STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PAUL J. SUOZZI AND KAREN L. SPENCER	:	DETERMINATION DTA NO. 827275
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 2012.	:	

Petitioners, Paul J. Suozzi and Karen L. Spencer, 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 2012.

A hearing was held before Barbara J. Russo, Administrative Law Judge, in Rochester, New York, on June 28, 2017 at 10:30 A.M., with all briefs to be submitted by November 27, 2017, 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. (Ellen Roach, 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 2012.

FINDINGS OF FACT

1. Petitioners, Paul J. Suozzi and Karen L. Spencer, jointly filed a New York State personal income tax return for the year 2012 on March 15, 2013. Petitioners claimed a tax credit

for qualified solar energy system equipment expenditures in the amount of $5,000.00 on the 2012 return.

2. The Division of Taxation (Division) selected petitioners' 2012 return for review and, by letter dated August 7, 2015, requested that petitioners provide additional information to substantiate the solar energy system equipment expenditures reported on their amended return.

3. In response, petitioners submitted to the Division a cover letter dated August 17, 2015 with the following attachments:

> 1) a copy of an invoice from Capital Heat, Inc. (Capital Heat), dated December 17, 2012, in the amount of $42,590.00 for a variable speed geothermal heat pump and dedicated 100% domestic hot water heat pump (system), which included the following: 3 ton geothermal heat pump (variable speed compressor with ECM motor), including water furnace, pressurized flow center with variable speed pump, deluxe touch-screen thermostat, 10 kWh electric plenum heater, high efficiency air filter, system sized based on ACCA Manual J Report, and 10 year parts and labor warranty; 1½ ton domestic hot water heat pump, including water furnace, Vaughn 80 gallon storage tank; and 10 year parts and labor warranty; duct work modifications; and ground heat exchanger;
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> 2) copies of canceled checks and credit card statements showing payments from petitioners to Capital Heat, dated November 5, 2012 in the amount of $12,091.50, December 17, 2012 in the amount of $13,462.50, December 21, 2012 in the amount of $15,036.00, January 30, 2013 in the amount of $3,770.27, and July 16, 2013 in the amount of $2,000.00; and
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> 3) a copy of DSIRE database of state incentives for renewables and efficiency.

4. Based on petitioners' response to the information request, the Division issued a statement of proposed audit changes, dated September 2, 2015, disallowing petitioners' claim for the solar energy system equipment credit and stating, in part, that:

> "New York State allows a credit for the purchase and installation of a qualified solar energy system. The qualified solar energy system equipment uses solar radiation to produce energy for heating, cooling, hot water, or electricity for residential use.

> Systems that generate heat directly are eligible for the credit. Therefore, geothermal systems do not qualify for the credit since these systems use energy stored within the earth's core."

The Division recomputed petitioners' 2012 return and determined additional tax due in the amount of $5,000.00 plus interest.

5. On September 8, 11 and 18, 2015, petitioners sent additional correspondence to the Division contending that their system qualified for the credit. Petitioners enclosed copies of Laws of New York 2005, Chapter 378 and excerpts from the Governor's bill jacket for Chapter 378 of the Laws of New York with the September 11, 2015 correspondence. On September 16, 2018, Ms. Spencer spoke with the auditor's supervisor, Marcia Foley, who informed Ms. Spencer of the Division's position. Ms. Foley stated, in an affidavit dated June 26, 2017, "[i]t is the Division's policy that ground source heat pump systems are not within the range of solar equipment contemplated within Tax Law § 606(g-1)."

6. The legislative sponsor's memorandum in support of the 2005 amendment of the solar credit in issue (L 2005, ch 378), included with petitioners' correspondence, noted the amendment's 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 credit being extended to apply to geothermal systems.

7. On September 21, 2015, petitioners paid $5,978.60 for the tax and interest determined due by the Division for 2012.

8. On December 8, 2015, petitioners responded to the Division's statement of proposed audit changes by returning the disagreement with findings, together with additional correspondence, an owner's manual for their water furnace system, and articles regarding geothermal systems.

9. The Division issued a notice of deficiency (notice) to petitioners, dated November 16, 2015, asserting tax due in the amount of $5,000.00 plus interest in the amount of $1,001.01. The notice reflects petitioners' payment of $5,978.60 and shows a balance due of $22.41. The notice provides the same explanation for the Division's disallowance of the claimed credit as stated in the statement of proposed audit changes (***see*** Finding of Fact 4). The Division subsequently adjusted the interest, on November 20, 2015, to $978.60.

10. During the hearing in this matter, petitioners presented the testimony of John Blatner, a mechanical engineer employed by Capital Heat, who designed petitioners' system. Mr. Blatner testified that for Capital Heat's first customers in 2011, it did not recommend claiming the solar tax credit for the ground source heat pump systems it installed. Mr. Blatner was informed in 2012 that another ground source heat pump system contractor, Buffalo GeoThermal, was advising customers that the geothermal systems qualified for the state solar tax credit. Capital Heat wanted to provide the same opportunity for its customers, and Mr. Blatner thought that the system would qualify for the credit based on his interpretation of the instructions for form IT-255, claim for solar energy system equipment credit. Mr. Blatner spoke with someone named Ashley from the Division's call center to inquire further whether the system would qualify for the credit. Mr. Blatner testified that Ashley informed him that the system described by him would qualify for the credit. Mr. Blatner made a written note of the conversation in his notebook and

informed petitioners of the conversation. Mr. Blatner did not request written confirmation from Ashley regarding the conversation and did not seek an advisory opinion from the Division.

11. Mr. Blatner described a ground source heat pump system as functioning in two ways: 1) the heat pump moves heat from one place to the next; and 2) the ground source refers to the location of heat, which comes from the earth's crust. The system uses energy from infrared solar radiation that is stored in the earth's crust. A heat exchanger, which is a piping system, is installed in the ground, and liquid, consisting of water and antifreeze, is used as a medium to transfer heat. The heat exchanger keeps the liquid separate from the earth, but allows the heat to transfer through the medium of the heat exchanger. The liquid moves through the system into the house and is used to heat the home and hot water. The system utilizes the infrared energy absorbed in the earth to heat indoor air during the cold months and remove heat from indoor air during the warm summer months.

Mr. Blatner distinguished the solar radiation in the earth's crust used in these systems from deep geothermal energy such as molten lava, geysers, or hot springs. Mr. Blatner identified information from the New York State Department of Environmental Conservation's internet web page which indicates that New York State lacks traditional geothermal energy sources such as volcanoes, geysers and hot springs.

12. Mr. Blatner described the system installed in petitioners' home. A heat exchanger was installed in the ground outside petitioners' home in order to extract heat from the earth's crust. The heat exchanger was then connected to a heat pump indoors. The indoor heat pump consists of a fluid circulator. When there is a call for heating or hot water in the house, the heat pump turns on and pumps fluid between the indoor heat pump and the outdoor heat exchanger. The

fluid circulates through the system and acts as a medium carrying heat from the ground into the house in order to heat the house and water. The ground source heat pump system in petitioners' house is not connected to any other heating system, and is the only system that heats the home and water. Electricity is used to run the pump of the system. The heat pump on petitioners' system is powered by electricity that is generated by solar panels. Petitioners' system is not connected to a recreational facility or equipment as a storage medium, and it is not connected to a non-solar energy system. Petitioners submitted photographs taken during the installation of the system.

13. Mr. Blatner stated that the ground source heat pump system is similar to a solar thermal system in that both have heat exchangers, which transfer heat stored from solar radiation to a transfer medium (a water and antifreeze solution), and circulator pumps that transfer the heat through the fluid medium into the home. They differ in that a solar thermal system has an active solar collector, that is active when exposed to the sun's rays, whereas a ground source heat pump system utilizes the energy from solar radiation that is stored in the earth and available 24 hours a day.

14. Petitioners began discussing a ground source heat pump system with representatives from Capital Heat in the fall of 2012, when Capital Heat was servicing petitioners' natural gas furnace. Petitioners met with John and Phil Blatner of Capital Heat to discuss retrofitting their house with a system. John Blatner informed petitioners that he had spoken with Ashley from the Division regarding whether a ground source heat pump system qualified for the solar energy credit (***see*** Finding of Fact 10).

15. Prior to preparing petitioners' 2012 income tax returns, Ms. Spencer contacted the Division's taxpayer assistance call center to inquire whether a ground source heat pump system qualified for the solar energy credit. Ms. Spencer testified that she was informed by a supervisor from the taxpayer assistance call center that the ground source heat pump system qualified for the solar energy credit. Ms. Spencer did not obtain the name of the person with whom she spoke.

16. On March 30, 2017, Capital Heat revised the invoice dated December 17, 2012, in response to a request from Ms. Spencer to itemize the charges for each component of the system installed in petitioners' home. The revised invoice shows the following charges totaling $42,590.00: $7,600.00 for engineering services, site preparation, drilling and reclamation; $9,105.00 for 3 ton 7 series water furnace with variable pump/compressor/heater; $3,008.00 for 1 ½ ton NSW water heater/heat pump/compressor; $2,400.00 for ground heat exchanger pipe and grout; $16,427.00 for labor and installation; and $4,050.00 for duct modifications.

17. Petitioners submitted an affidavit dated March 10, 2017 from Samara Levine, chief solar designer for American Solar Partners. Ms. Levine designed a photovoltaic system that was installed at petitioners' home in 2013. Ms. Levine states that the photovoltaic system includes inverters that, during the day, convert DC power produced by the solar panels into AC power for use in the home or transfer back to the electrical power grid. At night, the inverters are powered by electricity from the utility grid to enable monitoring of the system 24 hours a day. The monitoring equipment is powered by electricity from the utility grid.

18. In 2015, the New York State Legislature 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).

19. Petitioners introduced into evidence correspondence dated May 19, 2017 from New York State Senator Robert G. Ortt, which stated in part:

> "Prior to drafting [Senate Bill 2905], those involved on the issue believed that GSHP systems should qualify for a tax credit under New York State Tax Law § 606(g-1), which grants tax credits for solar energy equipment, and that new legislation was not needed. However, we were told by the New York State Tax Department Counsel's Office that GSHP systems were not eligible for the solar tax credit under § 606(g-1).
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> Because of this interpretation from the New York State Tax Department Counsel Office's, I sponsored Senate Bill 2905 in 2015, which would have established a separate distinct energy tax credit for ground source heat pump systems (GSHPs), which provide heating and cooling in residential homes. The bill was subsequently vetoed by Governor Cuomo as was a similar bill the following year."

20. Petitioners introduced into evidence correspondence dated January 4, 2016 from New York State Assembly Member Sean M. Ryan, which stated, in part:

> "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.

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> 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."

21. Petitioners submitted 38 proposed findings of fact. In accordance with State Administrative Procedure Act § 307 (1), proposed findings of fact 1, 2, 4 - 8, 12, 14, 16, 22, 25, 27 - 29, 32, 37, and 38 are supported by the record and have been substantially incorporated in the foregoing Findings of Fact.[1] Proposed findings of fact 3, 10, 11, 13, 15, 17, 18, 20, 21, 23, 26, 34, and 36 have been modified to more accurately reflect the record, and to remove portions that contain legal argument and portions that are not proper findings of fact. Proposed finding of fact 9 is rejected as not relevant. Proposed findings of fact 19, 30, and 31 are repetitive of previous proposed findings of fact. Proposed findings of fact 24, 33, and 35 are rejected as containing legal argument or conclusions of law and not appropriate findings of fact.

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

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[1] Many of the proposed facts as presented by petitioners have been condensed, combined, and renumbered as incorporated in the Findings of Fact set forth above.

> 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]).

"A tax credit is 'a particularized species of exemption from taxation'" (***Matter of Golub Serv. Sta. v Tax Appeals Trib.***, 181 AD2d 216, 219 [3d Dept 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]). Tax credit statutes, like the one at issue, are similar to and should be construed in the same manner as statutes creating tax exemptions (***see Matter of Grimm***, Tax Appeals Tribunal, January 11, 2018; ***Matter of Li***, Tax Appeals Tribunal, May 8, 2017; ***see also Matter of Piccolo v New York State Tax Appeals Trib.***, 108 AD3d 107 [3d Dept 2013]). That is, such statutes must be strictly and narrowly construed against the taxpayer (***see e.g. Matter of Costco Wholesale Corp***., Tax Appeals Tribunal, March 6, 2017). However, construction of an exemption or credit statute should not be so narrow as to defeat the provision's settled purpose (***see Matter of Grace v New York State Tax Commn.***).

Petitioners have the burden to establish "unambiguous entitlement" to the claimed statutory benefit (***Matter of Grimm***; ***Matter of Li***; ***Matter of United Parcel Serv. 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 their interpretation of the statute is not only plausible, but also that it is the only reasonable construction (***see Matter of Grimm***; ***Matter of Li***; ***Matter of American Food & Vending Corp. v New York State Tax Appeals Trib.***, 144 AD3d 1227 [2016]).

B. As the Tax Appeals Tribunal (Tribunal) previously found in the ***Matter of Li*** and the ***Matter of Grimm***, which both addressed the identical issue as the one presented in this matter, a

strict and narrow construction of the solar energy system equipment credit statute reasonably excludes geothermal systems from its benefits. As stated by the Tribunal, "a distinction between solar energy systems, which use solar energy directly, and geothermal energy systems, which use ground source heat, is rational for purposes of the solar energy credit" (***Matter of Grimm***). The Tribunal further noted that:

> "While we recognize that geothermal systems rely on solar energy that has been absorbed by the Earth, we find no indication in the legislative history of the Tax Law § 606 (g-1) that the Legislature intended to include such systems within the definition of solar energy system equipment for purposes of the credit. When the credit was first enacted, it applied only to solar electric generating systems (***see*** L 1997, c 399). In 2005, it was expanded to include systems that provide solar heating, cooling and hot water (***see*** L 2005, c 378). The memorandum in support of the Senate's 2005 bill indicates an intent to broaden the credit 'to include less expensive systems, such as solar hot water heaters' (Memorandum in Support, NY Senate Bill S5252). We find nothing in the legislative history of Tax Law § 606 (g-1), as amended, suggesting that the Legislature intended to include geothermal systems in the credit" (***id.***).

C. The Tribunal further found that the failed 2015 amendment to Tax Law § 606 also supports the conclusion that Tax Law § 606 (g-1) as enacted does not include geothermal systems within its purview (***id.***). As noted, the proposed change would have added a new credit expressly for geothermal energy systems (***see*** 2015 NY Senate-Assembly Bill S2905, A2177A). The Tribunal determined that, "[a]lthough vetoed, the proposed legislation does give rise to a presumption that the Legislature intended to make a material change in the existing law" (***Matter of Grimm***, citing ***Matter of Stein***, 131 AD2d 68, 72 [2d Dept 1987], ***appeal dismissed*** 72 NY2d 840 [1988]; ***see also*** McKinney's Cons Laws of NY, Book 1, Statutes § 193). As emphasized by the Tribunal,

> "Indeed, the Senate's 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' (Memorandum in

> Support, NY Senate Bill S 2905 [emphasis added]). The Governor's veto message also indicates that the bill would have provided a new credit (***see*** Governor's Veto Jacket Collection, L 2015, Veto Message No. 251 ['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 such incentives would have a 'significant revenue impact']). The failed amendment thus supports our construction of the solar energy system equipment credit as in effect in 2010" (***Matter of Grimm***).

The correspondence submitted by petitioners from Assembly Member Ryan and Senator Ortt, dated January 4, 2016 and May 19, 2017, respectively, provide little support to petitioners' proposed interpretation of Tax Law § 606 (g-1). "A statement regarding legislative intent, made by a sponsor of a bill, such as the Assemblymember, is properly given little weight when, as here, such a statement is 'not made during floor debate and there is no showing that other legislators were aware of its scope'" (***Matter of Grimm***, citing ***Kruger v Page Mgt. Co.***, 105 Misc 2d 14, 25 [Sup Ct NY Cty 1980]; ***Matter of Delmar Box Co. [Aetna Ins. Co.]***, 309 NY 60, 67 [1955]; ***see also Matter of Knight-Ridder Broadcasting v Greenberg***, 70 NY2d 151, 159 [1987] ["The views of one legislator . . . are not necessarily revealing of legislative intent"]). The letters are thus insufficient to overcome the previously cited presumption that, by proposing an amendment to a statute, the Legislature intended to make a material change in the law.

D. Based on the foregoing, it is unnecessary to address petitioners' arguments that their system qualifies for the credit because it is not connected to a conventional heating or cooling system or recreational facility or equipment (***see Matter of Li***; ***Matter of Grimm***).

E. The petition of Paul J. Suozzi and Karen L. Spencer is denied and the Notice of Deficiency, dated November 16, 2015, is sustained.

DATED: Albany, New York
May 24, 2018

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE