STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
GREG SCHAHET,	:	ORDER
LISA SCHAHET SCHUSTER AND JASON S. SCHUSTER,		DTA NOS. 827351,
JEFFREY AND WENDY BROWN, AND	:	827352, 827353
GARY AND PHYLLIS SCHAHET		AND 827354
	:	
for Redetermination of Deficiencies or for Refunds of New York Personal Income Tax under Article 22 of the Tax Law for the Years 2011 through 2013.	:	

Petitioners, Greg Schahet, Lisa Schahet Schuster and Jason S. Schuster,[1] Jeffrey and Wendy Brown, and Gary and Phyllis Schahet, filed petitions for redetermination of deficiencies or for refunds of New York State personal income tax under Article 22 of the Tax Law for the years 2011 through 2013.

On March 29, 2017, petitioners, by their representative, Hodgson Russ LLP (Christopher L. Doyle, Esq., and Ariele R. Doolittle, Esq., of counsel), brought motions dated March 28, 2017 for summary determination pursuant to 20 NYCRR 3000.5 and 3000.9(b). Together with the notices of motion, petitioners filed an affirmation of Christopher L. Doyle, Esq., with attached exhibits, and memoranda of law in support of the motions. On March 29, 2017, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Tobias Lake, Esq., of counsel), brought a motion, dated March 29, 2017, to dismiss the petition and a cross motion for summary

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[1] Prior to her marriage to Jason Schuster, Lisa Schahet Schuster was Lisa Schahet. Jason Schuster is not a petitioner for the years 2011 and 2012, and is a petitioner for the year 2013 only by virtue of his filing a joint tax return with Lisa Schahet Schuster for that year.

determination in the above-referenced matters pursuant to sections 3000.5, 3000.9(a)(1)(ii), 3000.9(a)(1)(vi), and 3000.9(b) of the Tax Appeals Tribunal's Rules of Practice and Procedure. Accompanying the notice of motion was the affirmation of Tobias Lake, Esq., dated March 29, 2017, and attached exhibits, and the affidavit of William Van Sleet, dated March 28, 2017, and attached exhibits. Petitioners filed a memorandum of law in opposition to the Division of Taxation's motion to dismiss and cross motion for summary determination. The Division of Taxation filed an affirmation in opposition, dated April 28, 2017, of Tobias A. Lake, Esq. The parties' responding papers were each filed on April 28, 2017, which date commenced the 90-day period for issuance of this order. Based upon the motion papers, the affirmations, the affidavit, and all pleadings and proceedings had herein, Winifred M. Maloney, renders the following order.

ISSUES

I. Whether the Division of Taxation's motion to dismiss or, in the alternative, cross motion for summary determination should be granted.

II. Whether petitioners' motions for summary determination should be granted.

FINDINGS OF FACT

1. On August 2, 2006, Schenectady Hotel, LLC (SHLLC) was certified as a Qualified Empire Zone Enterprise (QEZE) in the Schenectady Empire Zone. The New York State Department of Economic Development, Empire State Development, issued to SHLLC an Empire Zone Retention Certificate (EZRC) that was "[r]equired to claim Empire Zone and Qualified Empire Zone Enterprise tax credits for tax year 2008 and later."

2. On December 27, 2006, SHLLC entered into a ten-year Payment In Lieu of Tax (PILOT) Agreement with the Schenectady Metroplex Development Authority (Metroplex) for fiscal years 2006 through 2015. Pursuant to the PILOT Agreement, SHLLC agreed to make

PILOT payments directly to Metroplex for property located at the southwest corner of State and Clinton Streets,[2] in the City of Schenectady, County of Schenectady. The PILOT Agreement was signed by Greg Schahet as the managing member of SHLLC.

3. Pursuant to the PILOT Agreement, SHLLC made $200,000.00 PILOT payments to Metroplex in the years 2011 through 2013.

4. SHLLC timely filed its partnership returns (Forms IT-204) for the calendar years 2011, 2012, and 2013. On each of these partnership returns, SHLLC indicated that it had five Article 22 partners.

5. Along with its Forms IT-204 for the years 2011 through 2013, SHLLC filed claims for QEZE Credit for Real Property Taxes (Forms IT-606). On line 46 of the Forms IT-606, SHLLC reported eligible real property taxes of $286,880.00, $338,017.00, and $364,195.00 for the years 2011, 2012, and 2013, respectively.

6. SHLLC claimed a QEZE Real Property Tax Credit (QEZE credit) in the amount of $286,880.00 for each of the years 2011 and 2012, and claimed a QEZE credit in the amount of $364,195.00 for the year 2013. The QEZE credits were reported as "Other flow-through credits" on SHLLC's Forms IT-204, line 147a, for each of the years 2011 through 2013.[3]

7. During the years 2011 through 2013, Greg Schahet, Lisa Schahet Schuster, Gary Schahet, Phyllis Schahet, and Jeffrey and Wendy Brown were members of SHLLC.[4]

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[2] The street address of this 1.3 acre parcel is 450 State Street, Schenectady, New York.

[3] The $286,880.00 QEZE credit reported on line 147a of SHLLC's 2012 Form IT-204 was an error. The QEZE credit reflected on SHLLC's 2012 Form IT-606 was $338,017.00.

[4] Review of SHLLC's U.S. Return of Partnership Income, Form 1065, filed for the year 2011 indicates that four of its five partners, (i.e., Gary Schahet, Greg Schahet, Lisa Schahet, and Phyllis Schahet), collectively owned 90% of the partnership. The record is silent as to whether Jeffrey Brown or Wendy Brown owned the remaining 10% of the partnership.

Greg Schahet (DTA No. 827351)

8. Petitioner Greg Schahet timely filed nonresident and part-year resident income tax returns (Forms IT-203) for each of the years 2011 through 2013.

9. On line 61 of his nonresident income tax return filed for the year 2011, Mr. Schahet claimed refundable QEZE credits in the total amount of $66,606.00, as pass throughs from two QEZEs, i.e., SHLLC and State Street Hotel, Inc.

10. On line 61 of his nonresident income tax returns filed for the years 2012 and 2013, Mr. Schahet claimed refundable QEZE credits in the amount of $70,984.00 and $76,481.00, respectively, as a pass through from SHLLC.

11. On January 26, 2015, the Division of Taxation (Division) issued a notice of deficiency (Assessment ID no. L-042264598) to Mr. Schahet asserting additional personal income tax due in the amount of $12,346.00, plus interest and penalty, for the year 2011. The "Explanation and Instructions" section of the notice of deficiency referenced an original notice allegedly sent to Mr. Schahet on December 10, 2014 that showed the detailed computation of the additional tax due. The record does not include such original notice.

12. By an "Account Adjustment Notice - Personal Income Tax" (notice of account adjustment), dated December 15, 2014, the Division disallowed a portion ($10,629.00) of the pass through QEZE credit claimed as a refundable credit by Mr. Schahet on his 2012 nonresident income tax return.

13. On March 31, 2015, the Division issued a letter disallowing $9,426.00 of the pass through QEZE credit claimed as a refundable credit by Mr. Schahet on his 2013 nonresident income tax return.

Lisa Schahet Schuster and Jason S. Schuster (DTA No. 827352)

14. For the years 2011 and 2012, Lisa Schahet timely filed nonresident income tax returns. Petitioners Lisa Schahet Schuster and Jason S. Schuster timely filed a joint nonresident income tax return for the year 2013.

15. On line 61 of her nonresident income tax return filed for the year 2011, Ms. Schahet claimed refundable QEZE credits in the total amount of $66,606.00 as pass throughs from two QEZEs, i.e., SHLLC and State Street Hotel, Inc.

16. On line 61 of her nonresident income tax return filed for the year 2012, Ms. Schahet claimed a refundable QEZE credit in the amount of $70,984.00 as a pass through from SHLLC. On line 61 of their nonresident income tax return filed for the year 2013, Ms. Schahet Schuster and Mr. Schuster claimed a refundable QEZE credit in the amount of $76,481.00, as a pass through from SHLLC.

17. On January 26, 2015, the Division issued a notice of deficiency (Assessment ID no. L-042264597) to Ms. Schahet asserting additional personal income tax due in the amount of $12,346.00, plus interest and penalty, for the year 2011. The "Explanation and Instructions" section of the notice of deficiency referenced an original notice allegedly sent to Ms. Schahet on December 10, 2014, that showed the detailed computation of the additional tax due. The record does not include such original notice.

18. By a notice of account adjustment, dated December 4, 2014, the Division disallowed a portion ($10,629.00) of the pass through QEZE credit claimed as a refundable credit by Ms. Schahet on her 2012 nonresident income tax return.

19. On March 31, 2015, the Division issued a letter disallowing $9,426.00 of the pass through QEZE credit claimed as a refundable credit by Ms. Schahet Schuster and Mr. Schuster

on their 2013 nonresident income tax return.

Jeffrey and Wendy Brown (DTA No. 827353)

20. Petitioners, Jeffrey and Wendy Brown, timely filed nonresident income tax returns for the years 2011 through 2013.

21. On line 61 of their nonresident income tax return filed for the year 2011, Mr. and Mrs. Brown claimed refundable QEZE credits in the total amount of $31,431.00, as pass throughs from two QEZEs, i.e., SHLLC and State Street Hotel, Inc.

22. On line 61 of their nonresident income tax returns filed for the years 2012 and 2013, Mr. and Mrs. Brown claimed refundable QEZE credits of $33,802.00 and $36,420.00, respectively, as a pass through from SHLLC.

23. On January 28, 2015, the Division issued a notice of deficiency (Assessment ID no. L-042268911) to Mr. and Mrs. Brown asserting additional personal income due in the amount of $5,879.00, plus interest and penalty, for the year 2011. The “Explanation and Instructions” section of the notice of deficiency referenced an original notice allegedly sent to Mr. and Mrs. Brown on December 12, 2014, that showed the detailed computation of the additional tax due. The record does not include such original notice.

24. On January 28, 2015, the Division issued a notice of deficiency (Assessment ID no. L-042268912) to Mr. and Mrs. Brown asserting additional personal income due in the amount of $5,061.00, plus interest and penalty, for the year 2012. The “Explanation and Instructions” section of the notice of deficiency referenced an original notice allegedly sent to Mr. and Mrs. Brown on December 12, 2014, that showed the detailed computation of the additional tax due. The record does not include such original notice.

25. On August 24, 2015, the Division issued a notice of deficiency (Assessment ID no. L-

043314606) to Mr. and Mrs. Brown asserting additional personal income due in the amount of $4,489.00, plus interest, for the year 2013. The "Explanation and Instructions" section of the notice of deficiency referenced an original notice allegedly sent to Mr. and Mrs. Brown on July 8, 2015, that showed the detailed computation of the additional tax due. The record does not include such original notice.

Gary and Phyllis Schahet (DA No. 827354)

26. Petitioners, Gary and Phyllis Schahet, timely filed nonresident income tax returns for the years 2011 through 2013.

27. On line 61 of their nonresident income tax return filed for the year 2011, Mr. and Mrs. Schahet claimed refundable QEZE credits in the total amount of $214,163.00, as pass throughs from two QEZEs, i.e., SHLLC and State Street Hotel, Inc.

28. On line 61 of their nonresident income tax returns filed for the years 2012 and 2013, Mr. and Mrs. Schahet claimed refundable QEZE credits of $162,248.00 and $174,513.00, respectively, as a pass through from SHLLC.

29. On January 26, 2015, the Division issued a notice of deficiency (Assessment ID no. L-042265265) to Mr. and Mrs. Schahet asserting additional personal income due in the amount of $28,722.00, plus interest, for the year 2011. The "Explanation and Instructions" section of the notice of deficiency referenced an original notice allegedly sent to Mr. and Mrs. Schahet on December 10, 2014, that showed the detailed computation of the additional tax due. The record does not include such original notice.

30. By a notice of account adjustment dated December 15, 2014, the Division disallowed a portion ($24,293.00) of the pass through QEZE credit claimed as a refundable credit by Mr. and Mrs. Schahet on their 2012 nonresident income tax return.

31. On March 31, 2015, the Division issued a letter disallowing $21,551.00 of the pass through QEZE credit claimed as a refundable credit by Mr. and Mrs. Schahet on their 2013 nonresident income tax return.

32. As noted in Findings of Fact 12, 18, and 30, notices of account adjustment were issued to Mr. Schahet, Ms. Schahet, and Mr. and Mrs. Schahet for the year 2012. The "explanation" section of each notice of account adjustment, stated, in relevant part, as follows:

> "Pursuant to TSB-M-10(6)c, Tax Law Section 15(e) was amended to include a definition of tax for purposes of the QEZE Credit for Real Property Taxes. The term tax means a charge imposed upon real property by or on behalf of a county, city, town, village, or school district for municipal or school district purposes. The charges must be levied for the general public welfare by the proper taxing authorities at a like rate against all property in the territory over which such authorities have jurisdiction. The property must have been taxed at the rate determined for the class in which it is contained as provided for under Article 18 or Article 19 of the Real Property Tax Law. The term 'tax' does not include a charge for local benefits, including any portion of that charge that is properly allocated to the costs attributable to maintenance or interest, when:
>
> -the property subject to the charge is limited to the property that benefits from the charge,
> -the amount of the charge is determined by the benefit to the property assessed, or
> -the improvement for which the charge is assessed tends to increase the property value.
>
> Accordingly, we have concluded that Co Election Chg and Downtown Sp Imp Corp do not qualify as real property taxes for purposes of the QEZE Credit for Real Property Taxes.
>
> In addition, we have adjusted your PILOT limitation for Schenectady Hotel, LLC based on information on file.
>
> Further explanation and schedules detailing the adjustments are being issued under separate cover."

33. Christopher L. Doyle, Esq., on behalf of SHLLC, sent a letter dated May 27, 2015, to the Commissioners of the Departments of Taxation and Finance and Economic Development requesting that two adjustments to SHLLC's basis in certain real property be disregarded

pursuant to Tax Law § 15(e)(A)(ii).[5] The letter asserted, in part, as follows:

> "Following its certification as a QEZE, [SHLLC] built a new hotel in the City of Schenectady with the expectation that it would enjoy the full range of tax benefits available under the Empire Zones Program.
>
> [SHLLC] received $1,778,202 in grant funds from Empire State Development to be used to assist in the construction of the hotel. For federal tax purposes, the grant was treated as a non-shareholder contribution under I.R.C. § 118 and was reflected as such on the balance sheet of [SHLLC's] 2007 federal income tax return (Form 1065, Schedule L). In accordance with this treatment [SHLLC] reduced its basis in the hotel by the amount of the grant.
>
> [SHLLC] also requested and received a $5 million allocation of the Federal Renewal Community benefit in 2007, the year in which the hotel was placed in service. That allowed [SHLLC] to deduct $2,500,000.00 from its federal taxable income in 2007. The federal tax 'quid pro quo' for this special benefit was a reduction in [SHLLC's] federal tax basis in the hotel by $2,500,000.
>
> We submit that the basis reductions resulting from both [SHLLC's] receipt of the grant and its participation in the Federal Renewal Community Program should be disregarded for purposes of the QEZE Credit for Real Property Taxes (the 'Credit') under Tax Law § 15 for several reasons: (1) the adjustments distort the amount expended by [SHLLC] to improve the real property, (2) the adjustments do not accurately reflect the fair value of the real property, and (3) disregarding the adjustments is consistent with the purpose of the Credit, which is to provide an Empire Zone credit for [PILOTS] in an amount not to exceed the real property taxes that might otherwise apply."

34. Mr. Doyle was informed by letter dated July 2, 2015, from Amanda Hiller, the Department of Taxation and Finance Deputy Commissioner and Counsel, that SHLLC's request to disregard the "basis reductions for the basis limitation computation" was approved "for the tax returns that have not yet been filed, e.g. 2014." Ms. Hiller's letter further stated that:

> "because tax returns for the tax years 2011, 2012 and 2013 on which the QEZE credit for real property taxes was claimed by members of Schenectady Hotel LLC have already been filed, we conclude your request to disregard the required IRC basis reductions for these years is untimely. The petition mechanism in section 15(e) of the Tax Law is a request for the Department of Taxation and Finance and

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[5] The letter is labeled "Petition to Disregard QEZE's Reduction in Basis."

> the Department of Economic Development to exercise discretion. Like a request to exercise discretion to vary a statutory business allocation percentage under 20 NYCRR 4-6.1(c) for which the request must be submitted and approved before a tax return varying the percentage can be filed, this request must also be submitted and approved before a tax return is filed disregarding the required basis reductions. Because tax returns for tax years 2011, 2012 and 2013 have already been filed, Schenectady Hotel LLC's petition to disregard the required IRC basis reductions in the basis limitation of [Tax Law] [sic] § 15(e) in the tax years 2011, 2012 and 2013 is not approved.
>
> We have reviewed this conclusion with the Department of Economic Development and they concur."

35. On November 19, 2015, Mr. Schahet timely filed a petition challenging the notice of deficiency, dated January 26, 2015, issued for the year 2011; the notice of account adjustment, dated December 15, 2014, that disallowed a portion of the refund claimed by Mr. Schahet on his 2012 nonresident income tax return; and the letter, dated March 31, 2015, that disallowed a portion of the refund claimed by Mr. Schahet on his 2013 nonresident income tax return. Each of these statutory notices resulted from the Division's reductions of pass through refundable QEZE credits claimed by Mr. Schahet for the years 2011 through 2013. Mr. Schahet's petition states the amount of tax determined is "$32,401.00, plus interest and penalty," and the amount of tax contested is "the full amount."

36. On November 19, 2015, Ms. Schahet Schuster and Mr. Schuster timely filed a petition challenging the notice of deficiency, dated January 26, 2015, issued to Ms. Schahet for the year 2011; the notice of account adjustment, dated December 15, 2014, that disallowed a portion of the refund claimed by Ms. Schahet on her 2012 nonresident income tax return; and the letter, dated March 31, 2015, that disallowed a portion of the refund claimed by Ms. Schahet Schuster and Mr. Schuster on their 2013 nonresident income tax return. The two statutory notices issued to Ms. Schahet and the statutory notice issued to Ms. Schahet Schuster and Mr. Schuster resulted

from the Division's reductions of pass through refundable QEZE credits claimed by Ms. Schahet for the years 2011 and 2012, and claimed by Ms. Schahet Schuster and Mr. Schuster for the year 2013. Ms. Schahet Schuster and Mr. Schuster's petition states the amount of tax determined is "$32,401.00, plus interest and penalty," and the amount of tax contested is "the full amount."

37. On November 19, 2015, Mr. and Mrs. Brown timely filed a petition challenging two notices of deficiency, each dated January 28, 2015, issued for the years 2011 and 2012; and a notice of deficiency, dated August 24, 2015, issued for the year 2013. Each of these statutory notices resulted from the Division's reductions of pass through refundable QEZE credits claimed by Mr. and Mrs. Brown for the years 2011 through 2013. Mr. and Mrs. Brown's petition states that the amount of tax determined is "$15,429.00, plus interest and penalty," and the amount of tax contested is "the full amount."

38. On November 19, 2015, Mr. and Mrs. Schahet timely filed a petition challenging the notice of deficiency, dated January 26, 2015, issued for the year 2011; the notice of account adjustment, dated December 15, 2014, that disallowed a portion of the refund claimed by Mr. and Mrs. Schahet on their 2012 nonresident income tax return; and the letter, dated March 31, 2015, that disallowed a portion of the refund claimed by Mr. and Mrs. Schahet on their 2013 nonresident income tax return. Each of these statutory notices resulted from the Division's reductions of pass through refundable QEZE credits claimed by Mr. and Mrs. Schahet for the years 2011 through 2013. Mr. and Mrs. Schahet's petition states the amount of tax determined is $74,566.00, plus interest," and the amount of tax contested is "the full amount."

39. In their respective petitions, petitioners contend that the Division improperly adjusted and reduced the QEZE credits claimed on their respective returns filed for the years 2011 through 2013. In relevant part, petitioners asserted that: the Division's refusal to retroactively disregard

the adjustments to SHLLC's federal basis in the hotel property for purposes of the QEZE credit was arbitrary and capricious and/or an abuse of discretion; the Division failed to use the proper tax rate to compute SHLLC's PILOT QEZE credit limitation in each of the years 2011 through 2013; and for the year 2013, the Division miscalculated the amount of "eligible real property taxes" paid by SHLLC to the City of Schenectady. In addition, Mr. Schahet, Ms. Schahet Schuster and Mr. Schuster, and Mr. and Mrs. Brown, in their petitions, maintain that reasonable cause exists to abate the penalties.

40. During a pre-hearing conference call with the undersigned administrative law judge on February 7, 2017, counsel for petitioners and counsel for the Division mutually agreed to file simultaneous motions for summary determination and, thereafter, to file simultaneous responses to the same. On March 29, 2017, petitioners filed motions for summary determination and the Division filed a motion to dismiss and/or cross motion for summary determination.

41. In support of its motion to dismiss and/or cross motion for summary determination, the Division submitted the affirmation of Tobias Lake, Esq., the Division's representative, with attached exhibits, and the affidavit of William Van Sleet, a Tax Technician III in the Division's Income/Franchise Tax Desk Audit Bureau, with attached exhibits.

42. Mr. Van Sleet has worked for the Division's Audit Division since September 2001. As part of his regular duties, Mr. Van Sleet audits and reviews income tax cases dealing with QEZEs. During the course of his duties, he became involved in the audits of all of the petitioners. In his affidavit, Mr. Van Sleet avers that the "audits were conducted by other auditors who have since relocated to different audit groups within the Audit Division." He further avers that he "became involved in this matter in approximately May of 2014, and supervised the tax technician involved in the 2013 audit case until its conclusion." Mr. Van Sleet

also asserts that in working on this case, he "thoroughly reviewed the case files and spoke with any available supervisors and colleagues who were involved in the audit." He claims that his affidavit is based upon his personal knowledge of the facts and is based upon "his review of the Division's official records which are kept in the ordinary course of business." Mr. Van Sleet, in his affidavit, contends that petitioners erroneously calculated the QEZE credit caps for the years 2011 through 2013, and that the Division correctly calculated the amount of QEZE credits to which petitioners are entitled. Exhibits attached to Mr. Van Sleet's affidavit do not include any audit reports or any underlying substantiation for the statutory notices issued to the petitioners.

CONCLUSIONS OF LAW

A. As noted above, the Division made a motion to dismiss the petitions filed in this matter, and/or a cross-motion for summary determination in its favor. The Division's motion seeks dismissal of the petitions pursuant to 20 NYCRR 3000.9(a)(1)(ii) and (vi) on the grounds that the Division of Tax Appeals lacks jurisdiction over the subject matter of the petitions, and the petitions fail to state a cause for relief.

B. Each of the petitions alleges, among other things, that it was arbitrary and capricious for the Division to refuse to permit petitioners to retroactively disregard the negative adjustments to SHLLC's federal tax basis in the hotel property for purposes of the QEZE credits claimed by petitioners. The Division argues that the Division of Tax Appeals cannot review its exercise of discretionary authority with respect to adjustments to the federal tax basis in the hotel property. Specifically, that "the Division of Tax Appeals lacks jurisdiction to determine the outcome of such a claim" and, therefore, that "Petitioners have failed to state a cause for relief."

The Division's arguments are without merit. Proceedings before the Division of Tax Appeals are commenced by timely filing a petition challenging a statutory notice (***see*** Tax Law §

2000; 20 NYCRR 3000.1[d],[f],[k]; 20 NYCRR 3000.3[a]). As long as a petitioner has "sufficiently challenged the subject Notice," then "a controversy exists between petitioner and the Division over the subject Notice," and "the Division of Tax Appeals has jurisdiction to resolve" the matter (***see Matter of Medical Capital Corp.***, Tax Appeals Tribunal, July 25, 2013 [reversing and remanding the order below dismissing the petition on a motion made pursuant to 20 NYCRR 3000.9(a)(1)(ii)and (vi)]). The petitions timely filed in these matters protest the statutory notices issued by the Division. Each of the statutory notices resulted from the Division's partial disallowance of QEZE real property tax credits passed through to petitioners. One of the adjustments made by the Division was a limitation on the PILOT payments included in the QEZE credits claimed by SHLLC for the years 2011 through 2013. The basis adjustments sought by SHLLC for the years 2011 through 2013 would have a direct impact upon the amount of PILOT payments qualifying as "eligible real property taxes" for purposes of Tax Law § 15(e), and the amount of the QEZE credit passed through to petitioners for such years. As such, the Division's refusal to retroactively exercise its discretionary authority to allow the basis adjustments to SHLLC's hotel property is relevant because it directly affects each of the protested statutory notices. Clearly, the Division of Tax Appeals has jurisdiction to review discretionary acts by the Division where, as here, protested statutory notices are directly impacted by such an act or failure to act. Moreover, the Tax Appeals Tribunal has a "policy of *de novo* review of the exercise of discretion" (***see Matter of Vinter***, Tax Appeals Tribunal, September 27, 2001, ***dismissed on other grounds sub nom Matter of Vinter v. Commissioner of Taxation & Fin.***, 305 AD2d 738 [3d Dept 2003]). Since no provision of the Tax Law modifies or denies the Division of Tax Appeals' jurisdiction to review the Division's exercise of discretionary authority under Tax Law § 15(e) in these matters, the issue is properly before the Division of Tax Appeals.

It is also noted that this is not the sole issue raised in the petitions; petitioners are challenging all adjustments reflected in the statutory notices issued for the years 2011 through 2013, and the penalties asserted in the same. Therefore, the Division's motion to dismiss the petitions on the grounds that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition and for failure to state a cause of action is denied.

C. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

> "Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]; ***see also*** Tax Law § 2006[6]).
>
> The motion 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, therefor, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact" (20 NYCRR 3000.9[b][1]; ***see also*** Tax Law § 2006[6]).

In these matters, petitioners filed motions for summary determination requesting that all statutory notices issued to them be cancelled in their entirety, and their petitions be granted. The Division also filed a cross motion for summary determination, requesting that summary determination be issued in its favor, and the petitions be denied in their entirety.

D. The standard with regard to a motion for summary determination is well settled. A motion for summary determination made before the Division of Tax Appeals is "subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR" (20 NYCRR 3000.9[c]; ***see also Matter of Service Merchandise, Co.***, Tax Appeals Tribunal, January 14, 1999). Summary determination is a "drastic remedy and should not be

granted where there is any doubt as to the existence of a triable issue" (***Moskowitz v. Garlock***, 23 AD2d 943 [3d Dept 1965]; ***see Daliendo v. Johnson***, 147 AD2d 312 [2d Dept 1989]). Because it is the "procedural equivalent of a trial" (***Museums at Stony Brook v. Vil. of Patchogue Fire Dept.***, 146 AD2d 572 [2d Dept 1989]), undermining the notion of a "day in court," summary determination must be used sparingly (***Wanger v. Zeh***, 45 Misc2d 93 [1965], ***affd*** 26 AD2d 729 [3d Dept 1966]). If any material facts are in dispute, if the existence of a triable issue of fact is "arguable," or if contrary inferences may be reasonably drawn from the undisputed facts, the motion must be denied (***Glick & Dolleck, Inc. v. Tri-Pac Export Corp.***, 22 NY2d 439, 441 [1968]; ***Gerard v. Inglese***, 11 AD2d 381 [2d Dept 1960]).

E. The record as developed to this point is not sufficient to make a decision in these matters. As material and triable issues of fact exist in these matters, petitioners' motions are denied, and the Division's cross motion is also denied.

F. The Division of Taxation's motion to dismiss the petition is denied. Petitioners' motions for summary determination are denied. The Division of Taxation's cross motion for summary determination is likewise denied; and a full hearing on all issues with regard to the petitions filed in these matters will be scheduled in due course.

DATED: Albany, New York
July 27, 2017

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE