STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	DETERMINATION
		DTA NOS.
JOHN C. ROUSE AND KAREN S. ROUSE	:	826194, 826318,
JONATHON R. O'SHEA		826319,826320
KEVIN C. O'SHEA AND THERESA S. O'SHEA	:	AND 826321
NICHOLAS JACOMIDES AND VASSO JACOMIDES		
WILLIAM N. GLAUDE AND DAWN M. RYAN-GAUDE	:	
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2008, 2009 and 2010.	:	

Petitioners, John C. Rouse and Karen S. Rouse, Jonathon R. O'Shea, Kevin C. O'Shea and Theresa S. O'Shea, Nicholas Jacomides and Vasso Jacomides, and William N. Glaude and Dawn M. Ryan-Glaude (collectively referred to herein as petitioners), filed petitions for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 2008, 2009 and 2010.

On April 13, 2015 and April 17, 2015, respectively, petitioners, appearing by Centolella, Lynn, D'Elia & Temes, LLC (Timothy Lynn, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Tobias A. Lake, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by October 2, 2015, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

I. Whether the payments made by World Logistics Group, Inc., during the years 2008, 2009 and 2010 to the Town of Bethlehem Industrial Development Agency constituted "eligible real property taxes" pursuant to Tax Law § 15(e).

II. Whether payments made by World Warehouse and Distribution, Inc., during the years 2008, 2009 and 2010 to the County of Clinton Industrial Development Agency constituted "eligible real property taxes" pursuant to Tax Law § 15(e).

FINDINGS OF FACT

The parties entered into a stipulation of facts, dated July 16, 2015, which has been incorporated into the findings of fact set forth below.

1. Selkirk Ventures, LLC (Selkirk) was a New York limited liability company and was the owner of real property located at 158 West Yard Road, Bethlehem, New York (the Bethlehem property) during the years 2008, 2009 and 2010 (audit period).

2. 21 Lawrence Paquette, Inc. (Lawrence) was a corporation authorized to do business in the State of New York and was the owner of real property located at 21 Lawrence Paquette Industrial Drive, Champlain, Clinton County, New York (Clinton County property) during the audit period.

3. World Logistics Group, Inc. (WLG) was a corporation authorized to do business in the State of New York. Petitioners are all shareholders, or spouses of shareholders, of WLG.

4. World Warehouse and Distribution, Inc. (WWD) was a corporation authorized to do business in the State of New York. Petitioners were all shareholders, or spouses of shareholders, of WWD.

5. Both WLG and WWD were qualified empire zone enterprises (QEZEs) during the audit period, with their QEZE certifications in effect at all times.

The Bethlehem Property

6. On or about May 14, 2002, Selkirk, as the owner of the Bethlehem property, entered into a payment in lieu of tax agreement (Bethlehem PILOT Agreement) with the Town of Bethlehem Industrial Development Agency (Bethlehem IDA).

7. The then-current lessee of the Bethlehem property, Daisytek, Inc. (Daisytek), was a signatory to the Bethlehem PILOT Agreement.

8. Pursuant to the Bethlehem PILOT Agreement, the Bethlehem property was exempt from real property taxation pursuant to section 412-a of the Real Property Tax Law, but certain PILOT payments were required.

9. In or around March, 2004, Daisytek vacated the Bethlehem property.

10. On or about January 12, 2007, Selkirk entered into a lease agreement for the Bethlehem property with WLG.

11. A first amendment to the lease agreement between Selkirk and WLG was entered into on or about May 8, 2007.

12. A second amendment to the lease agreement between Selkirk and WLG was entered into on or about September 1, 2007.

13. A third amendment to the lease agreement between Selkirk and WLG was entered into on or about June 1, 2008.

14. Pursuant to the lease agreement between Selkirk and WLG, as amended, WLG was responsible for making direct payment of PILOT payments owed on the Bethlehem property for the relevant years.

15. Beginning in 2008 and continuing for the years 2009 and 2010, WLG made PILOT payments owed for the Bethlehem property directly to the relevant taxing authorities.

The Clinton County Property

16. On or about August 1, 1995, Champlain Buffalo Distribution Warehouse Group, LLC (Buffalo Distribution), entered into a PILOT agreement with the County of Clinton Industrial Development Agency (Clinton County IDA) related to the Clinton County property (Clinton County PILOT Agreement).

17. Pursuant to the Clinton County PILOT Agreement, the Clinton County property was exempt from real property taxation pursuant to section 412-a of the Real Property Tax Law, but certain PILOT payments were required.

18. On or about July 1, 1999, Buffalo Distribution entered into a lease agreement for the Clinton County property with Air Express International USA, Inc., d/b/a DHI Danzas Air & Ocean (Air Express).

19. On or about January 20, 2005, Buffalo Distribution and Air Express entered into a consent to sublease agreement whereby Air Express was permitted to sublease the Clinton County property to WWD.

20. On or about January 20, 2005, Air Express began subleasing the Clinton County property to WWD.

21. At some point in time after August 1, 1995, but before January 20, 2005, title to the Clinton County property was conveyed from the Clinton County IDA to Buffalo Distribution.

22. At some point in time after January 20, 2005, but before January 1, 2008, title to the Clinton County property was conveyed from Buffalo Distribution to Lawrence.

23. When the Clinton County property was conveyed to Lawrence, Lawrence and WWD agreed that WWD would continue to occupy the Clinton County property as a tenant, and would be subject to the provisions of the July 1, 1999 lease agreement between Buffalo Distribution and Air Express as if Lawrence and WWD were signatories to that agreement.

24. A lease amendment agreement was entered into between Lawrence and WWD effective August 22, 2007. Pursuant to the lease amendment, WWD was responsible for making direct payment of PILOT payments owed on the Clinton County property to the Clinton County IDA for the audit period.

25. On or about May 15, 2009, Lawrence and WWD entered into a new lease agreement for the Clinton County property. Pursuant to the lease amendment, WWD was responsible for making direct payment of PILOT payments owed on the Clinton County property to the Clinton County IDA for the audit period.

26. Beginning in 2008 and continuing for the years 2009 and 2010, WWD made PILOT payments owed for the Clinton County property directly to the relevant taxing authorities.

The Dispute

27. For each of the relevant tax years, WLG claimed the QEZE real property tax credit (RPTC) for the amounts paid to the relevant taxing authorities for the Bethlehem property. These amounts were allocated to, and claimed by, the various petitioners as the shareholders of WLG.

28. For each of the relevant tax years, WWD claimed the RPTC for the amounts paid to the relevant taxing authorities for the Clinton County property. These amounts were allocated to, and claimed by, the various petitioners as the stockholders of WWD.

29. The Division ultimately disallowed each of the petitioners' claims for the RPTC as they related to both the Bethlehem property and the Clinton County property, and issued notices of deficiency, dated December 22, 2011, to petitioners for the relevant tax years. The following chart illustrates the amounts asserted by the Division in the notices of deficiency, plus interest, which were paid by petitioners and for which a refund is being sought:

Petitioner	**Notice Number**	**Year**	**Tax and Interest (Paid by Petitioners)**
Kevin and Theresa O'Shea	L-037072743-7	2008	$45,626.94
	L-037072745-5	2009	$21,893.38
	L-037072735-5	2010	$44,994.73
John and Karen Rouse	L-037072738-2	2008	$45,230.95
	L-037072742-8	2009	$46,477.25
	L-037072740-1	2010	$29,850.59
William Glaude and Dawn Ryan-Glaude	L-037072741-9	2008	$45,231.19
	L-037072736-4	2009	$46,741.01
	L-037072737-3	2010	$32,115.99
Nicholas and Vasso Jacomides	L-037072733-7	2008	$46,478.93
	L-037072739-1	2009	$45,230.86
	L-037072746-4	2010	$30,255.20
Jonathon O'Shea	L-037072744-6	2009	$25,337.81
	L-037072734-6	2010	$25,925.78

30. Each of the petitioners herein made a claim for refund of the taxes they paid as set forth in the chart in Finding of Fact 29. By letters to petitioners dated February 20, 2014, the

Division denied the refund requests, stating in each letter that petitioners had not submitted satisfactory evidence to support a finding that either WWD or WLG had made payments in lieu of taxes pursuant to an agreement between those corporations and the State, a municipal corporation or public benefit corporation requiring the corporations to make such payment.

31. Only the Division placed any evidence in the record with respect to the recalculation of petitioners' QEZE tax reduction credit. The Division employee who reviewed the calculations, Mr. Fred Houser, in a sworn affidavit, concluded that those recalculations were correct, based on his extensive history with the QEZE program, his personal knowledge of the Division's policies and procedures and his careful review of the Division's records in these matters.

SUMMARY OF THE PARTIES' POSITIONS

32. Petitioners contend that WLG and WWD were successor tenants to Daisytek and Air Express, respectively, made PILOT payments directly to the relevant taxing authorities, and were effectively parties to the PILOT agreements such that they are entitled to the RPTC.

33. The Division argues that both WLG and WWD were lessees, and not signatories or parties to a PILOT agreement, and therefore, as a matter of law, neither they nor petitioners were eligible for the RPTC.

34. Petitioners and the Division disagree on the calculation of the QEZE tax reduction credit (TRC) and the amount of that credit to which petitioners may be entitled. The TRC amount in dispute is included within amounts set forth in the chart contained in Finding of Fact 29.

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. Tax Law § 16 provides for the QEZE tax reduction credit against corporate and personal income taxes of a QEZE and shareholders of New York Subchapter S corporations that are QEZEs.

B. This matter involves whether PILOT payments made by WLG and WWD 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 in 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 [3rd Dept 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 [3rd Dept 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 [3rd Dept 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 [3rd Dept 2009]).

D. The issue in this case, i.e, the eligibility of certain real property tax payments made pursuant to a lease, was 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 qualified only if such payments were made pursuant to a written agreement between the QEZE and the taxing governmental bodies. 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])."

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). 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. Notably, 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 [3rd Dept 2006]).

Similarly, the record in the instant matter lacks a written agreement between WLD and WWD and either a taxing jurisdiction or a public benefit corporation that required them to remit payments in lieu of taxes. WLD's and WWD's obligation to make PILOT payments arose from their leases and not from direct participation in the PILOT agreements. Thus, WLD's and WWD's payments did not constitute eligible real property taxes under Tax Law § 15(e).

Petitioners' argument that WLG and WWD were directly liable for payment of the taxes is not persuasive, despite the cases cited, which indicate nonsignatories could be so held. As noted by the Division, even though WLG and WWD may have been obligated to make the PILOT payments, their obligation to do so was pursuant to the provisions of their lease agreements with Selkirk, Air Express and Lawrence. It remains that they were never parties to, or obligated by, the PILOT agreements. Therefore, the clear statutory provisions requires denying petitioners' requests for the credits (***Golub***).

E. Petitioners' primary argument is that WLD and WWD were direct obligors to the IDAs with respect to the PILOT payments, distinguishing them from ***Golub***. They maintain that their case is similar to and controlled by ***Matter of Bombardier Mass Transit Corporation*** (Tax Appeals Tribunal, June 7, 2012) and ***Matter of Falso*** (Tax Appeals Tribunal, May 23, 2013). An analysis of these two decisions does not support petitioners' conclusions drawn therefrom.

First, neither WLD nor WWD was a party or a signatory to the PILOT Agreement giving rise to the PILOT payment obligation. The companies may have had a contractual obligation to make the PILOT or other real estate tax payments, but that obligation was pursuant to the terms of their leases, and not a PILOT agreement. The IDAs involved were neither parties nor signatories to the leases, and the relevant language in those documents does not give the IDAs any rights of enforcement directly against the companies. Hence, petitioners' argument that the companies were directly obligated to the IDA is not supported by the documents in the record.

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. In the instant matter, there is no such document signed by WLG or WWD, the IDA and other relevant parties. 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 that this factor was clearly an important consideration of the Tribunal in reaching its conclusion that the requirements of Tax Law § 15(e) were not met. Petitioners argue that their case is different from ***Golub*** as no such opt-out clause was present in the leases and WLD and WWD 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 the 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 missing here also.

G. 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 decisions 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 not signed by the IDA, and not a PILOT agreement. The lease provision for payment of taxes obligation does not satisfy the statutory requirement of Tax Law § 15(e) and the credits were properly disallowed by the Division.

H. In their stipulation of facts, the parties stated that there was a dispute with regard to the calculation of the tax reduction credit pursuant to Tax Law § 16. Only the Division submitted proof on this issue by way of the affidavit of Mr. Fred Houser, which, based on his experience, personal knowledge and careful review of the Division's records relating to the calculation of the TRC, is deemed credible and deserving of substantial weight. Therefore, it is concluded that the calculation of the TRC was proper and no modification of the notices of deficiency is warranted.

I. The petitions of John C. Rouse and Karen S. Rouse, Jonathon R. O'Shea, Kevin C. O'Shea and Theresa S. O'Shea, Nicholas Jacomides and Vasso Jacomides and William N. Glaude and Dawn M. Ryan-Glaude are denied and the refund denials, dated February 20, 2014, are sustained.

DATED: Albany, New York
March 17, 2016

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE