

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

BROOKFIELD POWER NEW YORK CORP. :

for Redetermination of a Deficiency or for Refund of
Corporation Franchise Tax under Article 9-A of the Tax
Law for the Years 2004 and 2005. :

DECISION
DTA Nos. 822205
and 822206

In the Matter of the Petition :

of :

BROOKFIELD POWER NEW YORK GP CORP. :

for Redetermination of a Deficiency or for Refund of
Corporation Franchise Tax under Article 9-A of the Tax
Law for the Years 2004 and 2005. :

Petitioners, Brookfield Power New York Corp. and Brookfield Power New York GP Corp., filed an exception to the determination of the Administrative Law Judge issued on October 15, 2009. Petitioners appeared by Hiscock & Barclay, LLP (David G. Burch, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Clifford M. Peterson, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument, at petitioners' request, was heard on May 12, 2010, in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly denied petitioners' claims for Empire Zone wage tax credits for the period ended December 31, 2005 on the basis of its determination that the periods ended September 28, 2004 and December 31, 2004 each constituted a full benefit year, thereby exhausting petitioners' final two years of wage tax credits.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Erie Boulevard Hydropower, LP (Erie) was created in August 1999 to acquire and operate various hydroelectric generating plants throughout New York State.

At the time of its creation, Erie was owned by Orion Power New York, LP (with 99% ownership) and Orion Power New York GP, LP (with 1% ownership). Orion Power New York, LP and Orion Power New York GP, LP, are subsidiaries that were indirectly owned by Orion Power Holdings, Inc., the taxpayer to which Erie's income, losses and credits were passed through during the Orion subsidiaries' ownership of Erie.

Erie is certified as a Qualified Empire Zone Enterprise (QEZE) in multiple locations, including the Fulton Empire Zone, the Potsdam Empire Zone, the Albany County Empire Zone, the City and Town of Watertown Empire Zone, the Lewis County Empire Zone, the Oswego Empire Zone and the Oneida/Herkimer County Empire Zone. Erie's earliest certification date is August 23, 1999.

The tax year ended December 31, 2001 was the first year of the benefit period for Erie for all Empire Zone tax credits (EZ tax credits), including the tax reduction credit, the real property tax credit and the wage tax credit. Erie first had Empire Zone employees in 2001. Accordingly, the tax year ended December 31, 2001 was the first year of the benefit period for Erie for all EZ tax credits.

In July 2004, Brascan Power, Inc., created subsidiaries Brascan Power New York, Inc., and Brascan Power New York GP, Inc., to acquire Erie from the Orion subsidiaries. Brascan Power New York, Inc., and Brascan Power New York GP, Inc., began conducting business in New York State on July 6, 2004.

On September 28, 2004, Brascan Power New York, Inc., purchased Orion Power New York, LP's entire 99% interest in Erie. On September 28, 2004, Brascan Power New York GP, Inc., purchased Orion Power New York GP, LP's entire 1% interest in Erie.

Orion-owned Erie filed New York State and federal partnership tax returns for the period January 1, 2004 to September 28, 2004. It filed a federal form 1065, U.S. Return of Partnership Income, for the period ended September 28, 2004; on the form 1065, Orion-owned Erie checked the box entitled "Final return." For the period ended September 28, 2004, Orion-owned Erie filed a New York form IT-204, Partnership Return, to which it attached the following statement: "Effective 9/28/2004, Erie Boulevard Hydropower, LP (FEIN: 52-2157261) was sold. Therefore, this is the final return filed."

Orion-owned Erie filed a New York form IT-601, Claim for EZ Wage Tax Credit, for the period January 1, 2004 through September 27, 2004. On the portion of the form IT-601 where the taxpayer was directed to mark an "X" in the appropriate box to indicate the tax year for which the EZ wage tax credit was being claimed, Erie placed an X in the box entitled "4th."

For the period September 29, 2004 through December 31, 2004, Brascan Power-owned Erie filed a form 1065, U.S. Return of Partnership Income; on the form 1065, an "X" was placed in the box "Initial return." For the period September 29, 2004 through December 31, 2004, Brascan Power-owned Erie filed a New York form IT-204, Partnership Return, on which it checked the box "Initial return."

Brascan Power New York, Inc., and Brascan Power New York GP, Inc. filed New York State and federal corporation tax returns for the period July 6, 2004 to December 31, 2004. The returns reflected the date the companies began business in New York.

For the period January 1, 2004 through December 31, 2004, Orion Power Holdings, Inc., as a taxpayer with calendar based taxable year, filed New York State and federal combined corporation tax returns which included its subsidiaries, Orion Power New York, LP, and Orion Power New York GP, LP.

In or about September 2005, Brascan Power New York, Inc., changed its name to Brookfield Power New York Corp. and Brascan Power New York GP, Inc., changed its name to Brookfield Power New York GP Corp.

For the tax period January 1, 2005 through December 31, 2005, Brookfield Power New York Corp. (f/k/a Brascan Power New York Corp.) and Brookfield Power New York GP Corp. (f/k/a Brascan Power New York GP Corp.) each filed a form CT-3, General Business Corporation Franchise Tax Return.

For the year, 2005, Erie filed a form IT-204, Partnership Return, on which it claimed an EZ wage tax credit in the amount of \$22,125.00.

For the period July 6, 2004 through December 31, 2004, as part of its New York General Business Corporation Franchise Tax Return, Brascan Power New York GP Corp. filed a New

York form CT-601, Claim for EZ Wage Tax Credit, on which it claimed an EZ wage tax credit of \$716.00, which it used to reduce its tax liability for this period.

For the period July 6, 2004 through December 31, 2004, as part of its New York General Business Corporation Franchise Tax Return, Brascan Power New York Corp. filed a New York form CT-601, Claim for EZ Wage Tax Credit, on which it claimed an EZ wage tax credit of \$70,909.00 which it used to reduce its tax liability for this period.

For the year 2005, Brookfield Power New York GP Corp., on its General Business Corporation Franchise Tax Return, attached a form CT-601, Claim for EZ Wage Tax Credit, on which it claimed an EZ wage tax credit of \$2,311.00 that was passed through from its ownership of Erie. This credit was used to reduce Brookfield Power New York GP Corp.'s tax liability for this period.

For the year 2005, Brookfield Power New York Corp., on its General Business Corporation Franchise Tax Return, attached a form CT-601, Claim for EZ Wage Tax Credit, on which it claimed an EZ wage tax credit of \$228,814.00 that was passed through from its ownership of Erie. Of this amount, Brookfield Power New York Corp. used \$168,417.00 to reduce its tax liability for this period. The balance, or \$60,397.00, was carried forward for use in future years.

On November 17, 2006, the Income/Franchise Desk Audit Bureau of the New York State Department of Taxation and Finance (the Audit Bureau) began a desk audit to review the 2004 and 2005 franchise tax returns of Brookfield Power New York Corp. and Brookfield Power New York GP Corp.

From April 30, 2007 to April 30, 2008, Brookfield Power New York Corp. and Brookfield Power New York GP Corp. and their attorneys corresponded with the Audit Bureau regarding

Erie's EZ benefits for the years 2004 and 2005, including the wage tax credit and the real property tax credit.

For the period September 29, 2004 through December 31, 2004, when computing its average qualified number of employees for purposes of its EZ wage tax credit, Erie had divided the total of its employees as of September 20, 2004 and December 31, 2004 by four. The Audit Bureau recomputed Erie's average number of employees by dividing by two rather than by four.

Based on its recalculation of Erie's average number of employees, the Audit Bureau increased Brookfield Power New York GP Corp.'s wage tax credit, passed through from Erie, to \$1,485.00 for the period September 28, 2004 through December 31, 2004.

Based on its recalculation of Erie's average number of employees, the Audit Bureau increased Brookfield Power New York Corp.'s wage tax credit, passed through from Erie, to \$147,015.00 for the period September 28, 2004 through December 31, 2004.

Based on its recalculation of Brookfield Power New York GP Corp.'s EZ wage tax credits, the Audit Bureau applied \$779.00 of the credit against its tax due for the period ended December 31, 2004. After this adjustment, Brookfield Power New York GP Corp. had an EZ wage tax credit carry forward of \$707.00. For the year 2005, the Audit Bureau applied the \$707.00 in full to reduce Brookfield Power New York GP Corp.'s tax liability for this period.

Based on its recalculation of Brookfield Power New York Corp.'s EZ wage tax credits, the Audit Bureau applied \$13,773.00 of the credit against its tax due for the period ended December 31, 2004. After this adjustment, Brookfield Power New York Corp. had an EZ wage tax credit carry forward of \$133,242.00. For the year 2005, the Audit Bureau applied the \$133,242.00 in full to reduce Brookfield Power New York Corp.'s tax liability for this period.

In their reply brief, petitioners did not dispute the Audit Bureau's recalculation, but asserted that petitioners and the sellers of Erie (the Orion companies) worked together to ensure that each claimed only the amount of EZ wage tax credits that were properly allocated to them and to further ensure that such credits were not claimed twice.

In its audit, the Audit Bureau claimed that the January 1, 2004 to September 28, 2004 filing constituted a full year of benefits for purposes of the EZ program.

In correspondence dated January 3, 2008, the Audit Bureau claimed that Erie's two filings in 2004 (one for the period ended September 28, 2004 and one for the period ended December 31, 2004) each constituted a full benefit year and, therefore, constituted its final two years of wage tax credits.

By letters dated January 3, 2008, the Audit Bureau disallowed the claims by Brookfield Power New York Corp. and Brookfield Power New York GP Corp. for wage tax credits passed through from Erie for the year 2005. The amount of the disallowed claims for EZ wage tax credits for the 2005 tax year is \$228,814.00.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that the Division properly denied petitioners' claim for EZ wage tax credits for the period January 1, 2005 to December 31, 2005 because Erie exhausted its final two periods of eligibility by experiencing two taxable years during the 2004 calendar year.

ARGUMENTS ON EXCEPTION

Petitioners assert that they are entitled to EZ wage tax credits for the period January 1, 2005 through December 31, 2005. Petitioners argue that the Administrative Law Judge erred in determining that two taxable years occurred in 2004 for the purposes of determining the benefit

period for the credit. In their exception, petitioners also argue for the first time that the Division violated their rights under the Equal Protection Clause.

The Division argues that the Administrative Law Judge correctly determined that the two short taxable years experienced by Erie during 2004 constituted its final two years of eligibility for EZ wage tax credits under Tax Law § 210(19)(c). The Division contends that the law is clear and unambiguous and, therefore, it would be inappropriate to look to the legislative intent to define the benefit periods. The Division also argues that petitioners have not carried their burden of proof with respect to their equal protection argument.

OPINION

Petitioners argue that they are entitled to the EZ wage tax credit for their taxable years for the period January 1, 2005 to December 31, 2005 because the two short taxable years during 2004 do not each consume a taxable year of eligibility under Tax Law § 210(19)(c). Petitioners support their position by suggesting that they should accrue five calendar years of tax credits because the 2004 termination, and resulting short taxable years, was merely technical and that for all practical purposes, Erie continued to exist and operate as before. Petitioners also suggest that the short 2004 taxable years should not constitute separate taxable years of EZ wage credit eligibility because they do not correspond to the prior benefit periods claimed by Erie.

The principal issue before us is whether a taxable year of less than a calendar year, otherwise known as a short year, constitutes a taxable year for claiming the EZ wage tax credit under Tax Law § 210(19)(c).¹

¹ We note that our decision today only concerns the treatment of short taxable years under the statutes for claiming EZ tax credits, i.e. Tax Law §§ 14(f), 210(19), 605(a)(1), 658(c)(1), and 20 NYCRR § 1-2.7.

We note that tax credits, such as the EZ wage tax credits at issue, are “a particularized species of exemption from taxation” (*Matter of Mallinckrodt*, Tax Appeals Tribunal, November 12, 1992). To show entitlement to the exemption, petitioners must show that their interpretation of the law is not only plausible, but the only reasonable construction (*see, Matter of Grace v. State Tax Commn.*, 37 NY2d 193 [1975], *lv denied* 37 NY2d 708 [1975]). Petitioners’ argument must satisfy the burden of demonstrating clear and unambiguous entitlement to the claimed exemption (*see, Matter of Marriott Family Rests. v. Tax Appeals Tribunal*, 174 AD2d 805 [1991], *lv denied* 78 NY2d 863 [1991]).

We also acknowledge that the statutory language providing the exemption must be construed in a practical manner with deference to the legislative intent behind the exemption (*see, Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577 [1998]; *see also, Matter of Qualex, Inc.*, Tax Appeals Tribunal, February 25, 1995). However, to determine legislative intent, courts must first look at the literal reading of the act itself (*see, McKinney’s Cons Laws of NY*, Book 1, Statutes § 92). Where the statute is clear, the courts must follow the plain meaning of its words: “there is no occasion for examination into extrinsic evidence to discover legislative intent . . .” (McKinney’s Cons Laws of New York, Book 1, Statutes § 120; *see, Matter of Raritan Dev. Corp. v. Silva*, 91 NY2d 98 [1997]; *see also, Matter of Schein*, Tax Appeals Tribunal, November 6, 2003).

The statutory framework for the EZ wage tax credits for individuals and corporations exist within Tax Law § 606(k)(1) and § 210(19), respectively. As relevant to the corporate petitioners,

the EZ wage tax credit is a credit against New York State corporation franchise tax and is calculated based upon the number of new jobs created at a designated Empire Zone location.²

As relevant herein, Tax Law § 210(19)(c) outlines the periods for which EZ wage tax credits may be claimed:

[t]he credit shall be allowed only with respect to the first taxable year during which payments of empire zone wages are made and the conditions set forth in this paragraph are satisfied, and with respect to each of the four *taxable years* next following . . . (emphasis added).

For the purposes of the EZ wage tax credits for partnerships, the term “taxable year” is defined as the “same as [the taxpayer’s] taxable year for federal income tax purposes” (Tax Law §§ 14[f], 605[a][1], 658[c][1]; 20 NYCRR § 1-2.7). No ambiguity exists because the statutes clearly define the State taxable year as the federal taxable year.

Turning to Internal Revenue Code (IRC or Code), the federal taxable year of a partnership is determined as though the partnership was a taxpayer (IRC § 706[b][1][a]). Pursuant to IRC § 708(b)(1) and Treas Reg § 1.708-1(b)(2), a partnership terminates on the day of the sale or exchange of 50 percent or more of the total interest in the partnership. Under IRC § 706(c)(1), the partnership taxable year closes at termination. Except when a termination takes place on the last day of the tax year, the termination results in short taxable years.

We find that the two short taxable years during 2004 consumed Erie’s final two taxable years of eligibility under Tax Law § 210(19)(c). In their papers, petitioners submitted that the Erie partnership did not terminate for any reason other than issues of federal taxation. This is

² The credit is calculated at a rate of \$1,500.00 per qualified employee or at \$3,000.00 if such employee is “targeted” as defined by Tax Law § 210(19)(b)(2).

precisely the point: eligibility for the EZ wage tax credit is determined by reference to federal tax law. According to the Code, the September 28, 2004 sale terminated the Erie partnership and resulted in two short taxable years in 2004; to wit, the periods January 1, 2004 to September 28, 2004 and September 29, 2004 to December 31, 2004. Orion-owned Erie filed State and federal partnership tax returns and claimed EZ wage tax credits for the period January 1, 2004 to September 28, 2004, which constituted the fourth taxable year of eligibility. Brascan-owned Erie filed State and federal returns and claimed EZ wage tax credits for the latter period September 29, 2004 to December 31, 2004, which constituted the fifth and final year of eligibility. Therefore, petitioners are not entitled to EZ wage tax credits for the period January 1, 2005 to December 31, 2005.

The statutes and regulations are plain on their face. For the purposes of claiming EZ wage tax credits under Tax Law § 210(19)(c), a federal taxable year is the State taxable year regardless of the calendar duration of the taxable year. The Legislature could have included language excluding taxable years shorter than the calendar year in Tax Law § 210(19)(c), as it has it for other tax credits,³ but it chose not to do so. We affirm the Administrative Law Judge's determination that it is not our function to legislate where the New York State Legislature has failed or chosen not to do so. Only the Legislature can amend a statute; we cannot.

We reject petitioners' argument that the two 2004 short taxable years should be considered as one because the short years resulted from a mere termination that did not affect the business operations of Erie. The character of the Erie partnership termination and continuation of its

³The Legislature has distinguished between full calendar-length taxable years and short taxable years with regard to other tax credits (*see, e.g.*, Tax Law §§ 210.12[j][3], 1456[i][8][C], 1511[q][7][c]). The Legislature could have elected to include language such as "excluding short taxable years or years shorter than the calendar year."

business are of no moment. The law is clear. Though the partnership termination may have been technical and had no practical effect on business operations, the termination ended the federal taxable year for Erie. This also closed the period for which EZ wage tax credits may be claimed because a taxable year for the purposes of the Empire Zones program is determined by reference to the federal taxable year. To accept petitioners' argument and consider the type of partnership termination and its effect on business would be improper because it would give meaning to the statutes not found therein (*see, Matter of Schein, supra; see also*, McKinney's Cons Laws of NY, Book 1, Statutes § 94). There is simply no authority to combine two short taxable years to form one single calendar-length taxable year.

Petitioners also urge that the short 2004 taxable years should not constitute separate taxable years of EZ wage tax credit eligibility because they do not correspond to the prior benefit periods claimed by Erie. We disagree. The statutes at issue do not define the benefit period by prior benefit period claimed by the taxpayer. They clearly and unequivocally state that, for the purposes of the Empire Zone program, the term "taxable year" shall be the "same as [the taxpayer's] taxable year for federal income tax purposes" (Tax Law §§ 14[f], 605[a][1], 658[c][1]; 20 NYCRR § 1-2.7). The statute contains no language either suggesting or requiring that the length of the taxable year correspond to either previous taxable years or a calendar year. In the absence of such language or any ambiguity, there is no basis to adjust petitioners' 2004 EZ wage tax credit periods to correspond with prior periods.

Finally, petitioners argue that the Division violated their rights under the Equal Protection Clause by denying them EZ wage tax credits for the period January 1, 2005 to December 31, 2005. Petitioners contend that the basis for the denial, i.e., interpreting the "taxable year" under

Tax Law § 210(19)(c) to include short taxable years, would result in disparate treatment among partnerships that have changed ownership.

After a careful review of petitioners' argument, we must reject their claim. Despite being couched in terms of challenging the application of a statute, petitioners actually seek a decision on the constitutionality of the statutory periods for EZ wage tax credits. As discussed above, the inclusion of a taxable year, regardless of calendar length, within the term "taxable year" is the result of a statutory framework. It is well established that this forum lacks jurisdiction to consider the constitutionality of statutes; therefore, the laws at issue are presumed to be constitutional on their face (*see, Matter of Eisenstein*, Tax Appeals Tribunal, March 27, 2003; *see also, Matter of Geneva Pennysaver*, Tax Appeals Tribunal, September 11, 1989; *Matter of Fourth Day Enters.*, Tax Appeals Tribunal, October 27, 1988). As such, petitioners' equal protection argument is rejected.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Brookfield Power New York Corp. and Brookfield Power New York GP Corp. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Brookfield Power New York Corp. and Brookfield Power New York GP Corp. are denied; and

4. The denial of petitioners' claims for refund of Empire Zone wage tax credits for the period January 1, 2005 through December 31, 2005, is sustained.

DATED:Troy, New York
November 10, 2010

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Carroll R. Jenkins
Carrol R. Jenkins
Commissioner

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner