STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FOREST CITY ENTERPRISES, INC.	:	DECISION DTA NO. 825157
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Period February 1, 2008 through January 31, 2009.	:	

Both petitioner, Forest City Enterprises, Inc., and the Division of Taxation, filed exceptions to the determination of the Administrative Law Judge issued on February 13, 2015. Petitioner appeared by Hodgson Russ LLP (Christopher L. Doyle, Esq. and Andrew W. Wright, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Clifford M. Peterson, 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's exception. The Division of Taxation filed a brief in opposition to petitioner's exception and in reply to the petitioner's brief in opposition to its exception. Petitioner filed a brief in reply to the Division's brief in opposition to its exception. Oral argument, at the request of both parties, was heard on November 19, 2015 in Albany, 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's failure to timely serve and file its answer results in a deemed admittance of the allegation in the petition that FC Yonkers Associates, LLC, had an employment number of at least one for purposes of Tax Law §§ 14 and 15.

II. Whether the Division of Taxation properly denied petitioner's claim for a qualified empire zone enterprise (QEZE) credit for real property taxes passed through from FC Yonkers Associates, LLC, because FC Yonkers Associates, LLC's employment increase factor was zero for the fiscal year February 1, 2008 through January 31, 2009.

III. Whether pe n titioner's claim for a QEZE credit for real property taxes passed through from FC Yonkers Associates, LLC, should be denied because the payments made by FC Yonkers Associates, LLC, did not qualify as "eligible real property taxes" for purposes of Tax Law § 15 (e).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact 51 and 53 which have been modified to more fully reflect the record. Finding of fact 79 has not been included, as it dealt with the Administrative Law Judge's treatment of petitioner's proposed findings of fact. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. Petitioner, Forest City Enterprises, Inc. (Forest City Enterprises), an Ohio corporation with a mailing address in Cleveland, Ohio, began doing business in New York State on March 23, 1962.

2. Petitioner is a developer, owner and operator of diversified urban real estate projects throughout New York and the United States. Each of petitioner's projects is developed through

one or more project specific special purpose entities.

3. Petitioner's project development activities in New York are conducted through its wholly-owned subsidiary, Forest City Ratner Companies, LLC (FCRC). FCRC's corporate offices are located at One MetroTech Center, Brooklyn, New York.

4. Forest City Rental Properties Corporation is wholly owned by petitioner.

5. F.C. Member, Inc. (F.C. Member), a New York corporation, is wholly owned by Forest City Rental Properties Corporation.

6. FC Yonkers Associates, LLC (FC Yonkers) is a New York limited liability company that was formed on May 22, 2001. F.C. Member and RRG Yonkers, LLC (RRG Yonkers), a New York limited liability company, entered into the Operating Agreement of FC Yonkers on August 2, 2002 (FC Yonkers Operating Agreement). F.C. Member and RRG Yonkers owned 70% and 30%, respectively, of FC Yonkers.

7. Pursuant to section 9 of the FC Yonkers Operating Agreement, RRG Yonkers, as "Managing Member" of FC Yonkers, had "all powers and rights necessary . . . to effectuate and carry out the purposes and business of [FC Yonkers], and shall be responsible for the implementation of the decisions of [FC Yonkers], and for conducting the ordinary and usual business and affairs of [FC Yonkers]."

8. Petitioner formed FC Yonkers to own and develop the Ridge Hill project located in the City of Yonkers, New York, on what was an underdeveloped 80-acre parcel between the Grassy Sprain Reservoir and the New York State Thruway. The Ridge Hill project is an $840 million multi-phase, mixed-use development consisting of commercial, retail and residential facilities, as well as open green spaces.

9. F.C. Member and RRG Yonkers entered into an Amended and Restated Operating

Agreement, on November 8, 2006 (FC Yonkers Amended Operating Agreement).[1] Pursuant to Article V, section 5.01, of the FC Yonkers Amended Operating Agreement, the overall management and control of the business and affairs of FC Yonkers was vested in a management committee (Management Committee) comprised of three members, two designated by F.C. Member and one designated by RRG Yonkers. F.C. Member designated James A. Ratner and Charles A. Ratner, and RRG Yonkers designated Bruce C. Ratner, as their respective initial representatives on the Management Committee. Pursuant to Article V, section 5.01 (d), the Management Committee was required to hold regular meetings on at least a quarterly basis. This section also required the Managing Member, RRG Yonkers, to "keep the Management Committee and the other Member informed as to all material developments and transactions involving [FC Yonkers] and the [Ridge Hill] Property." RRG Yonkers, as Managing Member, was authorized by Article V, section 5.02, of the FC Yonkers Amended Operating Agreement, to "supervise, on behalf of the Management Committee and pursuant to the Development Plan, the day to day [sic] activities of [FC Yonkers]" and was "responsible for the implementation of the decisions of the Management Committee and affairs of [FC Yonkers]." RRG Yonkers was also required to "conform in all material respects to the Budgets approved by the Management Committee," and the scope of its authority was limited by those policies and programs. RRG Yonkers also had "full power and authority to take any and all actions on behalf of [FC Yonkers]."

10. Article VI, section 6.01, of the FC Yonkers Amended Operating Agreement required RRG Yonkers to "maintain full and accurate books and records at the principal place of business

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[1] The ownership interests in FC Yonkers remained the same, with F.C. Member owning 70% and RRG Yonkers owning 30% (***see*** FC Yonkers Amended Operating Agreement, Article III, section 3.03).

of [FC Yonkers], in accordance with the accounting policies and procedures of [F.C. Member] and its Affiliates." This section also required RRG Yonkers to prepare and "submit to the Management Committee for its consideration" a budget for FC Yonkers "setting forth the estimated receipts and expenditures (working capital, operating, and other)" of FC Yonkers for the period covered by the budget, i.e., the fiscal year of FC Yonkers. After approval of the budget, as adjusted as appropriate, by the Management Committee, RRG Yonkers was required to implement such budget, and was authorized to make the expenditures and incur the obligations provided for in such budget.

11. The record includes very few of FC Yonkers' records. It does not include the minutes of FC Yonkers' Management Committee meetings, the Development Plan, FC Yonkers' books or its budgets.

12. On December 5, 1979, the Loral Corporation (Loral) entered into a lease agreement with the State of New York for property located in Yonkers, New York, known as Ridge Hill (Ridge Hill property) for a term of 99 years (Master Lease).

13. In December 1979, the City of Yonkers enacted a special ordinance providing for Payment-in-Lieu-of-Taxes (PILOT) payments by Loral on the Ridge Hill property (PILOT Ordinance).

14. Loral and Lockheed Martin Corporation (Lockheed Martin) merged. Subsequently, on December 14, 2000, Lockheed Martin entered into a Purchase of Leasehold Agreement with Ridge Hill Development Corporation (RHDC) that transferred to RHDC all of Lockheed Martin's right, title, and interest under the Master Lease.

15. At the request of RHDC, the City of Yonkers Industrial Development Agency (YIDA) accepted an interest in the Master Lease as authorized by YIDA resolution dated

December 2000.

16. On March 1, 2002, the Ridge Hill property was designated as zone property within the boundaries of the Yonkers Empire Zone.

17. FC Yonkers executed a Ground Lease with RHDC dated August 8, 2002 that transferred to FC Yonkers all of RHDC's right, title and interest in and to the Ridge Hill property that was subject to the Master Lease (Ground Lease).

18. The State of New York entered into a Purchase Agreement dated October 1, 2002, with RHDC for the sale of its interest in the Ridge Hill property that was subject to the Master Lease (Purchase Contract).

19. FC Yonkers and RHDC executed first and second amendments to the Ground Lease, dated November 8, 2002 and May 2004, respectively. Subsequently, FC Yonkers and RHDC entered into a third amendment to the Ground Lease that was executed on November 30, 2004. Pursuant to this third amendment, FC Yonkers became legally responsible for all taxes and PILOT payments with respect to periods on or after January 1, 2004, and FC Yonkers was directed to make such payments to the respective taxing jurisdictions.

20. On May 12, 2005, RHDC assigned the Purchase Contract to FC Yonkers Commercial, LLC (FC Commercial) to provide for the direct purchase of the State's fee interest in the Ridge Hill property, subject to the Master Lease, by FC Commercial. Review of the Sale and Purchase Agreement, dated May 12, 2005, between RHDC, as seller, and FC Commercial, as purchaser, indicates that under the State's existing Purchase Agreement with RHDC, the purchase price was $8,700,000.00.

21. On May 12, 2005, FC Commercial acquired fee title in the Ridge Hill property from the State, subject to the Master Lease.

22. RHDC retained its leasehold interest in the Ridge Hill property under the Master Lease, thereby enabling it to maintain the Ground Lease with FC Yonkers.

23. On July 11, 2006, in its Resolution No. 137-2006, the City Council of the City of Yonkers (City Council), in its capacity as lead agency under the New York State Environmental Quality Review Act, adopted its prior findings set forth in Resolution No. 258-2005, as adopted by the City Council on December 9, 2005 and approved by the Mayor on the same date. When doing so, the City Council also corrected and supplemented its prior findings. Specifically, the prior findings were corrected to reflect that the "Proposed Action" would "generate property taxes of not less than $10 million per year when fully built and operational." The prior findings were supplemented to reflect that the "Project Sponsor," which had acquired the Ridge Hill property subject to an agreement between Loral and the City of Yonkers (Loral Agreement), would "make payments in addition to those required pursuant to the Loral Agreement, for three years commencing in June 2007, in the amount of $3,333,333.00 per year."

24. On August 2, 2007, FC Yonkers acquired RHDC's leasehold interest under the Master Lease.

25. Effective August 2, 2007, FC Commercial merged into FC Yonkers.

26. On August 2, 2007, YIDA and FC Yonkers also entered into an agreement, entitled "Tax Benefit Leaseback Agreement" (Tax Benefit Leaseback Agreement), concerning the Ridge Hill Project. Under the terms of this Tax Benefit Leaseback Agreement, FC Yonkers conveyed to YIDA "a leasehold interest in the real property including any buildings, structures or improvements thereon," and "all of the interest in the equipment" located at Ridge Hill (which, collectively, the parties identified as the "Facility"). Pursuant to Article II of the Tax Benefit Leaseback Agreement, YIDA leased the Facility back to FC Yonkers, for rent of $1.00 for the

balance of the 2007 calendar year and for each subsequent year.

27. Pursuant to Article III, section 3.3, of the Tax Benefit Leaseback Agreement, FC Yonkers agreed:

> "[T]o make certain tax payments described in a Special Ordinance Authorizing the city manager to execute an agreement with [Loral] providing for a payment of real property taxes on the Ridge Hill Property issued by the City of Yonkers in connection with an agreement (the 'Loral Agreement') dated December 1979 (the 'City Council Special Ordinance'). As of the date hereof, [YIDA] has determined that the amount due under the City Council Special Ordinance for a 27-month period intended to approximate the construction period of the Project is an amount up to Eight Hundred Thirty-Six Thousand Thirty-Three and 00/100 ($836,033.00) Dollars (the 'Loral Tax'), which amount is based on the amount of $371,570 per annum (or such lesser amount as is due to the City of Yonkers in accordance with the provisions of the City Council Special Ordinance), set forth on Exhibit A to the Loral Agreement for payments due through June 30, 2009, computed as follows:
>
> 371,570 per annum ($30,964.16 per month) for 27 months = $836,033.00
>
> In addition, the terms of the Resolution of the City Council No. 137-2006, (the 'Resolution'), contemplate payments in the amount of $3,333,333.00 per year for a period of three years, totaling the sum of Ten Million and 00/100 ($10,000,000.00) Dollars (the 'Loral Enhanced Tax') during the same 27 month period. [YIDA] and [FC Yonkers] hereby agree to combine the Loral Tax and the Loral Enhanced Tax into two payments (the 'Combined Loral Tax Payments') to be made by [FC Yonkers] to the City of Yonkers, in the following amounts and on the following dates:
>
> | Payment Date | Amount | City Fiscal Year |
> |---|---|---|
> | December 1, 2007 | $3,704,903 | 2006-2007 |
> | June 1, 2008 | $7,131,130 | 2007-2008 |
>
> The parties acknowledge that the above referenced payments may be adjusted based on the actual amount that would have been payable under the City Council Special Ordinance so that the aggregate payments for December 1, 2007 and June 1, 2008 shall equal the actual amounts that would have been payable under the City Council Special Ordinance for periods prior to the effective date of the payments described in Schedule 3.3 plus $10,000,000. The parties further acknowledge that said amounts supplement and are in satisfaction of the payment obligations that originated with payments by Loral Corporation in the early 1980's and that said amounts will be paid to the City of Yonkers. The City Council Special Ordinance shall be of no further force and effect once payments

> commence under Schedule 3.3. In the event that the City Council Special Ordinance is not terminated once payments commence under schedule 3.3, then any amounts paid by [FC Yonkers] thereunder shall reduce the amounts due under Schedule 3.3.
>
> The parties acknowledge that the Combined Loral Tax Payments may be adjusted to the extent the actual construction period is less than or exceeds the estimated 27-month period (April 1, 2007 to June 30, 2009), to reflect an adjustment in the component attributable to the Loral Tax. If the construction period exceeds 27 months (beyond June 30, 2009), [FC Yonkers] shall be obligated to pay an amount equal to the annual amount that would have been payable as the Loral Tax under the City Council Special Ordinance prorated based on the actual number of months, or partial months, until [FC Yonkers] commences making the payments contemplated in subsection (b) below. Although no representations are made herein regarding the time periods on which construction shall actually commence or be completed, [FC Yonkers] agrees to use commercially reasonable efforts to proceed with construction such that payments under Schedule 3.3 commence on or before February 1, 2010."

28. On August 8, 2007, YIDA sent to the assessor and the chief elected officials of each taxing jurisdiction within which the Ridge Hill project was located, i.e., City of Yonkers and Westchester County, an "Industrial Development Agencies Application for Real Property Tax Exemption" (form RP-412-a), for the Ridge Hill property. In response to the form RP-412-a, item 6 question, "[i]s the property receiving or has the property ever received any other exemption from real property taxation?", the YIDA checked "yes." The YIDA further indicated that the "[p]roperty has exemption from real property taxes based on interests held in the property by the State of NY since 1979 pursuant to City of Yonkers City Council Special Ordinance."

29. Formal groundbreaking for the Ridge Hill project took place on November 28, 2007.

30. In January 2008, the City of Yonkers and FC Yonkers executed a document entitled "Memorandum of Understanding," in which the parties acknowledged and agreed that FC Yonkers was "legally responsible for making payment-in-lieu-of tax payments to the City of

Yonkers pursuant to the amounts, terms and conditions contained in the 1979 PILOT Ordinance, . . . , for periods on or after January 1, 2004." The parties further acknowledged and agreed that:

> "The payment-in-lieu-of tax payments under the 1979 PILOT Ordinance are for the City tax years 2003-04, 2004-05 and 2005-06. FC Yonkers and YIDA have entered into an agreement dated August 2, 2007 which covers payment in lieu of tax payments for City tax year 2006-2007 and thereafter."

David Berliner, Senior Vice President of RRG Yonkers, executed this Memorandum of Understanding on behalf of FC Yonkers.

31. The YIDA issued an invoice, dated May 28, 2008, to FC Yonkers that referenced section 3.3 of the Tax Benefit Leaseback Agreement and stated that the "Tax During Construction payment" terms were $7,131,130.00 for the "CITY FISCAL YEAR: 07/08." The invoice further indicated that the "Total Payment Due to the City of Yonkers" was $7,131,130.00 less "payments to COY for 07/08 on various parcels" of $50,780.07 for a net amount due of $7,080,349.93. On June 5, 2008, FC Yonkers wired from its Bank of America checking account the net amount due to the City of Yonkers' JP Morgan Chase bank account.

32. FC Yonkers became certified under Article 18-B of the General Municipal Law as a New York State Qualified Empire Zone Enterprise (QEZE) on March 8, 2004. Empire State Development Corporation issued to FC Yonkers an Empire Zone Retention Certificate (EZRC) "[r]equired to claim Empire Zone and Qualified Empire Zone Enterprise tax credits for tax year 2008 and later."

33. Petitioner and FC Yonkers have the same fiscal year with respect to the 2008 tax year, which is February 1, 2008 through January 31, 2009.

34. For the 2008 tax year, FC Yonkers reported its federal and New York State tax liability as if it were a partnership whose principal business activity was development of real

estate.

35. On its federal U.S. Return of Partnership Income, form 1065, filed for the fiscal year February 1, 2008 through January 31, 2009 (2008 tax year form 1065), FC Yonkers reported gross receipts or sales in the amount of $7,163,100.00, less cost of goods sold, per Schedule A listed as "Other Costs," in the amount of $5,510,278.00, for total income in the amount of $1,652,822.00. FC Yonkers did not report any salaries or wages as a deduction on line 9 of the partnership return. On the 2008 tax year form 1065, Schedule L, Balance Sheets per Books, line 13, entitled "Other assets (attach statement)," FC Yonkers reported an end of year balance in the amount of $373,485,202.00. The attached statement 2 listed "Schedule L - Line 13 - Other Assets" as "Construction in Progress" and reported a beginning balance in the amount of $192,054,576.00 and an ending balance in the amount of $373,485,202.00. The record does not include the source books and records pertaining to "Construction in Progress" listed on Schedule L - Line 13 of the 2008 tax year form 1065.

36. FC Yonkers did not report any salaries or wages on its New York State Partnership Return (form IT-204) filed for the fiscal year February 1, 2008 through January 31, 2009 (2008 tax year IT-204). In section 10 of the 2008 tax year IT-204, entitled "New York allocation schedule of this New York partnership return," FC Yonkers indicated that it carried on business at 1 Ridge Hill, Yonkers, New York, and described its business as "LOTS." On the return's section 11, entitled "Partners' credit information, Part 2 - Pass-through credits, addbacks and recaptures," FC Yonkers reported on line 147, entitled "Other pass-through credits," an EZ wage tax credit of $3,000.00 and a QEZE credit for real property taxes in the amount of $7,158,810.00.

37. On its form IT-606, Claim for QEZE Credit for Real Property Taxes, for the tax year 2008, FC Yonkers reported its date of first certification by Empire State Development

Corporation as March 8, 2004. On this form's section 1, entitled "For QEZEs first certified prior to April 1, 2005, Part 1 - Empire zone (EZ) employment - Computation of the employment number within all EZs for the current tax year and the five-year base period," FC Yonkers reported three full-time employees on March 31, 2008, two full-time employees on June 30, 2008 and September 30, 2008, and four full-time employees on December 31, 2008. In the same section, FC Yonkers reported the current tax year employment number within all EZs as "2.75." On the form's section 1, Schedule B, entitled "Computation of test year employment number within the EZs in which you are certified," FC Yonkers reported a test year employment number of zero. FC Yonkers reported a current tax year employment number of "1" on line 8 and an "Employment increase factor" of "1.0000" on line 13 of the form IT-606, section 1, Schedule C, entitled "Employment increase factor." On the form's section 1, Schedule D, entitled "Computation of QEZE credit for real property taxes for QEZEs first certified prior to April 1, 2005," FC Yonkers reported a "benefit period factor" of "1.000" on line 14; an "Employment increase factor" of "1.0000" on line 15; "Eligible real property taxes" in the amount of $7,158,810.00 on line 16; and "Total QEZE credit for real property taxes" in the amount of $7,158,810.00 on line 24.[2]

38. FC Yonkers' QEZE test date is March 8, 2004, its test year is the fiscal year ending January 31, 2004 (2003 tax year), and its base period is fiscal years ending January 31, 2002 (tax year 2001) and January 31, 2003 (2002 tax year). Its employment number for its base period is zero. The 2008 tax year was the fifth year of FC Yonkers' "business tax benefit period."

39. For the 2008 tax year, FC Yonkers allocated 100% of its claimed QEZE credit for

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[2] The record is not clear as to why there is a difference between the claimed QEZE credit for real property taxes in the amount of $7,158,810.00 and FC Yonkers' payment of $7,131,130.00 (***see*** finding of fact 31)

real property taxes to F.C. Member pursuant to the terms of Article IV of the FC Yonkers Amended Operating Agreement.

40. Petitioner filed a form CT-3-A, General Business Corporation Combined Franchise Tax Return (form CT-3-A), in the name of "Forest City Enterprises, Inc. and Subsidiaries," for the 2008 tax year. Along with the form CT-3-A, petitioner filed a form CT-604-CP, Claim for QEZE Credit for Real Property Taxes and QEZE Tax Reduction Credit for Corporate Partners, for the 2008 tax year (form CT-604-CP) in the name of FC Yonkers, the QEZE partnership. On line one of the form CT-604-CP, petitioner claimed a QEZE credit in the amount of $7,158,810.00 for real property taxes passed through from FC Yonkers. This amount was not used to reduce the tax liability of petitioner, but was fully refundable.[3]

41. By letter dated July 2, 2010, the Division of Taxation's (Division) Income/Franchise Desk Audit Bureau (Desk Audit) notified petitioner that it was reviewing FC Yonkers' claim for the QEZE Credit for Real Property Taxes for the 2008 tax year. This letter requested, among other things, a list of individuals employed by FC Yonkers during 2008, including each employee's full name, social security number, hire and termination dates, and indication of full or part-time status.

42. In response to Desk Audit's request, petitioner provided the requested employee information for five individuals that it asserted worked for FC Yonkers during 2008. Two of the five individuals it claimed worked part-time for FC Yonkers during the fourth quarter of 2008, but full-time for a related company. The information provided also indicated that one individual's full-time employment by FC Yonkers terminated on April 20, 2007; and another

[3] The total tax in the amount of $202,012.00 reported on Line 77 of the form CT-3-A was reduced by tax credits totaling the same amount. Of that $202,012.00, $25,250.00 was attributable to a QEZE credit for real property taxes that was obtained from petitioner's interest in FC Gowanus Associates, LLC, not FC Yonkers.

individual, Christopher Spring, left FC Yonkers' full-time employment on March 14, 2008. Petitioner also claimed that Alberto Rivera was employed full time by FC Yonkers during 2008.

43. After reviewing the Division's internal databases, Desk Audit determined that Mr. Rivera was also employed by Forest City Bridge Street Associates Partnership, a related person, for the year 2008. Petitioner contested Desk Audit's determination regarding Mr. Rivera, asserting that Forest City Bridge Street Associates Partnership and FC Yonkers were in a common paymaster arrangement. By letter dated February 15, 2011, Diane Houck, a Tax Technician in the Division's Income/Franchise Desk Audit Bureau, requested petitioner to provide, among other items, proof of the common paymaster arrangement, which proof she never received.

44. In a letter dated August 15, 2011, Joseph L. Krivis, CPA, MT, petitioner's Director of Federal and State Income Taxes, responded to Ms. Houck's information requests,[4] in relevant part, as follows:

"1. QEZE - FC Yonkers Associates, LLC:

> Please find enclosed an affidavit (Exhibit A) and associated schedule of employee hours signed by a member of Yonkers Associates, LLC [sic] attesting to the composition of employees and related hours as they related to the project during the fiscal year ended January 31, 2009 (or December 31, 2008). During the collection of information for this response, it came to our attention that the employee data originally given [sic] Alberto Rivera was incorrect. Alberto Rivera was not a full time employee for half the year as previously presented. However, the employees listed on the affidavit have devoted a portion of their work week to this project and their time and wages allocated accordingly. The attached schedule of employees shows greater than 1 full time equivalent during the tax year in question. As can be surmised from the scope of the project, it required substantial oversight and planning by the developer to conduct such a large undertaking. Onsite [sic] presence was required to efficiently and effectively manage the project.

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[4] Mr. Krivis' letter provided information concerning additional QEZE tax credits claimed by petitioner for the fiscal year ended January 31, 2009, none of which are at issue in this proceeding.

> We have provided a copy of the federal return for FC Yonkers Associates, LLC (Exhibit B) but it should be noted that the project was under development during the fiscal year ended January 31, 2009. As such, IRC §263A, §195 and §709 required the capitalization of costs. Therefore, wages were capitalized into the cost of the project as construction in progress (CIP) or Project under Development (PUD)."

45. Enclosed with Mr. Krivis' August 15, 2011 letter as Exhibit A was the "Certification FC Yonkers Associates, LLC" of David L. Berliner, Senior Vice President and Secretary of RRG Yonkers, the managing member of FC Yonkers, and an associated document entitled "Employee Hours at Ridge Hill for 2008." On August 10, 2011, Mr. Berliner certified to the Division as follows:

> "That attached hereto as Exhibit A is a true and accurate statement of 2008 Employee Wages on an average quarterly basis attributable to the Ridge Hill project which demonstrates that there was the equivalent of a full-time employee at the project."

The attached single-page document, entitled "Employee Hours at Ridge Hill for 2008" (schedule of employee hours), listed ten individuals, six under the classification "management" and four under the classification "service employees." For each management employee, a brief description of the on-site work performed, percentage of time spent on-site, the average hours per week, average hours per quarter and the numerical portion of a full-time equivalent employee per quarter was listed. For each service employee, only the average hours per quarter and the numerical portion of a full-time equivalent employee was listed. Management employees listed on the schedule of employee hours included, among others, "Russell, T," listed as working, i.e., "meeting twice per week," "40%" of the time on-site or an average of "16" hours per week, an average of "208.00" hours per quarter and "0.43" of a full-time equivalent employee per quarter; and "Goldban, M" listed as working, i.e., "meeting 1 day per week," "20.0%" of the time on-site or an average of "8" hours per week, an average of "104.00" hours per quarter and "0.22" of a

full-time equivalent employee per quarter.

46. After reviewing his August 15, 2011 letter, Ms. Houck sent a letter, dated August 29, 2011, to Mr. Krivis, in which she requested the following additional information:

> "You have supplied a schedule of employees and related hours as they relate to the project for the tax year ended January 31, 2009. As our wage reporting records do not reconcile to the information provided, it will be necessary to submit documentation that supports the presence of the employees in the empire zone for at least one-half of the taxable year.
>
> Please expand the list of employees to include the employee's full name, social security number, date of hire, date of termination (if applicable), job title, description of their job duties, and breakout of hours by quarter.
>
> In addition, provide the name of each employee's immediate supervisor, and copies of W-2's for the listed employees.
>
> Specific for the time allocated for Management employees, please provide a list of all meeting dates, and copies of all minutes of members' meetings. Provide documentation to support your estimate of time spent by the employees in the zone. Supply proof of employee's time spent in the zone including copies of travel logs, expense vouchers, and any other documentation substantiating time spent in the zone."

47. In response to Ms. Houck's request for additional information and documentation, Mr. Krivis sent a letter, dated February 15, 2012, along with six attachments totaling in excess of 1,300 pages of documentation. Mr. Krivis, in his letter, claimed that a "significantly updated" schedule of employees (Schedule), i.e., Attachment A, "reflects the fact that we had at least one full-time equivalent employee (i.e., at least 35 aggregate employee hours per week) at the Ridge Hill site for every week of the 2008 Tax Year." He further claimed that:

> "The Ridge Hill project saw significant development activity during the 2008 Tax Year, which involved the efforts of 20 of our employees, who are identified on the Schedule. Enclosed herewith as **Attachment 'B'** are copies of the 2008 W-2 forms issued to those employees, except for Mr. Christopher Spring. Many of those employees worked full-time on the Ridge Hill project throughout the 2008 Tax Year. Those employees are identified with a 'full time' reference next to their name on the Schedule.

> The Ridge Hill project development team was lead by Mr. Richard Pesin, who was our Executive Vice President of Retail during the 2008 Tax Year. All employees identified on the Schedule reported directly to Mr. Pesin and were directly supervised by him with respect to their involvement in the Ridge Hill project."

In his letter, Mr. Krivis also asserted that the remaining four attachments, i.e., Attachment "C" - minutes of construction meetings; Attachment "D" - minutes of design meetings; Attachment "E" - 7 employees' 2008 Outlook calendars; and Attachment "F" - "certain expense reports," provided support for specific employees' activities at the Ridge Hill site during the 2008 tax year, which activities were reflected on the Schedule.

48. Attachment "A" to the February 15, 2012 letter is a multi-page weekly schedule entitled "Forest City Enterprises, Inc. and Affiliates Schedule of 2008 Ridge Hill Employees" (Schedule) that included the personnel information requested by Ms. Houck for each of the 20 employees listed thereon. Three of the employees listed were "Goldban, Michael A," whose hire date was June 19, 2000 and "JOBCODE" was Senior Vice President - Development, "Russell, Theron I," whose hire date was September 15, 2003 and "JOBCODE" was Vice President Construction, and "Stutman, Scott G," whose hire date was February 1, 1995 and "JOBCODE" was Senior Vice President Construction. The notation "Full time" appeared next to all three men's names on this Schedule.

49. After reviewing petitioner's last submission and utilizing the Division's internal wage reporting databases, Ms. Houck determined that 14 of the individuals, including Messrs. Russell, Goldban and Stutman, worked for related persons to FC Yonkers, i.e., Forest City Enterprises, Inc., Forest City Ratner Companies, LLC, FC Flatbush II, LLC, Forest City Bridge Street Associates Partnership, RRG First NY Corp ET AL, FC Flatbush L.P., and FCRC Security Services Co LP, during the 2008 tax year or within New York State during the previous five

years. For five of the remaining six individuals, the Division's internal databases contained no evidence that those individuals were employed in New York State. Ms. Houck determined that those five individuals could not count as employees of FC Yonkers because they were not employed in the Empire Zone. With respect to the 20th individual, Mr. Spring, Ms. Houck determined that he was not employed full time by FC Yonkers for at least one half of the taxable year due to the termination of his employment on March 14, 2008.[5] Therefore, Ms. Houck concluded that none of the claimed individuals could be included in FC Yonkers' employment number and its employment number was zero for the 2008 tax year. Because the employment number for the 2008 tax year was determined to be zero, the employment increase factor for such tax year was determined to be zero, as well.

50. On March 28, 2012, the Division issued a Notice of Disallowance denying petitioner's claim for pass through of the QEZE credit for real property taxes from FC Yonkers, in the amount of $7,158,810.00, for the fiscal year February 1, 2008 through January 31, 2009. The letter stated, in part, that:

> "After a thorough review of the taxpayer's case file and all information provided by the taxpayer, it is our finding that FC Yonkers Associates, LLC's QEZE real property tax credit is zero, based on an employment increase factor of zero, for the period ended January 31, 2009."

51. In protest of this notice of disallowance, petitioner filed a petition with the Division of Tax Appeals on July 30, 2012. The Division of Tax Appeals acknowledged receipt of petitioner's petition in proper form via letter dated August 10, 2012. The August 10, 2012 date of the acknowledgment letter commenced the Division's 75-day time period to file its answer,

[5] It is noted that the record includes the Division's internal database information pertaining to Mr. Spring, which indicates that he was employed by FC Yonkers during the 2007 and 2006 tax years and RRG First NY Corp ET AL during the 2005 and 2004 tax years.

making the Division's answer due October 24, 2012. Such due date was set forth in the acknowledgment letter.

Petitioner asserts, in paragraph 12 of its petition, that FC Yonkers "has an 'Employment Number' (as that term is defined in § 14 (g) of the New York Tax Law) of at least 1.0 for the Taxable Year."

52. On August 17, 2012, the Division of Tax Appeals granted the Division's request to extend the deadline for serving its answer to November 8, 2012.

53. By a cover letter addressed to Supervising Administrative Law Judge Daniel J. Ranalli and dated November 16, 2012, the Division's representative transmitted the Division's answer to the Division of Tax Appeals. In that cover letter, Mr. Peterson stated that "I thought I had already mailed" the Division's answer "to the Division of Tax Appeals." The Division of Tax Appeals received the Division's cover letter and the enclosed answer on November 19, 2012. There is no envelope or other evidence in the Division of Tax Appeals' file to indicate that the answer was filed on any date other than November 19, 2012.

54. In its hearing memorandum, the Division raised an alternative basis for its denial of petitioner's claim for pass through of the QEZE credit for real property taxes from FC Yonkers to the effect that the $7,158,810.00 payment made by FC Yonkers did not qualify as "eligible real property taxes" for purposes of Tax Law § 15 (e).

55. At the hearing, petitioner presented the testimony, and the affidavit, of Theron Russell, an employee of FCRC.

56. As noted above, Mr. Russell was hired by FCRC on September 15, 2003. FCRC reported to the Division New York wages earned by Mr. Russell, and the tax withheld from same, for the years 2003 through 2007.

57. Mr. Russell and his wife jointly filed a 2004 Nonresident and Part-Year Resident Income Tax Return that bore a Baltimore, Maryland, mailing address. At the hearing, Mr. Russell agreed that the New York source income wages reported on that return were his. FCRC issued to Mr. Russell the W-2 Wage and Tax Statement that was attached to the joint nonresident tax return. Review of Mr. Russell's 2004 W-2 reveals that box 19, entitled "Local income taxes," was blank and box 20, entitled "Locality name," contained the acronym "NYC NR." The record does not include any documentation regarding Mr. Russell's assigned work project and the physical location where he performed such work during the year 2004.

58. Mr. Russell was employed by FCRC as a project manager for all of the 2008 tax year. He maintained an office in FCRC's corporate offices in Brooklyn, New York, during the 2008 tax year.

59. The record includes copies of expense receipts submitted for reimbursement to FCRC by Mr. Russell during the 2008 tax year. A FCRC Expense Report submitted by Mr. Russell for the expense period June 3, 2008 through August 20, 2008 contained numerous itemized expenses related to project "1431-99 Yonkers-Ridge Hill." All but two of the itemized expenses listed sought reimbursement for the costs of Mr. Russell's travel by Metro-North and taxi "to/from RH job site." This FCRC expense report was approved by Scott Stutman, Mr. Russell's manager.

60. FCRC issued to Mr. Russell a 2008 W-2 Wage and Tax Statement that listed his address as Baltimore, Maryland. On this wage and tax statement, FCRC reported that Mr. Russell earned wages in New York State. No New York City or City of Yonkers wages were reported on this wage and tax statement.

61. Petitioner presented the testimony, and the affidavit, of James M. Cory, currently

employed by petitioner in the position of Senior Vice President - Retail Leasing West Coast.

62. During the 2008 tax year, Mr. Cory was employed by petitioner holding the position of Vice President - Retail Leasing. Beginning on or about September 15, 2008, Mr. Cory maintained an office at FCRC's corporate offices in Brooklyn, New York.

63. Petitioner issued to Mr. Cory a 2008 W-2 Wage and Tax Statement that listed his address as Los Angeles, California. On the wage and tax statement, petitioner reported California wages and tax withheld on same. Petitioner did not report any New York State or New York City wages or the withholding of any City of Yonkers nonresident taxes for Mr. Cory for the year 2008.

64. Mr. Cory did not file a New York State personal income tax return or a New York City personal income tax return for the year 2008.

65. Petitioner submitted into evidence copies of Forest City Commercial Group expense reports and expense receipts submitted for reimbursement to Forest City Enterprises by Mr. Cory during the 2008 tax year.[6] These expense reports were approved by Michael Stevens, Mr. Cory's supervisor. It is noted that the description "leasing" appeared in the Account Distribution section in some of the expense reports submitted by Mr. Cory after September 2008, while the description "Ridge Hill, New York" appeared in other expense reports submitted by Mr. Cory after that month.

66. On cross-examination, Mr. Cory clarified that he was not an employee of FC Yonkers for the 2008 tax year.

67. Petitioner submitted into the record the affidavit of Michael A. Goldban, a former employee of FCRC.

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[6] Some of this documentation is barely readable. Petitioner submitted this documentation on a CD.

68. Mr. Goldban was employed by FCRC from June 19, 2000 through September 14, 2003 as an Associate General Counsel.

69. On or about September 15, 2003, Mr. Goldban began working within FCRC's retail development group, focusing primarily on the Ridge Hill project.

70. From June 19, 2000 through January 31, 2009, Mr. Goldban maintained an office at FCRC's corporate offices in Brooklyn, New York. During the 2008 tax year, Mr. Goldban held the title of Vice President, Retail Development with FCRC.

71. The record includes copies of expense receipts submitted for reimbursement to FCRC by Mr. Goldban during the 2008 tax year. A FCRC Expense Report submitted by Mr. Goldban for the expense period February 8, 2008 through May 20, 2008 contained numerous itemized expenses related to project "1431-99 Yonkers - Ridge Hill." Some of the itemized expenses listed sought reimbursement for mileage and tolls related to meetings at Ridge Hill. This FCRC expense report was approved by Richard Pesin, Mr. Goldban's manager.

72. FCRC issued to Mr. Goldban a 2008 W-2 Wage and Tax Statement that listed his address as New York, New York. On this wage and tax statement, FCRC reported Mr. Goldban earned wages in New York State and New York City. No City of Yonkers wages were reported on this wage and tax statement.

73. The record includes copies of the "Ridge Hill - Yonkers, New York Design / Owner Team Meeting Minutes" (design meeting minutes) for numerous dates between April 1, 2008 and December 16, 2008. For each meeting date, the name and firm initials of each attendee was listed at the beginning of the minutes. However, the start and end times, and meeting location were not listed in the minutes of any design meetings. The initials "FCRC" appeared next to the names of Messrs. Russell and Goldban in the minutes of design meetings that each man attended.

74. The record includes copies of the "Ridge Hill Village FC Yonkers Associates, LLC Site Progress Meeting Minutes" (construction progress meeting minutes) for numerous dates between January 3, 2008 and December 30, 2008 that were kept by the Whiting - Turner Contracting Company (Whiting - Turner). The name and firm initials of each attendee was listed at the beginning of the minutes of each construction progress meeting. The initials "FCY" or "FCYA" appeared next to the names of Messrs. Russell and Goldban in the minutes of construction progress meetings that each man attended. The date, start time, i.e., 8:30 A.M., and location of the next scheduled meeting, i.e., the Whiting - Turner field office located at Ridge Hill, appeared at the end of the minutes of each construction progress meeting. The time at which the meeting ended is not stated in any of the dated construction progress meeting minutes.

75. Petitioner submitted into the record two affidavits of Lauren T. Du, Senior Vice President and Controller of FCRC. Ms. Du maintains her office in FCRC's corporate offices in Brooklyn, New York. Exhibits attached to Ms. Du's first affidavit consist of the 2008 W-2, wage and tax statements, issued by FCRC to Messrs. Russell and Goldban, and the 2008 W-2, Wage and Tax Statement, issued by Forest City Enterprises to Mr. Cory. Exhibits attached to Ms. Du's second affidavit consist of FC Yonkers' Bank of America checking account statement for the period May 31, 2008 through June 30, 2008; the YIDA invoice, dated May 28, 2008, issued to FC Yonkers; and the FC Yonkers Amended Operating Agreement. No other books and records were attached to either of Ms. Du's affidavits.

76. At the hearing, petitioner submitted into evidence a multi-page summary table entitled "FC Yonkers Associates, LLC Schedule of Employees Days re: Ridge Hill Project Tax Year 2008" (Summary Schedule). This Summary Schedule is a compilation of the amount of hours that Mr. Russell, Mr. Goldban and Mr. Cory allegedly worked at Ridge Hill in the 2008 tax

year.

77. Donnely Warrant, CPA, a partner in and tax director for the accounting firm of Freed Maxick CPA, P.C., testified as an expert witness for petitioner. He is a specialist in tax incentive programs, including specifically the Empire Zones Program. Mr. Warrant has assisted over 100 of his accounting firm's clients in Empire Zone qualification and compliance matters. Petitioner and its subsidiaries have not been clients of Mr. Warrant or his firm prior to Mr. Warrant's engagement as an expert witness for the hearing.

78. Mr. Warrant's Empire Zone tax incentives experience includes performing employment number calculations for taxpayers for particular tax years. At petitioner's request, Mr. Warrant reviewed the Summary Schedule and performed calculations based upon the numbers that appeared on the Summary Schedule.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge explained that at issue was the correct calculation of FC Yonkers' employment increase factor as that term is defined in Tax Law § 15 (d). The Administrative Law Judge further explained that as FC Yonkers' employment increase factor is one of the factors multiplied to compute the QEZE credit for real property taxes, it necessarily follows that if FC Yonkers' employment increase factor is zero, petitioner is not entitled to any credit under Tax Law § 15 (b) (1).

The Administrative Law Judge explained that petitioner was asserting that as the Division had failed to timely file its answer, all of the material allegations of fact contained in the petition were deemed admitted. In particular, the Administrative Law Judge noted that petitioner asserted in its petition that FC Yonkers "has an 'Employment Number' (as that term is defined in § 14 (g) of the New York Tax Law) of at least 1.0 for the Taxable Year." The Administrative Law Judge

concluded that this assertion was not a "material allegation of fact," but the "ultimate conclusion of law," and thus did not require the granting of the petition.

The Administrative Law Judge concluded that petitioner had not proven that FC Yonkers' employment number was anything other than zero as asserted by the Division, because there could be no common paymaster relationship between FC Yonkers and FCRC or petitioner because FC Yonkers elected to be treated as a partnership, and not a corporation, for federal tax purposes. Furthermore, the Administrative Law Judge concluded that petitioner had failed to prove that a common law employment relationship existed between FC Yonkers and the persons asserted by petitioner to be employees of FC Yonkers, in that petitioner presented no contemporaneous books and records confirming such employment, nor any testimony of FC Yonkers Management Committee members or an officer of its managing member, RRG Yonkers. Thus, the Administrative Law Judge concluded that FC Yonkers' employment number was zero for the relevant fiscal year and, accordingly, so was its employment increase factor. Therefore, the Administrative Law Judge concluded that petitioner was not entitled to the QEZE credit for real property taxes at issue, and that the issue of whether the payments made by FC Yonkers were "eligible real property taxes" for purposes of Tax Law § 15 (e) was rendered moot.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner argues that the Administrative Law Judge was incorrect in summarily concluding that its allegation that FC Yonkers "has an 'Employment Number' (as that term is defined in § 14 (g) of the New York Tax Law) of at least 1.0 for the Taxable Year" was an "ultimate conclusion of law" and not a "material allegation of fact." Petitioner asserts that the everyday meaning of the words should be employed, and that in this case, a material allegation of fact should be defined as an allegation of fact that is significant or essential to the issue or matter

at hand. Petitioner asserts that case law supports this interpretation in that determinations of quantity or amount or determinations of the existence of an employer-employee relationship are considered questions of fact. Additionally, petitioner argues that case law supports its interpretation in that several subordinate facts can be contained in a single factual finding. Petitioner asserts that the fundamental fairness of the hearing process and the effectiveness of 20 NYCRR 3000.4 (b) (4) are undermined by the determination of the Administrative Law Judge. Finally, on this issue, petitioner asserts that the allegation in the petition setting forth FC Yonkers' employment number is only one factual component of determinating its eligibility for the credit, and it is that eligibility that is the ultimate conclusion of law.

In any event, petitioner argues that the record establishes that Theron Russell was an eligible employee of FC Yonkers on the Ridge Hill project on a full-time basis for the period at issue, and that petitioner has thus proven an employment number of one for the period at issue.

Finally, petitioner asserts that payment made by FC Yonkers to the city of Yonkers was a payment of "eligible real property taxes" for purposes of Tax Law § 15 (e) and notes that the Division raised this issue for the first time in its hearing memorandum submitted to the Administrative Law Judge prior to the hearing.

The Division argues that petitioner's assertion in its petition that FC Yonkers "has an 'Employment Number' (as that term is defined in § 14 (g) of the New York Tax Law) of at least 1.0 for the Taxable Year" was correctly found by the Administrative Law Judge not to be a material allegation of fact, but rather an asserted conclusion of law. Indeed, the Division asserts that each of the requirements of Tax Law § 15 is a separate conclusion of law and not a finding of fact. The Division seeks to distinguish the cases cited by petitioner for the proposition that a question retains its factual nature even if it is dispositive of an ultimate conclusion, by explaining

that such cases involved a factual inquiry into the intent of various individuals in order to determine the proper application of the law.

The Division argues that the record establishes that Theron Russell was an employee of FCRC for the period at issue and thus not an employee of FC Yonkers. Thus, the Division asserts that petitioner has not proven an employment number of one for the period at issue.

Finally, the Division asserts that payment made by FC Yonkers to the city of Yonkers was not a payment of "eligible real property taxes" for purposes of Tax Law § 15 (e). The Division responds to petitioner's complaint that it raised this issue for the first time in its hearing memorandum by asserting that petitioner was not prejudiced as a result of the Division's actions.

OPINION

Petitioner is claiming the QEZE credit for real property tax pursuant to Tax Law §§ 15 and 210 (27) on a pass through basis from FC Yonkers for its 2008 tax year. It is uncontested that if FC Yonkers is entitled to the credit, petitioner, as the ultimate 100% owner of FC Yonkers, is entitled to the credit on a pass through basis. Thus, the questions presented center on whether FC Yonkers is entitled to the QEZE credit for real property taxes in the first instance.

The QEZE credit for real property tax, subject to certain limitations not at issue, for a QEZE certified before April 1, 2005, is 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" (Tax Law § 15 [b] [1]).

The first issue presented is whether FC Yonkers had an employment increase factor greater than the zero factor asserted by the Division. For if, as the Division contends, the employment increase factor is zero, then the amount of the credit to which FC Yonkers would be entitled would be zero (i.e., zero multiplied by anything is zero).

Tax Law § 15 (d), defines "employment increase factor" as:

"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."

In turn, "employment number" means:

"[T]he average number of individuals, excluding general executive officers (in 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 [Internal Revenue Code § 465 (b) (3) (c)]" (Tax Law § 14 [g] [1]).

Thus, in order to determine FC Yonkers' employment increase factor, we must first determine FC Yonkers' employment number for the year in issue. Petitioner asserts that as the Division's answer was served and filed late, this Tribunal is required to find that FC Yonkers "has an 'Employment Number' (as that term is defined in § 14 (g) of the New York Tax Law) of at least 1.0 for the Taxable Year" as alleged in paragraph 12 of the petition. We agree.

Pursuant to this Tribunal's Rules of Practice and Procedure, the consequence to the Division for failing to serve and file a timely answer is that "all material allegations of fact set forth in the petition shall be deemed admitted" (20 NYCRR 3000.4 [b] [4]). There is no dispute

that the allegation that FC Yonkers' employment number is at least one is a material allegation. The dispute concerns the conclusion of the Administrative Law Judge that such allegation sets forth a conclusion of law, and not, as argued by petitioner, a finding of fact. The Division agrees with the determination of the Administrative Law Judge and argues that petitioner's allegation that FC Yonkers had an employment number of at least one is not a finding of fact, but rather "the ultimate issue necessarily determined by the application of the law to the facts of the record" (Division's Brief in Support, p 27).

The Division's phrasing actually highlights "the vexing nature of the distinction between questions of fact and questions of law" and the lack "of any . . . rule or principle that will unerringly distinguish a factual finding from a legal conclusion" (***Pullman-Standard v Swint*** 456 US 273, 288 [1982] [citations omitted]). Indeed, it has been found that the determination "to label an issue 'a question of law," a 'question of fact' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis" ***Miller v Fenton***, 474 US 104, 451 [1985], ***on remand to*** 756 F2d 598 [1986], ***cert denied*** 479 US 989 [1986], ***citing Monaghan, Constitutional Fact Review***, 85 Colum L Rev 229, 237 [1985]. To complicate matters further, the allegation that FC Yonkers had an employment number of at least one, is best labeled as an ultimate finding of fact (***see Schwarzer***, ***The Analysis and Decision of Summary Judgment Motions***, p 16 [Federal Judicial Center 1991] ["Like some historical facts, ultimate facts are derived by reasoning or inference from evidence, but, like issues of law, they incorporate legal principles or policies that give them independent significance. They often involve the characterization of historical facts, and their resolution is generally outcome-determinative"]). However, the labeling of the allegation as an ultimate finding of fact does not end the inquiry, as further analysis is necessary to determine if this allegation can be considered predominately

factual or predominately legal (***id.***).

In this case, the scale tips in favor of a conclusion that the allegation is predominately factual. Other than its computational provisions, Tax Law § 14 (g) requires a finding of the number of individuals employed full-time for at least half the year, with the requirement that such individuals not be employed by a related company for the past 60 months. The Division argues that determining someone's employment status under Tax Law § 14 (g) requires reaching a series of legal conclusions. We agree with petitioner that such a finding is more in the nature of a factual conclusion, an ultimate finding of fact reached based upon a number of subsidiary findings of fact.

While not directly on point, we find the cases cited by petitioner on this point persuasive (***Matter of Stiefvater Real Estate, Inc. [Commissioner of Labor]***, 34 AD3d 1176, 1177 [2006], ***lv denied sub nom In re McCann,*** 8 NY3d 807 [2007] [citations omitted] ["the existence of an employer-employee relationship is a factual question for the Board to resolve after weighing the conflicting evidence and the inferences that may be drawn therefrom"]; ***Matter of Rodriguez [2020 Video Voice Data, Ltd.–Commissioner of Labor]***, 58 AD3d 929 [2009] ["the existence of an employment relationship is a factual question for the Board to resolve"]. The underlying premise of these cases is that the Commissioner of Labor was in a better position to determine the existence of an employment relationship because even though such a determination involves the application of law to a certain extent, it is the evaluation of the credibility and strength of the evidence that controls the outcome. The same underlying premise exists here.

Accordingly, the allegation that FC Yonkers "has an 'Employment Number' (as that term is defined in § 14 (g) of the New York Tax Law) of at least 1.0 for the Taxable Year" is a material allegation of fact, and is deemed admitted. As FC Yonkers had a test year employment

number of zero and an employment number of at least one, petitioner had an employment increase factor of one (Tax Law § 15 [d]).

The only contested factor remaining concerns the determination of the eligible real property taxes paid or incurred by FC Yonkers during the year in issue (Tax Law § 15 [b]). The Administrative Law Judge, based upon her determination that petitioner had not proven that its employment number and corresponding employment increase factor were anything other than zero, concluded that the issue of whether the payments made by FC Yonkers were "eligible real property taxes" was moot.

We believe that "[T]he fullest possible development of an issue occurs in our two-stage hearing/exception process when an Administrative Law Judge renders a determination on an issue stating a complete rationale for the conclusion and the litigants debate the correctness of the Administrative Law Judge's rationale and conclusion on exception" (***Matter of United States Life Ins. Co.***, Tax Appeals Tribunal, March 24, 1994). When an issue that was explicitly raised by the parties is not addressed in a determination, we are deprived of the research and analysis of both the Administrative Law Judge and the parties on exception. As the determination does not address the issue raised by the Division regarding "eligible real property taxes," nor petitioner's procedural objections to the Division's raising of the issue, we remand this matter to the Administrative Law Judge for a supplemental determination.

The supplemental determination shall be rendered as expeditiously as possible and shall be based upon the factual record already made.

We will retain jurisdiction over this matter based on the exceptions timely filed by the Division and petitioner. After the Administrative Law Judge issues her supplemental determination, the parties will be allowed to add to their existing exceptions and briefs, provided

that they do so within 30 days of the issuance of the supplemental determination or request an extension of time within the 30-day period.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this matter is remanded to the Administrative Law Judge for the issuance of a supplemental determination in accordance with the foregoing decision.

DATED: Albany, New York
May 19, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

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