STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KATHLEEN GRIMM	:	DETERMINATION DTA NO. 826743
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.	:	

Petitioner, Kathleen Grimm, 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 Catherine M. Bennett, Administrative Law Judge, in Rochester, New York, on March 1, 2016, at 10:30 A.M., with all briefs to be submitted by July 1, 2016, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Alejandro Taylor, Esq., of counsel).

ISSUE

Whether petitioner met her burden of proving entitlement to the solar energy equipment system tax credit pursuant to Tax Law § 606(g-1) for tax year 2010.

FINDINGS OF FACT

1. Petitioner, Kathleen Grimm, filed a New York State personal income tax return for the year 2010, on May 11, 2011, on which she claimed a tax credit for qualified solar energy system equipment expenditures in the amount of $1,875.00.

2. The Division of Taxation (Division) selected petitioner's 2010 return for review and by correspondence dated April 16, 2013, requested that petitioner provide additional information to substantiate the solar energy system equipment expenditures reported on her return.

3. In response, petitioner returned the April 16, 2013 correspondence to the Division with information requested as to the address where the solar energy system was installed, whether the same address was petitioner's principal residence during 2010 and whether any of the equipment was purchased with nontaxable federal, state or local grants or rebates. Petitioner identified the installation address as one on Smith Road, East Amherst, New York, circled "no" in response to the question as to whether that address was her principal residence during 2010, and answered "no" to the use of any grant or rebate money to make the purchase. In explanation of her response regarding the principal residence status, petitioner stated that the home was a new construction project being built during 2010, and that she moved in during December 2010, but due to a heating malfunction with the ground source heat pump system, she was forced to seek other shelter temporarily until the problem was resolved. These facts and the fact that she did not reside at the Smith Road address for the entire year confused petitioner as to the correct answer to the principal residence question.

4. Petitioner submitted into the record a receipt from Geotechniques, LLC, dated December 28, 2010, for the "Installation of Geothermal Wells" in the amount of $28,843.90, marked as having been paid on "12/28," in a notation at the bottom of the document. The total price of $28,843.90 is not itemized among the component parts of the system.

5. At the hearing, petitioner reserved the right to submit the invoice for the work that she claimed was the basis for the solar energy credit in issue. The invoice was from Keepsake

Homes, Inc., was dated December 28, 2010, referenced petitioner's East Amherst, New York address, and described the services rendered, as follows: "Designed and installed electrical wiring for heat distribution for 8 ton ground source geothermal heat pump system," and listed an invoice amount of $7,500.00. The invoice was marked as having been paid on December 28, 2010, in a handwritten notation at the bottom.

6. Pursuant to the affidavit of Alicia Ryan, a Division Tax Technician I who has been responsible for conducting audits concerning solar energy credits and other tax credits since December 2010, a Statement of Proposed Audit Changes, dated February 10, 2014, disallowing petitioner's claim for the solar energy system equipment credit was issued. The Division recomputed petitioner's 2010 return and determined additional tax due in the amount of $1,875.00 plus interest.

7. The Division issued a Notice of Deficiency to petitioner, dated April 29, 2014, asserting tax due in the amount of $1,875.00 plus interest, for a total of $2,354.82.

8. A conciliation conference before the Bureau of Conciliation and Mediation Services was held on August 13, 2014, and the statutory notice was sustained by Conciliation Order CMS No. 261942, dated October 17, 2014. A petition challenging the results of the conciliation conference was filed with the Division of Tax Appeals on January 15, 2015.

9. During the hearing in this matter, petitioner presented the testimony of Jens Ponikau, a certified geothermal designer and physician, who described the system installed at petitioner's home in 2010. Although he did not perform the installation, he reviewed it in great detail due to some post-installation problems encountered by petitioner.

Dr. Ponikau explained that the solar heat that is stored in the ground outside the home is transferred into the home by a heat pump that operates by compressor technology and is an integral component of the whole system. The creation of the system in this case began with the drilling of shallow wells and installation of a series of pipes in the ground, outside the home, totalling approximately 2,000 to 3,000 feet of pipes, leading to the wells. The ground acts as a medium, storing heat absorbed from solar radiation. A pumping system exists inside the home and its function is to pump a water mixture through the system, in order to extract the heat from the ground. A heat pump, also located inside the home, takes the heat and distributes it as energy or heat inside the building. The pump, which circulates the water mixture through the pipes, the heat pump and the compressor require electricity to function. Without the electricity, the system could not function.

10. The Division introduced into evidence post-hearing the legislative sponsor's memorandum in support of the 2005 amendment of the solar credit in issue (L 2005, ch 378), which noted its purpose as: "To broaden the existing solar electric generating equipment personal income tax credit to also include equipment utilizing solar radiation to provide heating, cooling and/or hot water; and to increase the maximum amount of the credit to $5,000.00." Under the memorandum's justification section, the author specifically uses water heating as an example, and notes that such systems do not use electricity from the power grid. There is no mention of the exclusion from the credit qualification of non-solar components. The memorandum concludes with the following:

> "Broadening the scope of the credit to include less expensive systems such as solar hot water heaters, along with increasing its maximum amount, will provide a powerful incentive for homeowners to utilize this technology which will

> contribute greatly to a reduction in the state's energy usage and will have positive effects on the environment."

11. The New York State 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 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 framework" and that such incentive would have a "significant revenue impact" (Governor's Veto Jacket Collection, L 2015, Veto Message No. 251).

12. Petitioner introduced into evidence a letter from Assemblyman Sean Ryan, sponsor of Assembly Bill A 2177-A, which clarified his position in a letter dated January 4, 2016, in pertinent part, as follows:

> "In 2015, I introduced a bill (A.2177) which called for the establishment of a geothermal tax/ground source heat pump credit in New York. This bill passed both the Assembly and the Senate, eventually being vetoed by Governor Cuomo. I have been asked to provide the reasoning which led me to draft, introduce, and advocate for this bill.
>
> I am a big supporter of green technology. Increased usage of non-fossil fuel energy provides both numerous and substantial benefits. Ground source heat pumps have the potential to greatly reduce the cost of energy for the consumer and the reliance on traditional energy sources. This potential is why I believe a geothermal tax credit serves the best interest of New York State.
>
> Originally, it was suggested to me that geothermal tax credits are already available to New Yorkers under the solar energy tax credit currently established in New

> York. While I will leave the debate as to whether geothermal products qualify as solar equipment to others, it does not change the fact that I drafted bill A.2177 with the understanding that geothermal may already qualify for tax breaks. I proceeded with the introduction and advocacy of this bill for two purposes: 1) to solidify the establishment of the tax credit for geothermal, and 2) to allow individuals to utilize both a distinct geothermal tax credit as well as a solar tax credit."

SUMMARY OF THE PARTIES' POSITIONS

13. Petitioner asserts that she has established that the system she installed meets the plain language of Tax Law § 606(g-1), and she is entitled to the credit as claimed. Petitioner maintains that just because the system is connected to a non-solar energy component does not disqualify the entire expenditure for the solar energy system equipment, but would only disqualify the connected portion. Since that portion is attributable to the circulating pump, should the Division prevail, only the cost of this component, approximately $300.00, should be disallowed from the total costs forming the basis for the solar credit. Petitioner argues that the statute only requires that the system utilizes solar radiation, but not that it utilizes such radiation exclusively.

As to the recent legislation, petitioner maintains that the Division has misinterpreted the introduction of such legislation and pointed to the clarifying letter in support of Assembly Bill A 2177-A, which attempted to solidify the establishment of the geothermal tax credit as well as the solar tax credit.

14. The Division maintains that petitioner's system is reliant upon non-solar powered pumps and that the clear language of the statute indicates that the Legislature wanted to exclude from the credit solar energy system equipment that included components of a non-solar system. The electricity used in these functions is the non-solar energy that the Division identifies as disqualifying petitioner's expenditures for the solar energy credit. The Division points to

legislative history to support its position, and further argues that the Legislature's recent attempt to amend Tax Law § 606(g-1), to specifically allow a credit for ground source heat pump systems, demonstrates that such systems are not included in the existing version of the statute.

The Division lastly asserts that petitioner's ambiguous answers surrounding her residency in 2010, has led the Division to its conclusion that petitioner has not clearly and convincingly established that the Smith Road, East Amherst, New York, address was, in fact, her principal residence as of late December 2010.

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]).

Petitioner argues that the system installed in her home in 2010 qualifies for the tax credit, and that if a non-solar component must be separated from the whole system, only $300.00 for the circulating pump should be disallowed. The Division argues that the system does not meet the definition of "solar energy system equipment" as defined by Tax Law § 606(g-1)(3), and that petitioner did not establish that the installation was in her principal residence, and therefore, petitioner is not entitled to the tax credit in any amount.

B. Addressing first the issue of whether petitioner's installation of the system occurred in her principal residence, on the basis of petitioner's credible testimony about her confusion with the question, I find that petitioner met her burden of proof on this issue. The property was a new construction completed toward the very end of 2010, and petitioner initially thought she had to reside in the home all year to qualify it as her principal residence. Furthermore, although she moved into the home in December 2010, she briefly had to seek other shelter due to problems with the geothermal system. This forced absence did not change the fact that the Smith Road home had become her principal residence in 2010, the same tax year that the system was installed. The Division's argument that petitioner has not established this criteria is rejected.

C. There is no dispute that solar radiation is needed for petitioner's system to work. However, the dispute in this matter centers on the meaning of the definition of "solar energy system equipment" (Tax Law § 606[g-1][3]), and the statutory interpretation of the provision as whole. 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 [3d Dept 1995]). The Tax Appeals Tribunal recently discussed at length the principles of statutory interpretation in ***Matter of Purcell*** (Tax Appeals Tribunal, November 14, 2016), providing the following guidance:

> "Resolution of this question is a matter of statutory interpretation, the purpose of which is to ascertain and give effect to the intent of the Legislature (***Patrolmen's Benevolent Assn. of City of N.Y. v City of New York***, 41 NY2d 205 [1976] ***citing Matter of Petterson v Daystrom Corp.***, 17 NY2d 32 [1966]). The language of the

statute 'is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning' (***Matter of DaimlerChrysler Corp. v Spitzer***, 7 NY3d 653, 660 [2006]). Such language 'must be read in [its] context, and words, phrases, and sentences of a statutory section should be interpreted with reference to the scheme of the entire section' (McKinney's Cons Laws of NY, Book 1, Statutes § 97). Where the statutory language is ambiguous, however, extrinsic aids, such as the statute's legislative history, may be used to ascertain legislative intent (***see*** McKinney's Cons Laws of NY, Book 1, Statutes §§ 76, 92; ***Matter of Blau Par Corp***., Tax Appeals Tribunal, May 21, 1992). Ultimately, proper statutory construction focuses on 'the precise language of the enactment in an effort to give a correct, fair and practical construction that properly accords with the discernable intention and expression of the Legislature [citation omitted]' (***Matter of 1605 Book Ctr. v Tax Appeals Trib. of State of N.Y.***, 83 NY2d 240, 244, 245 [1994], ***cert denied*** 513 US 811 [1994]).

Tax credit statutes, including the QEZE tax reduction credit at issue, are similar to, and should be construed in the same manner as, statutes creating tax exemptions (***see Matter of Piccolo v New York State Tax Appeals Trib***., 108 AD3d 107 [2013]). That is, such 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*** 134 SCt 422 [2013]). However, construction of an exemption or credit statute should not be so narrow as to defeat the provision's settled purpose (***Matter of Grace v New York State Tax Commn.***, 37 NY2d 193, 196 [1975], ***rearg denied*** 37 NY2d 816 [1975], ***lv denied*** 338 NE2d 330 [1975]).

Petitioners have the burden to establish 'unambiguous entitlement' to the claimed statutory benefit (***Matter of United Parcel Serv., Inc. v Tax Appeals Trib. of State of N.Y.***, 98 AD3d 796, 798 [2012], ***lv denied*** 20 NY3d 860 [2013]). Indeed, petitioners must prove that the Division's interpretation is irrational and that their interpretation of the statute is the only reasonable construction (***Matter of American Food & Vending Corp. v New York State Tax Appeals Trib***., _ AD3d _ [2016] NY Slip Op 522043 [2016]; ***Matter of Brooklyn Navy Yard Cogeneration Partners, L.P. v Tax Appeals Trib. of State of N.Y.***, 46 AD3d 1247 [2007], ***lv denied*** 10 NY3d 706 [2008]).

D. Although on its face, Tax Law § 606(g-1) (3) appears to espouse a clear and unambiguous rule, excluding from the definition of "solar energy system equipment" any equipment "that is a component of part or parts of a non-solar energy system . . . ." in fact, both positions have merit. Petitioner is correct that Tax Law § 606(g-1) does not require the system to

operate on solar energy exclusively, and if there was a particular component that did not qualify, disqualification should only apply to that component, not the entire system, which would essentially make the credit criteria impossible to meet. Likewise, the Division makes an equally compelling argument as to the language on the statute's face, i.e., that the qualifying equipment shall not include equipment connected to it that is a component part of a non-solar source. Since the legislative intent was to favor credits for equipment utilizing solar radiation to provide heating, cooling or hot water, which is implemented in this case, disqualifying the credit in its entirety does initially seem to reach the right result. As guided by the Tribunal in ***Purcell***, when the statutory language is ambiguous, extrinsic aids, such as the statute's legislative history, may be used to ascertain legislative intent. The only Memorandum in Support of the existing statute (L 2005, ch 378) focuses narrowly on the use of solar radiation for heating water, as an example of the benefits, in support of the 2005 amendment, and does not address the functions of heating and cooling, or the specific provision in issue here, i.e., the exclusion of equipment that is a component of part or parts of a non-solar energy system. Thus, this legislative history fails to provide any real meaningful assistance. However, the recent proposed, but failed amendment to Tax Law § 606, as an additional extrinsic aid, does provide some assistance (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 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

framework" and that such incentive would have a "significant revenue impact" (Governor's Veto Jacket Collection, L 2015, Veto Message No. 251). Petitioner argues that the proposed legislation from 2015 is irrelevant with regard to her tax filing of 2010. However, contrary to petitioner's argument, 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 legislation was vetoed and the proposed amendment was not enacted, the proposed change to the law is nevertheless an indication that Tax Law § 606(g-1), as enacted, does not contain a credit for ground source heat pump systems. It is noted that there is no indication 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]). Additionally, Assemblyman Ryan's letter in support of his introduction of the 2015 amendment admits that he is unclear whether a geothermal system already receives a tax credit, but desires to be sure one exists, and supports a result that would allow individuals to have two separate credits. The 2015 proposed change to the statute evinces a lack of legislative intent to include ground source heat pump systems in the solar tax credit set forth in Tax Law § 606(g-1). The existing solar credit's statutory language lacks any clear indication of such an intent.

Again, referring to the principles set forth by ***Purcell***, petitioner must prove that the Division's interpretation is irrational and that her interpretation of the statute is the only reasonable construction. Given my conclusion that both positions have merit, and accordingly, that the Division's interpretation has been found to be reasonable, petitioner has failed to demonstrate that her interpretation of the statute is the only reasonable interpretation. Pairing that determination with the extrinsic aid of the proposed 2015 legislative amendment supports a conclusion that the Division's interpretation is to be followed, and the credit was properly denied under the facts of this case.

E. The petition of Kathleen Grimm is denied, and the Notice of Deficiency dated April 29, 2014, is hereby sustained.

DATED: Albany, New York
December 22, 2016

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE