STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
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| of | : | |
| **TRANSCANADA FACILITY USA, INC.** | : | DECISION<br>DTA NO. 827332 |
| For Revision of a Determination or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Period January 1, 2010 through December 31, 2012. | :<br>: | |

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The Division of Taxation and petitioner, TransCanada Facility USA, Inc., filed exceptions to the determination of the Administrative Law Judge issued on June 7, 2018. The Division of Taxation appeared by Amanda Hiller, Esq. (Jennifer Baldwin, Esq., of counsel). Petitioner appeared by Morrison & Foerster LLP (Craig B. Fields, Esq., and Irwin M. Slomka, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in support of its exception and in opposition to the Division of Taxation's exception. The Division of Taxation filed a brief in opposition to petitioner's exception and in reply to petitioner's brief in opposition. Petitioner filed a reply brief. Oral argument was heard on September 26, 2019 in Albany, New York. The parties were permitted to file simultaneous supplemental briefs. The six-month period for issuance of this decision began on October 31, 2019, the date such supplemental briefs were received.

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

## *ISSUES*

I. Whether, during the years at issue, petitioner was subject to the $350,000.00 cap applicable to qualified New York manufacturers in computing the capital base of its corporation franchise tax liability in Tax Law former § 210 (1) (b) (1).

II. If petitioner was not subject to such cap, whether petitioner has established that its filing position was substantially justified or that reasonable cause exists to support abatement of penalties.

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge, except for finding of fact 18, which we have modified to clarify the record. The Administrative Law Judge's findings of fact and the modified fact are set forth below.

Petitioner, TransCanada Facility USA, Inc., and the Division of Taxation (Division) entered into a joint stipulation of facts. These facts, as relevant, are included in the facts set forth below.

1. Petitioner, a Delaware corporation, provides wholesale energy through its wholly-owned limited liability companies, TC Ravenswood, LLC (Ravenswood) and, since May 2011, Coolidge Power LLC (Coolidge).

2. Petitioner acquired Ravenswood on August 26, 2008 from National Grid plc.

3. Ravenswood and Coolidge are disregarded entities treated as divisions of petitioner for federal income tax and New York State corporation franchise tax purposes.

4. Coolidge operates a power generating facility outside New York.

5. Ravenswood operates a 2,480 MW (megawatt) multiple unit generating facility located in Long Island City, New York (the Ravenswood generating station).

6. The Ravenswood generating station is a power plant consisting of four primary units (Units 10, 20, 30 and 40) that employ steam turbine, combined cycle and combustion turbine technology to generate electricity.

7. The Ravenswood generating station generates electricity that is sold to the New York Independent System Operator.

8. Units 10 and 20 at the Ravenswood generating station each has a single controlled circulation, dual furnace, balanced draft, Combustion Engineering boiler and a cross-compound General Electric turbine generator.

9. Unit 30 at the Ravenswood generating station has two identical controlled circulation, balanced draft, divided furnace, Combustion Engineering boilers and an Allis Chalmers/Westinghouse cross-compound turbine generator.

10. Unit 40 at the Ravenswood generating station consists of a General Electric 7FA combustion turbine generator with an ALSTOM steam turbine generator, a Kawasaki heat recovery system generator, and an air-cooled condenser.

11. Consolidated Edison of New York, Inc., constructed and placed in service Units 10, 20, and 30 in the 1960's, while KeySpan Corporation constructed and first placed Unit 40 in service in 2004.

12. Petitioner placed Units 10, 20, 30 and 40 in service in 2008 upon its acquisition of Ravenswood from National Grid plc.

13. Units 10, 20, 30 and 40 at the Ravenswood generating station are used 100% in the generation of electricity.

14. For each of the years at issue, petitioner filed a general business corporation combined franchise tax return (form CT-3-A) and a general business corporation MTA surcharge return (form CT-3M/4M) that included its wholly-owned subsidiary, TC Ravenswood Services Corp.

15. For each of the years at issue, petitioner's combined group's capital base yielded the highest tax of its four alternative tax bases. For each of those years, petitioner computed tax on its combined group's capital base at the capped amount of $350,000.00 on the ground that it met the requirements of a qualified New York manufacturer.

16. Petitioner reported and paid corporation franchise tax in the amount of $355,000.00, reflecting $350,000.00 of combined capital base tax and $5,000.00 of fixed dollar minimum tax attributable to TC Ravenswood Services Corp., and MTA surcharge in the amount of $60,350.00, for each of the years at issue.

17. The Division audited petitioner's New York State combined corporation franchise tax and MTA surcharge returns for each of the years at issue.

18. After an audit, the Division determined that petitioner's combined group did not meet the requirements of being a qualified New York manufacturer pursuant to Tax Law former § 210 (1) (b) (2)[1] and disallowed the $350,000.00 cap on petitioner's tax computed on the combined group's capital base. The Division's April 30, 2015 letter to petitioner communicating this determination asserted that petitioner was a manufacturer for purposes of Tax Law former § 210 (1) (b) (2), but not a qualified New York manufacturer.

19. Based on that audit determination, the Division recomputed petitioner's tax on the combined group's capital base without the $350,000.00 cap, issuing a notice of deficiency,

[1] We note that article 9-A was extensively amended by chapter 59 of the Laws of 2014 and chapter 59 of the Laws of 2015. Accordingly, references to provisions in article 9-A herein will refer to the former version in effect during the years at issue.

notice number L-043802034, to petitioner, dated October 16, 2015 (notice). The notice asserted liability in the amount of $3,281,659.00, plus interest (computed to November 6, 2015) of $1,190,057.54 and Tax Law § 1085 (k) penalties of $328,165.00 for substantial understatement of tax in the amount of 10% of the asserted underpayment, for the years at issue.

20. Petitioner timely filed a petition, dated November 19, 2015, with the Division of Tax Appeals challenging the notice in its entirety.

21. More than 50% of the gross receipts of petitioner's combined group, excluding intercorporate receipts, were derived from the sale of electricity that it generated at the Ravenswood generating station.

22. The property comprising Units 10, 20, 30 and 40 at the Ravenswood generating station (the Ravenswood property) is tangible property and was acquired by petitioner by purchase, as defined by Internal Revenue Code (IRC) (26 USC) § 179 (d) in 2008.

23. The Ravenswood property is depreciable pursuant to IRC (26 USC) § 167 and had an adjusted basis at the close of each of the years at issue for federal income tax purposes of at least $1 million.

24. The Ravenswood property has a situs in New York and has a useful life of four years or more and is principally used by petitioner in the generation of electricity.

## *THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE*

The Administrative Law Judge first noted that, during the years at issue, a corporation reported as its franchise tax liability the highest tax as computed under one of four alternative bases. The Administrative Law Judge observed that the parties are in agreement that the capital base yielded the greatest tax in each of the years under review and that the tax imposed by the capital base on qualified New York manufacturers was not to exceed $350,000.00 in any one

year. The Administrative Law Judge observed that the primary issue involves whether petitioner met the definition of qualified New York manufacturer to take advantage of the $350,000.00 liability cap.

The Administrative Law Judge determined that petitioner has the burden of proof to show that the Division's notice is erroneous. He found that the capital base paragraph in Tax Law former § 210 relates to the computation of tax and does not exempt or exclude any class of income or taxpayer. He, therefore, rejected the Division's argument that the statute must be construed against petitioner and that petitioner's interpretation of qualified New York manufacturer must be the only reasonable interpretation for it to succeed.

The Administrative Law Judge reviewed the legislative history and Tribunal decisions relating to the definition of manufacturer in the capital base paragraph and the terms "production of goods by manufacturing or processing" as found in the investment tax credit (ITC) subdivision of Tax Law former § 210. The Administrative Law Judge rejected the Division's argument that the production of goods by manufacturing or processing cannot include electricity and found that petitioner is a manufacturer as defined in the capital base paragraph of Tax Law former § 210.

The Administrative Law Judge next addressed the issue of whether petitioner, as a manufacturer, falls under the more restrictive definition of qualified New York manufacturer in the capital base paragraph. He rejected petitioner's argument that the capital base paragraph must be construed as not excluding electricity generators from its liability cap. The Administrative Law Judge determined that since petitioner did not identify any ambiguity in the definition of qualified New York manufacturer, its resort to rules of statutory construction was improper. The Administrative Law Judge also rejected petitioner's arguments that the legislative

history of the statute and the Division's technical memorandum and reporting instructions support its position. The Administrative Law instead agreed with the Division in finding that petitioner's property does not come within the language in the ITC subdivision. He determined, therefore, that petitioner cannot meet the definition of qualified New York manufacturer and the liability cap in the capital base paragraph does not apply to it for the years at issue.

Lastly, the Administrative Law Judge determined that petitioner has not established reasonable cause for the substantial understatement of tax or that its filing position was supported by substantial authority. He sustained the penalties for substantial understatement of tax.

***ARGUMENTS ON EXCEPTION***

Petitioner first argues that the capital base is an imposition statute and that the Administrative Law Judge correctly rejected the Division's argument that the tax cap in the capital base amounts to a tax credit or exemption.

Petitioner next argues that the legislature enacted different definitions of the term "manufacturer" for purposes of the entire net income (ENI) base and capital base paragraphs and that a corporation that generates electricity can be a manufacturer for purposes of the capital base, while not so qualifying for purposes of the ENI base. Petitioner contends that the legislature added a specific exclusion for generators of electricity in the definition of manufacturer in the ENI base paragraph because those taxpayers were not excluded from the definition of qualified New York manufacturer by reference to clause (A) of the ITC subdivision. Petitioner asserts that to conclude otherwise would render the definition of manufacturer that excludes generators of electricity in the ENI paragraph superfluous.

Petitioner contends that the capital base paragraph definition of qualified New York manufacturer refers only to property described in clause (A) of the ITC subdivision and the ITC

limitation sentence in that subdivision applies only for purposes of determining eligibility for the ITC. Petitioner asserts that the result that the Division seeks would require a statutory amendment which, it argues, the legislature has specifically declined to adopt in state fiscal year 2008 and 2009 state budget bills. Petitioner argues that the Division's own writings, its technical memoranda and instructions to tax return forms, demonstrate that the generation of electricity is not a qualifying manufacturing activity for purposes of the ENI base, but is a qualifying manufacturing activity for purposes of the capital base.

Lastly, petitioner asserts that even if it is not a qualified New York manufacturer all penalties should be waived because any understatement of corporation franchise tax was based on substantial authority. Petitioner argues that its interpretation of the capital base paragraph is supported by the legislative history of the statute and the Division's own technical memoranda and tax return form instructions. Petitioner contends that it acted in good faith and any understatement was based on reasonable cause and an honest misunderstanding of fact or law.

The Division first argues that the $350,000.00 tax cap in the capital base paragraph functions no differently than a tax credit or exemption because it is only available to those taxpayers that meet the statutory definition of a qualified New York manufacturer and, as such, it is the exception to the general rule for all other taxpayers subject to the tax computed on the capital base. Therefore, it argues that such an exemption from general taxation must be construed against the taxpayer, and petitioner must prove that its interpretation of the statute is the only reasonable interpretation.

Next, the Division contends that the definition of manufacturer in the capital base paragraph uses language taken from the ITC subdivision and the same meaning must apply in both places. It asserts that a taxpayer principally engaged in the generation of electricity is not a

manufacturer for purposes of the ITC and, therefore, cannot be a manufacturer for purposes of the tax computed on the capital base. The Division asserts that the ITC subdivision has always excluded generators of electricity, even prior to 1993 when the ITC limitation sentence was added to the statute. Therefore, with or without the ITC limitation sentence, the Division asserts that the production of goods by manufacturing or processing does not include electricity. The Division argues that its interpretation was confirmed in 2017, when the legislature provided an express exclusion for generation of electricity in the ITC statute and made legislative findings to the effect that the production of goods by manufacturing has never included the generation of electricity.

The Division further argues that, even if petitioner is deemed a manufacturer, it is not a qualified New York manufacturer because it did not have property in New York that qualifies for the ITC. The Division contends that the ITC limitation sentence applies to clause (A) and, therefore, petitioner's property does not qualify for qualified New York manufacturer status.

In response to petitioner's argument, the Division asserts that the legislature's lack of action to add an express exclusion in the capital base paragraph for the generation of electricity does not lead to the conclusion that electricity generators can meet the requirement of a qualified New York manufacturer. It argues that legislative inaction because of its inherent ambiguity affords the most dubious foundation for drawing positive inferences and that the legislature could have found an express exclusion redundant considering the reference to the ITC subdivision, which includes the ITC limitation sentence.

Regarding penalties, the Division asserts that the substantial understatement penalties should be sustained. It argues that the fact that a taxpayer exercises good faith in taking an incorrect legal interpretation does not constitute reasonable cause and that petitioner has not

proven that penalties should be abated.

***OPINION***

Article 9-A of the Tax Law imposes a franchise tax on every corporation doing business, employing capital, owning or leasing property, or maintaining an office in New York State (Tax Law former § 209 [1]). Corporations located or doing business within the Metropolitan Commuter Transportation District are also subject to an additional surcharge tax (Tax Law former § 209-B). During the years at issue, New York corporate taxpayers filing on a combined basis, such as petitioner, reported as their article 9-A liability the greatest amount of tax due as computed, in part, on the highest of four alternative bases (Tax Law former §§ 210 (1); 211 (4); 20 NYCRR 3-1.3). The parties agree that the capital base yielded the greatest tax of the four bases (Tax Law former § 210 [1] [b] [1]). During those years, Tax Law former § 210 (1) (b) (1) provided that the tax imposed by the capital base on qualified New York manufacturers was not to exceed $350,000.00.

**Statutory Construction**

The petitioner bears the burden of proof in any case before the Division of Tax Appeals except where that burden has been specifically allocated to the Division (Tax Law § 1089 [e]). Here, there is no disagreement that petitioner has the burden to prove that the notice of deficiency issued by the Division is erroneous. The parties dispute, however, what petitioner must show for its interpretation of qualified New York manufacturer to prevail.

It is well established that "[a] statute which levies a tax is to be construed most strongly against the government and in favor of the citizen. The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax" (***Matter of Grace v New York State Tax Commn.***, 37 NY2d 193, 196 [1976],

***rearg denied*** 37 NY2d 816 [1975], ***lv denied*** 338 NE2d 330 [1975], ***quoting People ex rel. Mutual Trust Co. v Miller***, 177 NY 51, 57 [1903]). This principle is applicable, however, only in determining whether property, income, a transaction or event is subject to taxation (***id***). When the matter at issue "'is subject to the taxing statute,' but the question is whether taxation is negated by a statutory exclusion or exemption, 'a different rule applies'" (***Matter of Wegman's Food Mkts., Inc., v Tax Appeals Trib. of State of N.Y.***, 33 NY3d 587, 592 [2019], ***quoting Grace***, 37 NY2d at 196). Statutes creating tax exemptions must be construed against the taxpayer and the taxpayer bears the burden of establishing that the requested exemption applies. The interpretation, however, should not be so narrow and literal so as to defeat the "settled purpose" of the exemption (***Grace***, 37 NY2d at 196). "To that end, it is not sufficient for the taxpayer to establish that its construction of the underlying statute is plausible; rather, the taxpayer must demonstrate that its interpretation of the statute is the only reasonable construction" (***Matter of 677 New Loudon Corp. v State of N.Y. Tax Appeals Trib.***, 85 AD3d 1341, 1342 [3d Dept 2011], ***affd*** 19 NY3d 1058 [2012], ***rearg denied*** 20 NY3d 1024 [2013], ***cert denied*** 571 US 952 [2013] [internal quotation marks and citations omitted]).

The Division argues that the liability cap applicable to qualified New York manufacturers in Tax Law former § 210 (1) (b) ("capital base paragraph") is a tax exemption because it reduces the tax liability of a certain class of taxpayers similar to a credit. It contends, therefore, that petitioner must show a clear cut entitlement to the statutory benefit and that its interpretation of the term qualified New York manufacturer must be the only reasonable interpretation, citing ***Matter of Golub Serv. Sta. v Tax Appeals Tribunal of State of N.Y.***, 181 AD2d 216, 219 (3d Dept 1992) and ***Matter of Brooklyn Navy Yard Cogeneration Partners, L.P. v Tax Appeals Trib. of State of N.Y.***, 46 AD3d 1247, 1248 (3d Dept 2007), ***lv denied*** 10 NY3d 706 (2008).

Petitioner contends that the capital base paragraph imposes a tax on a taxpayer's apportioned capital at a set rate. It asserts that the statute does not exempt any particular class of income or taxpayer; and that it does not provide a deduction from income, nor exempt income from taxation. It argues that the plain language of the statute establishes that the capital base paragraph is an imposition statute, not an exemption statute. As such, petitioner contends that it must be construed most strongly against the Division.

To resolve this threshold issue, we observe, first, that Tax Law former § 209 imposes the franchise tax on corporations and provides in relevant part:

> "For the privilege of exercising its corporate franchise, or of doing business . . . every domestic or foreign corporation . . . shall annually pay a franchise tax . . . ." That franchise tax is imposed ". . . upon the basis of its entire net income base, or upon such other basis as may be applicable as hereinafter provided . . . ."

Next, we note that Tax Law former § 210 (1) (b) (1) prescribes the rate at which tax shall be computed for each dollar of the taxpayer's total business and investment capital (capital base) and provides that the amount prescribed by that paragraph shall not exceed $350,000.00 for qualified New York manufacturers:

> (b) Capital base. (1) The amount prescribed by this paragraph for taxable years beginning before January first, two thousand eight shall be computed at .178 percent for each dollar of the taxpayer's total business and investment capital, or the portion thereof allocated within the state as hereinafter provided. For taxable years beginning on or after January first, two thousand eight, the amount prescribed by this paragraph shall be computed at .15 percent for each dollar of the taxpayer's total business and investment capital, or the portion thereof allocated within the state as hereinafter provided. However, in the case of a cooperative housing corporation as defined in the internal revenue code, the applicable rate shall be .04 percent. In no event shall the amount prescribed by this paragraph exceed three hundred fifty thousand dollars for qualified New York manufacturers and for all other taxpayers ten million dollars for taxable years beginning on or after January first, two thousand eight but before January first, two thousand eleven and one million dollars for taxable years beginning on or after January first, two thousand eleven.

To be sure, the two sections of law must be read together for they refer to, and rely on,

each other within the overall corporation franchise tax scheme. As relevant here, Tax Law former § 209 imposes a franchise tax upon petitioner's capital base as described in the first two sentences of Tax Law former § 210 (1) (b) (1). Thus, those provisions provide for the imposition of the franchise tax. The question in this case is whether the last sentence of Tax Law former § 210 (1) (b) (1), while clearly contained within the statutory imposition scheme, is nonetheless an exemption, exclusion or deduction that operates "to negate the taxpayer's obligation to pay the otherwise applicable tax" (***Matter of Wegman's Food Mkts., Inc. v Tax Appeals Trib. of State of N.Y.,*** 33 NY3d at 593).

The $350,000.00 tax cap to which petitioner claims entitlement is functionally distinct from an exclusion, exemption, deduction or credit as those terms are typically used in tax statutes. It is not an exemption, which would serve to make all, or a portion of, a taxpayer's income or property not taxable. The tax cap is not a deduction, which is a "species" of exemption, and which would provide a fixed amount or percentage that a taxpayer may subtract to arrive at taxable income (***Grace***, 37 NY2d at 197). Nor is it a credit, another "species" of exemption, which would be applied to reduce tax otherwise due (***Golub***, 181 AD2d at 219). Finally, the tax cap does not exclude property or income from tax but imposes a limit on the amount of tax that is imposed on all taxpayers, $350,000.00 for qualified New York manufacturers and either $10 million or $1 million for all other taxpayers, depending on the reporting period. Thus, the tax cap does not "negate the taxpayer's obligation to pay the otherwise applicable tax," but merely defines the applicable tax that is imposed (***id.***).

Pursuant to the foregoing discussion, we conclude that Tax Law former §§ 209 and 210 (1) (b) (1) together impose franchise tax on the basis of a taxpayer's capital base. Accordingly, these statutes, including the tax cap provision, are properly "construed most strongly against the

government and in favor of the citizen" (***Grace*** 37 NY2d at 196).

**Manufacturer**

To qualify for the tax cap, petitioner must meet the three discreet requirements of Tax Law former § 210 (1) (b) (2): (1) it must be a manufacturer; (2) it must have property in New York that is described in Tax Law former § 210 (12) (b) (i) (A); and (3) either (i) the adjusted basis of that property for federal income tax purposes at the close of the taxable year is at least $1 million or (ii) all of its real and personal property must be located in New York (Tax Law former § 210 [1] [b] [2]). The parties agree that petitioner's Ravenswood property, which is in New York, had an adjusted basis of at least $1 million for federal income tax purposes at the close of each of the years at issue (***see*** finding of fact 23).

Tax Law former § 210 (1) (b) (2) defines manufacturer as:

> "a taxpayer which during the taxable year is principally engaged in the *production of goods by manufacturing, processing,* assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing. Moreover, for purposes of computing the capital base in a combined report, the combined group shall be considered a 'manufacturer' for purposes of this subparagraph only if the combined group during the taxable year is principally engaged in the activities set forth in this subparagraph, or any combination thereof. A taxpayer or a combined group shall be 'principally engaged' in activities described above if, during the taxable year, more than fifty percent of the gross receipts of the taxpayer or combined group, respectively, are derived from receipts from the sale of goods produced by such activities. In computing a combined group's gross receipts, intercorporate receipts shall be eliminated." (emphasis added).

The parties agree that more than 50% of the gross receipts of petitioner's combined group, excluding intercorporate receipts, were derived from the sale of electricity that it generated at the Ravenswood generating station (***see*** finding of fact 21). Hence, in determining whether petitioner is a manufacturer, the question is whether the generation of electricity is an activity that qualifies as the "production of goods by manufacturing [or] processing" (Tax Law former §

210 [1] [b] [2]).

The definition of manufacturer originated in chapter 61 of the Laws of 2005, which amended Tax Law former § 210 (1) (b) (1) to limit the $350,000.00 tax cap in the capital base to "manufacturers" and defined that term in Tax Law former § 210 (1) (b) (2) (L 2005, ch 61, Part M, § 1). The Division contends that, in defining manufacturer, the legislature used the same language as that found in Tax Law former § 210 (12) (b) (i) (ITC subdivision). The language of the ITC subdivision provides in relevant part:

> "A credit shall be allowed under this subdivision with respect to tangible personal property and other tangible property, including buildings and structural components of buildings, which are: depreciable pursuant to section one hundred sixty-seven of the internal revenue code, have a useful life of four years or more, are acquired by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code, have a situs in this state and are *(A) principally used by the taxpayer in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing, . . . . For purposes of this subdivision, the term 'goods' shall not include electricity*" (Tax Law former § 210 [12] [b] [i] [emphasis added]).

As used in Tax Law former § 210 (12) (b) (i) above, "goods" constitute "tangible movable personal property having intrinsic value" (***Matter of Leisure Vue v Commissioner of Taxation & Fin***., 172 AD2d 872, 873 [3d Dept 1991]), which includes items that are "capable of being owned, bought and sold" (***Matter of Clark***, Tax Appeals Tribunal, September 14, 1992). In ***Matter of Clark*** and in ***Matter of BT Capital Corp.*** (Tax Appeals Tribunal, October 1, 1992), this Tribunal found that the equipment in a hydroelectric plant qualified for the manufacturing ITC because all components in the process were involved in producing electricity, which, given the statutory language at the time, was deemed a good. In response to these Tribunal decisions, the legislature amended Tax Law former § 210 (12) (b) (i) to exclude property used in the production of electricity from eligibility for the manufacturing ITC (***see Matter of Constellation***

***Nuclear Power Plants, LLC***, Tax Appeals Tribunal, June 18, 2014 [footnote 7, p 35] ***confirmed sub nom*** 131 AD3d 185 [2015], ***appeal dismissed*** 26 NY3d 996 [2015]). Specifically, in 1993, the legislature added the ITC limitation sentence, "[F]or purposes of this subdivision, the term "goods" shall not include electricity," to Tax Law former § 210 (12) (b) (i) (L 1993, ch 57, §§ 126, 127).

In determining whether petitioner is a manufacturer under Tax Law former § 210 (1) (b) (2), we are guided by the fundamental rule of statutory construction, which is to effectuate the intent of the legislature (***Matter of 1605 Book Ctr. 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)" (***New York State Assn. of Counties v Axelrod***, 213 AD2d 18, 24 [3d Dept 1995], ***lv dismissed*** 87 NY2d 918 [1996]). Every word must, if possible, be given meaning (***Sanders v Winship***, 57 NY2d 391, 396 [1982]). This is because "[t]he statutory text is the clearest indicator of legislative intent" (***Matter of DaimlerChrysler Corp. v Spitzer***, 7 NY3d 653, 660 [2006]).

The definition of manufacturer does not explicitly exclude or except electricity or the generation of electricity. Furthermore, as the Administrative Law Judge observed, in the absence of contrary intent, the legislature is presumed to be aware of judicial decisions when crafting legislation (***see Conesco Indus. v St. Paul Fire & Mar. Ins. Co***., 184 AD2d 956 [3d Dept 1992], ***lv denied*** 85 NY2d 809 [1995], citing McKinney's Cons Laws of NY, Book 1, Statutes § 191). When adding the definition of manufacturer to the capital base paragraph in 2005 (L 2005, ch 61, Part M, § 1), the legislature chose to use language that the Tribunal had interpreted to include the generation of electricity, without including an exclusion or exception for the generation of

electricity. While it is clear that the term "goods" shall not include electricity for purposes of determining the eligibility of property for the ITC, the legislature did not make any clear or unambiguous corresponding changes to the capital base paragraph of Tax Law former § 210. The "failure of the legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended" (McKinney's Cons Laws of NY, Book 1, Statutes § 74). Based on the foregoing, we agree with the determination of the Administrative Law Judge that the clear and unambiguous language of the capital base paragraph leads to the conclusion that petitioner is a manufacturer. To conclude otherwise would require us to impermissibly extend the ITC limitation sentence by implication to the definition of manufacturer in the capital base paragraph (***see*** McKinney's Cons Laws of NY, Book 1, Statutes § 94).

In reaching this conclusion, we necessarily reject the Division's contention that, with or without the ITC limitation sentence, the production of goods by manufacturing or processing has never included electricity. It points to a 1988 advisory opinion (***Newport Hydro Associates*** [TSB-A-88 (5)(I)]) and legislation adopted in 2017 wherein it asserts that the legislature confirmed that the generation of electricity never has been an ITC eligible activity (***see*** L 2017, ch 59, Part P, § 1). The decisions of the Tribunal in ***Matter of Clark*** and ***Matter of BT Capital Corp.*** were final, irrevocable and precedential (Tax Law § 2016). While the legislature subsequently overrode those decisions by adding the ITC limitation sentence, our interpretation nonetheless became part of that provision prior to the amendment (McKinney's Cons Laws of NY, Book 1, Statutes § 72). Furthermore, the advisory opinion and 2017 legislation cited by the Division relate, specifically, to determining qualification for the ITC.[2]

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[2] Part P, Section 1 of Chapter 59 of the Laws of 2017 provides: "Section 1. Legislative findings. The legislature finds and declares that this act does not alter the meaning of the statutes amended herein; instead, it is the intent of the legislature to confirm the long-standing position of the department of taxation and finance interpreting these statutes, as well as relevant prior statutes, as not allowing the investment tax credit where tangible personal property

We find additional support for our conclusion that petitioner is a manufacturer for purposes of the capital base tax cap by comparing that provision with the ENI tax cap provision in Tax Law former § 210 (1) (a) (vi). Both provisions deal with the same subject matter (franchise tax caps for qualified New York manufacturers) and are therefore in pari materia (***Matter of Piccolo v New York State Tax Appeals Trib.***, 108 AD3d 107, 110 [3d Dept 2013]). Hence, they should be construed together and applied consistently (***id.***). Accordingly, the express exclusion of electricity generators from the definition of manufacturer under the ENI tax cap and the absence of similar language under the capital base tax cap indicates a legislative intent to exclude such electricity generators from the benefit of the ENI cap but not from the capital base cap.

**Qualified New York Manufacturer**

As we have determined that petitioner is a manufacturer, we turn to the meaning of qualified New York manufacturer as that term is used in Tax Law former § 210 (1) (b) (2). "[T]he construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld" (***Matter of Astoria Gas Turbine Power, LLC v Tax Commn. of City of N.Y.*** 14 AD3d 553, 556 [2d Dept 2005], ***affd*** 7 NY3d 451 [2006], quoting ***Matter of Howard v Wyman***, 28 NY2d 434, 438 [1971]). Where, however, "the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency" (***Matter of Level 3 Communications, LLC v Erie County***, 174 AD3d 1497, 1500 [4th Dept 2019], ***rearg denied*** 177 AD3d 1346 [4th Dept 2019],

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and other tangible property is principally used by the taxpayer in the production or distribution of electricity or steam, the delivery of natural gas after extraction from wells and the production and delivery of water through pipes and mains" (L 2017 Ch 59, Part P § 1).

quoting ***Lorillard Tobacco Co. v Roth***, 99 NY2d 316, 322 [2003]). Here, we conclude that the question of whether petitioner falls under the definition of qualified New York manufacturer in Tax Law former § 210 (1) (b) (2) is one of pure statutory interpretation and, therefore, agency deference is not warranted (***id***).

Tax Law former § 210 (1) (b) (2) defines qualified New York manufacturer as:

> "a manufacturer that has property in New York that is described in clause (A) of subparagraph (i) of paragraph (b) of subdivision twelve of this section and either (i) the adjusted basis of that property for federal income tax purposes at the close of the taxable year is at least one million dollars or (ii) all of its real and personal property is located in New York."

Thus, the remaining question is whether petitioner "has property in New York that is described in" Tax Law former § 210 (12) (b) (i) (A). Petitioner argues that its property is so described in clause (A) of the ITC subdivision. It asserts that the ITC limitation sentence applies only for purposes of determining eligibility for the ITC, for which petitioner has not applied. The Division argues that the ITC limitation sentence applies to clause (A) under any circumstances. This question narrows to the following: does the phrase "[F]or purposes of this subdivision" mean that the ITC limitation sentence only applies when determining eligibility for the ITC? Alternatively, was it the intention of the legislature to exclude electric generators from the definition of qualified New York manufacturers by referring to the description of property in clause (A) of the ITC subdivision?

Contrary to the Administrative Law Judge's determination, we do not find the language in Tax Law former § 210 (12) (b) (i) clear and unambiguous. Where the statutory language is uncertain, other methods of determining the legislature's intent may be employed (***see*** McKinney's Cons Laws of NY, Book 1, Statutes §§ 76, 92; ***Matter of Guardian Life Ins. Co. of Am. v Chapman***, 302 NY 226 [1951]; ***Matter of American Communications Tech. v State of***

***N.Y. Tax Appeals Trib.*** 185 AD2d 79 [3d Dept 1993], ***lv granted*** 82 NY2d 653 [1993], ***affd*** 83 NY2d 773 [1994]). Such other methods include a review of the statute's legislative history (***see Roberts v Tishman Speyer Props., L.P.,*** 13 NY3d 270, 286 [2009]). Ultimately, proper statutory construction focuses on "the precise language of the enactment in an effort to give a correct, fair and practical construction that properly accords with the discernable intention and expression of the Legislature [citation omitted]" (***Matter of 1605 Book Ctr. v Tax Appeals Trib. of State of N.Y.*** 83 NY2d at 244). Additionally, inquiry should be made into the spirit and purpose of the legislation, which requires examination of the statutory context of the provision (***see Nostrom v A.W. Chesterton Co.***, 15 NY3d 502, 507 [2010]).

The legislative history of the ITC limitation sentence demonstrates that it was enacted to exclude property used in the generation of electricity from eligibility for the manufacturing ITC (Mem in Support, Bill Jacket, L 1993, ch 57, at 25-26). Nothing in the statutory language or the legislative history suggests that the legislature intended the limitation sentence to apply to subjects other than the eligibility for the ITC. To the contrary, the legislative history suggests that enactment of the statutory language was necessary solely to "correct" the law after the issuance of the two Tribunal decisions noted above by clarifying that property used in the generation of electricity is not eligible for the ITC (***id.***).

In adopting the ITC limitation sentence, the legislature clearly limited the force of the language to the ITC subdivision itself. The words "for the purposes of this subdivision" are clear and an ordinary person reading the statute would conclude that that phrase refers to the term "goods" in the context of determining eligibility for the ITC (***see*** McKinney's Cons Laws of NY, Book 1, Statutes § 313 [tax laws should be interpreted as the ordinary person would interpret them]). Further, the ITC limitation sentence is an exception within Tax Law former § 210 (12)

(b) (i), limiting the term goods to items other than electricity. Generally, exceptions extend only so far as their language fairly warrants, and all doubts should be resolved in favor of the general provision rather than the exception (***see*** McKinney's Cons Laws of NY, Book 1, Statutes § 213).

When adopting the definition of qualified New York manufacturer, it can be presumed that the legislature was cognizant of the fact that property used in the generation of electricity was not eligible for the ITC (***see Matter of Delese v Tax Appeals Trib. of State of N.Y.***, 3 AD3d 612, 614 [3d Dept 2004], ***appeal dismissed*** 2 NY3d 793 [2004]). Thus, if the legislature had intended to exclude generators of electricity from the definition of qualified New York manufacturer, it would have referred more broadly to the ITC subdivision or simply required the property of a qualified New York manufacturer to be "ITC eligible." Instead, the legislature defined the property criteria of a qualified New York manufacturer narrowly by referring specifically to clause (A) of the ITC subdivision, thereby avoiding the force and effect of the ITC limitation sentence.[3]

The legislature might also have expressly excluded electricity generators from the definition of manufacturer under the capital base, as it did under the ENI base. Specifically, in 2007, the ENI base paragraph was amended by setting a reduced rate for qualified New York manufacturers (L 2007, ch 60, Part N, § 2). That legislation also amended the definition of manufacturer in the ENI base to exclude the generation of electricity from its terms as follows:

> The term 'manufacturer' shall mean a taxpayer which during the taxable year is principally engaged in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing. *However, the*

[3] We note that Chapter 59 of the laws of 2017 also amended the ITC limitation sentence to indicate that it specifically relates to clause (A). The statute as amended now reads: "For purposes of clause (A) of this subparagraph, tangible personal property and other tangible property shall not include property principally used by the taxpayer in the production or distribution of electricity, natural gas after extraction from wells, steam, or water delivered through pipes and mains" (L 2017 Ch 59 [A3009C]).

> *generation and distribution of electricity, the distribution of natural gas, and the production of steam associated with the generation of electricity shall not be qualifying activities for a manufacturer under this subparagraph"* (Tax Law former § 210 [1] [a] [vi] [emphasis added]).

Both the ENI and capital base paragraphs provide special treatment for a qualified New York manufacturer and both require that a qualified New York manufacturer must be a manufacturer. The ENI paragraph, however, specifically excludes the generation of electricity as a qualifying activity for a manufacturer. Our interpretation of the ITC limitation sentence as applied to the capital base tax cap accords this difference a meaning. Under the Division's proposed construction, the exclusionary language in the ENI paragraph is rendered superfluous. Such a construction is to be avoided (***Matter of Branford House v Michetti***, 81 NY2d 681, 688 [1993]). Accordingly, we agree with petitioner's argument that the ITC limitation sentence in Tax Law former § 210 (12) (b) (i) has no effect on the definition of qualified New York manufacturer for purposes of either the capital base or the ENI base.

Our interpretation of the statute also makes sense in terms of the 2008 and 2009 legislative proposals that would have excluded generators of electricity (among others) from the definition of manufacturer in the capital base paragraph. Such changes would have precluded generators of electricity from qualifying as qualified New York manufacturers.

Specifically, in 2008, one year after the amendment of the ENI paragraph, the legislature amended the capital base paragraph by adding the reduced rate for qualified New York manufacturers and by defining qualified New York manufacturers with the same language used in the ENI base (L 2008, ch 57, Part GG-1, § 1). Although the budget bill submitted by the governor also proposed conforming the definition of manufacturer in the capital base to the definition of manufacturer in the ENI base by including the exclusionary language as noted above, the legislature did not act on that proposal (***see*** 2008 NY Senate-Assembly Bill S6810,

A9810 Part J § 1 at 160-161). Thus, the legislature left the definition of manufacturer in the capital base unchanged and different from the definition of manufacturer in the ENI base.

In 2009, a budget bill was submitted that, again, included proposed language to exclude the generation of electricity as a qualifying activity for a manufacturer in the capital base paragraph (***see*** 2009 NY Senate-Assembly Bill S60, A160 Part B § 1 at 7). The 2009-10 memorandum in support of the budget bill states that part B would "[c]larify that electric generation facilities do not meet the definition of "manufacturer" under the capital base of the corporation franchise tax." The memorandum further states that "[e]xisting law imposes a Tax Law Article 9-A exclusion of electricity generation under the entire net income base but does not impose such a restriction on the capital base" (***id.***, at 7-8). Again, the legislature did not act upon the proposed amendment.

We draw no positive inference from the legislature's lack of action on those proposals (***see Clark v Cuomo***, 66 NY2d 185, 190-191 (1985); however, they are relevant and instructive as to the executive's interpretation of the existing law and the perceived necessity for the proposed change. They are also consistent with our construction of the capital base tax cap herein.

When interpreting tax statutes, it is "the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out" (***Gould v Gould***, 245 US 151, 153 [1917]; ***American Locker Co., v City of New York***, 308 NY 264, 269 [1955]). In particular, it is axiomatic that ambiguity in tax statutes be "construed in favor of the taxpayer and against the taxing authority, and the burdens they impose are not to be extended by implication" (***Matter of American Cyanamid & Chem. Corp. v Joseph***, 308 NY 259, 263 [1955]). Application of these

principles leads to the conclusion that the legislature intended the phrase "for purposes of this subdivision" to be given its precise meaning and that the Division's broad interpretation of ITC limitation sentence is contrary to legislative intent.

Pursuant to the foregoing discussion, we find that petitioner has met its burden to show that it is a qualified New York manufacturer pursuant to Tax Law former § 210 (b) (1) (2). Accordingly, we conclude that petitioner was subject to the $350,000.00 tax cap applicable to qualified New York manufacturers in computing its corporation franchise tax under the capital base.

In view of this decision, it is not necessary to address the issue of penalties.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The exception of TransCanada Facility USA, Inc. is granted;
3. The determination of the Administrative Law Judge is reversed;
4. The petition of TransCanada Facility USA, Inc. is granted; and
5. The notice of deficiency dated October 16, 2015, is canceled.

DATED: Albany, New York
May 1, 2020

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner