STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MATTHEW AND DONNA FELDMAN	:	DETERMINATION DTA NO. 826740
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.	:	

Petitioners, Matthew and Donna Feldman, 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 Herbert M. Friedman, Jr., Administrative Law Judge, in Rochester, New York, on February 29, 2016 at 10:30 A.M., with all briefs to be submitted by June 27, 2016, which date began the six-month period for the issuance of this determination. Petitioners appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Alejandro Taylor, Esq., of counsel).

ISSUE

Whether petitioners met their burden of proving entitlement to the solar energy equipment system tax credit pursuant to Tax Law § 606 (g-1) for tax year 2010 based on the installation of a ground source heat pump in their home.

FINDINGS OF FACT

1. Petitioners, Matthew and Donna Feldman, timely filed a New York State personal income tax return for the year 2010. In their return, petitioners claimed a tax credit in the amount

of $5,000.00 pursuant to Tax Law § 606 (g-1) for expenditures associated with solar energy system equipment installed in their primary residence.

2. The equipment for which petitioners claimed the credit was a ground source heat pump system, sometimes referred to as a geothermal heat pump system (system).

3. By letter of March 28, 2013, the Division of Taxation (Division) informed petitioners that their 2010 personal income tax return had been selected for review. In particular, the Division requested information regarding the claimed solar energy system equipment credit.

4. After its review of all materials provided, the Division issued Notice of Deficiency number L-040756747, dated April 2, 2014, to petitioners, asserting tax due in the amount of $5,000.00 plus interest in the amount of $1,244.76. The basis for the notice was the Division's disallowance of petitioners' claimed solar energy system equipment credit.

5. At the hearing in this matter, petitioners presented the testimony of Jens Ponikau, an accredited geothermal designer and installer, who described the system his company, Buffalo Geothermal Heating, designed and installed at petitioners' home in 2010. The system uses heat pumps to transfer heat from the ground into the house's radiant system through a series of underground pipes in order to heat the house and the home's water. Initially, to install the system, pipes were placed in trenches within 10 feet of the ground's surface. The ground acts as a medium, storing heat absorbed from solar radiation. A water and antifreeze mixture is circulated through the pipes in order to extract the heat from the ground. The mixture is sent through the ground loop exchanger (or heat exchanger) into the ground, where the temperature increases by five degrees. The mixture is then circulated back into the house, the five-degree

increase is extracted by the heat pump and the heat is concentrated through a method of compression, releasing it into the radiant system in the process.

6. The pump that circulates the water and antifreeze mixture through the pipes, the heat pump and the compressor require electricity to function, and they are attached to the power grid. The system cannot run without the pumps or compressor. The system's allure is that it is far more efficient at converting electricity into useable heat because the electricity is used to move heat, not generate it.

7. In general, the system reverses the cycle during the cooling season to cool the house. The system removes heat and humidity from the air in the house, and transfers that heat back into the earth through the same loop system. In cooling mode, the ground source heat pump does not derive energy from solar radiation. Petitioners' system was only designed for heating when installed in 2010, although it was subsequently adapted at increased cost to provide the cooling feature.

8. The record does not contain an itemized breakdown of petitioners' expenditures for the components or installation of the system.

9. The Legislature recently failed in an attempt to amend Tax Law § 606 to add a new geothermal energy system credit (2015 NY Senate-Assembly Bill S2905, A2177-A). The proposed legislation defined "geothermal energy system equipment" as a "ground coupled solar thermal system that utilizes the solar thermal energy stored in the ground or in bodies of water to produce heat, and which is commonly known as or referred to as a ground source heat pump system" (***id.***). The proposed legislation passed both houses of the Legislature but was vetoed by the governor on the grounds that "it is premature to provide incentives for geothermal energy

systems without fully appreciating how those incentives will fit within the State's broader policy frameworks" and that such incentive would have a "significant revenue impact" (Governor's Veto Jacket Collection, L 2015, Veto Message No. 251).

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioners maintain that they have established that the system is an arrangement or combination of components utilizing solar radiation to provide heating and hot water to their home. As a result, they assert that the system meets the plain language of Tax Law § 606 (g-1) and they are entitled to the full credit. They further maintain that the Division has failed to definitively demonstrate that the source of the electric power to the pumps and compressor is non-solar. Moreover, petitioners argue that the Legislature intentionally crafted a statute in 2005 that contemplated multiple technologies beyond electricity-generating photovoltaic panels.[1] Finally, petitioners state that even if the components requiring electricity were removed from the cost of the system, their expenditures would still qualify for the maximum tax credit.

11. The Division, on the other hand, maintains that the system is reliant on electrically powered pumps, and the clear language of the statute indicates that the Legislature wanted to exclude such solar energy system equipment from the credit. The Division also points to legislative history to support its position. Finally, the Division adds that the recent attempt to amend Tax Law § 606 (g-1) to specifically allow a credit for ground source heat pump systems demonstrates that they are not included under the existing version of the statute.

[1] Photovoltaic panels are more commonly known as solar panels.

CONCLUSIONS OF LAW

A. Tax Law § 606 (g-1) provides for a tax credit of 25 percent of qualified solar energy system equipment expenditures, not to exceed $5,000.00, for qualified solar energy equipment placed in service in a primary residence in New York on or after September 1, 2006. "Solar energy system equipment" is defined, in relevant part, as:

> "an arrangement or combination of components utilizing solar radiation, which, when installed in a residence, produces energy designed to provide heating, cooling, hot water or electricity for use in such residence. Such arrangement or components shall not include equipment connected to solar energy system equipment that is a component of part or parts of a non-solar energy system or which uses any sort of recreational facility or equipment as a storage medium" (Tax Law § 606 [g-1] [3]).

B. At issue is whether petitioners' system, installed in their home in 2010, is "solar energy system equipment" and, therefore, qualifies for the tax credit. "A tax credit is 'a particularized species of exemption from taxation'" (***Matter of Golub Serv. Sta. v. Tax Appeals Trib.***, 181 AD2d 216, 219 [1992] ***citing Matter of Grace v. State Tax Commn.***, 37 NY2d 193, 197 [1975]) and a taxpayer carries "the burden of showing 'a clearcut entitlement' to the statutory benefit" (***Matter of Golub Serv. Sta. v. Tax Appeals Trib.***, at 219 [citation omitted]). Additionally, deduction and exemption statutes must be strictly construed against the taxpayer ***(see e.g. Matter of 677 New Loudon Corp. v. State of N.Y. Tax Appeals Trib.***, 19 NY3d 1058 [2012], ***rearg denied*** 20 NY3d 1024 [2013] ***cert denied*** 571 US__, 134 S Ct 422 [2013]). A taxpayer is required to prove that "its interpretation of the statute is the only reasonable interpretation" (***Matter of Brooklyn Navy Yard Cogeneration Partners***, Tax Appeals Tribunal, May 9, 2006, ***confirmed*** 46 AD3d 1247 [2007], ***lv denied*** 10 NY3d 706 [2008]).

The rules of statutory construction require that a "statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent" (McKinney's Cons Laws of NY, Book 1, Statutes § 97). Where the language of a statute is unambiguous, the statute should be construed so as to give effect to the plain meaning of the words used (***New York State Assn. of Counties v. Axelrod***, 213 AD2d 18, 24 [1995]).

C. Applying the tenets of statutory construction and the applicable burden of proof to the case at bar, petitioners have not demonstrated that their interpretation of the statute is the only reasonable interpretation. On the contrary, the plain language of Tax Law § 606 (g-1) (3) points to the opposite conclusion. While it is true that petitioners' system provides heat and hot water utilizing energy obtained from solar radiation, the statute specifically and unambiguously excludes from the definition of "solar energy system equipment" an arrangement or components that include "equipment connected to solar energy system equipment that is a component of part or parts of a non-solar energy system . . . ." It is uncontroverted that petitioners' system has several components that are reliant on the electric grid, a non-solar energy system, to operate. Indeed, the record unequivocally shows that petitioners' system does not operate without electricity. To the extent that petitioners maintain that the aforementioned exclusion does not apply to them as the original source of the electric grid may be solar energy, they bear the burden on that point and have offered no evidence to support it (***see*** Tax Law § 689 [e]). In sum, under the plain language of the statute, petitioners' system does not qualify for the solar energy system equipment credit.

D. Furthermore, the Division's position is supported by the legislative history of Tax Law § 606 (g-1). When originally enacted in 1997, the statute only provided the credit for electricity-generating solar equipment such as photovoltaic panels (***see*** L 1997, ch 399). The statute was amended in 2005 to expand the credit to other solar energy equipment, but to exclude those systems using electricity or other non-solar components (***see*** L 2005, ch 378). The memorandum in support of the 2005 amendment clearly demonstrates that the Legislature intended the credit to apply to systems that "use no electricity from the power grid" (***see*** Introducer's Mem, Bill Jacket, L 2005, ch 378). As a result, petitioners' system is excluded.

E. The Division also correctly points to a recent proposed, but failed, amendment to Tax Law § 606, which attempted to add a new geothermal energy system credit that would have arguably applied to systems such as petitioners' (2015 NY Senate-Assembly Bill S2905, A2177-A). The proposed legislation defined "geothermal energy system equipment" as a "ground coupled solar thermal system that utilizes the solar thermal energy stored in the ground or in bodies of water to produce heat, and which is commonly known as or referred to as a ground source heat pump system" (***id***.). Ultimately, the proposed legislation was vetoed by the governor as "it is premature to provide incentives for geothermal energy systems without fully appreciating how those incentives will fit within the State's broader policy framework" and that such incentive would have a "significant revenue impact" (Governor's Veto Jacket Collection, L 2015, Veto Message No. 251).

It is a fundamental rule of statutory construction that "[w]hen the Legislature amends a statute, it is presumed that the amendment was made to effect some purpose and make some change in the existing law" and that "[b]y enacting an amendment of a statute and changing the

language thereof, the Legislature is deemed to have intended a material change in the law" (***Matter of Stein***, 131 AD2d 68, 72 [2d Dept 1987], ***citing*** McKinney's Cons Laws of NY, Book 1, Statutes §§ 191, 193, ***appeal dismissed*** 72 NY2d 840 [1988]). "Moreover, a statute will not be held to be a mere reenactment of a prior statute if any other reasonable interpretation is attainable" (***id.***). While it is noted that the proposed amendment did not become law, it is nevertheless an indication that the Legislature believed that Tax Law § 606 (g-1), as enacted, does not contain a credit for ground source heat pump systems. Additionally, it is noted that there is no indication in the legislative record that the proposed change to the statute was intended to explain ambiguities in the existing statute (***see*** McKinney's Cons Laws of NY, Book 1, Statutes § 193 [b]). Indeed, the memorandum in support of the proposed amendment states that the purpose of the proposed change is to "extend tax credits to cover the purchase and installation costs of geothermal energy systems" rather than to clarify that such credits already existed (Memorandum in Support, NY Senate Bill S 2905).[2] As a result, pursuant to the above-noted principles of statutory construction, it must be concluded that the Division's interpretation of Tax Law § 606 (g-1), and not petitioners', is consistent with the legislative intent underlying the solar energy equipment system credit.

F. Finally, petitioners make an alternative argument that even if the electric pumps are excluded as nonqualifying components, the remaining amount spent on the solar powered

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[2] Petitioners placed into the record an unsworn letter, dated January 4, 2016, from Assemblyman Sean M. Ryan, the Assembly sponsor of the bill proposing the 2015 amendment. In the letter, Assemblyman Ryan states that he introduced the bill "to solidify the establishment of the tax credit for geothermal" and "to allow individuals to utilize both a distinct geothermal tax credit as well as a solar tax credit." Assemblyman Ryan also states, however, that he "will leave the debate as to whether geothermal products qualify as solar equipment to others. . . ." Moreover, the Assembly memorandum in support is conspicuously silent on the issue of clarification. Given that Assemblyman Ryan's letter is not part of the legislative record, and he was not presented as a witness at the hearing, the letter alone is not persuasive here.

components of the system still allows for the maximum credit. This position is a misinterpretation of the statute. The mere presence of non-solar powered components in the system disqualifies the entire system. Additionally, the record is devoid of any breakdown or itemization of the cost of the components of the system.[3] Hence, even if the other solar components independently qualified for the tax credit, petitioners failed to meet their burden of proof to establish the cost of the system without the electrically powered components.

G. The petition of Matthew and Donna Feldman is denied and the Notice of Deficiency dated April 2, 2014 is sustained.

DATED: Albany, New York
December 15, 2016

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE

[3] In their reply brief, petitioners assert that the cost of the pumps was "approximately" $4,000.00. Petitioners did not present evidence to that effect, though, and the Tribunal has cautioned against the consideration of bald argument as proof (***see Matter of Café Europa,*** Tax Appeals Tribunal, July 13, 1989).