STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

WILLIAM J. JONES :

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. :

In the Matter of the Petition :

of :

JOSEPH A. PETRELLA :

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. :

In the Matter of the Petition :

of :

DOUGLAS G. SWIFT :

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. :

In the Matter of the Petition :

of :

HOWARD A. ZEMSKY :

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. :

DETERMINATION
DTA NOS. 826618, 826619,
826620 AND 827773

Petitioners, William J. Jones, Joseph A. Petrella, Douglas G. Swift and Howard A. Zemsky, filed petitions for redetermination of deficiencies or for refunds of New York State personal income tax under Article 22 of the Tax Law for the year 2010.

Petitioners, appearing by McConville, Considine, Cooman & Morin, PC (Kevin S. Cooman, Esq., and Edward C. Daniel, III, Esq., of counsel), brought motions dated March 24, 2017, for summary determination in the above-referenced matters pursuant to sections 3000.5 and 3000.9(b) of the Tax Appeals Tribunal's Rules of Practice and Procedure. The Division of Taxation, by its representative, Amanda Hiller, Esq. (Tobias A. Lake, Esq., of counsel), filed responses to petitioners' motions on May 15, 2017. Petitioners filed replies on June 16, 2017, the date from which the 90-day period for the issuance of this determination began. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly disallowed a portion of the QEZE real property tax credits claimed by petitioners for the year 2010.

FINDINGS OF FACT

1. Petitioners William J. Jones, Joseph A. Petrella, Douglas G. Swift and Howard A. Zemsky were members of 598 Main Street, LLC (the LLC).

2. The LLC was formed on February 22, 2000 and was certified as a Qualified Empire Zone Enterprise (QEZE) with an effective date of February 28, 2002, pursuant to Article 18-B of the General Municipal Law.

3. The LLC operates the following parcels of real property in the City of Buffalo that are relevant to this proceeding: (i) 598 Main Street; (ii) 421 Pearl Street; (iii) 618 Main Street; (iv)

425 Pearl Street; (v) 726 Exchange Street; (vi) 796 Exchange Street; (vii)105 Hydraulic Street; and (viii) 211 Van Rensselaer Street (the Properties).

4. The LLC directly owns 598 Main Street, 421 Pearl Street, 618 Main Street and 425 Pearl Street. 726 Exchange Street, 796 Exchange Street, 105 Hydraulic Street and 211 Van Rensselaer Street are owned and operated through LCO Building, LLC, a wholly-owned limited liability company of the LLC. The LLC is the sole member of LCO Building, LLC.

5. Petitioners Jones, Petrella, Swift and Zemsky are all members of the LLC owning 1%, 1%, 24% and 69%, respectively. Another entity not a party to this proceeding owns the remaining 5% member interest in the LLC.

6. The Buffalo Sewer Authority (BSA) is a public benefit corporation created in 1935 by an Act of the New York State Legislature. The BSA is managed by a five-member board appointed by the Mayor of the City of Buffalo, subject to confirmation by the Common Council. The BSA provides sewage collection, treatment and disposal services for the City of Buffalo and neighboring communities.

7. The purposes, authority and powers of the BSA are set forth in the Public Authorities Law §§ 1175 through 1195.

8. In performing its responsibility to construct and operate a sewer system, the BSA performs an "essential governmental function" for the "improvement of [the people's] health, welfare and prosperity" (Public Authorities Law § 1177[3]).

9. Among the powers granted to the BSA by its enabling legislation is the authority to establish "sewer rents to be collected from all real property to be served by its facilities" (Public Authorities Law § 1180).

10. On May 26, 2010, the BSA adopted by resolution a "Final Schedule of Sewer Rents and Other Charges for 2010-2011" (Final Schedule).

11. The Final Schedule provided for two distinct types of Sewer Rents for properties situated within the limits of the City of Buffalo: “Part l a Sewer Rents” and “Part 1b Sewer Rents.” The Part l a and Part 1b nomenclature is used because those are the paragraph numbers of the BSA's Final Schedule in which the two types of Sewer Rent are established.

12. Both the BSA's 2009-10 Report and the BSA's 2010-11 Report describe the distinction between Part l a and Part 1b Sewer Rents using identical language, as follows:

> “The Authority's primary source of revenues is derived from sewer rents. There are two types of sewer rents. Sewer rents based on assessed valuation of real estate [i.e., Part la rents] and the other based on the use of water [i.e., Part 1b rents]. All real property, both developed and undeveloped, must pay the sewer rent based on assessed valuation.”

13. Part l a Sewer Rents for the 2009-2010 fiscal year were approved so as to collect a total of $12,050,000.00 from “all real property in the City of Buffalo by apportioning the said amount upon such property within the City as the same is set down on the last completed annual assessment roll of the City.”

14. As described by BSA management in the 2009-10 Report:

> “The levy of Sewer Rents based on assessed value [i.e., the Part l a sewer rents] will again remain $12,050,000 for the 2010-11 budget. This represents the amount of Sewer Rent that the Authority will collect from all real property in the City of Buffalo except those properties exempt by law. This amount, when spread over the total estimated assessment for sewer purposes from the Department of Assessment, will result in an annual sewer rent of $1.69730309 for each $1000 of assessed valuation.”

15. The Part l a Sewer Rents were collected by the City of Buffalo assessor on behalf of the BSA for the fiscal year July 1, 2010 through June 30, 2011, and invoiced as a separate line item on City of Buffalo tax bills, dated July 1, 2010, for each of the eight Properties, along with the City of Buffalo taxes (Tax Bills).

16. The Part la Sewer Rents were calculated and charged to the Properties by using the same assessment roll as was utilized by the City of Buffalo Assessor for imposition of the City's real property taxes.

17. The cumulative total of Part la Sewer Rents for the Properties amounted to $73,353.38.

18. The Tax Bills received for the Properties were all paid in full to the City of Buffalo in September 2010 by the LLC. The payment included payment in full of the Part la Sewer Rents assessed on the Tax Bills, which were due on or before September 30, 2010.

19. On its 2010 Form IT-606 Claim for QEZE Credit for Real Property Tax, the LLC claimed eligible real property taxes of $182,875.73, of which $73,353.38 represented the Part la Sewer Rents. On Part 1 Section D line 21 of the IT-206, the LLC reported that the QEZE credit for real property tax (the credit) was limited to $150,000.00.[1]

20. Because the LLC elected to be treated as a partnership for federal and state income tax purposes, its items of income, loss, deduction and credit passed through to petitioners and were reported on petitioners' income tax returns for the year at issue.

21. On their individual New York State income tax returns for the 2010 tax year each of the petitioners claimed the credit for their allocated shares of the taxes paid with respect to the Properties.

22. The second Part 1b type of Sewer Rents is a consumption charge based on the metered use of water (or a flat rate or minimum charge) at each specific property within the City of Buffalo that discharges waste water into the BSA's system. The Part 1b portion of the Sewer

[1]The affidavit of Gray Kriner, which was submitted as part of petitioners' motion papers, explains that the $150,000.00 limitation was erroneously reported. Although the affidavit does not elaborate on or explain the error, it is noted that for an entity certified as a QEZE prior to August 1, 2002 the amount of QEZE real property tax credit was not subject to a credit limitation (***see*** Tax Law § 15[f]). As noted in Finding of Fact 2, the LLC was certified as a QEZE on February 28, 2002.

Rents is explained by the BSA in its 2009-10 Report and 2010-11 Report using identical language, as follows:

> "Sewer rents based on water use are billed as flat rate or metered accounts. Flat rate sewer rents continue to be charged based on property characteristics (i.e., number of stories, front footage, etc.). There will be no increases to those charges. The sewer rent meter charges will continue at the same rate of $11.09 per 1000 cubit feet. All flat and metered accounts will continue to be assessed a capacity/drainage charge at a minimum of $6.00 per month."

23. Unlike the Part la Sewer Rents, the Part 1b Sewer Rents are billed by the Buffalo Water Board on quarterly invoices. These quarterly invoices show the water meter readings at a particular property, and impose a charge for: (1) the water supply inflow to the property and (2) the Part 1b Sewer Rent for the waste water discharged to the BSA's system.

24. The Buffalo Water Board issued quarterly bills in 2010 with respect to each of the Properties (Water Bills).

25. Although the LLC paid the Water Bills for the Properties, no portion of the Part 1b Sewer Rents was claimed by the LLC or by on the petitioners as an eligible real property tax credit.

26. The Division of Taxation (Division) audited the LLC's claim for the credit, as well as each of petitioners' claims for the credit for the 2010 tax year with respect to the Properties.

27. When the Division concluded its audit, the Division disallowed that portion of petitioners' claims for the credit which was based on the Part la Sewer Rents paid for the Properties on the basis that the Part la Sewer Rents were "local benefits" in the nature of "special assessments" and, therefore, did not qualify as "eligible real property taxes" as defined in Tax Law § 15(e) for purposes of the Credit.

28. On July 30, 2014, the Division issued to petitioner Howard A. Zemsky a letter adjusting his claim for refund for the tax year 2010 (notice of disallowance). The July 30, 2014 notice of disallowance provided, in part, that:

> "We have adjusted your claim for QEZE credit for real property taxes for the above referenced period. After a review of the IT-606, Claim for QEZE Credit for Real Property Taxes, filed by 598 Main St, LLC; we have removed the claim for special assessments, 'Sewer Rent', from the claim for credit. It is the Department's position the special assessments are not eligible real property taxes and cannot be claimed for the QEZE credit for real property taxes. As a result we have reduced 598 Main St, LLC's claim of credit from $150,000 to $109,522; therefore your claim of credit has been reduced from $121,932 to $90,884."

29. On August 6, 2014, August 7, 2014 and September 3, 2014, the Division issued notices of deficiency to petitioners Douglas G. Swift, William J. Jones and Joseph A. Petrella, respectively. Each of the notices provided the following explanation, in pertinent part:

> "We have adjusted your claim for credit for real property taxes for [2010]. After a review of the IT-606, Claim for QEZE Credit for Real Property Taxes, filed by 598 Main St, LLC; we have removed the claim for special assessments, 'Sewer Rent', from the claim for credit. It is the Department's position that special assessments are not eligible real property taxes and cannot be claimed for the QEZE credit for real property taxes. As a result we have reduced 598 Main St, LLC's claim of credit from $150,000 to $109,522."

SUMMARY OF THE PARTIES' POSITIONS

30. Petitioners assert that the 1 a portion of the sewer rents charged by the BSA meet the definition of real property taxes contained in Tax Law § 15(e) and request that summary determination be granted in their favor as there are no material issues of fact. In addition, they claim a refund for the amount of real property tax credit not previously claimed stemming from the real property tax credit limitation reported in error on the LLC's IT-206.

31. The Division, in opposition, asserts that the sewer rents are in the nature of special assessments which do not qualify as eligible real property taxes for purposes of Tax Law § 15, and request that the Division of Tax Appeals grant summary determination in its favor pursuant to 3000.9(b)(1) of the Tax Appeals Tribunal's Rules of Practice and Procedure.

CONCLUSIONS OF LAW

A. A motion for summary determination "shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented" (20 NYCRR 3000.9[b][1]). Section 3000.9(c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (***Winegrad v. New York Univ. Med. Ctr***, 64 NY2d 851, 853 [1985], ***citing Zuckerman v. City of New York***, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (***Glick & Dolleck, Inc. v. Tri-Pac Export Corp.***, 22 NY2d 439, 441 [1968]; ***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***Gerard v. Inglese***, 11 AD2d 381 [2d Dept 1960]).

B. Tax Law § 15 allows for a credit against personal income taxes for a certified QEZE for eligible real property taxes. Tax Law § 15(b) provides that the amount of the credit shall be 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. At issue here is whether charges assessed by the BSA called sewer rents are "eligible real property taxes" as defined in Tax Law § 15(e). Tax Law § 15(e) provides:

> "For purposes of this subdivision, the term "tax" means a charge imposed upon real property by or on behalf of a county, city, town, village or school district for municipal or school district purposes, provided that the charge is levied for the

> general public welfare by the proper taxing authorities at a like rate against all property in the territory over which such authorities have jurisdiction, and provided that where taxes are levied pursuant to article eighteen or article nineteen of the real property tax law, the property must have been taxed at the rate determined for the class in which it is contained, as provided by such article eighteen or nineteen, whichever is applicable. The term "tax" does not include a charge for local benefits, including any portion of that charge that is properly allocated to the costs attributable to maintenance or interest, when (1) the property subject to the charge is limited to the property that benefits from the charge, or (2) the amount of the charge is determined by the benefit to the property assessed, or (3) the improvement for which the charge is assessed tends to increase the property value."

C. Petitioners contend that the Sewer Rents qualify as taxes under Tax Law 15(e) because the sewer rents are: (i) charges upon real property; (ii) by or on behalf of the City of Buffalo; (iii) levied by the City of Buffalo for the public welfare; and (iv) at a like rate based upon assessed value. In this case, the sewer rents are not eligible real property taxes because they are not a charge upon real property by or on behalf of a county, city, town, village or school district for municipal or school district purposes. Although there can be no serious dispute that the 1a Sewer Rents are a charge upon real property (see Public Authorities Law § 1180) levied for the general public welfare (Public Authorities Law § 1177.3) and imposed at a like rate based upon real property tax assessment rolls, the sewer rents are not a tax because they are not charged by or on behalf of the City of Buffalo. Contrary to petitioners' arguments, the City of Buffalo does not assess or impose these charges, it merely collects them as agent for the BSA (***see*** Public Authorities Law § 1186). Second, the BSA is not the City of Buffalo nor is it an arm thereof. Rather, it is a separate body. The BSA has been given power to sue and be sued; to have its own seal; to make its own bylaws; to acquire real property in the name of the City of Buffalo; to acquire personal property for its own corporate purposes; to enter contracts and execute instruments necessary for its purposes; and to borrow money and issue negotiable bonds (***see*** Public Authorities Law § 1178). In addition, Public Authorities Law § 1178.14 bestows a broad grant of power upon the BSA to do all things necessary and convenient to carry out its purposes.

Furthermore, neither the City of Buffalo nor the State is liable on the bonds or on other obligations of the BSA which are all payable only out of BSA funds (***see*** Public Authorities Law § 1187). Moreover, the Buffalo Sewer Authority is not a "taxing jurisdiction" (***Watergate II Apartments v Buffalo Sewer Authority,*** 46 NY2d 52 [1978]). Petitioners' claim that the City of Buffalo imposes the sewer rents rather than the BSA, because the BSA does not have authority to impose the sewer rents but only set the rent schedule, is simply incorrect; Public Authorities Law § 1178(11) specifically gives the BSA the authority "[t]o fix and collect rates, rentals and other charges for goods or services rendered by the authority." Accordingly, it is determined that the part 1a sewer rents imposed by the BSA do not meet the definition of a tax under Tax Law § 15.

D. Regardless of whether the BSA qualifies as a taxing authority, the Sewer Rents still do not qualify as a tax under § 15 of the Tax Law because the sewer rents are a charge for local benefits. While Tax Law § 15(e) does not define "charge for local benefits" the term is used to describe charges for improvements to real property such as sidewalks and sewer systems (***see*** West's Tax Law Dictionary § C1180 [2017 ed]). For example, in ***Matter of Piccolo v Tax Appeals Tribunal*** (108 AD3d 107 [3rd Dept 2013]), the Third Department, in addressing the Division's disallowance of the QEZE real property tax credit for special assessments under Tax Law former § 15(e), opined that " . . . [c]ourts have long recognized that general exemptions from taxation do not include an exemption from special assessments for *local benefits* or improvements, thus indicating the different treatment of taxes versus special assessments." In this case, it is determined that the sewer rents are a charge for local benefits and are disqualified from being a tax under Tax Law § 15(e).

E. Having found the sewer rents in issue do not meet the definition of tax under Tax Law § 15(e), it is determined that the Division properly denied petitioners' claim for QEZE real

property tax credits with respect to the BSA charges for sewer rents and summary determination is rendered in the Division's favor pursuant to 3000.9(b)(1) of the Tax Appeals Tribunal's Rules of Practice and Procedure.

F. Petitioner' motion for summary determination is denied, the Division's cross-motion for summary determination is granted, the petitions of William J. Jones, Joseph A. Petrella, Douglas G. Swift and Howard A. Zemsky are denied, the August 6, 2014, August 7, 2014 and September 3, 2014 notices of deficiency are sustained, and the July 30, 2014 notice of disallowance is sustained.

DATED: Albany, New York
September 14, 2017

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE