseback Agreement received into evidence as the Division's Exhibit N. Mr. Cooman also pointed out that the Division submitted the City of Yonkers Industrial Development Agency (YIDA) invoice, issued to FC Yonkers for the payment due under the Tax Benefit Leaseback Agreement, as its Exhibit P, and that Ms. Du's December 18, 2013 affidavit demonstrated that the payment was, in fact, made on behalf of FC Yonkers in that year. Lastly, he explained that the only other requirement for that payment to qualify as eligible real property taxes under Tax Law § 15(e) was that the amount paid cannot exceed the cap that is allowed for that payment. In the case of FC Yonkers, Mr. Cooman explained that it is necessary to look in Section 4 of FC Yonkers' 2008 tax year IT-204, the Division's Exhibit H, to determine the end of tax year basis for line 56, "Other assets," $373,485,202.00, and multiply that number by Westchester County's full-value tax rate that can be found in the instructions for the 2008 Form IT-606 (2008 Form IT-606-I), and divide the product by 1,000. Mr. Cooman indicated that FC Yonkers' PILOT payment of $7,131,130.00

did not exceed the cap, and is, therefore, a qualifying eligible payment. He requested that judicial notice be taken of the 2008 Form IT-606-I as it relates to the issue raised by the Division about whether the PILOT payment in the amount of $7,131,130.00 qualifies as eligible real property taxes for which the QEZE credit for real property taxes is being sought. In response to a question by Judge Alston, Mr. Cooman indicated that he would cite the 2008 Form IT-606-I in his brief.

12. The Division declined to sum up its position at the conclusion of the hearing. Rather, the Division saved its arguments for its brief.

13. In its closing argument, petitioner did not claim any prejudice regarding the Division's alternative basis for denial of petitioner's claim for refund.

CONCLUSIONS OF LAW

A. Petitioner claims a QEZE credit for real property taxes under Tax Law §§ 15 and 210(27), which was passed through from FC Yonkers for the fiscal year February 1, 2008 through January 31, 2009, i.e., the 2008 tax year. Preliminarily, it is observed that "a tax credit is 'a particularized species of exemption from taxation' (***Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193, 197 [1975], ***lv denied*** 37 NY 2d 708 [1975]) and, therefore, petitioner[s] bore the burden of showing 'a clear cut entitlement' to the statutory benefit[s]' (***Matter of Luther Forest Corp. v. McGuiness***, 164 AD2d 629, 632 [3d Dept 1991])" (***Matter of Golub Service Station v. Tax Appeals Tribunal***, 181 AD2d 216 [3d Dept 1992]; ***see also*** Tax Law § 1089[e]).

B. Subject to certain limitations not at issue, for a QEZE certified before April 1, 2005, "the amount of credit for real property taxes 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" (Tax Law § 15[b][1]).

C. In its decision in the instant matter, the Tax Appeals Tribunal reversed the administrative law judge's determination with respect to the issue of whether the Division of Taxation's failure to timely serve and file its answer results in a deemed admittance of the allegation in the petition that FC Yonkers Associates, LLC, had an employment number of at least one for purposes of Tax Law §§ 14 and 15. The Tax Appeals Tribunal concluded that the allegation that FC Yonkers "has an 'Employment Number' (as that term is defined in § 14(g) of the New York Tax Law) of at least 1.0 for the Taxable Year" is a material allegation of fact, and is deemed admitted. Since FC Yonkers had a test year employment number of zero and an employment number of at least one, FC Yonkers had an employment increase factor of one.

The Tax Appeals Tribunal further concluded that the only contested factor remaining concerns the determination of the eligible real property taxes paid or incurred by FC Yonkers during the 2008 tax year (Tax Law § 15[b]). The Tax Appeals Tribunal remanded this matter to address the alternative issue raised by the Division regarding "eligible real property taxes," and petitioner's procedural objections to the Division's raising of the issue.

D. Petitioner claimed a refund of a pass through of the QEZE credit from FC Yonkers in the amount of $7,158,810.00 for the 2008 tax year. For the first time in its hearing memorandum, the Division raised an alternative basis for denial of petitioner's claim for refund, namely, that FC Yonkers's payment of $7,158,810.00 does not qualify as "eligible real property taxes" for purposes of Tax Law § 15(e). Petitioner contends that it is inappropriate to use the hearing memorandum to raise an additional basis for denial of petitioner's claim for refund. Petitioner's contention is without merit. The record clearly indicates that the Division, in its hearing memorandum, notified petitioner of the alternate basis for denial, along with the evidence on which it would rely. On the first day of the hearing, the Division's representative

stated the alternative issue and indicated that the Division was going to rely upon documentation that it entered into evidence. The record also shows that petitioner's representative did not raise any objection or claim of surprise regarding the Division's alternative basis for denial. Indeed, on the second day of the hearing, petitioner's representative submitted documentary evidence addressing the alternative issue raised by the Division. Clearly, petitioner had adequate notice of the Division's alternative argument and the evidence upon which it was going to rely and had an opportunity to respond (***see Matter of Matter of Heckt v. City of Lackawanna***, 44 AD2d 763 [1974], ***lv denied*** 35 NY2d 643 [1974]; ***Matter of Diamond Terminal Corp. v. Dept. of Taxation and Finance***, 158 AD2d 38 [1990], ***lv denied*** 76 NY2d 711 [1990]). Moreover, it is irrelevant that the Division used its hearing memorandum rather than an amended answer to apprise petitioner of the alternative basis for denial of the claim for refund (***Matter of Diamond Terminal Corp. v. Dept. of Taxation and Finance***.)

Additionally, where an issue not raised in the answer is tried by the parties, the Rules of Practice and Procedure of the Tax Appeals Tribunal provide that:

> "[W]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. The administrative law judge or presiding officer, upon motion of any party at any time, may allow such amendment of the pleadings, as may be necessary to cause them to conform to the evidence and to raise these issues; but failure to amend does not affect the result of the trial of these issues" (20 NYCRR 3000.4[2][i]).

In the instant matter, the alternative basis was tried by the implied consent of the parties during the two-day hearing.

E. Although a pass-through of a QEZE credit for real property taxes in the amount of $7,158,810.00 was claimed by petitioner, the documentary record only pertains to FC Yonkers's

$7,131,310.00 payment to the City of Yonkers.[3] The Division does not dispute that FC Yonkers's payment of $7,131,130.00 was made pursuant to the terms of the Tax Benefit Leaseback Agreement. However, the Division, in its brief, argues that in order for FC Yonkers's payment to qualify as "eligible real property taxes," petitioner must prove that the payment qualifies as a "payment in lieu of taxes" as defined in General Municipal Law § 854(17). The Division contends that the payments made under the Tax Benefit Leaseback Agreement were not payments in lieu of taxes because they were "unrelated to the amount of tax that would have been collected." It further contends that the language in Article III, Section 3.3(a) of the Tax Benefit Leaseback Agreement indicates that the amount of payments due under that section were determined by YIDA and FC Yonkers and "were not related to a value assessed by the City of Yonkers for Ridge Hill."

F. Tax Law § 15(e) defines the term "eligible real property taxes," and provides, in relevant part, as follows with respect to "payments in lieu of taxes":

> "[I]n 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. Provided, however, 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

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[3] The difference between the claimed QEZE credit of $7,158,810.00 and FC Yonkers's payment of $7,131,310.00 to the City of Yonkers is $27,500.00. The record does not contain any specifics or breakdown of that $27,500.00 difference.

> 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 with 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."

G. Statutory rules of construction provide that "[t]he legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction" (McKinney's Cons Laws of NY, Book 1, Statutes § 94). Where the statute is clear, the courts must follow the plain meaning of its words, and "there is no occasion for examination into extrinsic evidence to discover legislative intent . . ." (McKinney's Cons Laws of NY, Book 1, Statutes § 120; ***see Matter of Raritan Dev. Corp. v. Silva***, 91 NY2d 98, 108 [1997]; ***Matter of Schein***, Tax Appeals Tribunal, November 6, 2003).

The phrase "payment in lieu of taxes" as used in Tax Law § 15(e) is clear on its face. It is a payment in place of, instead of, as substitution for, hence "in lieu of" tax.

H. The $7,131,310.00 payment made by FC Yonkers to the City of Yonkers satisfies the pertinent language of Tax Law § 15(e). That payment was made pursuant to a Tax Benefit Leaseback Agreement dated August 2, 2007. FC Yonkers is a certified QEZE and YIDA is a public benefit corporation formed pursuant to General Municipal Law § 903. Article III, Section 3.3(a) of the Tax Benefit Leaseback Agreement states that the payments provided for therein encompass the following two payment obligations: (i) the payments called for in a City of Yonkers Special Ordinance "providing for a payment of real property taxes on the Ridge Hill property issued by the City of Yonkers in connection with an agreement (the 'Loral Agreement') dated December 1979"; and (ii) the payments contemplated in the City Council Resolution No.

137-2006, which payments are called for based upon a finding that the Ridge Hill project would "generate property taxes of not less than $10 million per year when fully built and operational." Section 3.3(a) further provides that a payment of $7,131,130.00 for City fiscal year 2007 - 2008 was to be made to the City of Yonkers on June 1, 2008. On May 28, 2008, YIDA invoiced FC Yonkers for the payment due to the City of Yonkers for the City fiscal year 2007 - 2008, which amount FC Yonkers paid by wire transfer into the City of Yonkers's JP Morgan Chase bank account on June 5, 2008. It is noted that in January 2008, the City of Yonkers and FC Yonkers executed a memorandum of understanding, in which the parties acknowledged, among other things, that FC Yonkers and YIDA had entered into an agreement dated August 2, 2007, i.e., the Tax Benefit Leaseback Agreement, that covered "payment in lieu of tax payments for City tax year 2006 - 2007 and thereafter." FC Yonkers's federal tax basis in the Ridge Hill project as of the last day of the 2008 tax year was $373,485,202.00. The full-value tax rate for Westchester County for the 2008 tax year was $21.00 per thousand dollars of assessed value, or 2.1% (***see*** 2008 Form IT-606-I). The product of those two numbers is $7,843,189.00, which exceeds the amount of the $7,131,130.00 PILOT payment. As such, the $7,131,130.00 PILOT payment made by FC Yonkers did not exceed the annual cap.

As for the Division's argument that the $7,131,130.00 payment is not a PILOT payment because it is not based upon the initial assessed value of the 1 Ridge Hill property, and has to be an amount that would otherwise have been levied as the actual real property taxes on the parcel, it is without merit. The pertinent language of Tax Law § 15(e) does not impose any such constraint on how a PILOT payment is determined, requiring only that it be "pursuant to a written agreement entered into between the QEZE and the state, municipal corporation or public benefit corporation," and that the PILOT not exceed a defined cap (***see*** Conclusion of Law F).

Even if the definition of a PILOT set forth in General Municipal Law § 854(17)[4] were to be used for purposes of Tax Law § 15(e), it confirms by its own terms that PILOTs will not be based upon the assessed value of the property, and are likely to be only a portion of the taxes that would otherwise be levied. In further support of its argument, the Division also references the YIDA Uniform Tax Exemption Policy, which by its own terms, provides guidelines for provision of financial assistance. Review of those guidelines regarding the percentage of exemption for real property taxes indicates that the basic real property tax abatement is 100% of the increased assessment value of the parcel in the first year of the abatement, with a decreasing exemption over the term of the PILOT; PILOT payments in the initial year shall not be less than the amount of taxes that were due on the parcel in the previous tax year prior to the transfer of title to YIDA; upon request of the project applicant, the abatement granted in certain years may be adjusted, provided the net present value of the total abatement is not substantially reduced; and applicants may apply to YIDA's Chairperson or President for deviations from the guidelines in order to increase abatements. YIDA's Uniform Tax Exemption Policy also includes procedures for deviations from the guidelines. Although City Council Resolution No. 137-2006 does not identify the increased assessment for the Ridge Hill project, when fully built and operational, it does state as a finding that the Ridge Hill project would "generate property taxes of not less than $10 million per year when fully built and operational." Clearly, the City Council considered the increased assessment value of Ridge Hill in making its finding regarding the amount of property taxes that would be generated when the Ridge Hill project was fully built and operational.

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[4] General Municipal Law § 854(17) defines "payments in lieu of taxes as "[A]ny payment made to an agency, or affected tax jurisdiction equal to the amount, or a portion of, real property taxes, or other taxes, which would have been levied by or on behalf of an affected tax jurisdiction if the project was not tax exempt by reason of agency involvement."

Article III, Section 3.3(a) of the Tax Benefit Leaseback Agreement states that payments provided for therein encompass the City of Yonkers Special Ordinance dated December 1979 (the Loral Agreement); and the payments contemplated in City Council Resolution No. 137-2006, the sum of which comprises the "Combined Loral Tax payments." That section also states that YIDA and FC Yonkers agreed to split the "Combined Loral Tax payments" into two payments, one of which was the City fiscal year 2007 - 2008 payment in the amount of $7,131,130.00 due on June 1, 2008. In addition, Schedule 3.3 of the Tax Benefit Leaseback Agreement breaks out the $10,000,000.00 property taxes based upon the type of property, as fully built and operational, and tax rates for various parts of the Ridge Hill development. Clearly, the parties to the Tax Benefit Leaseback Agreement considered YIDA's Uniform Tax Exemption Policy when the leaseback agreement was drafted and executed. As such, the $7,131,310.00 payment was a PILOT payment made to the City of Yonkers pursuant to the Tax Benefit Leaseback Agreement, dated August 2, 2007, between FC Yonkers and YIDA.

I. In sum, since the $7,131,310.00 PILOT payment made by FC Yonkers to the City of Yonkers did not exceed the annual cap, that PILOT payment is within the definition of "eligible real property taxes" for purposes of Tax Law § 15(e). In its decision in the instant matter, the Tax Appeals Tribunal concluded that FC Yonkers had an employment increase number of one. As the 2008 tax year was the fifth year of FC Yonkers's business tax benefit period, its benefit period factor was one (***see*** Tax Law § 15[c]). FC Yonkers's QEZE credit for real property taxes for the 2008 tax year is $7,131,310.00, the product of its benefit period factor of 1.0; its employment increase factor of 1.0; and its eligible real property taxes of $7,131,310.00 (Tax Law § 15[b][1]).

J. Pursuant to Tax Law § 211(4), petitioner filed a combined franchise tax return for the

fiscal year February 1, 2008 through January 31, 2009 with, among other subsidiaries, F.C. Member, Inc. (F.C. Member), and Forest City Rental Properties Corporation. Forest City Rental Properties Corporation is wholly owned by petitioner. F.C. Member is wholly owned by Forest City Rental Properties. F.C. Member owns 70% of FC Yonkers pursuant to the FC Yonkers Amended Operating Agreement. Pursuant to the terms of Article IV of the FC Yonkers Amended Operating Agreement, 100% of FC Yonkers's QEZE credit for real property taxes is allocated to F.C. Member. Since FC Yonkers's QEZE credit for real property taxes for the fiscal year February 1, 2008 through January 31, 2009 has been determined to be $7,131,310.00, petitioner is entitled to claim a refund of the QEZE credit for real property taxes passed through from FC Yonkers in the amount of $7,131,310.00 for the fiscal year February 1, 2008 through January 31, 2009.

K. The petition of Forest City Enterprises, Inc., is granted to the extent of Conclusions of Law H, I, and J; the Division is directed to issue a refund accordingly, but in all other respects the petition is denied.

DATED: Albany, New York
February 23, 2017

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE