

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ROGER L. BURDICK</b>	:	DETERMINATION
	:	DTA NO. 822728
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 2006 and 2007.	:	

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Petitioner, Roger L. Burdick, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 2006 and 2007.

A hearing was held before Timothy Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on August 25, 2009, with all briefs submitted by November 24, 2009, which date began the six-month period for the issuance of this determination. Petitioner appeared by Kevin R. McAuliffe, Esq., and Amanda K. Davis, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Margaret T. Neri, Esq., of counsel).

***ISSUE***

Whether petitioner has established entitlement to a refund of the empire zone wage tax credit under Tax Law § 606(k), as claimed on his personal income tax returns for the years at issue.

***FINDINGS OF FACT***

1. Petitioner, Roger L. Burdick, is a third-generation automobile dealer who has owned and operated numerous automobile dealerships in the Syracuse, New York, area over the past several decades.

2. Petitioner formed RLB Development, LLC (RLB) on October 20, 2000 for the purpose of purchasing, developing and managing real property formerly known as the Penn-Can Mall (the facility) in Cicero, New York, a Syracuse suburb. Petitioner is the sole member of the LLC.

3. RLB purchased the mostly vacant Penn-Can Mall property on October 26, 2000.

4. Driver's Village, Inc. (Driver's Village), an S-corporation, was incorporated in Delaware on December 11, 2001. Petitioner is its sole shareholder.

5. On April 8, 2002, both Driver's Village and RLB were certified as New York State Qualified Empire Zone Enterprises (QEZE) in the Onondaga County Empire Zone pursuant to Article 18-B of the General Municipal Law, effective December 28, 2001.

6. In November 2005, seven auto dealerships owned by petitioner (all S-corporations with petitioner as the sole shareholder) and Driver's Village were merged into a single corporation. Driver's Village was the merger's surviving corporation.

7. Petitioner formed RLB, purchased the former Penn-Can Mall property, formed Driver's Village and merged his other dealerships into a single entity as part of a plan to create a large retail enterprise that differed from the typical stand-alone auto dealership and better served consumers. Petitioner hoped to imitate the success of big box retailers by providing a one-stop automotive shopping experience. In petitioner's opinion, the traditional, stand-alone dealership model of operation is out of step with modern consumer expectations. He noted the closing of several such dealerships in the Central New York area over the past several years. Through the

development of Driver's Village petitioner hoped to provide consumers with an automotive shopping experience that was, in the words of the Driver's Village director of operations, "bigger, better, faster and easier."

8. Petitioner, acting through RLB and Driver's Village, has invested more than \$24 million to acquire, renovate and equip the facility.

9. As operated during the years at issue, Driver's Village sold 12 makes or brands of new vehicles at the facility. Each brand of vehicle has its own store at the facility, which identifies itself as a dealership for that brand. Such an arrangement is atypical among automobile dealers and required significant effort on petitioner's part to secure the consent of the vehicle manufacturers to this arrangement. Traditionally, manufacturers exercise tight control over the brands with which their vehicles may be affiliated. A traditional dealership sells one or two brands of vehicle. The facility also sells many brands of used vehicles at its used car and truck "warehouse." Driver's Village thus provides customers with the opportunity to shop multiple brands of new and used vehicles at a single location and under one roof.

10. All phone and internet inquiries to Driver's Village are routed through a single central customer development center. There are 16 employees in the customer development center, including 6 sales consultants. These employees are trained to match the customer with the vehicle best suited to the customer's wants and needs. They are trained in all brands of vehicles sold at Driver's Village and are not tied to or paid commissions in respect of sales of any particular brand. Such a central customer development center selling multiple brands is not the norm in a traditional dealership.

11. Driver's Village also has sales consultants who specialize in leasing. Because certain brands no longer lease vehicles, these sales people now sell across multiple brands.

12. Additionally, Driver's Village has sales people located in each store who are tied to particular brands of vehicles. Such sales people are similar to those found in a traditional dealership.

13. Driver's Village offers credit counseling to potential customers through Finance First Credit Counseling, which is located on the premises. Petitioner trains its sales people to inquire how a customer perceives his or her own credit. If the customer believes his or her credit is questionable, then the sales person is trained to offer the services of Finance First Credit Counseling. An employee assigned to Finance First will then assist the customer in determining which car he or she can afford early in the process. This saves the customers from potential embarrassment once they have chosen a car and also makes more efficient use of the sales person's time. Employees working at Finance First at the facility are Driver's Village employees.

14. After a customer and a sales person come to an agreement on a vehicle and a price, Driver's Village has several sales managers on the premises available to finalize the purchase and a delivery coordinator to handle Department of Motor Vehicles and other paperwork. As explained by the Driver's Village director of operations, in the traditional model of closing sales the customer meets with the finance manager and the paperwork is handled by a title clerk. The Driver's Village process differs in that there are multiple sales managers available rather than a single finance manager, and the delivery coordinator is available throughout business hours rather than 9 to 5. The Driver's Village process is designed to be quicker than the traditional process, thereby improving the customer's experience and prompting repeat business.

15. Driver's Village has a vehicle appraisal purchase center. All potential trade-ins are referred to this central point for appraisal, the results of which are entered into a computer and

are available for use by sales people of all brands of vehicle. The vehicle appraisal center is open throughout Driver's Village's hours of operation. Conventional dealerships generally assign an individual to appraise potential trade-in vehicles. Previously, when petitioner operated several dealerships a different person would appraise vehicles at each dealership. The same car could thus get different appraisals, which would be embarrassing and could cause the loss of deals. It also took time. The new process is faster and more efficient.

16. Driver's Village operates a service shop at the facility called Driver's Express. In contrast to the traditional dealership, no appointment is necessary for maintenance work at Driver's Express. Prices at Driver's Express for routine maintenance work, such as oil changes, brake work and muffler repair are competitive with similar work done at specialty service shops. According to the director of operations, repair work at Driver's Express is less expensive than traditional dealerships. Through Driver's Express, petitioner hopes to secure the service business of customers who purchase cars at Driver's Village, including used car buyers who purchase a brand of car not sold as new at Driver's Village.

17. Driver's Village operates a state-of-the-art collision center that petitioner believes is the largest by square footage in New York State. Working with consultants, Driver's Village developed an innovative strategy for collision work. Several employees, working together, each perform separate tasks and are thereby able to make repairs faster and more efficiently than by the traditional method, by which a single employee is responsible for all tasks on a vehicle.

18. Petitioner's former stand-alone dealerships also offered collision repair and maintenance services.

19. Driver's Village operates an after-market accessories store within the facility called Driver's Expressions, which sells audio, video and security accessories. Although petitioner sold

some of these accessories in his traditional dealerships, Driver's Expressions sells a wider variety of these products, including remote starters, a popular item. By purchasing such accessories at Driver's Expressions at the time of purchase of a vehicle at Driver's Village, a customer can finance the accessories as part of the vehicle financing.

20. There is also a NAPA Auto Parts store within the facility that sells parts wholesale to Driver's Village, which, in turn, sells parts to the various dealerships or to customers. The purpose of placing the NAPA store in the facility was to enable NAPA to better supply Driver's Village. The NAPA store is run by NAPA employees.

21. Driver's Village also runs a coffee shop at the facility called Driver's Espresso.

22. The Driver's Village facility has an expansive waiting area for use by customers of all vehicle brands, which is much larger than that available in a traditional dealership. It features couches, work spaces, televisions, internet access, wi-fi, and a children's play area.

23. The various brands of vehicles sold at Driver's Village are connected by a common space. This helps customers to shop several brands before making a purchase, not only saving time but also avoiding any hassles associated with bad weather.

24. Driver's Village uses the common space and the extensive hallways in the facility to display vehicles of the various brands sold on the premises. Traditional dealerships do not have the space for this sort of marketing.

25. The common space in the facility is often used for community events coordinated by Driver's Village marketing employees. Examples include several blood drives each year, dance school performances, a community Easter Egg hunt, and performances by the Syracuse Symphony. Driver's Village also has classic car shows in its parking lots. These activities bring people to the facility who might not otherwise have occasion to visit and also brings people to the

facility at normally slow times. While petitioner's former dealerships held community events, such as blood drives, the availability of space at the facility enabled Driver's Village to expand the number and scope of such activities.

26. In addition to the various Driver's Village operations described above, the facility, which, as noted, is operated and maintained by RLB, also rents space to several tenants, including a barber shop, two insurance agencies, car rental agencies, a tax preparer, the Greater Syracuse Sports Hall of Fame, a leather and shoe repair shop, a dancing school, and a driving school. There are also conference facilities available for rental.

27. Driver's Village operates with a single payroll system, which includes all sales and support staff. It uses one accounting system and uses a single financial statement.

28. Petitioner's 2006 and 2007 federal S-corporation returns (Form 1120S) for Driver's Village, Inc., described the business of Driver's Village as "sales & service" of "new and used vehicles."

29. Petitioner timely filed his 2006 and 2007 New York State personal income tax returns.

30. On his 2006 New York return petitioner claimed a refundable QEZE real property tax credit of \$506,086.00 in respect of the real property taxes paid by RLB on the facility property. Petitioner also claimed a refundable empire zone wage tax credit of \$237,375.00 in respect of Driver's Village.<sup>1</sup> The Division of Taxation (Division) issued a refund in respect of these claims for credit.

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<sup>1</sup> Petitioner claimed a \$474,750.00 empire zone wage tax credit for the 2006 tax year, 50 percent of which was refundable.

31. Following the issuance of the refund, the Division conducted an audit and determined that petitioner was not entitled to a refund of the empire zone wage tax credit because Driver's Village was not a "new business" as defined in Tax Law § 210(12)(j).

32. On October 6, 2008, the Division issued to petitioner a Notice of Deficiency asserting tax due of \$237,375.00, plus interest, for the year 2006. The tax due in the notice equals the amount of the empire zone wage tax credit previously refunded to petitioner.

33. On his 2007 New York return petitioner claimed a refundable QEZE credit for real property taxes paid by RLB on the facility property. He also claimed an empire zone wage tax credit of \$441,750.00 in respect of Driver's Village for the 2007 tax year. He claimed a refund of 50 percent of that amount or \$220,875.00.

34. On August 11, 2008, the Division issued a refund to petitioner that included his QEZE real property tax credit claim. In explanation, a Statement of Tax Refund dated August 11, 2008 advised that the claimed empire zone wage tax credit was disallowed because, according to the Division, Driver's Village was not a "new business" as defined in Tax Law § 210(12)(j). More specifically, the Statement of Tax Refund explained:

Driver's Village is considered substantially similar in both ownership and operation to Roger's Buick, Inc.,<sup>2</sup> which was previously taxable under Article 9-A of the New York State Tax Law. We have identified other business entities as well that were substantially similar in both ownership and operation to Driver's Village and were previously taxed under Article 9-A of the New York State Tax Law.

The Statement of Tax Refund further noted the availability of the disallowed refund as a carryforward for 2008.

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<sup>2</sup> Roger's Buick, Inc., was one of the seven S-corporation dealerships owned by petitioner that were merged into Driver's Village (*see* Finding of Fact 6).

35. Following the issuance of the August 11, 2008 Statement of Tax Refund, the Division requested from petitioner a breakdown of the revenue and expenses of Driver's Village for the years at issue. Petitioner did not provide such records to the Division in response to this request and did not submit any such records at the hearing.

### ***CONCLUSIONS OF LAW***

A. Petitioner seeks a refund of the empire zone wage tax credit under Tax Law § 606(k). “[A] tax credit is ‘a particularized species of exemption from taxation’ (*Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193, 197, 371 NYS2d 715 [1975]) and, therefore, petitioner bore the burden of showing ‘a clear-cut entitlement’ to the statutory benefit (*Matter of Luther Forest Corp. v. McGuinness*, 164 AD2d 629, 632, 565 NYS2d 570 [3d Dept 1991])” (*Matter of Golub Service Station v. Tax Appeals Tribunal* 181 AD2d 216, 585 NYS2d 864 [3d Dept 1992]). Nevertheless, construction of an exemption statute should not be so narrow as to defeat the exemption's settled purpose (*Matter of Grace v. New York State Tax Commn.*, 37 NY2d at 196, 371 NYS2d at 718).

B. As a threshold issue, petitioner attacks the Division's assertion that a presumption of correctness attaches to a Notice of Deficiency. This claim is without merit. The presumption of correctness is well established (*see e.g. Matter of Panuccio*, Tax Appeals Tribunal, August 16, 2007).

C. As a second threshold issue, petitioner contends that the Empire Zone wage tax credit at issue should not be subject to the rule of statutory construction noted above because of his “contractual relationship with the State” resulting from Driver's Village, Inc.'s QEZE status. Whether or not the granting of QEZE status creates a contractual relationship, this contention is

without merit. As enacted by the Legislature, the credit at issue is a part of the Tax Law and is, by its own terms, a *tax credit*. It is properly treated as such.

D. Turning to the substantive issue herein, Tax Law § 606(k) provides for an empire zone wage tax credit against personal income tax “as hereinafter provided” where, as in the present matter, the taxpayer has been certified as a QEZE pursuant to Article 18-B of the General Municipal Law. Pursuant to Tax Law § 606(i), New York S corporation shareholders may claim a credit against personal income tax with respect to the credits enumerated in that subsection in an amount equal to the shareholder’s pro rata share of the S corporation’s credit base. The empire zone wage tax credit is among the credits listed in subsection (i). Here, since petitioner is the sole shareholder of the S corporation, he was entitled to claim 100 percent of the corporation’s credit base.

E. Tax Law § 606(k)(5) provides that where the amount of empire zone wage credit exceeds a taxpayer’s tax for a given year the excess may be carried over to the following year or years. In lieu of carrying over any such excess, a taxpayer who qualifies as “an owner of a new business” may claim a refund of 50 percent of such excess credit

F. In the present matter there is no dispute that petitioner is entitled to the empire zone wage tax credit as computed on his income tax returns for the years at issue. What is in dispute is whether petitioner qualified as an owner of a “new business” and was therefore entitled to a refund of 50 percent of the wage tax credit as claimed on his returns.

G. Pursuant to Tax Law § 606(i)(1)(B), for purposes of determining the application of the credits listed in that section, S corporation shareholders are treated as “the owner of a new business” if the corporation qualifies as a “new business” under Tax Law § 210(12)(j).

H. As relevant herein Tax Law § 210(12)(j)(2) defines “new business” as any corporation, except a corporation which “is substantially similar in operation and in ownership to a business entity (or entities) taxable, or previously taxable, under this article . . . or [Article 22].”

I. The specific question presented in the present matter is thus whether Driver’s Village was “substantially similar in operation” to the seven S-corporations that were merged together to form Driver’s Village.<sup>3</sup> Considering that both Driver’s Village and the former stand-alone dealerships were engaged in the business of selling and servicing vehicles there was unquestionably some level of similarity in these businesses. A close review of the record, however, clearly establishes that Driver’s Village was not “substantially similar in operation” to the former dealerships within the meaning of Tax Law § 210(12)(j)(2). Accordingly petitioner is properly entitled to a refund of the empire zone wage credits as claimed pursuant to Tax Law § 606(k)(5).

There were many significant differences in the operation of petitioner’s former stand-alone dealerships and the operation of Driver’s Village. Most fundamentally, petitioner reorganized his dealerships to operate through a single corporate entity and relocated such dealerships to a central location. As a result, rather than operating seven separate businesses at seven locations, with the creation of Driver’s Village petitioner operated a single business at a single location. This change made possible many other changes. It enabled petitioner to centralize his management of the dealerships as well as his payroll and accounting functions (*see* Finding of Fact 27). This centralization also provided consumers with the unusual opportunity to shop a wide variety of vehicles at one location and the design of the mall encouraged customers to browse various

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<sup>3</sup> Since petitioner was the sole shareholder of both Driver’s Village and the seven S-corporations, there is no question that Driver’s Village was substantially similar in ownership to these previously taxable entities.

vehicle brands (*see* Findings of Fact 9, 23, 24). Petitioner also instituted new procedures at Driver's Village to improve the sales process and make it more efficient (*see* Findings of Fact 14, 15). He centralized his phone and internet sales through the customer development center which, contrary to tradition in the automotive industry, sold across all brands (*see* Finding of Fact 10). He also added credit counseling to his services (*see* Finding of Fact 13). He centralized and improved his service department to make it competitive with specialty service shops (*see* Findings of Fact 16). He installed a state-of-the art central collision department, which used an innovative method of doing collision work (*see* Finding of Fact 17). He also expanded his inventory of after-market accessories (*see* Finding of Fact 19). Additionally, available space at the facility allowed petitioner to expand the number and scope of community events coordinated by Driver's Village marketing staff (*see* Finding of Fact 25). Considered together, these were "important" and "essential" changes to the "method or manner of functioning" of Driver's Village and thus compel the conclusion that Driver's Village was not "substantially similar in operation" to the previously taxable entities.<sup>4</sup>

J. The Division notes, correctly, that the various changes to petitioner's operation notwithstanding, Driver's Village remains a business that sells and services vehicles and is therefore not a "new business" under Tax Law § 210(12)(j)(2). As noted, however, the statute in question defines "new business" in terms of substantial similarities in operations and thus requires a focus on the entities' specific method or manner of functioning to determine whether

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<sup>4</sup> Where, as here, words in a statute are not defined in the statute or regulations, it is appropriate to use dictionary definitions to ascertain the words' ordinary, everyday meanings (*see Matter of Publishers Clearing House*, Tax Appeals Tribunal, July 22, 1997). As relevant herein, "substantially" means "important, essential" and "operation" means "a method or manner of functioning" (*see* Merriam-Webster Online Dictionary [2010]).

or not a corporation meets the test. Here, as discussed, Driver's Village does meet the statutory definition of "new business."

The Division also correctly argues that the amenities provided by unrelated tenants in the mall facility (*see* Finding of Fact 26) should not be considered in determining whether Driver's Village was substantially similar in operation to the previous dealerships. Driver's Village neither owned nor operated the facility. Petitioner chose to create a separate business, RLB, to perform this function. The operation of the facility and the presence of other tenants in the facility are thus not a part of the business of Driver's Village. The exclusion of this factor notwithstanding, however, petitioner has met the new business test under Tax Law § 210(12)(j)(2).

The Division also points to petitioner's failure to provide a breakdown of Driver's Village's revenue and expenses for the years in question despite the Division's request for such material (*see* Finding of Fact 35) as indicative of petitioner's failure to prove entitlement to the claimed refund. With respect to this contention, it is unclear what value such information would have without similar information from years when the former dealerships were operating separately. In any event, as noted, the statute requires an analysis of the manner in which the entities conduct their operations. Revenue and expense information is not necessary to show how the entities operated. As discussed, petitioner has established that Driver's Village differed significantly in operation from the previously taxed entities. Accordingly, the lack of expense and revenue information is not fatal to petitioner's claim.

K. The petition of Roger L. Burdick is granted. With respect to the tax year 2006, the Notice of Deficiency dated October 6, 2008 is cancelled. With respect to the tax year 2007, the Division of Taxation is directed to refund such empire zone wage tax credit as claimed on petitioner's return for that year, together with such interest as may be applicable.

DATED: Troy, New York  
May 13, 2010

/s/ Timothy Alston  
ADMINISTRATIVE LAW JUDGE