

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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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. :

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In the Matter of the Petition :

of :

**JOSEPH A. PETRELLA** :

DETERMINATION  
DTA NOS. 826618, 826619  
AND 826620

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. :

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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. :

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Petitioners, William J. Jones, Joseph A. Petrella and Douglas G. Swift, 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.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Tobias A. Lake, Esq., of counsel), brought motions dated June 11, 2015 seeking an order dismissing the petitions, or in the alternative, summary determination in the above-referenced matters pursuant to sections 3000.5, 3000.9(a) and 3000.9(b) of the Tax Appeals Tribunal's Rules of Practice and Procedure. Petitioner, appearing by McConville, Considine, Cooman & Morin, PC (Edward C. Daniel, III, Esq., of counsel), filed responses to the Division of Taxation's motions on July 9, 2015, 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.

#### ***ISSUES***

Whether the Division of Taxation (Division) 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 and Douglas G. Swift, 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. 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.

4. In computing its QEZE credits for the year 2010, the LLC included charges incurred from the Buffalo Sewer Authority as part of its eligible real property taxes.

5. Upon audit of the LLC and petitioners, the Division disallowed the charges imposed by the Buffalo Sewer Authority in determining the amount of credit attributable to real property taxes.

6. 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:

“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.”

#### ***CONCLUSIONS OF LAW***

A. The Division has filed alternative motions, seeking dismissal under 20 NYCRR 3000.9(a), or summary determination under 20 NYCRR 3000.9(b). As the Division of Tax Appeals has subject matter jurisdiction in the instant matter, the Division’s motion will be treated as one for summary determination (*see Matter of Ali*, Tax Appeals Tribunal, January 22, 2015).

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]).

B. 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. Vil. 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])

C. 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 Buffalo Sewer Authority are “eligible real property taxes” as defined in Tax Law § 15.

D. As argued by the Division, the term eligible real property taxes does not include ad valorem levies and special assessments (*Matter of Stevenson v New York State Tax Appeals Trib.*, 106 AD3d 1146, 1148 [2013]). The question presented is whether the Buffalo Sewer Authority charges are taxes as claimed by petitioners or rather are ad valorem levies and special assessments. The Division did not introduce any direct evidence as to the nature of the Buffalo Sewer Authority charges; rather, it relies on the Court of Appeals holding in *Watergate II Apts. v. Buffalo Sewer Auth.* (46 NY2d 52 [1978]) where the Court specifically held that sewer rents

imposed by the Buffalo Sewer Authority are not taxes but instead constitute ad valorem levies or special assessments.

E. Petitioners have offered nothing to contradict this finding other than their representative's conclusory allegation that the charges imposed by the Buffalo Sewer Authority are taxes rather than fees. These statements are rejected. "To defeat a motion for summary judgment, the opponent must . . . produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim'" (*Whelan v. GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992] *citing Zuckerman*). Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (*Alvord & Swift v. Stewart M. Muller Constr. Co.*, 46 NY2d 276 [1978]).

F. The Division's motions for summary determination are granted, the notices of deficiency are sustained, and the petitions of William J. Jones, Joseph A. Petrella and Douglas G. Swift, are denied.

DATED: Albany, New York  
September 24, 2015

/s/ Kevin R. Law  
ADMINISTRATIVE LAW JUDGE