

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOHN CIPOLLA : DETERMINATION
for Redetermination of a Deficiency or for Refund : DTA NO. 825961
of New York State Personal Income Tax under :
Article 22 of the Tax Law for the Year 2010. :

Petitioner, John Cipolla, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 2010.

A hearing was held before Arthur S. Bray, Administrative Law Judge, in Rochester, New York, on March 12, 2015 at 10:00 A.M., with all briefs due by May 4, 2015, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly disallowed petitioner's claim for a refund of personal income tax on the ground that he did not have an ownership interest in a firm that claimed the qualified empire zone enterprise real property tax credit.

FINDINGS OF FACT

1. On or about January 20, 2011, petitioner, John Cipolla, filed a form IT-203, Nonresident and Part-Year Resident Income Tax Return, for the year 2010, wherein he claimed a qualified empire zone enterprise (QEZE) credit for real property taxes in the amount of

\$11,606.00. The inclusion of the credit resulted in an overpayment and a claim for a refund of \$11,606.00.

2. In a letter dated March 21, 2011, the Division of Taxation (Division) advised petitioner, among other things, that before it could consider the refund claimed on the income tax return, petitioner would need to submit a copy of his federal schedule E. The Division also noted that it had not received a partnership return for the entity through which petitioner had claimed the credit. Consequently, the Division could not verify, at that time, the QEZE credit claimed on the return. The letter pointed out that the inability to verify the QEZE credit might also result in a delay in the processing of the return.

3. On April 8, 2011, Niagara & Ontario Plaza (Niagara & Ontario) filed an IT-204, Partnership Return, for the year 2010 claiming a QEZE Credit for Real Property Taxes in the amount of \$56,308.00 for the period ending December 31, 2010. According to the return, the partners of Niagara & Ontario included an S-corporation, 81 and 3 of Florida, Inc. (81 and 3), with a 99 percent ownership interest, and a corporation with a 1 percent ownership interest. The Division conducted an audit of the QEZE credit that included a review of the tax bills and employee's information. Following its review, the credit was adjusted to \$54,577.00.

4. 81 and 3 filed a form CT-3-S, New York S Corporation Franchise Tax Return, for the fiscal year ending December 31, 2010. Schedule B of the return, which asks for a list of the shareholders' identifying information, named four shareholders and the corresponding percentages of ownership as follows:

Shareholder	Percentage of Ownership
Joseph A. Cipolla	0.333333
Penny D. Cipolla	0.333333

John Cipolla	0
Mary Ripper	0.333333

5. 81 and 3 also filed a Form 1120S, U.S. Income Tax Return for an S Corporation, for the year 2010. The schedules K-1, included with the return, reported that petitioner did not have any percentage of the stock ownership for the tax year. However, each of the remaining shareholders was reported to have a stock ownership interest of 33.333 percent.

6. On April 4, 2012, the Division issued a Notice of Disallowance to petitioner, which advised that the Division was disallowing the claim for a refund because petitioner's share of the ownership in 81 and 3 was zero percent according to the 2010 New York S Corporation CT-34-SH Form filed by 81 and 3.

7. 81 and 3 began its operations as a closely-held firm that engaged in developing real estate. It also acted as a holding company for other entities. Prior to 2010, there were four shareholders of 81 and 3 consisting of petitioner and petitioner's sister, brother and stepmother. Each shareholder owned 25 percent of the firm.

8. Petitioner received an undated email from the attorney for 81 and 3 asking petitioner to sign an agreement that proposed that he surrender his stock in 81 and 3 in exchange for the termination of any personal obligation to the firm. The email noted that petitioner's father informed the attorney that, upon signing the agreement, petitioner would have no further obligation on any other loan. The email was accompanied by a Share Surrender Agreement, bearing an unspecified date in July 2010, stating that petitioner owned 25 shares of common stock of the company and that this constituted 25 percent of the issued and outstanding stock of the company as of the closing date. Petitioner has refused to sign the Share Surrender Agreement without an accounting.

9. In December 2010, petitioner commenced a proceeding in the Supreme Court, Erie County, for poor person relief and an accounting. Petitioner alleged that he has a good cause of action based upon the fact that he is an officer and 25 percent shareholder of 81 and 3 and that the defendants breached their fiduciary duty by not providing an accounting or financial records. In an order dated December 22, 2010, the motion was denied on the grounds that petitioner failed to make,

- “1. A sufficient showing of a meritorious cause of action/defense and/or
2. A sufficient showing of indigence. . . .”

10. At the hearing, petitioner presented one page of a Form 1040, Schedule E, for the year 2010 reporting that he had an interest in 81 and 3. According to the Schedule E, petitioner received nonpassive income of \$86,000.00 and a nonpassive loss of \$60,000.00 for a total income of \$26,000.00.

CONCLUSIONS OF LAW

A. Tax Law § 15(a) provides for a credit against personal income tax for eligible real property taxes paid on property owned by a qualified empire zone enterprise (QEZE). Petitioner claims that he is entitled to a portion of this credit, and the resulting refund, as a stockholder of 81 and 3, which, in turn, is a partner of the QEZE, Niagara & Ontario.

B. As set forth above, the Division denied petitioner’s claim for a refund because the S corporation tax return reported that petitioner did not have any interest in 81 and 3. At the hearing, petitioner maintained that he was a partner in 81 and 3 prior to 2010, that he continued to be a partner of 81 and 3 during the year in issue and that the remaining partners improperly reported that he did not have any interest in 81 and 3 in order to obtain a larger refund for themselves. In support of this position, he offered a series of documents. The first document

offered by petitioner is a schedule E that reports nonpassive income of \$86,000.00 and a nonpassive loss of \$60,000.00 for a total income of \$26,000.00. In contrast, the schedule K-1 that is a part of 81 and 3's income tax return does not show any income or loss for petitioner. In view of the fact that petitioner did not have access to the books of 81 and 3 and there is no information as to what the schedule E is based upon, it is concluded that there is no basis to give any weight to the schedule E offered by petitioner.

The email from 81 and 3's attorney and the unsigned Share Surrender Agreement arguably support an inference that there was a time when petitioner owned stock in 81 and 3. However, it is impossible to extrapolate from these unsigned documents that petitioner is entitled to a portion of the QEZE credit for real property tax for the year in issue.

Petitioner's reliance upon the court order in his proceeding for an accounting is misplaced. The statement on the first page of the order that petitioner is an officer and 25% share holder of 81 and 3 is merely an allegation by petitioner and not a factual finding by the court. Petitioner's position is further undermined by the court's conclusion that petitioner did not present a sufficient showing of a meritorious cause of action. In sum, petitioner has not satisfied his burden of proof of showing that he is entitled to the QEZE credit for real property taxes (Tax Law § 689[e]).

C. The petition of John E. Cipolla is denied and the Notice of Disallowance, dated April 4, 2012, is sustained.

DATED: Albany, New York
October 29, 2015

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE