STATE OF NEW YORK

DIVISION OF TAX APPEALS

| | | |
|---|---|---|
| In the Matter of the Petitions | : | |
| of | : | |
| **JOSEPH HUCKO AND SURIA TAWIL AND JOSEPH J. HUCKO TRUST** | : | |
| | : | AMENDED DETERMINATION |
| for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2005, 2006 and 2007. | : | DTA NOS. 823873 AND 823874 |
| | : | |

Petitioners, Joseph Hucko, Suria Tawil and Joseph J. Hucko Trust, filed petitions for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 2005, 2006 and 2007.

On November 17, 2011 and December 5, 2011, respectively, petitioners, appearing by Bousquet Holstein, PLLC (Philip S. Bousquet and Paul M. Predmore, Esqs., of counsel), and the Division of Taxation, appearing by Mark F. Volk, Esq. (Christopher O'Brien, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by June 29, 2012, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

## *ISSUE*

Whether the Division of Taxation properly disallowed petitioners' claims for the qualified empire zone enterprise real property tax credits claimed by WL, LLC, for the years 2005, 2006 and 2007, on the grounds that the company did not meet the employment increase factor.

## *FINDINGS OF FACT*

1. In April, 2000, a New York limited liability company known as WL, LLC (WL), was formed. Petitioners Joseph Hucko and Joseph H. Hucko Trust, among others, were partners of WL, and as such, derived tax benefits therefrom. Suria Tawil, though not a partner of WL, is a petitioner in this matter by virtue of her filing a joint federal income tax return with her husband, Joseph Hucko.

2. The Division of Taxation (Division) certified WL as a qualified empire zone enterprise (QEZE) effective May 9, 2000.

3. Commencing in January 2001, and continuing throughout each of the tax years in issue in this case, WL had one full-time employee, i.e., Albert Bradwell. Mr. Bradwell never worked for WL until he became a full-time employee at that time.

4. From 1998 through 2003, Mr. Bradwell was a part-time employee of Washington Street Partners, Inc. (WSP), never exceeding more than 35 hours per week for WSP during these years.

5. By virtue of common ownership, WSP and WL are "related persons" as defined in Internal Revenue Code (IRC) § 465(b)(3)(C).

6. For each of the tax years, 2005, 2006 and 2007, WL claimed real property tax credits under Tax Law § 15 in the amounts of $86,293.00, $90,207.45 and $92,054.29, respectively. By virtue of their respective ownership interests in WL, each petitioner was allocated a portion of those credits.

7. After the Division's review of WL's tax returns for 2005, 2006 and 2007, it was concluded that the company could not satisfy the employment increase factor pursuant to Tax Law § 15(b). The sole basis for that determination was that Mr. Bradwell could not be counted

in the employment number calculated under Tax Law § 14(g), because he had been employed part-time by WSP, a related person to WL.

8. The Division issued a Notice of Deficiency to Joseph H. Hucko Trust dated June 29, 2009, asserting personal income taxes due in the amount of $17,259.00 plus interest for 2005.

Petitioner Joseph H. Hucko Trust had submitted a claim for refund for the 2006 and 2007 tax years in the total amount of $73,670.00 (Refund Claim No. X877069587). By Notice of Disallowance dated June 26, 2009, the trust's claim for refund in the amount of $17,517.00 for 2006 was denied. The Division also issued to the trust a Statement of Tax Refund for 2007, dated July 10, 2009, reflecting a disallowance of a portion of its refund claim in the amount of $56,153.00.

The basis for the assessment for 2005, and the amounts disallowed for 2006 and 2007, was that the employee claimed by WL did not meet the employment increase factor criteria, resulting in a disallowance of the associated QEZE real property tax credits.

9. The Division issued a Notice of Deficiency to Joseph H. Hucko and Suria Tawil dated September 2, 2008, asserting personal income taxes due in the amount of $36,319.00 plus interest for 2005. The corresponding statement of audit changes indicated that the basis for this assessment was twofold: (1) $31,928.00 represented disallowed QEZE real property tax credits from WL for its failure to meet the employment increase factor; and (2) $4,391.00 represented special assessments included in the eligible taxes for the QEZE real property tax credits claimed. Only the disallowance of $31,928.00 is contested.

The Division issued a Notice of Deficiency to Joseph H. Hucko and Suria Tawil dated September 2, 2008, asserting personal income taxes due in the amount of $35,559.00 plus interest for 2006. The corresponding statement of audit changes indicated that the basis for this

assessment was twofold: (1) $33,377.00 represented disallowed QEZE real property tax credits from WL for its failure to meet the employment increase factor; and (2) $2,182.00 represented special assessments included in the eligible taxes for the QEZE real property tax credits claimed. Only the disallowance of $33,377.00 is contested.

The Division issued two additional notices of deficiency to Joseph H. Hucko and Suria Tawil dated November 27, 2009 and November 5, 2009, for tax years 2006 and 2007, respectively, assessing $18,883.00 and $18,433.95 plus interest, which are also petitioned in this case. The corresponding statements of audit changes indicated that the basis for these assessments was that there were special assessments included in the eligible taxes for the QEZE real property tax credits claimed. The Division determined these special assessments were not qualified charges and the credits associated therewith were disallowed. Petitioners no longer contest these 2006 and 2007 assessments.

***SUMMARY OF THE PARTIES' POSITIONS***

10. Petitioners' position is that they are entitled to the pass through of the QEZE real property tax credits. Petitioners argue that the employment increase test is met because as to the calculation of the employment number, the employment of Mr. Bradwell by the related company, specifically its part-time nature, is of no consequence and not disqualified.

11. The Division maintains that WL's employment number for the three years at issue is zero because Mr. Bradwell cannot be counted due to the exclusionary language of Tax Law § 14(g)(1). The Division believes its interpretation of this section does not allow petitioners to count Mr. Bradwell, since he was employed part-time by WSP, a person "related" to WL under the Internal Revenue Code.

## *CONCLUSIONS OF LAW*

A. Petitioners seek entitlement to the QEZE credit for real property taxes under Tax Law § 15, which are claimed by WL, LLC, for the years 2005, 2006 and 2007. Under Tax Law § 15(b)(1), for a QEZE certified before April 1, 2005, the amount of the real property tax credit shall be equal to the product of (i) the benefit period factor, (ii) the employment increase factor, and (iii) the eligible real property taxes paid or incurred by the QEZE during the taxable year. The parties agree that WL was certified as a QEZE before April 1, 2005 and with reference to the Tax Law § 15(b)(1) criteria, neither the benefit period factor nor the eligible real property taxes paid are in dispute. The narrow question presented is whether WL is entitled to any real property tax credits based upon the calculation of the employment increase factor.

In order to calculate the employment increase factor under Tax Law § 15(d), it is necessary to know both the QEZE's employment number for the taxable year as well as the QEZE's test year employment number. It is undisputed that WL's test year is 1999 and the test year employment number is zero. The only remaining question is how to identify WL's employment number for the tax years in issue.

B. Tax Law § 14(g)(1) defines "employment number" as follows:

> The term "employment number" shall mean the average number of individuals, excluding general executive officers (in the case of a corporation), employed full-time by the enterprise for at least one-half of the taxable year. Such number shall be computed by determining the number of such individuals employed by the taxpayer on the thirty-first day of March, the thirtieth day of June, the thirtieth day of September and the thirty-first day of December during the applicable taxable year, adding together the number of such individuals determined to be so employed on each of such dates and dividing the sum so obtained by the number of such dates occurring within such applicable taxable year. *Such number shall not include individuals employed within the state within the immediately preceding sixty months by a related person to the QEZE, as such term "related person" is defined in subparagraph (c) of paragraph three of subsection (b) of section four hundred sixty-five of the internal revenue code.* For this purpose, a

> "related person" shall include an entity which would have qualified as a "related person" to the QEZE if it had not been dissolved, liquidated, merged with another entity or otherwise ceased to exist or operate (emphasis added).

C. Petitioners' position is that upon the application of Tax Law § 14(g)(1), WL's employment number for each of the tax years 2005, 2006 and 2007 is "1," since prior to its certification WL had no employees, and after its May 9, 2000 certification, it had one full-time employee, i.e., Albert Bradwell. The Division maintains that WL's employment number for the three years at issue is zero because Mr. Bradwell cannot be counted due to the exclusionary language of Tax Law § 14(g)(1). The Division believes the plain language interpretation of this section does not allow petitioners to count Mr. Bradwell, since he was employed part-time by WSP, a person "related" to WL, and the part-time characterization is not relevant.

D. Resolution of the instant matter ultimately turns on the definition of the term "employment number" as set forth in Tax Law § 14(g), and its application to these facts. This is a matter of statutory construction, the fundamental rule of which is to effectuate the intent of the Legislature (***Matter of 1605 Book Center, Inc. v. Tax Appeals Tribunal***, 83 NY2d 240, 244, 609 NYS2d 144, 146 [1994], ***cert denied*** 513 US 811, 130 L Ed 2d 19 [1994]). Where the statutory language is clear and unambiguous it should be construed so as to give effect to the plain meaning of the words used (***Patrolmen's Benevolent Assn. v. City of New York***, 41 NY2d 205, 208, 391 NYS2d 544, 546 [1976]). Statutes authorizing tax exemptions or tax credits are to be strictly and narrowly construed against the taxpayer (***see Matter of International Bar Assn. v. Tax Appeals Tribunal***, 210 AD2d 819, 620 NYS2d 582 [3d Dept 1994], ***lv denied*** 85 NY2d 806, 627 NYS2d 323 [1995]).

It is well established that the primary objective of the Empire Zones program was to create jobs in distressed areas of the state, and I am in agreement with the Division that to ignore the

previous part-time employment of Mr. Bradwell by a related entity undermines the purpose of the scheme and consequently would be counter to the Legislative intent. Tax Law § 14(g)(1) makes no distinction between the part-time and full-time employment of persons who were employed by related companies, and to make such distinction reads something into the statutory language that simply does not exist. Mr. Bradwell's employment by a related company, whether or not part-time, excluded him in the determination of the employment number for the tax years in issue, adversely affecting the employment increase factor, and the pass-through of the QEZE real property tax credits. Accordingly, the Division properly disallowed the real property tax credits claimed by WL and ultimately passed through to petitioners in this matter.

E. The petitions of Joseph Hucko, Suria Tawil and Joseph J. Hucko Trust are denied, and the Division's notices of deficiency dated June 29, 2009 and September 2, 2008, Notice of Disallowance dated June 26, 2009, and the Statement of Tax Refund disallowance dated July 10, 2009, are all hereby sustained.

DATED: Albany, New York
December 6, 2012

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE