STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

SAMUEL J. AND ANNE L. SAVARINO :

for Redetermination of a Deficiency or for Refund of Personal Income Tax Under Article 22 of the Tax Law for the Year 2016. :

In the Matter of the Petition :

of : DETERMINATION
DTA NOS. 829454, 829458

DAVID P. AND BERNADETTE A. FRANJOINE : 829459 AND 829460

for Redetermination of a Deficiency or for Refund of Personal Income Tax Under Article 22 of the Tax Law for the Year 2016. :

In the Matter of the Petition :

of :

ROBERT W. AND BEVERLY S. ZUCHLEWSKI :

for Redetermination of a Deficiency or for Refund of Personal Income Tax Under Article 22 of the Tax Law for the Year 2016. :

In the Matter of the Petition	:
of	:
DENNIS M. FRANJOINE	:
for Redetermination of a Deficiency or for Refund of Personal Income Tax Under Article 22 of the Tax Law for the Year 2016.	:

Petitioners, Samuel J. and Anne L. Savarino, David P. and Bernadette A. Franjoine, Robert W. and Beverly S. Zuchlewski, and Dennis M. Franjoine, filed petitions for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law for the year 2016.

On November 2, and 16, 2020, respectively, petitioners, appearing by Phillips Lytle LLP (Kelly E. Marks, Esq. and Craig R. Bucks, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Tobias A. Lake, Esq., of counsel), waived a hearing and submitted these consolidated matters for determination based on documents and briefs to be submitted by May 17, 2021, which date commenced the six-month period for the issuance of this determination. After due consideration of the documents and arguments submitted, Jessica DiFiore, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether payments in lieu of taxes by a lessee of real property constitute eligible real property taxes for purposes of the remediated brownfield tax credit for real property taxes under Tax Law § 22.

II. Whether payment of taxes by the lessee of real property to Erie County and the City of Buffalo constitute eligible real property taxes for purposes of the remediated brownfield tax credit for real property taxes under Tax Law § 22.

FINDINGS OF FACT

The parties entered into a stipulation of facts, which has been incorporated into the findings of fact below.

1. At all times relevant to this proceeding, 500 Seneca Street, LLC (the Company) was the owner of property located in the City of Buffalo, with tax map/parcel number 111.81-7-1, consisting of land and a 324,000 square foot building, commonly known as 500 Seneca Street (the Property).

2. At all times relevant to this proceeding, the Company's members were two limited liability companies: 500 Seneca Street MM LLC (Managing Member) and 500 Seneca Street MT LLC (Tenant).

3. During the 2016 tax year, Managing Member was a member of Tenant.

4. Frontier Development Initiatives LLC (Frontier) and Heimat Holdings LLC (Heimat) were members of Managing Member for the 2016 tax year.

5. During the 2016 tax year, petitioners David P. Franjoine, Dennis M. Franjoine and Robert W. Zuchlewski were members of Frontier.

6. During the 2016 tax year, petitioner Samuel J. Savarino was the sole member of Heimat, an entity that is disregarded from its owner for federal and New York State income tax purposes.

7. The Company entered into a brownfield site cleanup agreement with the Commissioner of the New York State Department of Environment Conservation (DEC), dated June 7, 2013, regarding the Property.

8. The Commissioner of DEC issued to the Company a certificate of completion with respect to the Property dated December 14, 2015. Tenant was not issued a certificate of completion and was not otherwise named on the certificate of completion issued for the Property.

9. The Property is a qualified site within the meaning of Tax Law § 22 (a) (2).

10. The Erie County Industrial Development Agency (the Agency) and the Company entered into a Payment-in-Lieu-of-Tax Agreement dated November 1, 2015 (the PILOT Agreement), agreeing that the Company would make payments in lieu of taxes for the Property and an additional parcel. Tenant was not a party to the PILOT Agreement.

11. The Agency currently is, and in taxable years 2015 and 2016 was, a public benefit corporation pursuant to General Municipal Law §§ 856 (2) and 891-A.

12. Section 2 of the PILOT Agreement, which is entitled "Obligation of the Company to Make Payments in Lieu of Taxes," states the following: "[s]ubject to the approval of the RP-412-a, the Agency shall require, and the Company agrees to make, payments in lieu of real estate taxes to the appropriate taxing authorities pursuant to the terms of this PILOT Agreement. The parties agree and acknowledge that payments made hereunder are to obtain revenues for public purposes, and to provide a revenue sources [sic] that affected tax jurisdictions would otherwise lose because the subject parcels will not be on the tax rolls."

13. Section 3 of the PILOT Agreement, entitled "Taxing Authorities and Amounts" provides that the Company will make payments in lieu of general levy real estate taxes to Erie County for each of the tax fiscal years 2017 through 2025 and payments in lieu of general levy

real estate taxes to the City of Buffalo for each of the tax fiscal years 2016-2017 through 2024-2025. Section 3 also provides that prior to these fiscal years, the Company will pay all appropriate taxing authorities all taxes due.

14. Section 1 of the PILOT Agreement, entitled "Agency Tax Exemption" provides that the Property is not exempt from real estate taxes until the 2017 tax fiscal year of Erie County and the 2016-2017 tax fiscal year of the City of Buffalo. Section 1 also states in relevant part, "[p]rior to the 2017 County and 2016-2017 City tax fiscal years, the Company shall continue to timely pay all Real Estate Taxes due as if the Agency were not in leasehold title and had no ownership or control of the [Property] . . ."

15. The Agency issued an invoice to the Company dated July 1, 2016, for two payments of $117,097.63 due on July 31, 2016, and December 31, 2016, to be made payable to the Agency for the Property and for property located at 332 Myrtle.

16. The City of Buffalo issued the Company an invoice dated April 1, 2016, for unpaid tax for the fiscal year 2015-2016 for the Property, showing a tax amount billed of $8,771.83 with interest due of $723.68, tax paid of $4,385.92, and an outstanding balance of $5,119.59. Payment was due in full by April 30, 2016.

17. Erie County issued the Company an invoice for tax year 2016 for the Property in the amount of $1,933.34 to be paid by February 16, 2016.

18. The Company and the Tenant entered into a Master Lease (Lease) on June 12, 2015. The Lease defines "Impositions" to include "all taxes . . . any payments in lieu of taxes, which may be levied, assessed, charged or imposed during and are applicable to the Term of this Lease upon the Premises, or any part therefore . . . ." Pursuant to Section 3.C of the Lease, Tenant is

responsible for Impositions as "Additional Rent" and must pay all Impositions directly to the applicable Governmental Authority, as defined in the Lease.

19. During the 2016 taxable year, Tenant remitted payments in full to the Agency, the City of Buffalo and Erie County for property taxes for the Property.

20. By virtue of their ownership interest in the Company, petitioners David P. Franjoine, Robert W. Zuchlewski, Dennis M. Franjoine and Samuel J. Savarino, and their spouses, filed Claim for Remediated Brownfield Credit for Real Property Taxes, form IT-612 (Claim for Credit).

21. Petitioners David P. and Bernadette A. Franjoine were married New York State residents in 2016 and filed their 2016 New York State Resident Income Tax Return, form IT-201 (tax return), as married filing jointly. With their tax return, petitioners filed Claim for Credit, seeking a real property tax credit in the amount of $118,648.00 for the Property as a partner in Frontier and as a partner in FGC Buffalo, LLC.[1]

22. Dennis M. Franjoine was a single New York resident in the 2016 taxable year. With his tax return, he filed a Claim for Credit seeking a real property tax credit in the amount of $33,754.00 for the Property as a partner in Frontier and as a partner in FGC Buffalo, LLC.

23. Petitioners Robert W. and Beverly S. Zuchlewski were married New York State residents in 2016 and filed their 2016 tax return as married filing jointly. With their tax return, petitioners filed a Claim for Credit, seeking a real property tax credit in the amount of $8,184.00 for the Property as a partner in Frontier.

24. Petitioners Samuel J. and Anne L. Savarino were married New York State residents in 2016 and filed their tax return as married filing jointly. With their tax return, petitioners filed

[1] The relevance or ownership interest of FGC Buffalo, LLC in any of the Seneca Street entities entitling it to a credit was not provided in the record.

a Claim for Credit, seeking a real property tax credit in the amount of $28,885.00 for the Property as a partner in Managing Member.

25. The Division of Taxation (Division) denied in full petitioners' respective refund claims for the remediated brownfield tax credit (the credit) under Tax Law § 22 for 2016.

26. On July 23, 2018, the Division sent David P. and Bernadette A. Franjoine a letter reducing their claim for the credit for the Property from $884,829.00 to the allowed amount of $766,181.00. The credit claimed was reduced because the payment in lieu of taxes claimed, totaling $233,058.00, was disallowed. The Division found that based on the proof of payment submitted to it, the payment was not made by the Company to the state, a municipal corporation or a public benefit corporation pursuant to the terms of the written agreement. The Division also found that the payment does not meet the definition of eligible real property taxes as defined in Tax Law § 22. The credit was also adjusted because the charges levied by the City of Buffalo and Erie County, for $5,119.00 and $1,933.00 respectively, were also disallowed. The Division determined that these charges also were not paid or incurred by the Company during the taxable year and that they are not includable in the computation of the credit. Accordingly, David P. and Bernadette A. Franjoine's share of the credit was reduced by $118,648.00.

27. By letter of the same date, the Division notified Dennis M. Franjoine that his claim for the credit for the Property was being reduced from $249,733.00 to the allowed amount of $215,979.00. The credit was reduced for the same reasons as those stated in the Division's letters to David P. and Bernadette A. Franjoine. Notably, the July 23, 2018 letter states that petitioner Dennis M. Franjoine's share of the credit was reduced by $118,658.00. However, as stated earlier in the letter and in the Claim for Credit, Dennis M. Franjoine's claim was only for $33,754.00.

28. On August 15, 2018, the Division sent Samuel J. and Anne L. Savarino a letter reducing their claim for the credit for the Property from $287,379.00 to the allowed amount of $258,494.00. The credit was reduced for the same reasons as those stated in the Division's letter to David P. and Bernadette A. Franjoine. Accordingly, Samuel J. and Anne L. Savarino's share of the credit was reduced by $28,885.00. [2]

29. On September 8, 2018, the Division sent Robert W. and Beverly S. Zuchlewski a letter reducing their claim for the credit for the Property for the same reasons as those stated in the Division's letter to David P. and Bernadette A. Franjoine. Accordingly, Robert W. and Beverly S. Zuchlewski's share of the credit was reduced by $8,184.00.

30. The Division submitted four proposed findings of fact with its brief. In accordance with State Administrative Procedure Act § 307 (1), proposed finding of fact 1 is rejected as conclusory. Proposed findings of fact 2, 3, and 4 are supported by the record, and have been consolidated, condensed, combined, renumbered, and substantially incorporated herein.

SUMMARY OF THE PARTIES' POSITIONS

31. Petitioners assert that they are "developers" within the meaning of Tax Law § 22 because, as individual members of Frontier or Hiemat, limited liability companies that are members of the Company's Managing Member, they are part of the Company's ownership structure and are indirectly partners in the Company. Petitioners also argue that the real property tax and PILOT payments made for the Property during the 2016 taxable year constitute "eligible real property taxes" within the meaning of Tax Law § 22 (b) (5). Petitioners contend that the Tenant issued the PILOT payments on the Company's behalf pursuant to the Lease, satisfying

[2] A letter was previously sent to Samuel J. and Anne L. Savarino on August 8, 2018 advising that their claim for the Remediated Brownfield Credit for Real Property taxes was reduced from $287,379.00 to $238,085.00, a reduction of $49,294.00, for the same reasons as those stated in the August 15, 2018 letter. However, at the conclusion of both letters, the Division states that their share of the credit was reduced by $28,885.00.

the Company's obligations under the PILOT Agreement, and that this constituted PILOT payments "by" the Company as required by Tax law § 22.

Petitioners also assert that they must be granted the credits to maintain consistency with federal and New York State income tax treatment of the Tenant's remittance of PILOT payments on behalf of the Company. Petitioners contend that because they can take an income tax deduction for the PILOT payments remitted by the Tenant for the purpose of determining their respective New York taxable incomes (***see*** 26 C.F.R. § 1.162-11 [a]), they should also be able to treat the Company as having made the PILOT payments for the purpose of determining entitlement to the credit.

32. The Division contends that petitioners are not entitled to the credit because (1) the PILOTS were not paid or incurred by the developer (here the Company), but were instead shifted to a tenant who was not a developer named on the Certificate of Completion as required by Tax Law § 22; (2) payments made by a lessee do not qualify as "eligible real property taxes"; and (3) the tenant was not a signatory to the PILOT agreement so its payments cannot qualify as "eligible real property taxes."

CONCLUSIONS OF LAW

A. In 2003, the New York State Legislature enacted the Brownfield Cleanup Program (BCP), to promote the cleanup, reuse, and redevelopment of abandoned and likely contaminated properties, known as brownfields (***see*** Environmental Conservation Law § 27-1403). A "brownfield site," as relevant here, is "any real property where a contaminant is present at levels exceeding the soil cleanup objectives or other health-based or environmental standards, criteria or guidance adopted by the department that are applicable based on the reasonably anticipated use of the property, in accordance with applicable regulations" (ECL § 27-1405 [2]).

As part of its enactment, the BCP established the credit (***see*** Tax Law § 22). Tax Law § 22 (b) provides a tax credit for eligible real property taxes to a developer of a qualified site who is subject to tax under article 22. A "developer" is a taxpayer who has been issued a certificate of completion with respect to a qualified site (***see*** Tax Law § 22 [a] [3]). A "qualified site" is a site for which a certificate of completion has been issued by the Commissioner of Environmental Conservation (***see*** Tax Law § 33 [a] [2]). Where the entity that is issued a certificate of completion is a partnership, any partner in such partnership who or which is taxable under article 22 is a developer (***see id.***). "Eligible real property taxes" are defined as follows:

> "[T]axes imposed on real property which consists of a qualified site owned by the developer, provided such taxes become a lien on the real property in a period during which the real property is a qualified site. In addition, the term 'eligible real property taxes' includes payments in lieu of taxes by the developer, with respect to a qualified site, to the state, a municipal corporation or a public benefit corporation pursuant to a written agreement entered into between the developer and the state, a municipal corporation or a public benefit corporation" (Tax Law § 22 [b] [5]).

The parties agree petitioners claimed the subject credit as indirect partners of the Company, the Company was issued a certificate of completion, the Company was the developer, and the Property is a qualified site.

B. The issues here are whether the Tenant's payments to the Agency, Erie County, and the City of Buffalo, constitute eligible real property taxes pursuant to Tax Law § 22. Resolution of this question is a matter of statutory interpretation. When interpreting a statute, the fundamental rule of statutory construction is to effectuate the intent of the legislature (***see Matter of Watchtower Bible and Tract Society of New York, Inc.***, Tax Appeals Tribunal, July 16, 2020, citing ***Matter of 1605 Bookcenter, Inc.. v Tax Appeals Trib. of State of N.Y.***, 83 NY2d 240, 244 [1994], ***cert denied*** 513 US 811 [1994]). "[W]hen the language of a tax statute is unambiguous, it should be construed so as to give effect to the plain meaning of the words used (citation

omitted)" (***id.***, quoting ***New York State Assn. of Counties v Axelrod***, 213 AD2d 18, 24 [3d Dept 1995], ***lv dismissed*** 87 NY2d 918 [1996]). Where possible, every word must be given meaning because the language of the statute is the clearest indicator of legislative intent (***see id.***).

Tax credits are a form of tax exemption and should be construed in the same manner as statutes creating exemptions (***see Purcell v New York State Tax Appeals Trib.***, 167 AD3d 1101, 1103 [3d Dept 2018], ***lv dismissed*** 33 NY3d 999 [2019], ***lv denied*** 33 NY3d 913 [2019]). "Statutes creating exemptions must be strictly construed against the taxpayer, and, if ambiguity arises, against the exemption, although such statutes should not be interpreted so narrowly as to defeat their settled purposes" (***id.***, quoting ***Matter of Piccolo v New York State Tax Appeals Trib.***, 108 AD3d 107, 111-112 [3d Dept 2013]). Petitioners must prove they are entitled to the credit, showing that their interpretation is the only reasonable construction (***see id.***).

Petitioners have failed to meet their burden of showing entitlement to a credit for the PILOT payments made by the Tenant to the Agency. The text of Tax Law § 22 (b) (5) unambiguously defines eligible real property taxes, in part, as "payments in lieu of taxes by the developer, with respect to a qualified site, to . . . a public benefit corporation pursuant to a written agreement entered into between the developer and . . . a public benefit corporation." Explicit language of an unambiguous provision of a statute cannot be ignored (***see Golub Corp. v New York State Tax Appeals Trib***, 116 AD3d 1261, 1263 [3d Dept 2014]). The language in Tax Law § 22 makes clear that to qualify for the credit, the PILOT payments must be made by the developer pursuant to a written agreement between the developer and the appropriate governmental entity.

Here, petitioners concede that the Tenant and not the Company made the payments in lieu of taxes to the Agency. As the Company was issued a certificate of completion with respect

to the Property, the Company is a developer (***see*** Tax Law § 22 [a] [3]). However, there is no evidence in the record that the Tenant was issued a certificate of completion with respect to the Property. Thus, the Tenant is not a developer. Because the payments were made by the Tenant, who was not a developer of the Property, and not the Company, petitioners are not entitled to the credit.

C. The issue presented is, at least in part, similar to that addressed by the Appellate Division in ***Golub Corp***. In both cases, a lessee that was not a party to a PILOT agreement made PILOT payments directly to the appropriate governmental entities pursuant to the terms of a lease. In ***Golub Corp***, the Court held that the language of the statute provides that to qualify for the credit, the PILOT payments must be made pursuant to a written agreement, and because the entity that made the payments was not a party to that agreement, it could not receive the credit (116 AD3d at 1262-63). The fact that in ***Golub Corp*** it was the lessee seeking the credit while here it is the owner/developer who was a party to the PILOT agreement is immaterial. The payments were not made by the Company, the entity that entered into the agreement with the Agency, pursuant to the requirements of Tax Law § 22. Therefore, such payments do not constitute eligible real property taxes within the meaning of the statute.

D. Petitioners rely on the Appellate Division, Third Department's holding in ***Balbo v New York State Tax Appeals Tribunal*** (163 AD3d 1364 [3d Dept 2018]) in support of their position that the payments issued by the Tenant for the Property qualify as "eligible real property taxes" entitling petitioners to the credit. In ***Balbo***, the petitioners claimed a real property tax credit pursuant to Tax Law § 15 (e) (3) for payments they made for real property taxes for the relevant property as a lessee of the property. The Division denied the claimed credit because petitioners did not pay the subject property taxes via a "direct payment" to the taxing authority

when they made the payment through a mortgage tax escrow account (***id.*** at 1366). The Division of Tax Appeals and the Tax Appeals Tribunal both upheld the denial (***id.***). The Appellate Division, Third Department, then reversed, finding that under the circumstances there, the use of a mortgage tax escrow account to make the payment of taxes did not preclude petitioners from claiming the real property tax credits (***id.*** at 1366-67).

Petitioners assert that the Company is comparable to the lessee in ***Balbo*** because both made tax payments through an intermediary; in ***Balbo***, the mortgage servicer, and here, the Tenant. Petitioners also contend that as the lessee that was required to pay the taxes at issue in ***Balbo*** was "exclusively controlled by a single member or shareholder," so too, do petitioners maintain exclusive pass-through ownership of the Company, whom the PILOT Agreement required to make the PILOT payments on the property. However, in ***Balbo***, unlike here, the owner and lessee of the property were both exclusively controlled by a single member and, while the payment was through a mortgage tax escrow account and not made "directly," the servicing agent did not maintain any discretion as to how the payment was used as it was required to be used for the payment of the real estate taxes for the relevant property pursuant to the applicable lender agreement (***see id.***). Here, the record does not show that the Company and the Tenant have all of the same members, that the Tenant lacked any discretion as to how to spend its funds, or that any specific funds were earmarked to pay the tax due.

The issue in ***Balbo*** was not who was entitled to the credit, but whether the entity that appeared otherwise entitled properly complied with the requirements to receive the credit pursuant to the specific language of the applicable statute. The statute at issue in ***Balbo***, Tax Law § 15 (e) (3), has different requirements to be eligible for a different tax credit and allows

lessees entitlement to the credit when certain circumstances are met. Tax Law § 22 does not include language allowing a lessee to make payments pursuant to a PILOT agreement.

E. Petitioners' argument that because they can take an income tax deduction for the PILOT payments remitted by the Tenant for the purpose of determining their respective New York taxable incomes pursuant to 26 C.F.R. § 1.162-11 (a), they should also be able to treat the Company as having made the PILOT payments for the purpose of determining entitlement to the credit, is misplaced. To award petitioners the credit simply because they can take an income tax deduction for tax payments remitted by the Tenant would directly contradict and ignore the explicit language of Tax Law § 22 (b) (5).

F. Petitioners have sufficiently demonstrated their entitlement to the claimed remediated brownfield credit for the taxes paid by the Tenant to Erie County. Eligible real property taxes are taxes imposed on a qualified site owned by a developer, as long as such taxes become a lien during the time the real property is a qualified site (***see*** Tax Law § 22). The amount of the credit is determined in part by the eligible real property taxes incurred by the developer during the taxable year (Tax Law § 22 [b] [2]). Here, the tax imposed by Erie County for the 2016 fiscal year and by the City of Buffalo for the 2015-2016 fiscal year were excluded from the PILOT payments (***see*** finding of fact 14). These taxes were incurred by the developer, here the Company, for a qualified site and were paid by the Tenant.

G. The next question is at what point such taxes became a lien. All taxes levied on real property, except where otherwise expressly provided by law, become a lien thereon beginning the first day of January of the fiscal year for which levied (***see*** Real Property Tax Law (RPTL) § 902; ***Kennedy v Mossafa***, 100 NY2d 1, 7 [2003]). The fiscal year for the City of Buffalo begins on the first day of July (***see*** Buffalo, NY Code § 28-9). For the City of Buffalo, taxes become

liens upon real property "from the time of publication of the notice by the commissioner required by section 28-64 until paid . . . ." (***see*** Buffalo, NY Code § 28-13). This notice is a notice to pay that is published on or before June 20th in each year stating that the payment of local assessments may be made to the director of taxes pursuant to the subsequent sections in the Code for the City of Buffalo (***see*** Buffalo, NY Code § 28-64). The Code then requires that payments be made by the end of July and December to avoid the accrual of interest (***see*** Buffalo, NY Code § 28-65). Accordingly, the real property taxes for the 2015- 2016 tax year became a lien on June 20, 2015.

While the parties stipulated that the Property was a qualified site, they did not stipulate for what years (***see*** finding of fact 9). Additionally, a qualified site is a site with respect to which a certificate of completion has been issued by the Commissioner of Environmental Conservation (Tax Law § 22 [a] [2]). The certificate of completion for the Property was not issued until December 14, 2015 (***see*** finding of fact 8). Thus, the Property could not have been a qualified site until on or after that date. As these taxes became a lien on June 20, 2015, prior to the issuance of the certificate of completion, they did not become a lien on the real property in a period during which the real property was a qualified site, as required by Tax Law § 22 (b) (5). Therefore, the taxes the Tenant paid to the City of Buffalo for the 2015-2016 fiscal year are not eligible real property taxes and petitioners are not entitled to the credit.

H. For Erie County, the taxes due became a lien on January 1, 2016 for the 2016 fiscal year (***see*** RPTL § 901; Erie, NY, Tax Act art. 6 § 6-2.0 [April 2, 2009]). As the Property was a qualified site for 2016 (***see*** findings of fact 8, 9; Tax Law § 22 [a] [2]), the Erie County taxes became a lien during the time the real property was a qualified site. Therefore, petitioners are entitled to a credit for the eligible real property taxes paid to Erie County.

I. The petitions of Samuel J. and Anne L. Savarino, David P. and Bernadette A. Franjoine, Robert W. and Beverly S. Zuchlewski, and Dennis M. Franjoine, as set forth in conclusion of law H, are granted, and the Division is directed to refund petitioners accordingly. The petitions are otherwise denied, and the notices of disallowance sustained.

DATED: Albany, New York
November 10, 2021

/s/ Jessica DiFiore
ADMINISTRATIVE LAW JUDGE