STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ZVIKA KLEPAR & NOURIT HOUMINER	:	
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 2010.	:	
In the Matter of the Petitions	:	
of	:	
ISRAEL & DORIT CARMEL	:	DETERMINATION
for Redetermination of Deficiencies or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Years 2010 and 2011.	:	DTA NOS. 826524, 826525, 826526, 826646 AND 826647
In the Matter of the Petitions	:	
of	:	
SHARONE BEN-HAROSH	:	
for Redetermination of Deficiencies or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Years 2010 and 2011.	:	

Petitioners Zvika Klepar and Nourit Houminer filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under

Article 22 of the Tax Law and the New York City Administrative Code for the year 2010.

Petitioners Israel and Dorit Carmel filed petitions for redetermination of deficiencies or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 2010 and 2011.

Petitioner Sharone Ben-Harosh filed petitions for redetermination of deficiencies or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 2010 and 2011.

A consolidated hearing was held before Kevin R. Law, Administrative Law Judge, in New York, New York, on November 12, 2015, with all briefs due by March 9, 2015, which date began the six-month period for issuance of this determination. Petitioners appeared by David J. Hehn, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Tobias Lake, Esq., of counsel).

ISSUE

Whether the Division of Taxation (Division) properly disallowed the qualified empire zone enterprise (QEZE) real property tax credit claimed by Flat Rate Movers, Ltd., as lessee of real property, because it did not pay the property tax directly to the taxing authority.

FINDINGS OF FACT

1. During the period in issue, Flat Rate Movers, Ltd., (Flat Rate), was a New York S corporation certified as a QEZE owned by Zvika Klepar and Nourit Houminer, Israel and Dorit Carmel, and Sharone Ben-Harosh (collectively petitioners). The record does not disclose the percentage of ownership that each petitioner held in Flat Rate.

2. Flat Rate operated a moving business. It leased property from 27 Bruckner Blvd., Inc., (Bruckner, Inc.) located at 27 Bruckner Blvd., Bronx, New York (27 Bruckner Blvd) pursuant to

a lease agreement dated April 12, 2007.

3. Pursuant to the terms of the lease agreement between Flat Rate and Bruckner, Inc., in addition to the annual rent, Flat Rate was obligated to pay all the operating expenses of 27 Bruckner Blvd, including real estate taxes. Specifically, with regard to real estate taxes, the lease agreement provided:

> "[Flat Rate] shall pay each installment of taxes upon receipt of bills therefor, prior to the date on which the same become delinquent, provided, however, that if [Bruckner, Inc.] is required to deposit monthly installments of Taxes into a tax impound, escrow or reserve account ('Tax Reserve') pursuant to the terms of any first mortgage on the Premises ('Mortgage'), then [Flat Rate] shall pay on the first day of each month the amount of each installment, and such funds shall be used to pay Taxes as provided in the Mortgage. If the holder of the Mortgage ('Lender') releases funds from the Tax Reserve which are in excess of the amount required to pay Taxes, such funds shall be returned to [Flat Rate]."

4. David Hehn, petitioners' representative, testified at the November 12, 2015 hearing in this matter. According to Mr. Hehn, the petitioners herein also owned Bruckner, Inc. The record does not disclose the percentage of ownership each petitioner held in Bruckner, Inc.

5. 27 Bruckner Blvd was encumbered by a mortgage. According to the terms of the mortgage, the mortgagor, Bruckner, Inc., was required, among other things, to pay all taxes and operating expenses on the mortgaged premises. Consistent with the lease agreement and the mortgage on 27 Bruckner Blvd, Mr. Hehn acknowledged that the real estate taxes on 27 Bruckner Blvd were paid out of Bruckner, Inc.'s, escrow account.

6. Flat Rate and Bruckner, Inc., had the same computer system and the same accountant, the representative herein, Mr. Hehn. Mr. Hehn stated that Flat Rate and Bruckner, Inc., were alter egos of each other. Mr. Hehn testified that Flat Rate was a guarantor of the Bruckner, Inc., mortgage loan on 27 Bruckner Blvd. The mortgage document contained in the hearing record does not establish that fact although the rents from the lease with Flat Rate were pledged as

security on the loan pursuant to the terms of the mortgage.

7. Following a desk audit of QEZE tax credits claimed on each of the petitioners' respective New York State personal income tax returns, the Division issued notices of deficiency to each of the petitioners that disallowed the QEZE credit for real property taxes claimed for the 2010 year. A Notice of Deficiency was also issued petitioner Sharone Ben-Harosh disallowing the QEZE credit for real property taxes for the 2011 tax year. Petitioners Zvika Klepar and Nourit Houminer and Israel and Dorit Carmel,[1] were not assessed deficiencies for the 2011 tax year. Each of the notices of deficiency also made audit adjustments to the Empire Zone wage tax credits claimed by petitioners; these credits have subsequently been allowed and are not at issue in this proceeding. Penalties were not assessed, with the exception of the notice issued to Sharone Ben-Harosh for 2011,which did assess penalties.

CONCLUSIONS OF LAW

A. Tax Law § 15 allows a qualified enterprise zone enterprise (QEZE) a credit for "eligible real property taxes." Petitioners, as shareholders of Flat Rate, a New York S corporation that is a QEZE, claimed credits for real property taxes paid by Flat Rate pursuant to the terms of its lease with Bruckner Inc. The gravamen of the instant matter is whether these tax payments constituted eligible real property taxes. As is relevant here, Tax Law § 15(e) provides that:

> "'[E]ligible 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

[1]Petitioners Israel and Dorit Carmel originally filed petitions for the 2010 and 2011 tax years. At the November 12, 2015 hearing in this matter, it was clarified that neither a notice of deficiency nor a refund denial for the year 2011 was ever issued.

> 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."

B. A tax credit is a particularized species of exemption from tax (***Matter of New York Fuel Terminal Corp.***, Tax Appeals Tribunal, August 27, 1998). Statutes creating exemptions from tax are to be strictly construed (***see Matter of Grace v. New York State Tax Commn***., 37 NY2d 193, [1975], ***lv denied*** 37 NY2d 708 [1975]; ***Matter of Blue Spruce Farms v. New York State Tax Commn***., 99 AD2d 867 [1984], ***affd*** 64 NY2d 682 [1984]). Tax credits "[are] not a matter of right, but [are] allowed only as a matter of legislative grace" (***Matter of Grace v New York State Tax Commn.***, 37 NY2d 193, 196 [1975]). In order for petitioners to establish their entitlement to the credit, they must show that their "interpretation of the statute is not only plausible, but also that it is the only reasonable construction" (***Matter of Moran Towing & Transp. Co. v. New York State Tax Commn.***, 72 NY2d 166, 173 [1988]; ***Matter of CBS Corp. v. Tax Appeals Trib. of State of NY***, 56 AD3d 908, 909-910, [2008], ***lv. denied*** 12 NY3d 703 [2009]).

C. In this case, petitioners have not demonstrated entitlement to the credit. While Flat Rate was required to pay taxes, those payments took the form of rent and not direct payments to the taxing authority; the taxes were paid out of the landlord/mortgagor's escrow account pursuant to terms of the mortgage. Under the terms of the mortgage, Bruckner, Inc., was required to pay real property taxes with such taxes coming out of its escrow account. Petitioners, in their brief, acknowledge as much. In that same vein, the record fails to contain a receipt from the taxing authority indicating tax paid by Flat Rate. Although granting petitioners the credit appears to be an equitable result, petitioners' entitlement to the credits depends on application of the statute (***Matter of Golub Corp. v. Tax Appeals Tribunal***, 116 AD3d 1261[2014]). The plain wording of

the statute precludes petitioners from obtaining the credits they seek.

D. Petitioners, while acknowledging that Flat Rate did not pay taxes directly to the taxing authority, rely upon ***Gartner v. Snyder*** (607 F2d 582, 586 [2d Cir 1979]), to allege that Bruckner Inc., and Flat Rate were alter egos of one another such that Bruckner Inc.'s tax payments should allow Flat Rate to be eligible for the credit and consequently petitioners. In ***Gartner v. Snyder*** the Court stated:

> "New York courts disregard corporate form reluctantly, they do so only when the form has been used to achieve fraud, or when the corporation has been so dominated by an individual or another corporation (usually a parent corporation), and its separate identity so disregarded, that it primarily transacted the dominator's business rather than its own and can be called the other's alter ego."

Use of this theory herein fails both legally and factually. Here, there has been no such showing that the two entities acted as if one. While there is some commonality between the two entities, the record is so sparse that a detailed analysis of whether the corporate lines between the two entities were so blurred that they should be treated as one, is impossible. Second, there is simply no legal authority to disregard the separate legal structure of the two entities that petitioners presumably created. As stated by the Court in ***Dodd v. Commissioner of Internal Revenue*** (298 F2d 570, 577 [4th Cir 1962]), "[i]t is well established that if a taxpayer has voluntarily created a corporation to suit his or its own purposes, such taxpayer may not ignore and disregard the corporate entity when to do so would result in an otherwise unavailable tax benefit."

E. The petitions of Zvika Klepar and Nourit Houminer, Israel and Dorit Carmel, and Sharone Ben-Harosh are denied, and the notices of deficiency as modified by agreement of the parties (***see*** Finding of Fact 7) are sustained.

DATED: Albany, New York
September 1, 2016

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE