

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions :

of :

JOSEPH SPIEZIO, III, JACQUELINE SPIEZIO, :
JOSEPH SPIEZIO, IV AND LIANNA SPIEZIO :

for Redetermination of Deficiencies or for Refund of
Personal Income Tax under Article 22 of the Tax Law :
for the Year 2008. :

DECISION

DTA NOS. 824755, 824756,
824757, 824758 AND
824759

In the Matter of the Petition :

of :

LOUISE SPIEZIO AND JOSEPH SPIEZIO, III :

for Redetermination of Deficiencies or for Refund of :
Personal Income Tax under Article 22 of the Tax Law :
for the Years 2006 and 2007. :

Petitioners, Joseph Spiezio, III, Louise Spiezio, Jacqueline Spiezio, Joseph Spiezio, IV and Lianna Spiezio filed an exception to the determination of the Administrative Law Judge issued on July 17, 2014. Petitioners appeared by Harris Beach PLLC (Pietra G. Lettieri, Esq., of counsel). The Division of Taxation, appeared by Amanda Hiller, Esq. (Christopher O'Brien, 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 January 21, 2016, in New York, New York, which date began the six-month period for the issuance of this decision.

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

ISSUES

I. Whether the Division of Taxation properly disallowed petitioners' Empire Zone wage tax credits and Empire Zone real property tax credits claimed via Joni Property Trust, LLC, for the years 2006, 2007 and 2008, on the basis that Joni Property Trust, LLC, had an employment increase factor of zero because certain employees of that corporation were not "qualified employees" since they had been employed by a related entity, Joni Management and Realty Services, LLC, within the immediately preceding 60 months.

II. Whether the Division of Taxation properly disallowed petitioners' Empire Zone wage tax credits claimed via Spiezio Organization, LLC f/k/a Mercantile Lofts, LLC, for the year 2008, upon the basis that such entity failed to maintain a full-time employee for more than half of that year.¹

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact 2 and 10 which have been modified to more fully reflect the record. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. During the years at issue, 2006 through 2008, and during the year 2005, petitioner Joseph F. Spiezio, III, was the managing member and tax member of certain domestic limited

¹ The Division of Taxation did not file an exception to the conclusion of the Administrative Law Judge that petitioners were entitled to their claimed Empire Zone real property tax credits for the years 2006, 2007 and 2008, and their claimed Empire Zone real property tax credits for the years 2006 and 2007. Accordingly, those issues are not before this Tribunal.

liability companies (Spiezio Companies). These companies, the dates of their creation, and their allocated ownership interests at various points in time are set forth below:

a) Spiezio Family Holdings, LLC (SFH) was created November 9, 1997. For the years 2005, 2006 and 2008, SFH was owned by Joseph Spiezio, III (9%), Louise Spiezio (61%), Jacqueline Spiezio (10%), Joseph Spiezio (10%) and Lianna Spiezio (10%). For the year 2007, SFH was owned by Joseph Spiezio, III (100%).

b) Joni Property Trust LLC (Joni Property) was created August 18, 1998. For the year 2005, Joni Property was owned by SFH (50%) and by one Nicholas Tarsia (50%).² For the year 2006, Joni Property was owned by Joseph Spiezio, III (50%) and Nicholas Tarsia (50%). For 2007, Joni Property was owned by Joseph Spiezio, III, (50%) and Louise Spiezio (50%).³ In 2008, Joni Property was owned by SFH (50%) and Nicholas Tarsia (50%).

c) Joni Management & Realty Services LLC (Joni Management) was created April 6, 1999. For all of the years 2005 through 2008, Joni Management was owned by SFH (50%) and Nicholas Tarsia (50%).⁴

d) Spiezio Organization LLC, f/k/a Mercantile Lofts LLC (Merc) was created May 3, 2001. For all of the years 2005 through 2008, Merc was owned by Joseph Spiezio, III (100%).

2. For the audit years at issue, Joseph Spiezio, III, and/or the other members of SFH, including the other four petitioners herein who are the spouse and children of Joseph Spiezio, III, received the flow-through benefit of Qualified Empire Zone Enterprise (QEZE) tax credits claimed by certain of the Spiezio Companies, with such credits allocated pro-rata to the various petitioners in accordance with their proportional membership interests in the various entities

² For those years during which SFH owned 50% of Joni Property (2005 and 2008), and with respect to the 50% ownership interest SFH held in Joni Management, their 50% ownership interests were in turn held in the same percentages as are set forth with respect to the ownership of SFH during the years 2005, 2006 and 2008 (*see* finding of fact 1 [a]).

³ The record reflects that for 2007, Joni Property was owned by Joseph Spiezio, III (50%) and Louise Spiezio (50%) (*see* Ex L, 2007 New York Partner's Schedule K-1 [Form IT-204-IP]). This differs from the ownership for such year as set forth in petitioners' brief (Joseph Spiezio, III [50%] and Nicholas Taxzia [50%]). This distinction has no impact on the conclusion that Joni Property and Joni Management were "related persons" per Internal Revenue Code (IRC) § 465 (b) (3) (C).

⁴ Joni Management was dissolved October 28, 2009.

during the particular years in issue. Petitioners' Joni Property-based claims for credit were calculated utilizing Joni Property's test year of the calendar year 2001, a test year employment number of zero and an employment number for each of the years in issue of two employees, Mr. Hector Paulino and Mr. Scott Fredericks. Petitioners' Merc-based claims for credit were calculated utilizing Merc's test year of the calendar year 2001, a test year employment number of zero and an employment number for each of the years in issue of one employee, Ms. Mildred Molina.

3. Until the end of 2005, when it was merged into Joni Property, Joni Management was an operating company that engaged in the overall management of various commercial real estate projects owned and developed by the Spiezio Companies. Joni Management acted as the primary operator and the designated entity to conduct repairs to properties that were purchased by the Spiezio Companies in the City of Yonkers, New York, Empire Zone (the Yonkers Zone). Joni Management also undertook all of the construction and renovation of dilapidated properties purchased by its affiliated entities. Joni Management applied for, and was certified as, a QEZE on December 27, 2000. Joni Management's successes in the revitalization of the urban core of the City of Yonkers led to it being presented with the first "Rising Development" award given in the history of the City of Yonkers.

4. Joni Property initially operated as a real estate holding company, having purchased for redevelopment a run down and abandoned retail shopping center. Joni Property applied for, and was certified as, a QEZE on May 30, 2002 in connection with a facility located at 660 Tuckahoe Road, Yonkers, New York (the Tuckahoe project). The property was completely rehabilitated into a thriving shopping center that currently employs over 100 people in the Yonkers community. As a result of Joni Property's development efforts, the developer was able to hire

local contractors. The taxes collected on the property increased from \$60,000.00 to \$160,000.00. In order to attract viable tenants so as to make the shopping center a success, a pass-through of the Yonkers Zone tax credits to all tenants through their leases was offered, such that upon fulfillment of its economic development goals, Joni Property's tenants were not required to reimburse the landlord for property taxes paid.

5. In similar fashion, Merc undertook the development of a vacant and abandoned commercial building, located in Yonkers at 12 - 14 North Broadway, into the first new loft building in the City of Yonkers (the Merc Project). The Merc Project was developed for both residential and commercial use, including the development of a single unit commercial space for a retail store. Merc applied for, and was certified as, a QEZE on May 30, 2002 in connection with the facility located at 12 - 14 North Broadway, Yonkers, New York. The loft development was commenced and completed in accordance with the goals set out by the local and State Empire Zone program to promote economic development and job creation in an economically distressed area of the State.

6. SFH was created as a holding company for all of the Spiezio family holdings and it continues to operate in the same capacity today. According to the August 29, 2013 affidavit of Joseph Spiezio, III, although Joni Management, Joni Property, and Merc were separate legal entities for Empire Zone purposes, they were viewed by him as one cohesive operation, with employees working "concurrently." Mr. Spiezio states that he interpreted "facility" as meaning "location rather than taking into account employment for the separate legal entities."

7. Mr. Hector Paulino was hired by Joseph Spiezio, III, in 2001 as a property manager and local site manager to perform maintenance functions and handle tenant inquiries for the SFH properties, including the Tuckahoe Project and the Merc Project, located within the Yonkers

Zone. Mr. Paulino avers by his affidavit dated August 29, 2013 that he was employed full-time during the years 2006 through 2008 and, given the differences in size and scope of the properties he managed, spent approximately 80% of his working time at the Tuckahoe Project and 20% of his working time at the Merc Project. Mr. Paulino states that he was under the direction of Joseph Spiezio, III, in performing services including, but not limited to, site management, oversight of all retail tenants, and common area maintenance of the facilities. Mr. Paulino notes that his paychecks were issued by Joni Management until 2005, when it ceased operations and was merged into Joni Property, and that his paychecks were thereafter issued by Joni Property.

8. Mr. Scott Fredericks was hired by Joseph Spiezio, III in 2001 as a comptroller for the SFH companies, to perform financial functions including comptroller functions, assisting all managers of the Spiezio companies, meeting with Yonkers Zone officials, filing reports, reviewing and paying contractor invoices and vetting lease qualifications and lease procurement with respect to the above-noted properties located within the Yonkers Zone. Mr. Fredericks avers by his affidavit dated August 29, 2013 that, like Mr. Paulino, he was employed full-time during the years 2006 through 2008, and spent approximately 80% of his working time on the Tuckahoe Project and 20% of his working time on the Merc Project. Mr. Fredericks states that he was under the direction of Joseph Spiezio, III in performing his various functions on behalf of the Spiezio Companies. Like Mr. Paulino, Mr. Fredericks notes that his paychecks were issued by Joni Management until 2005, when it ceased operations and was merged into Joni Property, and that his paychecks were thereafter issued by Joni Property.

9. Ms. Mildred Molina was hired by Joseph Spiezio, III, as a property manager at the Merc Project, in charge of advertising and leasing, conducting meetings and showings, and overseeing maintenance of the loft property. Petitioners claim that Ms. Molina was employed

full-time, as the on-site rental manager for the Merc loft property, and that as such, her compensation included the value of an apartment in which she was required to live at the property. Ms. Molina was required to be on call 24 hours per day, seven days per week, and had increased responsibilities during the construction of the several-phase project. Ms. Molina was employed by Merc commencing with the execution of an employment agreement dated August 1, 2005 between Ms. Molina and Merc for a term of employment running from such August 1, 2005 date through June 30, 2008 (Employment Agreement). Joseph Spiezio, III, states that, like Messrs. Paulino and Fredericks, Ms. Molina worked under his direction in performing her employment responsibilities concerning Merc.

10. Although petitioners' brief describes Ms. Molina as a "leased employee," the Employment Agreement is, by its own terms, a direct agreement between Merc, as employer, and Ms. Molina, as employee, and there is no evidence that Ms. Molina was employed by Joni Management at any time or was an employee leased by that entity to Merc. The Employment Agreement specifies, at Article 2, paragraph 2.01, that it is for a fixed term of employment spanning August 1, 2005 through June 30, 2008, "unless the employment of the Employee is otherwise terminated or extended pursuant to the provisions of this Agreement or the agreement of the parties." The Employment Agreement requires, under Article 7, paragraph 7.03, that any changes to the terms of the agreement must be "in writing signed by the party to be bound." Ms. Molina's compensation was set, per Article 3, paragraph 3.01, at a salary of \$30,500.00 per year, consisting of \$24,000.00 to be deducted therefrom as the value of an on-premises apartment in which she was required to live, leaving \$6,500.00 as the balance of her salary income. The date and method of payment of her compensation, per Article 3, paragraph 3.02, was set as a weekly

payment of \$125.00, plus the \$2,000.00 per month amount attributable to the on-premises apartment to be deducted on the last business day of each month.

11. Ms. Molina's final weekly payment of \$125.00 was made on June 27, 2008. Pursuant to the terms of the Employment Agreement, the final deduction for the value of the on-premises apartment would have been made on June 30, 2008. There is no evidence that the Employment Agreement was terminated prior to its June 30, 2008 ending date, nor any evidence that such agreement was extended beyond such date. Similarly, and contrary to petitioners' allegations by brief, there is no evidence that Ms. Molina continued to have the right to remain in the on-premises apartment, or that she in fact remained in that apartment or that she continued in her employment with Merc beyond the June 30, 2008 termination date of the Employment Agreement.

12. As the result of an audit of petitioners' New York State personal income tax returns for the years 2006, 2007 and 2008, the Division issued the following notices of deficiency:

Petitioner	Date of Notice	Notice Number	Tax Year	Tax Amount ⁵
Joseph Spiezio, III & Louise Spiezio	11/29/2010	L-035069555-4	2006	\$72,621.00
Joseph Spiezio, III & Louise Spiezio	11/29/2010	L-035069557-2	2007	\$145,182.00
Jacqueline Spiezio	02/24/2011	L-035069554-5	2008	\$14,389.00
Joseph Spiezio, IV	02/24/2011	L-035069553-6	2008	\$14,389.00
Lianna Spiezio	02/24/2011	L-035069550-9	2008	\$15,116.00

13. On February 2, 2011, the Division issued to petitioners Joseph Spiezio, III, and Louise Spiezio a Notice of Disallowance, premised upon the foregoing audit and pursuant to

⁵ The amounts shown reflect tax only and do not include interest due thereon. No penalties were asserted on the deficiencies at issue.

which the Division disallowed a portion, \$106,499.00, of Mr. and Mrs. Spiezio's claim for refund for the year 2008.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge explained that the Empire Zones program was adopted by the Legislature in an effort to encourage economic growth and the creation of new jobs. The Administrative Law Judge went on to explain that this was accomplished by providing QEZE's with tax credits. In this case, the credits are the QEZE credit for real property taxes (Tax Law §§ 15 and 210 [27]) (real property tax credit) and the QEZE wage tax credit (Tax Law § 210 [19]) (wage tax credit). Petitioners receive the benefits of these credits as New York S corporation shareholders (Tax Law §§ 15 and 606 [i], [k], [bb]). The credits were claimed through SFH via Joni Property and Merc for the years 2006, 2007 and 2008.

The Administrative Law Judge, with regard to the Joni Property-based credits, concluded that the employees utilized by petitioners in calculating their employment increase factor were not eligible to be included in that calculation as they were employed by a related person, Joni Management, within the previous 60 months and therefore excluded from the calculation by Tax Law §§ 14 (g) (1), 606 (k) (4) (iii) and 210 (19) (d) (3). In reaching this conclusion, the Administrative Law Judge found petitioners' argument that the employees were actually employed by SFH to work concurrently for the Spiezio Companies to be unsupported by the facts in the record. Specifically, the Administrative Law Judge found the affidavits relied upon by petitioner to be insufficient to meet petitioners' burden of proof.

The Administrative Law Judge, with regard to the Merc-based credits, explained that the controversy centered on who was an "eligible employee" and what were "eligible wages" under the relevant statutes. The Administrative Law Judge concluded that petitioners were entitled to

the real property tax credit for the years 2006, 2007 and 2008, as well as the wage tax credit for 2006 and 2007, because petitioners established that Ms. Molina was employed full-time and paid according to her Employment Agreement with Merc from August 1, 2005 through June 30, 2008.

However, the Administrative Law Judge concluded that petitioners were not entitled to the wage tax credit for 2008 because there was no evidence in the record to support petitioners' argument that Ms. Molina was employed by Merc beyond June 30, 2008. Thus, Ms. Molina did not receive "empire zone wages for more than half of the taxable year" as required by Tax Law § 210 (19) (d) (2).

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioners argue, with regard to the Joni Property-based credits, that they proved by clear and convincing evidence that Messrs. Paulino and Fredericks were concurrently employed under a common paymaster relationship, and that thus, the Administrative Law Judge incorrectly found that petitioners were not entitled to the claimed Joni Property-based real property tax credits and wage tax credits claimed for 2006, 2007 and 2008. Petitioners assert that affidavits are allowed under the Tax Appeals Tribunal's Rules of Practice and Procedure and are a valid basis for findings of fact. Thus, the affidavits submitted by petitioners should not have been ignored by the Administrative Law Judge. Petitioners argue that having introduced the affidavits, it was incumbent upon the Division to discredit the facts asserted therein.

Petitioners argue that they are entitled to the Merc-based 2008 wage tax credit in that there is no evidence in the record that Ms. Molina ceased to be an employee of Merc, or vacated the apartment that constituted part of her compensation, prior to December 31, 2008. Petitioners also assert that there is no evidence in the record that the Employment Agreement between Ms. Molina and Merc was terminated.

Petitioners also argue that the Division should be estopped from denying the credits at issue as: (1) they relied upon representations from the New York State Department of Economic Development that tax incentives were available in exchange for economic development in the targeted zone; (2) they entered into leases with tenants where the tax credits were taken into account in determining rental rates; and (3) these lower rental rates allowed the tenants to hire more people. Petitioners assert that they relied upon the QEZE certifications to their detriment in that they have no means available to recoup any additional rents.

Petitioners argue that the Administrative Law Judge's interpretation of the relevant statutory language is contrary to both the intent of the statutes and the economic development policy that the statutes were intended to foster. Furthermore, petitioners argue that the result of the Administrative Law Judge's determination amounts to an unconstitutional taking of their property in violation of the Due Process Clauses of the United States and New York constitutions. Petitioners' argument is that there has been a retroactive breaching of a de facto contract between New York State and petitioners.

Finally, petitioners request that this Tribunal consider the additional evidence, i.e., a document entitled Agreement for Services, dated January 3, 2001, that was submitted with their reply brief on exception. Petitioners argue that such evidence did not come to the attention of their representative until after the record was closed and that such evidence is relevant to a material issue in this matter, the issue of whether the employment test was met with regard to the Joni Property-based credits.

The Division asserts that petitioners are attempting to treat Joni Management, Joni Property and Merc as separate entities for purposes of qualifying as QEZEs and calculating test period employment numbers, while at the same time treating the Spiezio Companies as one

cohesive operation when it comes to calculating employment numbers for the years at issue. It is the Division's position that petitioners cannot have it both ways.

The Division further asserts that there is no evidence in the record that a concurrent employment situation existed or that there existed a common paymaster arrangement. Rather, the Division argues that all of the evidence submitted indicates the opposite, i.e., that there existed separate entities with separate payrolls.

With regard to the Merc-based credits, the Division argues that Ms. Molina's employment with Merc ended on June 30, 2008 and that there is no evidence in the record to support petitioners' contention that she was employed by Merc beyond that date or entitled to remain in the on-premises apartment for the remainder of 2008. Thus, the Division asserts that Ms. Molina was not employed for more than half of 2008 and accordingly, petitioners are not entitled to the benefits of the Merc-based credit for 2008.

The Division also argues that there is no basis to apply the doctrine of estoppel against it under the present circumstances because the certification of Joni Property and Merc as QEZEs did not automatically entitle petitioners to the benefits of real property tax credits and wage tax credits. Rather, the Division urges that QEZEs must meet the requirements contained in the Tax Law in order to receive the credits and that such requirements were not met in this case.

The Division asserts that its application of the Tax Law is not contrary to legislative intent, public policy or the United States Constitution. The Division argues that the primary goal of the Empire Zones program is to create new full-time jobs in distressed areas. The Division argues that the employees were merely shifted from one business to another and thus no new jobs were created in the Empire Zone as a result of Messrs. Paulino and Fredericks being hired by Joni Property.

Finally, the Division argues that the evidence petitioners sought to introduce into the record with their reply brief was not newly discovered evidence as claimed by petitioners and should not be considered by this Tribunal.

OPINION

The Legislature enacted the Empire Zones program to spur economic growth and job creation (*see* General Municipal Law § 956; *Matter of Hucko Trust*, Tax Appeals Tribunal, September 19, 2013). To accomplish these goals, the legislation provides certain tax benefits in the form of credits to QEZEs. In this case, the credits at issue are the real property tax credit (Tax Law §§ 15 and 210 [27]) and the wage tax credit (Tax Law § 210 [19]). Petitioners receive the benefits of these credits as New York S corporation shareholders by claiming the credits through SFH via Joni Property and Merc for the years 2006, 2007 and 2008 (Tax Law §§ 15 and 606 [i], [k], [bb]).

As is evident from the determination of the Administrative Law Judge, an understanding of the burden of proof is crucial to the resolution of these issues. In order to prevail, petitioners must first overcome the presumption of correctness, which attaches to the notices, by proving them clearly erroneous (*Matter of Gilmartin v Tax Appeals Trib.*, 31 AD3d 1008 [2006]). Further, we observe that “a tax credit is ‘a particularized species of exemption from taxation’ (*Matter of Grace v New York State Tax Commn.*, 37 NY2d 193, 197 [1975], *rearg denied* 37 NY2d 816 [1975], *lv denied* 37 NY2d 193 [1975]) and, therefore, petitioner bore the burden of showing ‘a clear cut entitlement’ to the statutory benefit” (citations omitted)” (*Matter of Golub Serv. Sta. v Tax Appeals Trib. of State of N.Y.*, 181 AD2d 216, 219 [1992]; *see also Matter of Piccolo v New York State Tax Appeals Trib.*, 108 AD3d 107 [2013]). Indeed, petitioners must

establish that, under the circumstances, their interpretation of the statute is the only reasonable interpretation (*Matter of Hucko Trust*).

The Joni Property-Based Credits

Subject to certain limitations not at issue, the amount of a real property tax credit in a given tax year is the product of three factors, one of which is the employment increase factor (*see* Tax Law § 15 [b]). Consistent with the goals of the Empire Zones program, the employment increase factor measures increases in employment by comparing the QEZE's employment number in the year in which credit is claimed to its employment number in a test year. The specific manner by which this factor is calculated is set forth in Tax Law § 15 (d) as follows:

“The employment increase factor is the amount, not to exceed 1.0, which is the greater of:

(1) the excess of the QEZE's employment number in the empire zones with respect to which the QEZE is certified pursuant to article eighteen-B of the general municipal law for the taxable year, over the QEZE's test year employment number in such zones, divided by such test year employment number in such zones; or

(2) the excess of the QEZE's employment number in such zones for the taxable year over the QEZE's test year employment number in such zones, divided by 100.

(3) For purposes of paragraph one of this subdivision, where there is an excess as described in such paragraph, and where the test year employment number is zero, then the employment increase factor shall be 1.0.”

As used in Tax Law § 15 (d), employment number generally means “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” (Tax Law § 14 [g]). Excluded from that number, however, are individuals “employed . . . within the immediately preceding sixty months by a related person to the QEZE, as such term ‘related person’ is defined in (26

USCA § 465 [b] [3] [C])” (*id.*). Tax Law §§ 606 (k) (4) (iii) and 210 (19) (d) (3) set forth virtually identical limiting language with regard to the type of individuals who may not be included within the employment number for purposes of the wage tax credit.

It is undisputed that Joni Management was related to Joni Property, the QEZE under which the credits were claimed, and that Messrs. Paulino and Fredericks were paid by Joni Management within the 60 months preceding their being paid by Joni Property. Thus, it appears that Messrs. Paulino and Fredericks would be excluded from Joni Property’s employment number for the years in issue. As they are the only two employees claimed by Joni Property, Joni Property’s employment numbers for the years in issue are thus zero and, accordingly, its employment increase numbers are also zero. As such, petitioners would not be entitled to the benefit of the Joni Property-based credits (*see Matter of Solis-Cohen*, Tax Appeals Tribunal, March 3, 2016).

Petitioners argue however, that Messrs. Paulino and Fredericks were actually concurrently employed by the Spiezio Companies pursuant to a common paymaster arrangement. Petitioners are correct that, under certain circumstances, QEZE credits may be allowed where common paymaster or common employment arrangements are utilized, even where such arrangements occur within a group of related companies. However, such circumstances are not present here.

We agree with the Administrative Law Judge that petitioners have failed to prove that Messrs. Paulino and Fredericks were employed concurrently by the Spiezio Companies and paid by a common paymaster. Indeed, the only proof offered by petitioners in support of this position were the somewhat conclusory affidavits of: (1) Mr. Joseph Spiezio, III, averring that he viewed Joni Management, Joni Property and Merc as one cohesive operation, even though they were

separate legal entities, with the employees working concurrently on the separate projects; (2) Mr. Hector Paulino averring that he spent approximately 80% of his working time at the Tuckahoe Project and 20% of his working time at the Merc Project; worked at the direction of Mr. Joseph Spiezio; and that his paychecks were issued by Joni Management until 2005 when it ceased operations and merged into Joni Property, and thereafter by Joni Property; and (3) Mr. Scott Fredericks averring that he spent approximately 80% of his working time at the Tuckahoe Project and 20% of his working time at the Merc Project; worked at the direction of Mr. Joseph Spiezio; and that his paychecks were issued by Joni Management until 2005 when it ceased operations and merged into Joni Property, and thereafter by Joni Property. As noted by the Administrative Law Judge, petitioners did not submit into evidence any contemporaneous documentation that would support the claims in the affidavits of concurrent employment by the Spiezio Companies, or any common paymaster arrangements between the companies.

Petitioners did attempt to submit additional evidence, a document entitled Agreement for Services, dated January 3, 2001, with their reply brief on exception. Petitioners urge this Tribunal to consider this evidence on the basis that it did not come to the attention of petitioners' representative until after the record was closed and it is relevant to a material issue, the issue of whether the employment test was met. This Tribunal has repeatedly held "that a fair and efficient hearing process must be defined and final, and that the acceptance of evidence after the record is closed is not conducive to that end" (*Matter of Ippolito*, Tax Appeals Tribunal, August 23, 2012, *confirmed sub nom Matter of Ippolito v Commissioner of N.Y. State Dept. of Taxation & Fin.*, 116 AD3d 1176 [2014] [citations omitted]). However, petitioners did have the option of bringing a motion to reopen the record within 30 days from the issuance of the determination of the Administrative Law Judge (20 NYCRR 3000.16 [b]). Newly discovered evidence may be

admitted pursuant to such a motion if it “could not have been discovered with the exercise of reasonable diligence in time to be offered into the record” (20 NYCRR 3000.16 [a] [1]).

Petitioners did not attempt to file a motion to reopen the record, nor did they even assert that the evidence they wanted to introduce “could not have been discovered” prior to the record being closed “with the exercise of reasonable diligence.” Accordingly, we have not considered the additional evidence that petitioners attempted to submit with their reply brief.

With regard to the evidence in the record, petitioners are correct that affidavits are allowed under the Rules of Practice and Procedure of this Tribunal (20 NYCRR 3000.15 [d] [1]), and that findings of fact may be based upon such affidavits (*see Matter of Orvis Co. v Tax Appeals Trib. of State of N.Y.*, 86 NY2d 165 [1995], *cert denied* 516 US 989 [1995]). However, the affidavits contain contradictory indications of employment in that Messrs. Paulino and Fredericks concede that they were paid by Joni Management and then Joni Property. Without any documentation to support the contrary assertions in the affidavits that they were employed by the Spiezio Companies, or the ability of the Division to cross-examine, or the ability of the Administrative Law Judge to determine the credibility of the witnesses’ testimony, the affidavits are insufficient to meet petitioners’ burden of proof in this matter (*Matter of Golub Serv. Sta. v Tax Appeals Trib. of State of N.Y.*); *see also Matter of Piccolo v New York State Tax Appeals Trib.*). As noted by the Court of Appeals in *Orvis*, “[t]he fact is, on the crucial issue in this litigation, Orvis declined to expose its witnesses to cross-examination by producing them at the hearing before the State Tax Appeals Tribunal” (*Matter of Orvis Co. v Tax Appeals Tribunal*, 86 NY2d at 180). Petitioners’ argument that as they submitted the affidavits, it was incumbent upon the Division to refute them by evidence or by subpoenaing the affiants, must also fail. As

noted previously, the burden of proof in this matter rests on petitioners. Thus, the risk of submitting their case on the papers, rather than proceeding by hearing, also rests on petitioners.

As petitioners have failed to prove that Messrs. Paulino and Fredericks were not employed by a related entity within the preceding 60 months, petitioners are not entitled to the benefits of the Joni Property-based real property tax credits or wage tax credits.

The Merc-Based Credits

With regard to the Merc-based credits, petitioners argue that they are entitled to the benefit of the Merc-based credits for 2008 because Ms. Molina was a full-time employee of Merc for the entire calendar year on the basis that there is no evidence in the record that her Employment Agreement with Merc was terminated, that she ceased to be an employee of Merc, or that she vacated the apartment that was part of her compensation, prior to December 31, 2008. The determination of the Administrative Law Judge dealt fully and correctly with this issue and we affirm for the reasons stated therein. In addition, we note specifically that Ms. Molina's Employment Agreement with Merc provided that her term of employment ended on June 30, 2008, unless it was extended by agreement of the parties pursuant to the terms of the Employment Agreement. The terms of the Employment Agreement provided that any changes must be in writing and signed by the party to be bound. There is no document in the record evidencing that Ms. Molina's term of employment was extended beyond June 30, 2008. Thus, there is no support in the record for petitioners' position on this issue.

Petitioners' Additional Arguments

Petitioners assert that the Division should be estopped from denying their entitlement to the benefits of the QEZE credits claimed herein because they relied to their detriment upon representations from the New York State Department of Economic Development that the QEZE

credits would be available to them, and they are no longer able to recover rent charged to their tenants based upon such representations. Petitioners also argue that this conduct by State agencies is a retroactive breach of a de facto contract between New York and petitioners and thus violates the Due Process Clauses of the United States and New York constitutions. We agree with the Division that both of these arguments are based upon a faulty premise. Joni Management, Joni Property and Merc were granted QEZE status. That status alone did not guarantee that petitioners would receive the benefits of the allowable QEZE tax credits. Rather, petitioners had to meet the requirements of the provisions of the Tax Law that actually provide for the credits, i.e., Tax Law §§ 15 and 210 (19) and (27), in order to be entitled to the credits. As set forth above, petitioners failed to prove that they met those requirements.

Finally, petitioners argue that denying them the benefits of the QEZE credits in this matter operates against public policy and the legislative intent of the QEZE program. Petitioners are incorrect. As noted above, the intent of the Empire Zones program is to spur economic growth and job creation (*see* General Municipal Law § 956; *Matter of Hucko Trust*). The provision that disqualified petitioners herein, Tax Law § 14 (g), did not allow petitioners to include in their employment number individuals “employed . . . within the immediately preceding sixty months by a related person to the QEZE.” The purpose of this provision was to prevent businesses “from reincorporating or transferring employees or assets among related entities in order to appear to have created new jobs or made new investments in order to maximize Program benefits” (*James Sq. Assoc. LP v Mullen*, 21 NY3d 233, 242). While petitioners claim that this is not what happened here, we are unpersuaded. The fact of the matter is that the Spiezio Companies employed Messrs. Paulino and Fredericks prior to the certification of Joni Property as a QEZE, and that they continued to employ Messrs. Paulino and Fredericks

after the certification of Joni Property as a QEZE. We fail to see what new jobs were created by Joni Property. The decision of this Tribunal not to allow petitioners the benefits of the QEZE real property tax credits and wage tax credits they are claiming in this case does not frustrate public policy or the intent of the Legislature, but rather upholds them.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Joseph Spiezio, III, Louise Spiezio, Jacqueline Spiezio, Joseph Spiezio, IV, and Lianna Spiezio is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Joseph Spiezio, III, Louise Spiezio, Jacqueline Spiezio, Joseph Spiezio, IV, and Lianna Spiezio are granted to the extent indicated in Conclusion of Law L (granting the Merc-based real property tax credits claimed for 2006, 2007 and 2008 and the Merc-based wage tax credits claimed for 2006 and 2007) of the Administrative Law Judge's determination, but are otherwise denied; and
4. The notices of deficiency dated November 29, 2010 and February 24, 2011 and notice of disallowance dated February 2, 2011, as recalculated in accordance herewith, are sustained.

DATED: Albany, New York
July 19, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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