

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
NELSON AND SUSAN TAXEL : DETERMINATION
for Redetermination of Deficiency or for Refund of : DTA NO. 828090
Personal Income Tax under Article 22 of the Tax Law :
for the Years 2009 through 2012. :

Petitioners, Nelson and Susan Taxel, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law for the years 2009 through 2012.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Tobias A. Lake, Esq., of counsel), filed a motion on August 31, 2018, seeking dismissal of the petition of the and/or summary determination in the above-referenced matter pursuant to Tax Law § 2006 (5) and (6) and sections 3000.5, 3000.9 (a) (1) (ii), (iii), (v) and (vi) and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners, appearing by Hutton and Solomon, LLP (Roger S. Blane, Esq., of counsel), filed their brief in opposition on November 14, 2018, which date began the 90-day period for issuance of this determination. Based upon the motion papers, the affidavits and documents submitted therewith and all pleadings and documents submitted in connection with this matter, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction to entertain challenges to the New York State Equalization Rates.

II. Whether the Division of Taxation correctly calculated the real property tax credit cap by utilizing the estimated effective full value tax rate within Suffolk County for the relevant tax years.

FINDINGS OF FACT

1. Petitioners, Nelson and Susan Taxel, were shareholders of Positive Promotions, Inc. (Positive Promotions), an S corporation during the tax years 2009 through 2012.

2. Positive Promotions was certified as a qualified empire zone enterprise (QEZE), effective June 28, 2008, and was a QEZE during the tax years 2009 through 2012.

3. On or about December 1, 2002, Positive Promotions entered into a payment in lieu of taxes (PILOT) agreement with J.S.B. Real Estate Company, LLC (JSB) and the Town of Islip Industrial Development Agency (Islip IDA).

4. The PILOT agreement provides that the Islip IDA agreed to acquire title to real property located at 15 Gilpin Avenue, Hauppauge, Town of Islip, Suffolk County (property), and that the property would be leased to JSB and subleased to Positive Promotions. In exchange, because the Islip IDA is exempt from real property taxes, JSB and Positive Promotions agreed to make PILOT payments in accordance with the terms set forth in the PILOT agreement.

5. Petitioners timely filed their New York State resident personal income tax return (form IT-201) for 2009, which included a Claim for QEZE Credit for Real Property Taxes (form IT-606) that claimed a \$353,890.00 QEZE real property tax credit (RPTC) by virtue of pass-through taxation from Positive Promotions.

6. For tax year 2010, form IT-606, attached to petitioners' form IT-201, claimed a \$369,279.00 QEZE RPTC by virtue of pass-through taxation from Positive Promotions.

7. For tax year 2011, form IT-606, attached to petitioners' form IT-201, claimed a \$374,015.00 QEZE RPTC by virtue of pass-through taxation from Positive Promotions.

8. For tax year 2012, form IT-606, attached to petitioners' form IT-201, claimed a \$391,192.00 QEZE RPTC by virtue of pass-through taxation from Positive Promotions.

9. The Division performed an audit of petitioners' tax returns for the years 2009 through 2012. On July 29, 2016, the Division issued a notice of disallowance to petitioners partially disallowing their claims of RPTCs for the tax years 2009 through 2012.

10. Petitioners' claims for RPTCs were reduced to \$351,195.00 for tax year 2009, \$361,478.00 for the tax year 2010, \$370,879.00 for the tax year 2011 and \$387,227.00 for the tax year 2012. These adjustments are not in dispute.

11. The Division then calculated the RPTC allowable for the PILOT payments claimed by petitioners for the years 2009 through 2012. This calculation resulted in a portion of the claimed RPTC being disallowed pursuant to the cap on RPTCs.

12. The amount of RPTCs allowable pursuant to the cap was calculated by the Division to be as follows: \$104,320.00 for the tax year 2009, \$111,102.00 for the tax year 2010, \$138,978.00 for the tax year 2011 and \$158,102.00 for the tax year 2012.

13. Petitioners filed a timely petition with the Division of Tax Appeals on February 16, 2017, contesting the reduced amount of RPTC allowed by the Division for each of the tax years. Specifically, petitioners argue that the commissioner erred in imposing a limit on the RPTC claimed by a QEZE making PILOT payments and they contest the underlying estimated effective full value tax rates for Suffolk County.

14. The estimated effective full value tax rate within Suffolk County for the tax years is as

follows: 15.90 in 2009, 16.80 in 2010, 18.20 in 2011 and 20.20 in 2012. The estimated effective full value tax rate within a county is given in dollars per \$1,000.00 of full value, rounded to the nearest tenth of a dollar.

15. Based upon the audit, and after review of any information provided by petitioners in support of their 2009 form IT-201, for purposes of calculating the RPTC PILOT cap, the applicable federal basis was \$6,560,996.00 as reported by JSB.

CONCLUSIONS OF LAW

A. The Division has moved for dismissal of the petition pursuant to Tax Law § 2006 (5) and 20 NYCRR 3000.5 and 3000.9 (a) (1), specifically, upon the basis that the Division of Tax Appeals lacks jurisdiction over the subject matter of the petition and that petitioners do not have standing to challenge State equalization rates.

B. Tax Law § 2006 (4) of the Tax Law authorizes the Tax Appeals Tribunal, in pertinent part, as follows:

“To provide a hearing as a matter of right, to any petitioner upon such petitioner’s request, pursuant to such rules, regulations, forms and instructions as the tribunal may prescribe, unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter.”

Since petitioners’ protest involves a challenge to eligible real property taxes pursuant to Tax Law § 15 (e), it is determined that the Division of Tax Appeals has jurisdiction to entertain the timely filed petition. Therefore, the Division motion will be treated solely as a motion for summary determination under Tax Law § 2006 (6) and 20 NYCRR 3000.9 (b).

C. A motion for summary determination shall be granted:

“if, upon all 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]).

D. Chapter 63 of the Laws of 2000 amended the Tax Law to provide benefits under the Empire Zones Program Act, amending articles 9-A, 22, 32 and 33 of the Tax Law to provide new tax credits, which applied to taxable years beginning on or after January 1, 2001. Among various tax benefits under the program, Tax Law § 15, together with Tax Law § 606 (bb), provides for the QEZE RPTC for eligible real property taxes.

E. In this matter, petitioners are seeking a tax credit. A tax credit is a particularized species of exemption from tax (*Matter of New York Fuel Term. Corp.*, Tax Appeals Tribunal, August 27, 1998; *Matter of Marriott Family Rests. v Tax Appeals Trib.*, 174 AD2d 805 [3d Dept 1991], *lv denied* 78 NY2d 863 [1991]) and, thus, taxpayers bear the burden of establishing their entitlement thereto (*see e.g. Matter of Golub Serv. Sta. v Tax Appeals Trib.*, 181 AD2d 216 [3d Dept 1992]). Petitioners must establish that, under the circumstances, their interpretation of the statute is the only reasonable interpretation (*Matter of Hucko Trust*, Tax Appeals Tribunal, September 19, 2013).

F. This case involves the RPTC and the proper calculation of the statutory cap or limitation on the credit allowable for PILOT payments. Tax Law § 15 (e) provides a RPTC for QEZEs. QEZEs are generally able to claim an income tax credit for the amount of RPTC paid. However, when a QEZE makes PILOT payments, Tax Law § 15 (e) imposes a limitation on the RPTC.

Tax Law § 15 (e) states, in pertinent part, that:

“ . . . a payment in lieu of taxes made by the QEZE pursuant to a written agreement executed or amended on or after January first, two thousand one, shall

not constitute eligible real property taxes in any taxable year to the extent that such payment exceeds the product of (A) the greater of (i) the basis for federal income tax purposes, calculated without regard to depreciation, determined as of the effective date of the QEZE's certification pursuant to article eighteen-B of the general municipal law of real property, including buildings and structural components of buildings, owned by the QEZE and located in empire zones with respect to which the QEZE is certified pursuant to such article eighteen-B of the general municipal law . . . or (ii) the basis for federal income tax purposes of such real property described in clause (i) of this subparagraph, calculated without regard to depreciation, on the last day of the taxable year . . . and (B) the estimated effective full value tax rate within the county in which such property is located, as most recently calculated by the commissioner. The commissioner shall annually calculate estimated effective full value tax rates within each county for this purpose based upon the most current information available to him or her in relation to county, city, town, village and school district taxes."

G. Petitioners herein argue that the Division erred by using the estimated effective full value tax rate of Suffolk County when it calculated the allowable RPTC pursuant to Tax Law § 15 (e). A plain reading of the statutory language expressly finds that the estimated effective full value tax rate of the county is precisely what rate to use when determining the cap. There can be no other interpretation of the statutory provision.

Additionally, petitioners argue that the estimated effective value tax rate imposed by Suffolk County was based on inappropriate market values and comparables. As correctly pointed out by the Division, market value surveys are conducted by the Office of Real Property Tax Services (ORPTS) pursuant to Real Property Tax Law (RPTL) § 1200. Market value surveys are conducted by ORPTS in order to determine equalization rates. Equalization rates are the method by which the assessed value of real property in a municipality is converted to full value. RPTL § 1206 provides the procedure for challenging the equalization rates as follows:

"If any city, town, village, special assessing unit, or approved assessing unit . . . proposes to complain at the hearing of the commissioner concerning the tentative equalization rate, class ratios and class equalization rates determined for it or any

portion contained therein, such city, town, village, special assessing unit or approved assessing unit . . . must cause a written complaint specifying its objections to be served on the commissioner at least five days before the day specified for the hearing . . . A complaint concerning data used for purposes of a tentative equalization rate . . . shall be deemed a complaint with respect to such data for all such purposes.”

A municipality can appeal the administrative determination, which is ultimately made by the State Board of Real Property Tax Services, by filing a CPLR article 78 proceeding (RPTL § 1218). The plain language of the statute demonstrates that only a municipality can challenge the equalization rate, both at the administrative level and on appeal directly to the Appellate Division.

In *Matter of Feiner v New York State Office of Real Prop. Servs.* (25 AD3d 1005, 1006-1007 [3d Dept 2006]), the court noted that “individual taxpayers lack standing to challenge the methodology the Board [of Real Property Services] used to calculate equalization rates” citing *Matter of Town of Riverhead v New York State Bd. of Real Prop. Servs.*, 7 AD3d 934 [3d Dept 2004], *affd* 5 NY3d 36 [2005]). Clearly, petitioners are not a municipality and, therefore, do not have standing to challenge State equalization rates. Additionally, challenges to equalization rates must be filed with the State Board of Real Property Tax Services, as outlined in RPTL § 1206, and not the Division of Tax Appeals.

Since petitioners challenge the estimated effective full value rate for Suffolk County and do not challenge any of the numbers used by the Division other than the use of the estimated effective full value rate as required pursuant to Tax Law § 15 (e), petitioners’ argument is rejected.

H. The Division of Taxation's motion for summary determination is granted, the petition of Nelson and Susan Taxel is denied, and the notice of disallowance is sustained.

DATED: Albany, New York
February 7, 2019

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE