

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
FOREST CITY ENTERPRISES, INC. : DECISION
for Redetermination of a Deficiency or for Refund of : DTA NO. 825917
Corporation Franchise Tax under Article 9-A of the :
Tax Law for the Period February 1, 2009 through :
January 31, 2010. :

Petitioner, Forest City Enterprises, Inc., and the Division of Taxation filed exceptions to the determination of the Administrative Law Judge issued on January 19, 2017. Petitioner appeared by McConville, Considine, Cooman & Morin, P.C. (Kevin S. Cooman, Esq. and Edward C. Daniel, III, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Clifford M. Peterson, Esq., of counsel).

Both petitioner and the Division of Taxation filed briefs in support of their respective exceptions. Both petitioner and the Division of Taxation filed briefs in opposition and in reply to the other's exception. Oral argument was held in New York, New York on March 29, 2018, which date began the six-month period for issuance of this decision.

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

ISSUES

I. Whether petitioner is entitled to claim 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 one for the fiscal year February 1, 2009

through January 31, 2010.

II. If petitioner is entitled to claim a QEZE credit for real property taxes passed through from FC Yonkers Associates, LLC, for fiscal year February 1, 2009 through January 31, 2010, whether payments that FC Yonkers Associates, LLC, made during 2009 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 that we have not restated the Administrative Law Judge’s finding of fact “147” as that fact merely summarizes the Administrative Law Judge’s treatment of petitioner’s proposed findings of fact. As so modified, the Administrative Law Judge’s findings of facts are set forth below.

1. Petitioner, Forest City Enterprises, Inc., 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 and operator of diversified real estate projects throughout New York and the United States. Each of petitioner’s real estate development projects is developed through one or more project-specific special purpose entities.
3. Forest City Rental Properties Corporation is wholly-owned by petitioner.
4. FC Member, Inc. (FC Member), a New York corporation, is wholly-owned by Forest City Rental Properties Corporation.
5. FC Yonkers Associates, LLC (FC Yonkers) is a New York limited liability company that was formed on May 22, 2001. FC Member and RRG Yonkers, LLC (RRG Yonkers), a New York limited liability company, entered into an operating agreement dated as of August 2, 2002. FC Yonkers was formed to own and develop the Ridge Hill project (Ridge Hill or Project) in the City of Yonkers, New York, as its sole business focus.

6. FC Member and RRG Yonkers entered into an Amended and Restated Operating Agreement, on November 8, 2006 (FC Yonkers Amended Operating Agreement). FC Member and RRG Yonkers owned 70% and 30%, respectively, of FC Yonkers (FC Yonkers Amended Operating Agreement, Article III, section 3.03). The “Managing Member” of FC Yonkers was RRG Yonkers.

7. 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 FC Member and one designated by RRG Yonkers. FC 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. Article V, section 5.01(d) of the FC Yonkers Amended Operating Agreement 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.”

8. 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 also had “full power and authority to take any and all actions on behalf of [FC Yonkers],” and was required to “take all actions which may be necessary or appropriate for the development, maintenance, preservation and operation of the [Ridge Hill] Property and other assets of [FC Yonkers] in accordance with the provisions” of the FC Yonkers Amended Operating Agreement “and applicable laws and regulations.”

9. RRG Yonkers, as managing member, was required to arrange for payment of fees by FC Yonkers, including among others, site management fees due to Forest City Ratner Companies, an affiliate of FC Member, for performance of site management services pursuant to “one or more separate agreements with [FC Yonkers]” (FC Yonkers Amended Operating Agreement, Article IV, section 4.04[b]). Although the record does not include any written agreement regarding site management services, it does include evidence that FC Yonkers included fees for site management services in the Ridge Hill project budget, and paid such site management fees on a monthly basis.

10. Articles of organization for RRG Yonkers were filed with the New York State Secretary of State on October 4, 2001, and its Limited Liability Company Operating Agreement was entered into by certain members on October 4, 2001. The Amended and Restated Limited Liability Company Operating Agreement of RRG Yonkers was executed on August 10, 2006 by Bruce C. Ratner, Managing Member of RRG Yonkers, and four Class A Members (RRG Yonkers Amended Limited Liability Operating Agreement). Pursuant to section 10 of the RRG Yonkers Amended Limited Liability Operating Agreement, the managing member, Bruce C. Ratner, has “all powers and rights necessary, appropriate or advisable to effectuate and carry out the purposes and business of [RRG Yonkers],” and is “responsible for the implementation of the decisions of [RRG Yonkers], and for conducting the ordinary and usual business and affairs of [RRG Yonkers]. . . .” Section 34 of the RRG Yonkers Amended Limited Liability Operating Agreement listed the following officers “elected to the offices set opposite their respective names:” (i) Bruce C. Ratner - President, (ii) David L. Berliner - Senior Vice President and Secretary, (iii) Joanne Minieri - Senior Vice President and Treasurer, (iv) Robert Sanna - Vice President, (v) Jeanne Mucci - Assistant Secretary, and (vi) Deborah Levinson - Vice President.

11. On November 28, 2006, the City of Yonkers Industrial Development Agency (YIDA) adopted “Inducement Resolution (FC Yonkers Associates LLC - Tenant Improvement Project),” Resolution No. 11/2006-02 (inducement resolution) that authorized (i) the appointment of FC Yonkers (and/or its affiliates)¹ as its agent for the purpose of undertaking the Tenant Improvement Project pursuant to an agent agreement;² (ii) the YIDA Chairman, Vice Chairman, Chief Executive Officer, Chief Financial Officer and Executive Director, on behalf of YIDA, to negotiate (a) a Lease Agreement, pursuant to which FC Yonkers leases the Tenant Improvement Project to YIDA, (b) the related Leaseback Agreement conveying YIDA’s interest in the Tenant Improvement Project back to FC Yonkers, and (c) any related documents as approved by counsel to YIDA or Transaction Counsel; (iii) the provision of financial assistance to FC Yonkers for the Tenant Improvement Project including (a) an exemption from all state and local sales and use taxes with respect to qualifying personal property, (b) an exemption from all mortgage recording taxes with respect to any qualifying mortgage on the Tenant Improvements, and (c) the retention by YIDA of title to or a leasehold interest in the Tenant Improvements by YIDA for a period of time so as to enable FC Yonkers to receive the financial assistance; and (iv) the holding of a public hearing with respect to the Tenant Improvement Project. The inducement resolution also limited the financial assistance provided by YIDA to \$100,000.00 until a public hearing was held and a subsequent resolution was passed by YIDA.

¹ FC Yonkers’ affiliates included FC Commercial, LLC, as well as other named and unnamed affiliates.

² The Tenant Improvement Project consisted of the acquisition, construction and equipping on approximately 81.4 acres of land located at 1 Ridge Hill, Yonkers, New York (land) of a building or buildings containing in the aggregate approximately 1.3 million square feet of single- and multi-story retail space for use by several anchor tenants, numerous smaller tenants, restaurants and a multi-screen cinema, all designed and configured to replicate the layout of a traditional town square.

12. On December 18, 2006, YIDA held a public hearing with respect to the Tenant Improvement Project and the proposed financial assistance. On February 1, 2007, YIDA, by Resolution No. 02/2007-1, acknowledged the public hearing held on December 18, 2006, and authorized YIDA to provide financial assistance in excess of \$100,000.00, which financial assistance included, among other things, a Leaseback Agreement.

13. On August 2, 2007, YIDA and FC Yonkers also entered into a Leaseback Agreement, entitled "Tax Benefit Leaseback Agreement" (Tax Benefit Leaseback Agreement), concerning the Ridge Hill Project. The Tax Benefit Leaseback Agreement "[c]overs "all of the Project other than certain roads covered by the Roadway Lease Agreement dated the date hereof," identified on the cover page as "Tax Parcel No. See Schedule A." 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, described in Schedule A (see legal description attached)" and "all of the interest in the equipment" located at Ridge Hill (which, collectively, the parties identified as the "Facility") (Tax Benefit Leaseback Agreement, Article II, Section 2.1). The attached Schedule A contained a "Metes & Bounds Description" of "Former Lot 1, Block 4060 Less Proposed Parcel M, Ridge Hill Boulevard and Otis Drive, Part of Former Lot 1, Block 4060 City of Yonkers, Westchester County, New York." Pursuant to Article II, Section 2.6(a) 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.

14. Pursuant to the Tax Benefit Leaseback Agreement, Article III, Section 3.3(a), entitled "Tax During Construction," FC Yonkers agreed, in relevant part,

“to make certain tax payments described in a Special Ordinance Authorizing the city manager to execute an agreement with the Loral Corporation (“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

. . . . 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.”

15. The Tax Benefit Leaseback Agreement, Article III, Section 3.3(d) provides, in pertinent part, that:

“[FC Yonkers] has been certified as eligible to receive the benefits afforded by the New York State Empire Zone Program in connection with the Facility which is located within the Yonkers Empire Zone. Such eligibility entitles the members of [FC Yonkers] to declare a QEZE credit against their New York State personal income taxes for real property taxes and/or in lieu of tax payments paid by [FC Yonkers] in respect to the Project.”

16. The Tax Benefit Leaseback Agreement Schedule 3.3 has five specifically identified pages. On Schedule 3.3-3, the paragraph entitled “Real Property Tax Exemption” provides, in pertinent part, that:

“[t]he Land and existing improvements as of the date hereof are exempt from the payment of Real Estate Taxes (as defined below) based on interests held

by the State of New York and or [YIDA] since prior to 1979. The Facility shall continue to be exempt from Real Estate Taxes for periods after the date hereof so long as [YIDA] has a continuing interest in this Facility through this Leaseback Agreement and related Lease Agreement. For purposes of this paragraph, "Real Estate Taxes" means all general real estate taxes levied against the Facility by the County and the City for its fiscally dependent schools excluding however, the Special Charges as described below Notwithstanding anything contained herein to the contrary, in the event the exemption from Real Estate Taxes is denied for any reason, [FC Yonkers] shall pay (and hereby agrees to pay) all Real Estate Taxes levied upon the Facility as they become due, specifically including but not limited to Real Estate Taxes for years prior to and after the tax years covered by this Leaseback Agreement. . . ."

On Schedule 3.3-5, the paragraph entitled "Special District Charges, Special Assessments and other charges" provides as follows:

"Special district charges, special assessments, and special ad valorem levies (specifically including but not limited to any fire district charges or "curb charges"), and pure water charges and sewer charges (collectively, "Special Charges") are to be paid in accordance with normal billing practices."

17. The Tax Benefit Leaseback Agreement, Article III, Section 3.7 provides as follows:

"If [FC Yonkers] fails, after notice pursuant to Section 7.1(a) and the period to cure as described in Section 7.1(a) have expired, (i) to pay any tax, assessment or other governmental charge required to be paid by Section 3.3 hereof or (ii) to maintain any insurance required to be maintained by Section 3.4 hereof, [YIDA] may pay such tax, assessment or other charge or the premium for such insurance. [FC Yonkers] shall reimburse [YIDA] for any amount so paid together with interest thereon from the date of payment at twelve percent (12%) per annum."

18. Located on an 80 acre site between the Grassy Sprain reservoir and the New York State Thruway approximately one-half mile north of Tuckahoe Road in Yonkers, New York, the Ridge Hill project involved the construction of approximately one million square feet of new retail space fitted out for tenants, as well as residential parcels and a hotel site. It was constructed on what was formerly a largely vacant site with a few existing buildings, some of which were demolished as part of the project. Entirely new utility infrastructure had to be created for the Ridge Hill site, including the roads, sanitary sewers, water service, cable and

telephone service, gas service and electrical service installations.

19. Ridge Hill construction included five multi-story parking garages, a four-level retail building with a 12-plex movie theater, a two-story retail building including restaurants, Fountain Plaza with water feature, a Town Square, interior access roads, and several other retail buildings for major national retailers and restaurants such as Apple, Whole Foods, LL Bean, Dick's Sporting Goods, Cheesecake Factory, Container Store and LA Fitness. The Ridge Hill site was also fitted out for high-rise residential and hotel construction. A portion of the site was sold by FC Yonkers to another developer for high rise condominium construction.

20. The Ridge Hill project also involved the reconstruction of New York State Thruway entrances and overpasses, and the new construction or improvement of access roads to Ridge Hill, along with associated traffic signalization systems. Additionally, the Ridge Hill project also included extensive environmental mitigation, including the off-site rehabilitation of native plant species.

21. Ridge Hill development resulted in the creation of many construction jobs for local employers, such as Yonkers Contracting Company, Inc., which FC Yonkers engaged as the largest single prime contractor for the project, with a contractual commitment of \$230,042,000.00.

22. As examples of the extensive job creation resulting from FC Yonkers' development of Ridge Hill, the average number of construction workers onsite at Ridge Hill on a daily basis was 287 in February 2009, 424 in June 2009, and 174 in January 2010.

23. FC Yonkers became certified under the Empire Zones Program (Article 18-B of the General Municipal Law) (the "Program") as a New York State QEZE effective March 8, 2004 to claim Empire Zone benefits in connection with the facilities located at 1 Ridge Hill, Yonkers,

New York designated as zone property on March 1, 2002 within the boundaries of the Yonkers Empire Zone. The Empire State Development Corporation issued to FC Yonkers an Empire Zone Retention Certificate (EZRC) that was “[r]equired to claim Empire Zone and Qualified Empire Zone Enterprise tax credits for tax year 2008 and later.”

24. The Ridge Hill project required an investment by FC Yonkers of more than \$800 million. The primary lender for the project, Bank of America, provided construction loan funding of approximately \$600 million.

25. As part of its capital budget for Ridge Hill, FC Yonkers included an expectation of receiving the QEZE credit for real property taxes as a certified eligible participant in the Empire Zones Program. FC Yonkers relied upon the QEZE credit, and if the QEZE credit is not received, FC Yonkers will have to raise and obtain an alternative equity funding source.

26. In the 2009 tax year, Ridge Hill was approximately midway through construction. During that year, the new Thruway bridge received planking, retail buildings A, H and J were under construction, parking garages B, AP and JK were taking shape, and the excavation and foundations for other retail buildings were taking place.

27. During the 2009 tax year, FC Yonkers invested approximately \$158 million dollars into the Ridge Hill project in the form of hard construction costs (including payments to contractors for labor and materials), and soft costs (including all site management fees, interest, and real estate taxes and charges). All these costs were capitalized on the 2009 income tax returns for FC Yonkers because the project was in development.

28. Petitioner and FC Yonkers have the same fiscal year with respect to the 2009 tax year, which is February 1, 2009 through January 31, 2010.

29. For the 2009 tax year, FC Yonkers reported its federal and New York State tax

liability as if it were a partnership whose principal business activity was the development of real estate.

30. FC Yonkers is eligible to claim the QEZE credit for real property taxes for the 2009 tax year with respect to the Ridge Hill project.

31. On its U.S. Return of Partnership Income, Form 1065, filed for the fiscal year February 1, 2009 through January 31, 2010 (2009 tax year Form 1065), FC Yonkers reported gross receipts or sales in the amount of \$7,177,033.00, less cost of goods sold, per Schedule A listed as "Other Costs," in the amount of \$6,220,214.00, for a total income in the amount of \$956,819.00. FC Yonkers did not report any salaries or wages as a deduction on line 9 of the partnership return because Ridge Hill was in development. As such, the salaries and wages of FC Yonkers' employees were required to be capitalized rather than expensed. On the 2009 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 \$530,626,803.00. The attached statement 2 listed "Schedule L - Line 13 - Other Assets" as "Construction in Progress" and reported a beginning balance in the amount of \$373,485,202.00 and an ending balance in the amount of \$530,626,803.00.

32. 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, 2009 through January 31, 2010 (2009 tax year IT-204). In Section 10 of the 2009 tax year IT-204, entitled "New York allocation schedule," 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," a QEZE credit for real property taxes in the

amount of \$327,866.00.³

33. On its Form IT-606, Claim for QEZE Credit for Real Property Taxes, for the 2009 tax year, FC Yonkers reported its date of first certification by the Empire State Development Corporation as March 8, 2004. On this form's Section 1 entitled "For QEZEs first certified prior to April 1, 2005, Schedule A - Employment test 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 two full-time employees on March 31, 2009, June 30, 2009, September 30, 2009 and December 31, 2009. In the same section, FC Yonkers reported the current tax year employment number within all EZs as "2." 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 "1.0000" on line 14; an "employment increase factor" of "1.0000" on line 15; "Eligible real property taxes" in the amount of \$327,866.00 on line 16; and "total QEZE credit for real property taxes" in the amount of \$327,866.00 on line 24.⁴

34. FC Yonkers's QEZE test date is March 8, 2004, its test year is the fiscal year ending

³ The QEZE credit for real property taxes is actually \$311,028.00, the total amount of taxes paid by FC Yonkers in 2009 (*see* finding of fact 43).

⁴ *See* footnote 3.

January 31, 2004 (2003 tax year), and its base period is fiscal years ending January 31, 2002 (2001 tax year) and January 31, 2003 (2002 tax year). Its employment number for its base period is zero. The 2009 tax year was the sixth year of FC Yonkers's business tax benefit period.

35. For the 2009 tax year, FC Yonkers allocated 100% of its claimed QEZE credit for real property taxes to FC Member pursuant to the terms of Article IV of the FC Yonkers Amended Operating Agreement.

36. 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. & Subsidiaries" (combined group) for the 2009 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 2009 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 \$327,866.00 for real property taxes passed through from FC Yonkers. On line 78 of its form CT-3-A, petitioner reduced the combined group's tax liability by applying \$374,479.00 in credits, which credits included the QEZE credit in the amount \$327,866.00 passed through from FC Yonkers. On line 100a of its form CT-3-A, petitioner claimed a refund of unused tax credits in the amount of \$4,109,386.00.

37. By letter dated May 23, 2012, Diane Houck, a Tax Technician in the Division of Taxation's (Division) Income/Franchise Desk Audit Bureau, Audit Group 12, notified petitioner that she was reviewing petitioner's claim for QEZE credit for real property taxes and QEZE tax reduction credit for corporate partners in the name of FC Yonkers.⁵ In that letter, Ms. Houck

⁵ Ms. Houck's letter also requested information regarding petitioner's claim for QEZE credit for real property taxes and QEZE tax reduction credit for corporate partners in the name of FC Gowanus Associates LLC (FC Gowanus Associates). FC Gowanus Associates' claim for the QEZE credit for real property taxes is not at issue in this proceeding.

requested information and documentation as follows:

A. Copies of the property tax bills and proofs of payment for all taxes that were the basis for the QEZE credit obtained from FC Yonkers.

B. For any payment in lieu of taxes (PILOT payments) made pursuant to a written agreement executed or amended after January 1, 2001, a computation of the PILOT payment limitation which is the product of (1) and (2) below divided by 1,000.

- “1. The greater of the basis for federal income tax purposes on the certification date of real property (including buildings and structural components of buildings) owned by the QEZE and located in the Empire Zone for which it is certified or the basis on the last day of the tax year;
2. The full value tax rate within the county where such property is located as most recently reported to the Commissioner of Tax and Finance by the State Board of Real Property Services.”

C. A list of the employees that were claimed for the QEZE real property tax credit, including each employee’s name, social security number, hire date, termination date, a designation of full or part-time hire status, and the number of hours worked for each quarter of the fiscal year ended January 31, 2010.

D. A copy of all pages of the New York State Partnership Return filed by FC Yonkers for the fiscal year ended January 31, 2010.

38. Having received no response to her May 23, 2012 letter, Ms. Houck sent another letter dated July 17, 2012, requesting the same information. On or about August 1, 2012, Joseph Krivis, petitioner’s Director of Federal and State Income Taxes, responded by email and requested an extension to submit the requested information. Ms. Houck granted the extension. On October 16, 2012, Ms. Houck called Mr. Krivis to inquire about the status of the requested information. At that time, Mr. Krivis stated that they were working on getting the information.

Subsequently, Ms. Houck left voice mail messages for Mr. Krivis on December 28, 2012 and February 5, 2013 regarding the status of the requested information. Mr. Krivis did not respond to either of Ms. Houck's voice messages. None of the requested information was supplied to Ms. Houck.

39. On April 22, 2013, Ms. Houck mailed the statement of tax reduction or overpayment, dated February 27, 2013, to petitioner that allowed a net refund of \$3,606,386.00 for the period ended January 31, 2010. Ms. Houck allowed petitioner's Claim for Brownfield Redevelopment Tax Credit and Claim for QEZE Credit for Real Property Taxes based upon petitioner's ownership interest in a partnership, Tiago Holdings, LLC, adjusted to reflect the amount required to reduce the tax to the fixed minimum tax due. The Statement also advised that petitioner's claims for QEZE credit for real property taxes and QEZE tax reduction credit for corporate partners from FC Gowanus Associates and FC Yonkers were being addressed under separate cover.

40. In March 2013, Ms. Houck closed the audit on petitioner's claim for the QEZE credit for real property taxes passed through from FC Yonkers for the fiscal year February 1, 2009 through January 31, 2010. On April 22, 2013, Ms. Houck issued a Notice of Disallowance denying petitioner's claims for pass through of the QEZE credit for real property taxes from FC Gowanus Associates and FC Yonkers in the respective amounts of \$243,306.00 and \$327,868.00 for the period ended January 31, 2010 because "we have not received the information requested in our letter dated May 23, 2012."

41. On October 15, 2013, petitioner commenced this petition before the Division of Tax Appeals to contest the notice of disallowance with respect to FC Yonkers. On January 15, 2014, the Division's counsel served and filed its answer.

42. By letter dated October 18, 2013, Mr. Krivis responded to Ms. Houck's letters of May 23, 2012 and June 25, 2012 with some of the requested information for the fiscal years ended January 31, 2010 and January 31, 2011 with respect to FC Yonkers and FC Gowanus Associates. For FC Yonkers' 2009 tax year, Mr. Krivis provided copies of most of the property tax bills and proof of payments⁶ and a copy of its New York State partnership return for the fiscal year February 1, 2009 through January 31, 2010. In his letter, Mr. Krivis indicated that the employee data would be forthcoming in a separate response. He also stated that:

“the last 2009 check issued by FC Yonkers Associates, LLC was voided and then reissued February 5, 2010 which is within the tax year 2010. Thus the 2009 credit was reduced by that check and we are asking that [tax year] 2010 be increased by the appropriate amounts. In addition, the amount of the check was reduced to reflect that one Parcel was deeded to a new owner in the 4th quarter of 2009 and thus tax was not owed by the taxpayer.”

43. Included with Mr. Krivis' October 18, 2013 letter was a schedule of check payments made by FC Yonkers for 28 properties that were identified by their respective block and lot numbers on the schedule. This schedule contained detailed information regarding the reduction in the 2009 tax year pass-through QEZE credit generally referenced in the October 18, 2013 cover letter. Review of this schedule indicates that in the 2009 tax year, total taxes in the amount of \$311,028.00 were paid, a \$16,838.00 reduction in the amount of QEZE real property taxes claimed by petitioner as a pass through from FC Yonkers. According to the explanation at the bottom of the schedule, the difference was due to a \$31.00 keypunch error, voided check number 4344 in the amount of \$15,380.81,⁷ and an extra payment in the amount of \$1,487.65 for block

⁶ Mr. Krivis did not provide any billing invoice related to the \$185,784.96 payment to the City of Yonkers.

⁷ Voided check number 4344 included installment payments on bill numbers 17264, 35129, 35130, 35131, 35132, 35133, 35134, 35135, 35136, 35137, 35138, 35139, 35140, 35141, 35142, 35143, 35144, 35145, 35146, 35147, 35148, 35149, 35150, 35151, 35152, and 35153 issued to block - lot numbers 4000-130, 4061-001, 4061-002, 4062-001, 4063-001, 4064-001, 4065-001, 4066-001, 4067-001, 4068-001, 4069-001, 4069-002, 4070-001, 4071-001, 4072-001, 4072-002, 4072-003, 4072-004, 4072-005, 4073-001, 4074-001, 4075-001, 4076-001, 4076-002, 4077-001, and 4078-001, respectively.

4001 lot 214 included in check number 4247, “(-31 + 1,488 + 15,381 = 16,838).” As a result of this difference, the taxes paid by FC Yonkers in the 2009 tax year totaled \$311,028.00 (\$327,866.00 - \$16,838.00 = \$311,028.00). As such, the 2009 tax year QEZE credit for real property taxes passed through from FC Yonkers was \$311,028.00.

44. As part of his October 18, 2013 information submission to Ms. Houck, Mr. Krivis also included the computation of FC Yonkers’ PILOT limitation for the period February 1, 2009 through January 31, 2010 that follows:

“Federal basis of real property	537,276,131
Divide by 1,000	<u>1,000</u>
	537,276
Westchester county full value rate	<u>20.3</u>
PILOT Limitation	<u>10,906,703”</u>

Mr. Krivis indicated that the amount of the PILOT payment made by FC Yonkers, and claimed by petitioner for the 2009 tax year as part of the QEZE credit, \$185,784.96, does not exceed the annual cap amount limitation. He further indicated that FC Yonkers’ federal basis of real property was based upon the following balances as of January 31, 2010:

“Building Costs	8,550,361
Development	474,576,143
Land	41,234,492
Procurement Costs	<u>12,915,134</u>
	<u>537,276,131”</u>

45. Forest City Ratner Companies, LLC (FCRC), whose corporate offices are located at One MetroTech Center, Brooklyn, New York, is wholly owned by petitioner. FCRC is an overhead management company that provides centralized services, including accounting and legal services, for the separate Forest City entities that own and develop real estate projects, including FC Yonkers.

46. In order for petitioner to develop real estate projects in a cost-efficient manner, certain

centralized services are provided by FCRC for petitioner's individual project development entities, including FC Yonkers. Payroll, medical, dental and disability insurance, a 401(k) plan, legal services and accounting services are provided by FCRC for all of those individual project entities. This centralized services approach is the most economical way to provide services and benefit packages.

47. FCRC also furnishes IT services on a centralized basis, including the email accounts for all personnel who work for any of petitioner's development entities, like Theron Russell, who was working on FC Yonkers' Ridge Hill project during the 2009 tax year. This is the most efficient way to provide email services. FCRC also provided letterhead/stationery used by personnel working on development projects.

48. FCRC also issued on a centralized basis the payroll checks and annual forms W-2 to the employees of the various development entities. This was the most efficient way to distribute compensation across multiple development entities for personnel who, from time to time, moved from one specific project entity to another.

49. FCRC recovered the cost of its centralized services and the payroll costs expended for personnel of the various development projects through a site management fee that was budgeted by, charged to, and collected from each project entity.

50. The budget prepared and updated for the construction of Ridge Hill by FC Yonkers included various categories of costs, one of which was the site management fee. The site management fee was paid by FC Yonkers to reimburse FCRC for the cost of the centralized services that FCRC provided in support of the Ridge Hill project.

51. FCRC billed the budgeted site management fee systematically on a monthly basis to the various development entities, including FC Yonkers. FCRC would "true up," i.e., reconcile,

the billed site management fee to the actual time spent and costs incurred at the each project, such as Ridge Hill, on a quarterly basis.

52. Lauren Du holds a degree in accounting from New York University, is a CPA, and serves as Senior Vice President and Controller of FCRC. In that role, she is in charge of the accounting department, overseeing financial reporting, cash disbursements, payroll, and Sarbanes-Oxley compliance.

53. Prior to working at FCRC, Ms. Du worked with the public accounting firms of Kenneth Leventhal and Ernst & Young, primarily auditing real estate-related entities, including FCRC. Ms. Du had been promoted to the level of manager when she left Ernst & Young to work at FCRC in 1995.

54. At the hearing, Ms. Du explained, among other things, the method FCRC uses to make the quarterly “true-up” adjustments to the site management fee charged to, and collected from, each project entity. One or more of the following FCRC departments provide personnel services to the various development entities: the office building development group “20PDOF;” the retail sectors development group “40PDRT;” the construction group, “60CONT,” [Mr. Sanna’s group] that provided construction project managers; the legal group, “70LEGL;” the finance group “80FINC;” and the public relations group, “20GOVR.” For each quarter, the managers of each of these groups determine the amount of time their respective personnel spend on the various projects on a one hundred percent basis.⁸ Then, for each project, a weighted average is derived by taking the percentage of time spent on the project by each group, multiplying each percentage by the base wages of the respective group, totaling the products of the same, and then dividing the sum total of the base wages of personnel devoted to the project by the sum total of the base

⁸ The total base wages for each group is also determined on a quarterly basis, as well as the sum total of the base wages for all six groups.

wages for all six groups. In each quarter, FCRC determines its total overhead costs, which amount includes the total wages for all of the company's groups, all employee benefits, rent, light and water. To determine the total site management calculation, the weighted average percentage of each project is multiplied by the total overhead for the quarter. For each project, an up or down rounding of the quarterly site management allocation takes place. A site management analysis is then made for each project to determine any adjustments needed to be made to the budgeted site management fees collected for the quarter from that project to reflect the actual quarterly site management fees allocated to the same. Based upon the site management analysis, a debit or credit invoice will be issued to each project to reflect the true-up adjustment to the site management fees collected from it for the quarter.

55. The site management fee billings by FCRC to FC Yonkers included recovery of the wages and benefits of the personnel dedicated to Ridge Hill. The site management fee bills from FCRC to FC Yonkers were in fact paid by FC Yonkers for the months in the 2009 tax year.

56. The record includes information used to determine the "true-up" adjustments that FCRC made to site management fees collected from each project in the first and third quarters of the 2009 tax year. Review of those documents indicates that the following groups spent time in each of those quarters on the Ridge Hill project (referred to as "Yonkers-Retail"): the retail sectors development group, the construction group, the legal group, the finance group, and the public relations group.⁹

57. The total (multi-year) budgeted site management fee for FC Yonkers' Ridge Hill project was \$33,433,622.00, and updated in December 2009 to \$34,931,999.00. The monthly

⁹ Neither of these time allocation documents contains the confidential base wage amounts for any individual group, or the confidential sum total wages for all six groups that were used as part of the time allocation computations. However, both time allocation documents list amounts for total overhead costs, and the site management allocation amounts determined to be due for each project.

site management fee payment from FC Yonkers to FCRC was \$547,468.00 in 2009, subject to the quarterly true-up adjustment. Prior to any quarterly true-up adjustment, the quarterly site management payments totaled \$1,642,906.00, or total site management payments in the amount of \$6,569,624.00 for the 2009 tax year. The true-up process with respect to the Ridge Hill site management fee charged by FCRC to FC Yonkers was done for each quarter in the 2009 tax year. Specifically, true-up credit adjustments of \$250,406.00, \$307,406.00, \$645,406.00, and \$752,406.00 were made to the billed and paid quarterly service management fees by invoices dated April 30, 2009, July 31, 2009, October 31, 2009, and January 31, 2010, respectively. As a result of the quarterly true-up credit adjustments made by FCRC, FC Yonkers paid site management fees in the total amount of \$4,614,002.00 in the 2009 tax year.

58. The personnel costs for Theron Russell (including his salary and benefits), which were paid in the first instance by FCRC, were recovered from FC Yonkers as part of the site management fee.

59. Mr. Russell submitted his expense reports to FCRC for reimbursement. Although business expenses were reimbursed to Mr. Russell by FCRC in the first instance, these costs were allocated and billed to FC Yonkers, and recovered from FC Yonkers.

60. Robert Sanna began his employment with the Forest City entities in 1989 after working 10 years for a construction company. Mr. Sanna holds Bachelor of Science and Bachelor of Architecture degrees received from City College of New York in 1978 and 1980, respectively, and is registered as an architect in New York. He first worked as a Forest City construction project manager on the One Metro Tech Project, and became Executive Vice President of Design, Development and Construction in 1993.

61. Mr. Sanna held the title of Executive Vice President of Design, Development and

Construction with FCRC, and also served as an officer of every one of the development entities (including FC Yonkers) that owned and developed the individual projects (like Ridge Hill).

62. Mr. Sanna has been a Vice President of RRG Yonkers since its inception in 2001. As Vice President of RRG Yonkers directing the work of FC Yonkers at Ridge Hill, Mr. Sanna's role was to assign and coordinate all the resources to the Ridge Hill project based upon experience and skill, to review the construction contracts and bidding, and to be sure that the personnel assigned to Ridge Hill were following corporate procedures for bidding, awarding and overseeing the work and processing the related documentation.

63. Mr. Sanna had responsibility for signing and entering into the contracts between FC Yonkers as the Ridge Hill project owner and the individual contractor entities. He did so in his capacity as an officer of the managing member of FC Yonkers.

64. Mr. Sanna, as Vice President of RRG Yonkers, was responsible for supervising the project managers who were working for FC Yonkers on Ridge Hill, including Mr. Russell.

65. Mr. Sanna originally hired Mr. Russell in 2003 to work as a construction project manager for a particular Forest City entity, FC Quarter Master Associates, L.P., which was developing the Quarter Master project in Philadelphia, Pennsylvania.

66. Mr. Sanna assigned Mr. Russell to work for FC Yonkers on Ridge Hill in 2005 based upon Mr. Russell's experience with large scale projects.

67. As an officer of the managing member of FC Yonkers charged with directing the work at Ridge Hill, Mr. Sanna required Mr. Russell to report directly to him. Mr. Sanna had the authority to fire Mr. Russell. He conducted Mr. Russell's in-person annual performance reviews, including salary adjustments and bonus compensation adjustments. In the 2009 taxable year, Mr. Russell's bonus compensation was severely reduced by Mr. Sanna because of the "Great

Recession.”

68. The Agreement for Program Management Services between FC Yonkers Associates, LLC as Owner/Developer and The Whiting-Turner Contracting Company (Whiting-Turner) was entered into on November 14, 2007 (Whiting-Turner contract). Mr. Sanna, as Vice President of RRG Yonkers, signed the contract between FC Yonkers and Whiting-Turner, to engage Whiting-Turner as the program manager for the Ridge Hill project.¹⁰ A copy of this contract was distributed to Mr. Russell because he was going to have day-to-day administration of the Whiting-Turner contract for FC Yonkers.

69. Whiting-Turner, the program manager, was an independent contractor, not an agent or an employee of FC Yonkers. Under the Whiting-Turner contract, FC Yonkers as the owner/developer of Ridge Hill, designated Theron Russell and Scott Stutman as its representatives to act on its behalf with respect to the Ridge Hill project, and “[e]ach of these representatives and their designees may act individually on behalf of the owner.” By this designation, Mr. Russell was given express authority to approve and act on behalf of FC Yonkers as the owner of Ridge Hill. Whiting-Turner served as an extension of the project manager services provided by Mr. Russell and Mr. Stutman at Ridge Hill.

70. Mr. Russell’s delegated authority included the responsibility to approve and sign change orders for the Ridge Hill project. Exercising this authority on behalf of FC Yonkers, Mr. Russell approved and signed change orders, including one in September 2009 with Whiting-Turner for \$1,304,328.00.

71. On May 15, 2007, Mr. Sanna, as Vice President of RRG Yonkers, signed the

¹⁰ This contract governed all services (pre-construction and construction phase) provided by Whiting-Turner for the Ridge Hill project from April 1, 2007 onward. Whiting-Turner had performed pre-construction services for FC Yonkers from November 2006 through March 31, 2007 under a separate pre-construction services agreement dated February 11, 2005 (*see* Whiting-Turner contract, Article 3, Section 1).

\$230,042,000.00 Trade Contract for Construction Work between FC Yonkers and Yonkers Contracting Company, Inc. (Yonkers Contracting Company) for infrastructure construction at Ridge Hill. Mr. Russell was included on the distribution list for this executed contract.

72. Throughout 2009, Yonkers Contracting Company was paid monthly by FC Yonkers based upon an application for payment that was submitted to and approved by Mr. Russell for FC Yonkers. For example, Mr. Russell reviewed and approved the application for work performed in February 2009 totaling \$4,752,607.64, and in September 2009 totaling \$7,317,042.02. It was Mr. Russell's responsibility as an FC Yonkers project manager to ensure that the requested payment for work was appropriate.

73. Based upon the "blue sheets"¹¹ approved and signed by Mr. Russell, an FC Yonkers' check was issued by the FCRC accounting department in payment of the monthly payment applications from Yonkers Contracting Company for work performed at Ridge Hill. The FC Yonkers monthly checks were signed by Ms. Du, the comptroller.

74. On February 12, 2008, Mr. Sanna, as Vice President of RRG Yonkers, signed the \$67,280,028.00 contract between FC Yonkers and Worth Construction Company (Worth Construction) for the construction of retail buildings A1, A2, A3, B and C (plus pedestrian bridges AC, AB and BC) at Ridge Hill. Mr. Russell was included on the distribution list for this contract as a FC Yonkers' project manager at Ridge Hill.

75. Throughout 2009, Worth Construction was paid monthly by FC Yonkers based upon applications for payment that were submitted to and approved by Mr. Russell for FC Yonkers. For example, Mr. Russell reviewed and approved the application for work performed by Worth Construction for payment by FC Yonkers in February 2009 and in September 2009 including the

¹¹ The "blue sheets" were so-named because of the blue paper on which the forms were printed.

underlying change orders.

76. Based upon the “blue sheets” approved and signed by Mr. Russell, FC Yonkers’ checks were issued by the FCRC accounting department in payment of the monthly payment applications from Worth Construction for work performed at Ridge Hill. The FC Yonkers monthly checks were signed by Ms. Du, the comptroller. For example, Worth Construction was paid \$2,389,082.21 in February 2009 and \$2,539,927.80 in October 2009 by FC Yonkers on the approval of Mr. Russell.

77. In the same manner as with Whiting-Turner, Yonkers Contracting Company and Worth Construction, Mr. Russell acted with authority on behalf of FC Yonkers to review and approve monthly payment requisitions for the other contractors on the Ridge Hill project.

78. On June 25, 2007, Mr. Sanna, as Vice President of RRG Yonkers, signed the \$666,000.00 contract between FC Yonkers and Eastern Excavation for work at Ridge Hill.

79. Prior to a contract being signed, it was Mr. Russell’s responsibility on behalf of FC Yonkers to identify the work required, solicit proposals and bids for work, and then make a recommendation to Mr. Sanna as to the scope of the contract and the vendor to whom the contract would be awarded.

80. The FC Yonkers checks issued to pay the Ridge Hill contractors were signed by Ms. Du, as an authorized signer for FC Yonkers, after receiving all the necessary approvals, including that of Mr. Russell, as FC Yonkers’ Ridge Hill project manager.

81. Mr. Russell is a project manager in the real estate development industry with 40 years of experience, including 18 years from 1985 to 2003 owning and operating his own construction company, which specialized in the renovation of commercial and institutional properties.

82. Mr. Russell began working for FC Yonkers on the Ridge Hill project in January 2005

as a construction project manager, and continued that work through June 2013.

83. Mr. Russell's principal responsibilities involved the procurement and management of design and construction contracts for construction of the development at Ridge Hill. In this role, he was responsible for the bidding and contracting process for the infrastructure construction work at Ridge Hill, the interface with project inspectors, and the management of municipal agency approvals for the project.

84. Mr. Russell held a full-time position, which required an average of 50 hours a week of work. He was devoted exclusively to FC Yonkers' Ridge Hill project during the 2009 tax year.

85. Mr. Russell was assigned to work for FC Yonkers at Ridge Hill, and was supervised by Mr. Sanna, who also provided the direction and control of Mr. Russell's work at Ridge Hill. This direction and control was provided in Mr. Sanna's capacity as an officer of the managing member of FC Yonkers. Mr. Sanna typically visited the Ridge Hill site once a month. Mr. Russell and Mr. Sanna were in frequent contact by email, occasional phone calls, and in person approximately once per week.

86. Mr. Sanna set forth the time, scope and budget objectives of the Ridge Hill development, and approved all the contracts entered into by FC Yonkers. Mr. Russell reported to Mr. Sanna on bid solicitations and recommendations for contracting by FC Yonkers with architects, engineers and contractors hired to build Ridge Hill. His recommendations to Mr. Sanna for contract approvals were transmitted either by paper copy, or later via an electronic delivery system known as LiveLink.

87. After the contracts between FC Yonkers and its contractors were signed by Mr. Sanna, Mr. Russell was sent a copy of the contracts for his information and use in administering them in his capacity as project manager.

88. Mr. Russell's work at Ridge Hill initially involved the bidding and purchase of demolition services in order to remove the remaining old buildings at the site, photographing the site, and making judgments with the engineers about the best way to design the site. He was also responsible for meeting with City of Yonkers officials, utility companies and New York State Thruway Authority personnel to plan the construction of Ridge Hill. Mr. Russell also oversaw the renovation of Building H at Ridge Hill.

89. FC Yonkers contracted with Whiting-Turner to serve as program manager for the Ridge Hill project, which Mr. Russell utilized as one of his resources in support of his responsibilities for administering the work at the site. Mr. Russell helped draft the requirements for the request for proposals (RFP), and the evaluation of the proposals, which led to the selection and hiring of Whiting-Turner.

90. Mr. Russell worked in collaboration with other FC Yonkers project managers at Ridge Hill, including Dennis Rauchet, Marianna Circiumaru and Scott Stutman. Mr. Russell was most actively involved in the administration of site work, i.e., at or below the ground, while Mr. Stutman was more involved with the buildings themselves, i.e., above the ground.

91. Mr. Russell had responsibility for overseeing the change order process with Whiting-Turner on any contracts where work at Ridge Hill was added or deleted. This included reviewing and approving change orders on behalf of FC Yonkers during 2009, resulting in the additional commitment by FC Yonkers to millions of dollars in additional payments.

92. Mr. Russell possessed and exercised signatory authority for the change orders as a project manager on behalf of FC Yonkers, including the one signed by him on October 1, 2009, entitling Whiting-Turner to an additional \$1.3 million from FC Yonkers, and one dated February 3, 2009, entitling Yonkers Contracting Company to an additional \$51,000.00.

93. In preparation for the award by FC Yonkers of the project's largest single prime contract to Yonkers Contracting Company, Mr. Russell had responsibility for interviewing the prospective contractors, reviewing their qualification statements, assembling the bidding documents, and soliciting the bids. He did so on behalf of FC Yonkers. Mr. Russell then worked closely with Mr. Sanna to determine whether a responsive and accurate bid had been made by Yonkers Contracting Company, and to award the contract for \$230,042,000.00 of site work at Ridge Hill.

94. Mr. Russell's responsibilities for FC Yonkers included the review of monthly payment requisitions from the contractors, such as Yonkers Contracting Company, which were submitted specifically to him as the representative of FC Yonkers. This involved his review of the contractor's draft submissions in collaboration with the contractor, program manager and lender's representative to determine the accuracy of the requests. This monthly process often involved a field inspection at the site to determine or verify the percentage of completion of a particular item of work prior to approving payment for it.

95. Mr. Russell had responsibility on behalf of FC Yonkers to sign off on the "blue sheets" that approved the contractors' monthly payment applications. For example, on March 12, 2009, he approved the Yonkers Contracting Company application #24 resulting in FC Yonkers paying \$4,752,000.00 on April 1, 2009 to the contractor for its work at Ridge Hill in February 2009. In the fall of 2009, Mr. Russell reviewed and approved the Yonkers Contracting Company's payment requisition for the month of September 2009, which authorized FC Yonkers to pay the contractor \$7.3 million.

96. During 2009, Mr. Russell reviewed and approved other monthly payment applications from other contractors on behalf of FC Yonkers, such as Worth Construction, which had

responsibility for building the retail core, shell buildings and pedestrian bridges. For example, on March 12, 2009, Mr. Russell approved payment to Worth Construction for \$2,389,082.21 for its work in February 2009. This followed Mr. Russell's review and approval or adjustment of the application at a "pencil meeting" based upon his knowledge of the site and the amount of work completed. He similarly approved the Worth Construction payment requisition for September 2009 in the amount of \$2,539,927.80 on behalf of FC Yonkers.

97. During his work for FC Yonkers on Ridge Hill, Mr. Russell's principal office was located on the third floor of Building H at the Ridge Hill site (rather than a construction trailer), where there were also field offices for the seven or eight prime contractors, the City of Yonkers building inspector, other third party inspectors, and the resident engineer for the Thruway Authority.

98. The third floor of Building H also contained a large scale model of the Ridge Hill project for use in marketing the retail opportunities at the site to prospective tenants. In addition, almost all of the enormous volume of engineering and architectural drawings related to Ridge Hill were kept in a large room on the third floor of Building H.

99. Mr. Russell routinely attended design progress and construction progress meetings at the Ridge Hill site, as well as ad hoc meetings on an as needed basis with City of Yonkers officials and utility company representatives. At these meetings, Mr. Russell was representing FC Yonkers as the owner of Ridge Hill.

100. Mr. Russell had to be based at and working out of the Ridge Hill site field office, because this was where the construction activity was actually taking place, where job meetings were held, and where municipal agency inspections occurred. He could not perform his project manager job for FC Yonkers at Ridge Hill without working at and out of the project site. Mr.

Russell was FC Yonkers' "boots on the ground" to develop an intimate knowledge of the site conditions and activity, and to properly administer the construction activity.

101. In connection with his work for FC Yonkers at Ridge Hill, Mr. Russell also had to spend time at various offices offsite from Ridge Hill, including meetings at offices of Yonkers Contracting Company in Yonkers and at the City of Yonkers offices.

102. Mr. Russell's work for FC Yonkers was typically performed at Ridge Hill or in the City of Yonkers on Tuesday, Wednesday and Thursday each week. He also spent time in the Brooklyn offices of FCRC, where FCRC's legal and accounting personnel who had responsibilities for the Ridge Hill project were located. Mr. Russell typically interacted with legal and accounting staff at the FCRC offices in Brooklyn on Mondays.

103. Pursuant to an arrangement he made with Mr. Sanna, Mr. Russell performed his Ridge Hill responsibilities, including telephone conference calls and emails, from his home in Baltimore one day a week, usually on Fridays. Even though not physically present at Ridge Hill on those days when he worked from home, his work was nevertheless in connection with his responsibilities for FC Yonkers at Ridge Hill.

104. As noted above, FCRC provided the legal and accounting back office infrastructure needed to support the design and construction activities that were taking place in Yonkers at Ridge Hill. FCRC issued Mr. Russell his paycheck and, at year end, his Form W-2. Those personnel costs for Mr. Russell were then charged back by FCRC to FC Yonkers as the project entity/owner of Ridge Hill.

105. During 2009, Mr. Russell maintained an electronic calendar in the Outlook program, which generally reflected his meetings and responsibilities. He also maintained a chronological day book in which he recorded his activities, meetings and decisions related to Ridge Hill during

2009. This day book was a contemporaneously maintained work diary. The day books were an aid to him in performing his job responsibilities.

106. Construction progress meetings for Ridge Hill were generally held weekly. Minutes of these meetings were kept by Whiting-Turner as program manager. The minutes provide a summary of the issues discussed and list the attendees at the meetings.¹² Mr. Russell and other project managers represented FC Yonkers at these meetings. The construction progress meetings were held at Ridge Hill in the third floor large conference room in Building H.

107. Design team meetings for Ridge Hill were also generally held weekly. Minutes of these meetings were kept by Studio Five Partners and Architects, and later by Whiting-Turner. These minutes contain a summary of the topics discussed and list the attendees.¹³ The design team meetings were held at Ridge Hill in the third floor large conference room in Building H.

108. As a representative of FC Yonkers, Mr. Russell also attended other meetings to address issues at the Ridge Hill site. For example, on February 25, 2009, he attended a meeting in the conference room in Building H pertaining to the preparation of construction documents that would satisfy Consolidated Edison's requirements for construction of a high voltage transformer vault at the north end of the completed site. Both the minutes of that meeting and Mr. Russell's day book document his attendance at the meetings.¹⁴

109. On another occasion, on May 27, 2009, Mr. Russell attended a meeting in the

¹² The record includes site progress meeting minutes for Ridge Hill Village, FC Yonkers Associates, LLC, prepared by Whiting-Turner during the 2009 tax year. Each attendee's name and firm are listed at the beginning of each set of meeting minutes. "FCYA" attendees at various meeting included Messrs. Russell, Stutman and Rauchet, and Ms. Circiumaru.

¹³ The record includes Ridge Hill - Yonkers, New York Design/Owner Team meeting minutes for meetings held during the 2009 tax year. FCRC is the firm listed for Messrs. Russell, Stutman, and Rauchet, and other individuals, who attended these meetings.

¹⁴ Mr. Russell's company is listed as "FCYA" in the list of attendees in the minutes of the February 25, 2009 Vault A - Submittal Review Meeting.

Building H third floor conference room to discuss the results of concrete testing to determine the cause of a deficiency in material that had been incorporated in curbs and buildings and to develop a plan to address the issue. Mr. Russell was listed in the attendance list for the meeting¹⁵ and also recorded the meeting in his day book.

110. Exhibit 34 is a schedule showing those days on which Mr. Russell was physically present at the Ridge Hill site during the 52 weeks of the 2009 taxable year from February 1, 2009 through January 31, 2010. The entries are confirmed by the source documents, consisting of Mr. Russell's Outlook calendar, his day book, the construction meeting minutes, the design meeting minutes, and his expense reports. Mr. Russell verified the accuracy of the schedule.

111. As summarized on page 21 of exhibit 34, Mr. Russell was physically present at Ridge Hill three days per week for 12 of the 52 weeks in the 2009 taxable year; two days per week for 33 of the 52 weeks in the 2009 taxable year, and one day per week in five of the 52 weeks in the 2009 taxable year. He was on vacation for two full weeks of the 52 weeks in the 2009 taxable year.

112. Mr. Russell documented his inspections of work being performed and assessed the progress of Ridge Hill construction for FC Yonkers by taking photographs. The record includes a series of photographs taken by Mr. Russell showing construction progress over the course of the 2009 taxable year on the Ridge Hill site south of Building H, including buildings I and J; and the north end of the site, including Building A (the multiplex theater), Building B, Building C, Building D, and Building G.

113. As noted above, Mr. Russell was issued a Form W-2 for the year 2009, which listed FCRC as his employer. His 2009 W-2 did not list any City of Yonkers tax withholding.

¹⁵ Both Mr. Russell and Mr. Raucher attended the meeting, with "Forest City" next to their respective names in the May 27, 2009 meeting minutes.

114. Mr. Russell was hired to work as a construction project manager within the Forest City group of companies by an FCRC letter of hire dated September 8, 2003. He was initially assigned to work on the Quarter Master project in Philadelphia, Pennsylvania. While working on the Quarter Master project, Mr. Russell reported directly to Mr. Sanna.

115. Mr. Russell worked full-time as project manager on petitioner's Quartermaster Plaza project (a retail development project) on a 40 acre site in Philadelphia, Pennsylvania until January 2005. No part of the Quarter Master project is located in New York State. While working on the Quartermaster Plaza project, Mr. Russell rented an apartment in the City of Philadelphia, where he resided Monday through Thursday.

116. While working in Pennsylvania, Mr. Russell received his paycheck and Form W-2 from FCRC. The 2004 Form W-2 issued to Mr. Russell only reported New York State wages and New York State taxes withheld from the same.

117. Mr. Russell originally filed a New York State tax return for the year 2004, which was prepared by his Maryland-based tax preparer, on which he erroneously declared and paid New York State income tax on his earnings, even though he was actually working in Pennsylvania during 2004.

118. After learning of this error at a hearing before the Division of Tax Appeals with respect to petitioner's 2008 tax year, Mr. Russell filed an amended New York State income tax return for 2004 declaring no income earned in New York for 2004, and requesting a refund of his approximately \$9,000.00 overpayment to New York.

119. Mr. Russell also corrected his tax filings for 2004 by filing a 2004 State of Pennsylvania income tax return and a 2004 City of Philadelphia school tax return, paying the state and municipal income taxes due.

120. On his original New York State income tax filings for 2005 through 2011, Mr. Russell did not pay tax on his nonresident earnings from his employment in the City of Yonkers. He was not aware that the City of Yonkers imposed such a tax.

121. After being advised by the Division's counsel at petitioner's hearing for the 2008 tax year to correct his tax filings for 2005 and subsequent years to reflect the City of Yonkers tax, Mr. Russell filed amended New York State income tax returns for 2005 through 2011. On the amended returns, he declared his City of Yonkers earnings, and paid the nonresident income taxes of approximately \$500.00 to \$1,500.00 owed for each of those years.

122. No City of Yonkers income tax had been withheld from Mr. Russell's paychecks by FCRC for 2005 through 2011. No FCRC development entity had ever constructed a project in the City of Yonkers prior to Ridge Hill.¹⁶

123. The YIDA issued Invoice # 09-COY-FCYONKERS, dated July 10, 2009, to FC Yonkers for "1 Ridge Hill Plaza," Yonkers, New York, "BLOCK/LOT: 4060/1" that referenced "Section 3.3 Taxes Assessments and Utility Charges (a) Tax During Construction" of the Tax Benefit Leaseback Agreement and stated the "Tax During Construction Payment" terms were "\$30,964.16 per month" for the "City Fiscal Year (Period Covered): July - December, 2009." The "Current Assessment" section of this invoice stated that the "Current Payment Due to the City of Yonkers" was \$185,784.96. On September 11, 2009, FC Yonkers paid the City of Yonkers \$185,784.96 by a check drawn on its Bank of America checking account.

124. For the 2009 tax year, in addition to the payment in lieu of taxes (PILOT) payment that it made for 1 Ridge Hill Boulevard, FC Yonkers paid taxes imposed by the City of Yonkers and Westchester County on the following 26 properties:

¹⁶ The City of Yonkers is a unique municipality in New York in imposing an income tax on nonresidents who earn wages within the City.

(1) Block 4000 Lot 130, 1 Grassy Sprain Road (property valuation: \$10,400.00, Net Amt subj to County tax: \$10,400.00, Net Amt subj to Real Estate Tax \$10,400.00, New Amt subj to School Tax \$10,400.00, Sewer Dist: 1 S-Value: \$10,400.00, Solid Waste Value: \$10,400.00, and unit frontage 121 feet) -

(A) County taxes paid on April 1, 2009 in the total amount of \$2,003.23, consisting of County/State Tax of \$1,313.21, Solid Waste Tax of \$122.20, Total Sewer Tax of \$192.82 and Safety Inspection Fee of \$375.00.

(B) City taxes paid on April 1, 2009 in the total amount of \$6,188.08, consisting of Real Estate Tax of \$1,449.03, School Tax of \$4,458.90, Frontage Tax of \$169.40, and Sundry Interest of \$110.75.

(C) City Tax for tax year 2010, bill number 17264, total City tax due in the amount of \$7,803.75, consisting of Real Estate Tax of \$1,687.19, School Tax of \$4,560.61, Frontage Tax of \$169.40, and Sundry Interest of \$1,386.55. Partial payments of \$2,601.25 were included in check number 4204 (July-August 2009) and check number 4288 (Sept-Oct 2009). A partial payment of \$2,601.25 was included in check number 4344 that was voided after issuance.

(2) Block 4061 Lot 1, 100 Ridge Hill Boulevard (Assessed Value \$240,400.00, County Exempt Value \$240,400.00, City Exempt Value \$240,400.00, School Exempt Value \$240,400.00, "INDL.DEVLDP" exemption type, 6.5 acres) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35208, total County tax in the amount of \$7,430.76 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$2,824.70, computed on a taxable value of \$240,400.00 at a tax rate of \$11.75, and North Yonkers Sewer District County Sewer Valuation tax of \$4,606.06, computed on a taxable value of \$240,400.00 at a tax rate of \$19.16.

(B) City of Yonkers Tax Statement for July 1, 2009 to June 30, 2010, bill number 35129, total tax due in the amount of \$3,969.00 for unit frontage property taxes.¹⁷ Partial payments of \$1,323.00 were included in check number 4204 (July-August 2009) and check number 4288 (Sept-Oct 2009). A partial payment of \$1,323.00 was included in check number 4344 that was voided after issuance.

(3) Block 4061 Lot 2, 2 Lembo Drive (Assessed Value \$87,200.00, County Exempt Value \$87,200.00, City Exempt Value \$87,200.00, School Exempt Value \$87,200.00, "INDL.DEVLP" exemption type, 2.36 acres, and unit frontage of 1,027 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35209, total County tax in the amount of \$2,695.35 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$1,024.60, computed on a taxable value of \$87,200.00 at a tax rate of \$11.75, and North Yonkers Sewer District County Sewer Valuation tax of \$1,670.75, computed on a taxable value of \$87,200.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35130, total City tax due in the amount of \$1,437.80.00 for frontage tax. Partial payments were made in the following amounts: \$479.28 included in check number 4204 (July-August 2009), and \$479.26 included in check number 4288 (Sept-Oct 2009). A partial payment of \$479.26 was included in check number 4344 that was voided after issuance.

(4) Block 4062 Lot 1, 22 Lembo Drive (Assessed Value \$69,000.00, County Exempt Value \$69,000.00, City Exempt Value \$69,000.00, School Exempt Value \$69,000.00, "INDL.DEVLP" exemption type, 1.87 acres, and unit frontage of 813 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number

¹⁷ The unit frontage line item in the Property Taxes section of this City of Yonkers Tax Statement did not have a taxable value listed, but did have a tax rate of \$1.40 listed.

35210, total County tax in the amount of \$2,132.79 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$810.75, computed on a taxable value of \$69,000.00 at a tax rate of \$11.75, and North Yonkers Sewer District County Sewer Valuation tax of \$1,322.04, computed on a taxable value of \$69,000.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35131, total City tax due in the amount of \$1,138.20 for frontage tax. Partial payments of \$379.40 were included in check number 4204 (July-August 2009) and check number 4288 (Sept-Oct 2009). A partial payment of \$379.40 was included in check number 4344 that was voided after issuance.

(5) Block 4063 Lot 1, 21 Market Street (Assessed Value \$21,000.00, County Exempt Value \$21,000.00, City Exempt Value \$21,000.00, School Exempt Value \$21,000.00, "INDL.DEVLP" exemption type, .57 acres, and unit frontage of "000000" feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35211, total County tax in the amount of \$649.11 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$246.75, computed on a taxable value of \$21,000.00 at a tax rate of \$11.75, and North Yonkers Sewer District County Sewer Valuation tax of \$402.36, computed on a taxable value of \$21,000.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35132, total City tax due in the amount of \$347.20 for frontage tax. Partial payments were made in the following amounts: \$115.74 included in check number 4204 (July-August 2009), and \$115.73 included in check number 4288 (Sept-Oct 2009). A partial payment of \$115.73 was included in check number 4344 that was voided after issuance.

(6) Block 4064 Lot 1, 22 Market Street (Assessed Value \$46,900.00, County Exempt Value \$46,900.00, City Exempt Value \$46,900.00, School Exempt Value \$46,900.00,

“INDL.DEVLP” exemption type, 1.27 acres, and unit frontage of 553 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35212, total County tax in the amount of \$1,449.68 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$551.08, computed on a taxable value of \$46,900.00 at a tax rate of \$11.75, and North Yonkers Sewer District County Sewer Valuation tax of \$898.60, computed on a taxable value of \$46,900.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35133, total City tax due in the amount of \$774.20 for frontage tax. Partial payments were made in the following amounts: \$258.08 included in check number 4204 (July-August 2009), and \$258.06 included in check number 4288 (Sept-Oct 2009). A partial payment of \$258.06 was included in check number 4344 that was voided after issuance.

(7) Block 4065 Lot 1, 74 Market Street (Assessed Value \$115,600.00, County Exempt Value \$115,600.00, City Exempt Value \$115,600.00, School Exempt Value \$115,600.00, “INDL.DEVLP” exemption type, 2.59 acres, and unit frontage of 1,126 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35213, total County tax in the amount of \$3,948.20 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$1,358.30, computed on a taxable value of \$115,600.00 at a tax rate of \$11.75, a North Yonkers Sewer District County Sewer Valuation tax of \$2,214.90, computed on a taxable value of \$115,600.00 at a tax rate of \$19.16, and a Safety Inspection Fee of \$375.00.

(B) City Tax for tax year 2010, bill number 35134, total City tax due in the amount of \$1,576.40 for frontage tax. Partial payments were made in the following amounts: \$525.48 included in check number 4204 (July-August 2009), and \$525.46 included in check number 4288 (Sept-Oct 2009). A partial payment of \$525.46 was included in check number 4344 that was

voided after issuance.

(8) Block 4066 Lot 1, 73 Market Street (Assessed Value \$474,200.00, County Exempt Value \$474,200.00, City Exempt Value \$474,200.00, School Exempt Value \$474,200.00, “INDL.DEVLP” exemption type, 2.55 acres, and unit frontage of 1,110 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35214, total County tax in the amount of \$15,032.52 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$5,571.85, computed on a taxable value of \$474,200.00 at a tax rate of \$11.75, a North Yonkers Sewer District County Sewer Valuation tax of \$9,085.67, computed on a taxable value of \$474,200.00 at a tax rate of \$19.16, and a Safety Inspection Fee of \$375.00.

(B) City Tax for tax year 2010, bill number 35135, total City tax due in the amount of \$1,554.40 for frontage tax. Partial payments of \$518.00 were included in check number 4204 (July-August 2009) and check number 4288 (Sept-Oct 2009). A partial payment of \$518.00 was included in check number 4344 that was voided after issuance.

(9) Block 4067 Lot 1, 135 Market Street (Assessed Value \$89,100.00, County Exempt Value \$89,100.00, City Exempt Value \$89,100.00, School Exempt Value \$89,100.00, “INDL.DEVLP” exemption type, 2.41 acres, and unit frontage of 1,050 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35215, total County tax in the amount of \$2,754.09 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$1,046.93, computed on a taxable value of \$89,100.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$1,707.16, computed on a taxable value of \$89,100.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35136, total City tax due in the amount of

\$1,470.00 for frontage tax. Partial payments of \$490.00 were included in check number 4204 (July-August 2009) and check number 4288 (Sept-Oct 2009). A partial payment of \$490.00 was included in check number 4344 that was voided after issuance.

(10) Block 4068 Lot 1, 136 Market Street (Assessed Value \$34,900.00, County Exempt Value \$34,900.00, City Exempt Value \$34,900.00, School Exempt Value \$34,900.00, “INDL.DEVLP” exemption type, .94 acres, and unit frontage of 411 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35216, total County tax in the amount of \$1,078.76 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$410.68, computed on a taxable value of \$34,900.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$668.68, computed on a taxable value of \$34,900.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35137, total City tax due in the amount of \$575.40 for frontage tax. Partial payments of \$191.80 were included in check number 4204 (July-August 2009) and check number 4288 (Sept-Oct 2009). A partial payment of \$191.80 was included in check number 4344 that was voided after issuance.

(11) Block 4069 Lot 1, 77 Cole Street (Assessed Value \$102,400.00, County Exempt Value \$102,400.00, City Exempt Value \$102,400.00, School Exempt Value \$102,400.00, “INDL.DEVLP” exemption type, 1.96 acres, and unit frontage of 853 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35217, total County tax in the amount of \$3,540.18 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$1,203.20, computed on a taxable value of \$102,400.00 at a tax rate of \$11.75, a North Yonkers Sewer District County Sewer Valuation tax of \$1,961.98, computed on a taxable value of \$102,400.00 at a tax rate of \$19.16, and a Safety Inspection Fee of \$375.00.

(B) City Tax for tax year 2010, bill number 35138, total City tax due in the amount of \$1,194.20 for frontage tax. Partial payments were made in the following amounts: \$398.08 included in check number 4204 (July-August 2009), and \$398.06 included in check number 4288 (Sept-Oct 2009). A partial payment of \$398.06 was included in check number 4344 that was voided after issuance.

(12) Block 4069 Lot 2, 500 Otis Drive (Assessed Value \$16,600.00, County Exempt Value \$16,600.00, City Exempt Value \$16,600.00, School Exempt Value \$16,600.00, "INDL.DEVLP" exemption type, .45 acres, and unit frontage of 196 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35218, total County tax in the amount of \$513.11 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$195.05, computed on a taxable value of \$16,600.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$318.06, computed on a taxable value of \$16,600.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35139, total City tax due in the amount of \$274.40 for frontage tax. Partial payments were made in the following amounts: \$91.48 included in check number 4204 (July-August 2009), and \$91.46 included in check number 4288 (Sept-Oct 2009). A partial payment of \$91.46 was included in check number 4344 that was voided after issuance.

(13) Block 4070 Lot 1, 194 Market Street (Assessed Value \$74,100.00, County Exempt Value \$74,100.00, City Exempt Value \$74,100.00, School Exempt Value \$74,100.00, "INDL.DEVLP" exemption type, 2.00 acres, and unit frontage of 874 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35219, total County tax in the amount of \$2,290.44 paid on April 1, 2009, consisting of a County

Waste Disposal Tax of \$870.68, computed on a taxable value of \$74,100.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$1,419.76, computed on a taxable value of \$74,100.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35140, total City tax due in the amount of \$1,223.60 for frontage tax. Partial payments were made in the following amounts: \$407.88 included in check number 4204 (July-August 2009), and \$407.86 included in check number 4288 (Sept-Oct 2009). A partial payment of \$407.86 was included in check number 4344 that was voided after issuance.

(14) Block 4071 Lot 1, 193 Market Street (Assessed Value \$83,700.00, County Exempt Value \$83,700.00, City Exempt Value \$83,700.00, School Exempt Value \$83,700.00, "INDL.DEVLP" exemption type, 2.26 acres, and unit frontage of 987 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35220, total County tax in the amount of \$2,587.17 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$983.48, computed on a taxable value of \$83,700.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$1,603.69, computed on a taxable value of \$83,700.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35141, total City tax due in the amount of \$1,381.80 for frontage tax. Partial payments of \$460.60 were included in check number 4204 (July-August 2009) and check number 4288 (Sept-Oct 2009). A partial payment of \$460.60 was included in check number 4344 that was voided after issuance.

(15) Block 4072 Lot 1, 29 Fitzgerald Street (Assessed Value \$92,700.00, County Exempt Value \$92,700.00, City Exempt Value \$92,700.00, School Exempt Value \$92,700.00, "INDL.DEVLP" exemption type, 2.52 acres, and unit frontage of 1,093 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35221, total County tax in the amount of \$2,865.36 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$1,089.23, computed on a taxable value of \$92,700.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$1,776.13, computed on a taxable value of \$92,700.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35142, total City tax due in the amount of \$1,530.20 for frontage tax. Partial payments were made in the following amounts: \$510.08 included in check number 4204 (July-August 2009), and \$510.06 included in check number 4288 (Sept-Oct 2009). A partial payment of \$510.06 was included in check number 4344 that was voided after issuance.

(16) Block 4072 Lot 2, 230 Market Street (Assessed Value \$14,600.00, County Exempt Value \$14,600.00, City Exempt Value \$14,600.00, School Exempt Value \$14,600.00, "INDL.DEVLP" exemption type, .39 acres, and unit frontage of 172 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35222, total County tax in the amount of \$451.29 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$171.55, computed on a taxable value of \$14,600.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$279.74, computed on a taxable value of \$14,600.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35143, total City tax due in the amount of \$240.80 for frontage tax. Partial payments were made in the following amounts: \$80.28 included in check number 4204 (July-August 2009), and \$80.26 included in check number 4288 (Sept-Oct 2009). A partial payment of \$80.26 was included in check number 4344 that was voided after issuance.

(17) Block 4072 Lot 3, 229 Market Street (Assessed Value \$20,900.00, County Exempt Value \$20,900.00, City Exempt Value \$20,900.00, School Exempt Value \$20,900.00, “INDL.DEVLP” exemption type, .57 acres, and unit frontage of 247 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35223, total County tax in the amount of \$646.02 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$245.58, computed on a taxable value of \$20,900.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$400.44, computed on a taxable value of \$20,900.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35144, total City tax due in the amount of \$345.80 for frontage tax. Partial payments were made in the following amounts: \$115.28 included in check number 4204 (July-August 2009), and \$115.26 included in check number 4288 (Sept-Oct 2009). A partial payment of \$115.26 was included in check number 4344 that was voided after issuance.

(18) Block 4072 Lot 4, 801 Otis Drive (Assessed Value \$120,200.00, County Exempt Value \$120,200.00, City Exempt Value \$120,200.00, School Exempt Value \$120,200.00, “INDL.DEVLP” exemption type, 3.25 acres, and unit frontage of 1,417 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35224, total County tax in the amount of \$3,715.38 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$1,412.35, computed on a taxable value of \$120,200.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$2,303.03, computed on a taxable value of \$120,200.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35145, total City tax due in the amount of \$1,983.00 for frontage tax. Partial payments were made in the following amounts: \$661.28

included in check number 4204 (July-August 2009), and \$661.26 included in check number 4288 (Sept-Oct 2009). A partial payment of \$661.26 was included in check number 4344 that was voided after issuance.

(19) Block 4072 Lot 5, 800 Otis Drive (Assessed Value \$9,800.00, County Exempt Value \$9,800.00, City Exempt Value \$9,800.00, School Exempt Value \$9,800.00, “INDL.DEVLP” exemption type, .27 acres, and unit frontage of 116 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35225, total County tax in the amount of \$302.92 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$115.15, computed on a taxable value of \$9,800.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$187.77, computed on a taxable value of \$9,800.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35146, total City tax due in the amount of \$162.40 for frontage tax. Partial payments were made in the following amounts: \$54.14 included in check number 4204 (July-August 2009), and \$54.13 included in check number 4288 (Sept-Oct 2009). A partial payment of \$54.13 was included in check number 4344 that was voided after issuance.

(20) Block 4073 Lot 1, 950 Ridge Hill Boulevard (Assessed Value \$178,700.00, County Exempt Value \$178,700.00, City Exempt Value \$178,700.00, School Exempt Value \$178,700.00, “INDL.DEVLP” exemption type, 4.83 acres, and unit frontage of 2,106 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35226, total County tax in the amount of \$5,523.62 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$2,099.73, computed on a taxable value of \$178,700.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$3,423.89, computed

on a taxable value of \$178,700.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35147, total City tax due in the amount of \$2,948.40 for frontage tax. Partial payments of \$982.80 were included in check number 4204 (July-August 2009) and check number 4288 (Sept-Oct 2009). A partial payment of \$982.80 was included in check number 4344 that was voided after issuance.

(21) Block 4074 Lot 1, 151 Ridge Hill Boulevard (Assessed Value \$133,000.00, County Exempt Value \$133,000.00, City Exempt Value \$133,000.00, School Exempt Value \$133,000.00, "INDL.DEVLP" exemption type, 3.60 acres, and unit frontage of 1,568 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35227, total County tax in the amount of \$5,425.07 paid on April 1, 2009, consisting of S M Valley Sewer District County Sewer Valuation tax of \$5,425.07 computed on a taxable value of \$133,000.00 at a tax rate of \$21.63.

(B) City of Yonkers Tax Statement for July 1, 2009 to June 30, 2010, bill number 35148, total tax due in the amount of \$2,195.20 for unit frontage property taxes, computed on a taxable value of 1,568 at a tax rate of \$1.40. Partial payments were made in the following amounts: \$731.74 included in check number 4204 (July-August 2009), and \$731.73 check number 4288 (Sept-Oct 2009). A partial payment of \$731.73 was included in check number 4344 that was voided after issuance.

(22) Block 4075 Lot 1, 251 Ridge Hill Boulevard (Assessed Value \$186,200.00, County Exempt Value \$186,200.00, City Exempt Value \$186,200.00, School Exempt Value \$186,200.00, "INDL.DEVLP" exemption type, 4.77 acres, and unit frontage of 2,077 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35228, total County tax in the amount of \$6,130.44 paid on April 1, 2009, consisting of a County

Waste Disposal Tax of \$2,187.85, computed on a taxable value of \$186,200.00 at a tax rate of \$11.75, a North Yonkers Sewer District County Sewer Valuation tax of \$3,567.59, computed on a taxable value of \$186,200.00 at a tax rate of \$19.16, and a Safety Inspection fee of \$375.00.

(B) City Tax for tax year 2010, bill number 35149, total City tax due in the amount of \$2,907.80 for frontage tax. Partial payments were made in the following amounts: \$969.28 included in check number 4204 (July-August 2009), and \$969.26 included in check number 4288 (Sept-Oct 2009). A partial payment of \$969.26 was included in check number 4344 that was voided after issuance.

(23) Block 4076 Lot 2, 499 Ridge Hill Boulevard (Assessed Value \$35,700.00, County Exempt Value \$35,700.00, City Exempt Value \$35,700.00, School Exempt Value \$35,700.00, "INDL.DEVLDP" exemption type, .97 acres, and unit frontage of 421 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35230, total County tax in the amount of \$1,103.49 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$419.48, computed on a taxable value of \$35,700.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$684.01, computed on a taxable value of \$35,700.00 at a tax rate of \$19.16.

(B) City of Yonkers Tax Statement for July 1, 2009 to June 30, 2010, bill number 35151, total tax due in the amount of \$589.40 for frontage tax, computed on a taxable value of 421 at a tax rate of \$1.40. Partial payments were made in the following amounts: \$196.48 included in check number 4204 (July-August 2009), and \$196.46 included in check number 4288 (Sept-Oct 2009). A partial payment of \$196.46 was included in check number 4344 that was voided after issuance.

(24) Block 4077 Lot 1, 849 Ridge Hill Boulevard (Assessed Value \$88,700.00, County

Exempt Value \$88,700.00, City Exempt Value \$88,700.00, School Exempt Value \$88,700.00, “INDL.DEVLP” exemption type, 1.32 acres, and unit frontage of 574 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35231, total County tax in the amount of \$3,116.72 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$1,042.23, computed on a taxable value of \$88,700.00 at a tax rate of \$11.75, a North Yonkers Sewer District County Sewer Valuation tax of \$1,699.49, computed on a taxable value of \$88,700.00 at a tax rate of \$19.16, and a Safety Inspection Fee of \$375.00.

(B) City Tax for tax year 2010, bill number 35152, total City tax due in the amount of \$803.60 for frontage tax. Partial payments were made in the following amounts: \$267.88 included in check number 4204 (July-August 2009), and \$267.86 included in check number 4288 (Sept-Oct 2009). A partial payment of \$267.86 was included in check number 4344 that was voided after issuance.

(25) Block 4078 Lot 1, 949 Ridge Hill Boulevard (Assessed Value \$208,500.00, County Exempt Value \$208,500.00, City Exempt Value \$208,500.00, School Exempt Value \$208,500.00, “INDL.DEVLP” exemption type, 5.64 acres, and unit frontage of 2,458 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35232, total County tax in the amount of \$6,444.74 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$2,449.88, computed on a taxable value of \$208,500.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$3,994.86, computed on a taxable value of \$208,500.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35153, total City tax due in the amount of \$3,441.20 for frontage tax. Partial payments were made in the following amounts: \$1,147.08 included in check number 4204 (July-August 2009), and \$1,147.06 included in check number

4288 (Sept-Oct 2009). A partial payment of \$1,147.06 was included in check number 4344 that was voided after issuance.

(26) Block 4076 Lot 1, 701 Ridge Hill Boulevard (Property Valuation: \$258,900.00, Exempt Real Estate Tax Value \$258,900.00, Exempt School Tax Value \$258,900.00, frontage 3,053 feet)-

(A) City Tax for tax year 2010, bill number 35150, total City tax due in the amount of \$4,274.20 for frontage tax. Partial payments were made in the following amounts: \$1,424.74 included in check number 4204 (July-August 2009), and \$1,424.73 included in check number 4288 (Sept-Oct 2009). A partial payment of \$1,424.73 was included in check number 4344 that was voided after issuance. Sometime in the last quarter of 2009, this property was deeded to a new owner.

125. For Block 4001 Lot 214, 373 Tuckahoe Road, a City of Yonkers Tax Statement for July 1, 2009 to June 30, 2010, bill number 17277, dated July 13, 2009, was issued to YIDA. The tax statement listed total tax due in the amount of \$4,462.93, consisting of City tax of \$1,135.61, School tax of \$3,069.64, Unit Frontage taxes of \$77.00 (Taxable value 55 feet at tax rate of \$1.40), Taxable Housing Unit taxes of \$3.00 (taxable value 1 at tax rate of \$3.00), and Sundry/Interest of \$177.68. Payment of this tax statement was approved by an unidentifiable YIDA employee on July 28, 2009 with the handwritten reference "Acct. 5035 PILOT PAYABLE." By its check dated July 28, 2009, YIDA paid \$4,462.93 to the City of Yonkers for 373 Tuckahoe Rd (Block 4001 Lot 214), invoice 17277. With respect to Block 4001 Lot 214, 373 Tuckahoe Road, FC Yonkers made a partial payment of \$1,487.65 to the City of Yonkers for City Tax year 2010, bill number 17277, which partial payment was included in its check number 4204 (July-August 2009).

126. Subsequently, YIDA issued an Invoice, Invoice Number: 113, dated August 11, 2009 to FC Yonkers in the total invoice amount of \$4,462.93 for “[p]roperty tax on Block 4001 Lot 214 (373 Tuckahoe Rd).” On September 11, 2009, FC Yonkers paid YIDA \$4,469.93 by a check drawn on its Bank of America checking account. As a result of this \$4,469.83 payment to YIDA, FC Yonkers made an extra payment in the amount of \$1,487.65 with respect to the City of Yonkers Tax Statement, bill number 17277, issued for 373 Tuckahoe Road.

127. The Division admits that all the payments at issue were in fact made by FC Yonkers, and not another entity, such as FCRC.

128. At the hearing, the Division presented the testimony of Frederick Houser, a Tax Technician III in the Division’s Income/Franchise Desk Audit Bureau, Audit Group 12, who currently supervises, among other tax technicians, Ms. Houck. Mr. Houser was not the assigned auditor for petitioner. He was not privy to the history of FC Yonkers previously receiving the QEZE credits in the 2006 and 2007 taxable years, as he was not then part of Audit Group 12, which was responsible for QEZE credit audits. Mr. Houser did not join Audit Group 12, and become Ms. Houck’s supervisor until June 2013, and did not start any review of petitioner’s 2009 tax year claim to the pass through of the QEZE credit from FC Yonkers until December 2013.

129. Mr. Houser explained that the data in the Division’s historical wage reporting database is a summary of the information that employers report on the New York State Quarterly Combined Withholding, Wage Reporting, and Unemployment returns (forms NYS-45) that they file quarterly with New York State. In conjunction with his review of petitioner’s claim for the pass-through QEZE credit, Mr. Houser reviewed information contained in the historical databases for both FC Yonkers and FCRC. That information indicated that FC Yonkers did not

report wages earned by any employees in New York State in 2009, while FCRC reported wages earned by Mr. Russell in New York State for the period 2004 through 2010. Mr. Houser also explained that Audit typically requests forms W-2 from employers to confirm the information in the Division's historical wage reporting database. Prior to the hearing, petitioner furnished Mr. Russell's Form W-2 issued by FCRC for the year 2009.

130. Based upon the information in the Division's historical wage reporting databases and Mr. Russell's 2009 Form W-2, Mr. Houser determined that Mr. Russell was not an employee of FC Yonkers for the 2009 tax year and that he was an employee of FCRC for that year.

131. Based upon his review of the exhibits and transcript for the hearing for petitioner's claim for the pass-through QEZE credit for the 2008 tax year, Mr. Houser also determined that Mr. Russell was employed by a related party to FC Yonkers in the 60 months prior to the 2009 tax year and, accordingly, he would not include Mr. Russell in FC Yonkers' computation of its employment number.

132. Mr. Houser acknowledged that the proper test for determining which entity is the employer of a particular individual is "the direction and control test and the right to hire and fire an individual."

133. To qualify as an eligible employee for purposes of meeting the requirements for the QEZE credit, a person must be "connected with or working out of" the Empire Zone - in this case, the Ridge Hill site in Yonkers. The Division's audit management requires that an eligible employee work at the Empire Zone location every day, and start and end his day at that location, in order to meet this "connected with or working out of" test. The Division admits that there is no authority for such a requirement in a regulation or statute.

134. Although Mr. Houser concluded that Mr. Russell was an employee of FCRC, and not

FC Yonkers, for the 2009 tax year, he was unable to name any task that Mr. Russell performed for FCRC. Mr. Houser admitted that: (1) he had no evidence that Mr. Russell worked on any other project other than Ridge Hill in 2009, and (2) that Mr. Russell worked totally on Ridge Hill. Mr. Houser also admitted that it is possible that a person might actually work in the City of Yonkers, but that the person's employer might not have withheld City taxes, and the employee might not have paid City taxes as they should have.

135. Mr. Houser also acknowledged that a sizeable workforce and contractors were necessary in order to build Ridge Hill. It could not have been accomplished with only the zero, one or three employees reflected in the Division's historic wage reporting database for FC Yonkers for 2007 through 2012.

136. In order to qualify for the QEZE credit for the 2009 tax year, FC Yonkers must satisfy an employment test, have an employment number of "1," and have an employment increase factor of "1." Mr. Houser admitted that if Mr. Russell was a common law employee of FC Yonkers for the 2009 tax year, he counts as the necessary "1," and therefore, both the employment test and the employment increase test are satisfied.

137. Ms. Houck prepared a Schedule A, dated August 22, 2014, listing the payments made by FC Yonkers to the City of Yonkers that petitioner asserted were eligible real property taxes for purposes of the QEZE credit. On Ms. Houck's Schedule A, she allowed a total of \$187,977.24 as eligible real property taxes for purposes of the QEZE credit.¹⁸

138. Just nine days before the hearing in this matter, Mr. Houser prepared a new Schedule A, dated July 1, 2015. On this Schedule A, Mr. Houser allowed eligible real property taxes

¹⁸ Ms. Houck subtracted \$15,380.81 for the voided check and \$1,487.65 for the erroneous payment from \$204,845.70 to arrive at the amount of \$187,977.24 as eligible real property taxes for purposes of the pass-through QEZE credit.

totaling only \$13,468.94. No adjustment for either the \$15,380.81 voided check or the \$1,487.65 erroneous payment was made by Mr. Houser.

139. For the parcel known as 1 Grassy Sprain Road, the Division conceded that three tax bills of \$1,313.21, \$5,907.93 and \$6,247.80, totaling \$13,468.94, were eligible real property taxes. For this parcel, Ms. Houck and Mr. Houser disallowed the “solid waste tax,” the “total sewer tax” and the “safety insp[ection] fee” as eligible real property taxes, notwithstanding that they are listed on the County Tax bill. For this parcel, the Division also disallowed the charge shown on the tax bill for “frontage,” because the charge was levied based upon the number of linear feet (121) of water main on the property.

140. The 2009 tax bill of \$7,430.76 for 100 Ridge Hill Boulevard was disallowed as an eligible real property tax by both Ms. Houck and Mr. Houser on the grounds that the “waste disposal” portion of the county tax and the “sewer valuation” portion of the county tax were “special assessments” that in their view do not qualify as eligible real property taxes under Tax Law § 15 (e).

141. The Division similarly disallowed the waste disposal and sewer valuation taxes reflected on all the other bills submitted in support of the QEZE credit by petitioner.

142. Ms. Houck classified the \$185,784.96 payment by FC Yonkers of the YIDA bill for 1 Ridge Hill Blvd. as an allowed PILOT payment, and hence as “eligible real property taxes.”

143. Mr. Houser’s position at the hearing contradicted Ms. Houck’s determination, and he claimed that the \$185,784.96 bill paid by FC Yonkers does not qualify as real property taxes because “we can’t determine whether or not it’s based on an assessed value of the property.”

144. The Division concedes that the amount of the PILOT payment made by FC Yonkers, and claimed by petitioner for the 2009 tax year as part of the QEZE credit, does not exceed the

annual cap amount.

145. With respect to the 373 Tuckahoe Road property, Ms. Houck allowed \$4,205.25 as a PILOT payment, and disallowed the unit frontage taxes of \$77.00, the taxable housing unit taxes of \$3.00 and sundry/interest of \$177.68. However, Mr. Houser determined that FC Yonkers' payment of \$4,462.93 to YIDA would not qualify as a payment for eligible real property taxes because YIDA owned 373 Tuckahoe Road and, therefore, YIDA must have leased the property to FC Yonkers and FC Yonkers paid the \$4,462.93 to YIDA rather than to the City of Yonkers. Alternatively, Mr. Houser would disqualify \$257.68 of the \$4,462.93 because the charges for frontage, taxable housing unit and sundry/interest were for special assessments.

146. On January 26, 2016, the Division filed its post-hearing brief with five addenda attached, including, among others, 8 pages (pages bearing numbers 33 through 40) of what the Division described as "City of Yonkers, FY 2009 Results" (Addendum C), a one-page document entitled "Tax Rates, Exemption Maximums, Equalization Rates (ER), & Residential Ratios" dated April 9, 2015 (Addendum D), and a one-page document that the Division described as "Westchester County Tax Commission, 2009 Special District Rates" (Addendum E).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began her determination in this matter by identifying the sections of the Tax Law that provide for the tax credits under the QEZE program that were passed through to petitioner for tax year 2009. She noted that a tax credit is a particularized species of tax exemption and, as such, a taxpayer bears the burden of showing a clear-cut entitlement to the statutory benefit.

The Administrative Law Judge then described the method under the Tax Law for determining the amount of and eligibility for the QEZE tax credit for real property taxes paid or

incurred. Among the factors that determine eligibility for the QEZE credit that were listed by the Administrative Law Judge is the “employment increase factor.” The definition of “employment increase factor” is a number equal to or less than one and calculated, in part, by reference to the number of employees, not including officers, employed by the business enterprise for at least one-half of the taxable year. It does not include individuals employed in New York within the preceding sixty months by a person related to the QEZE, as “related” is defined in Internal Revenue Code § 465 and compared to the number of employees in its test year, a period that precedes its year of QEZE certification. As FC Yonkers was first certified as a QEZE in March 2004, the Administrative Law Judge found that its employment number was zero for its test year. She also found that given petitioner’s common ownership interests in FCRC and in 70% of FC Yonkers, FCRC and FC Yonkers were related persons under the Internal Revenue Code. By examining the overall statutory scheme, the Administrative Law Judge determined that FC Yonkers must have at least one eligible employee in order to qualify for QEZE credit in tax year 2009.

The Administrative Law Judge described the issue as ultimately coming down to whether Mr. Russell was an employee of FC Yonkers. She described petitioner’s position that Mr. Russell did qualify as an employee under the common law test, while she described the Division’s position that formal indicators pointed to Mr. Russell’s employment by FCRC.

The Administrative Law Judge discussed the common law employment test and set out factors that indicate an employer-employee relationship, noting that decisions of this Tribunal have relied on such factors to determine such a relationship. The Administrative Law Judge found that the credible testimony of employees of petitioner’s subsidiaries clearly showed that Mr. Russell was a common law employee of FC Yonkers for tax year 2009.

The Administrative Law Judge next addressed the Division's argument that notwithstanding the finding of a common law employment relationship between FC Yonkers and Mr. Russell, such employment does not count, as Mr. Russell was employed by a related person in New York within the immediately preceding sixty months; more specifically, that he was employed by FCRC from February 2004 through January 2009. The Administrative Law Judge acknowledged that FC Yonkers and FCRC were related persons within the meaning of the Tax Law, but that prior to his employment by FC Yonkers, Mr. Russell was a common law employee of another real estate development entity in Pennsylvania until he was transferred to Ridge Hill project in January 2005. As such, the Administrative Law Judge observed that Mr. Russell's employment with FC Yonkers fulfilled the requirements of the Tax Law and concluded that FC Yonkers' employment increase factor was equal to one.

Turning next to the question of whether the payments FC Yonkers made during the year qualified as "eligible real property taxes" for the purposes of the Tax Law, the Administrative Law Judge referred to the definition of this term as given in Tax Law § 15 (e). The Administrative Law Judge also highlighted the 2010 legislative amendments to the Tax Law that defined this term, as it was not defined for purposes of the QEZE credit before that time. The Administrative Law Judge also noted the well-established rule of construction that legislative intent should be ascertained from the words and language used, and that courts should interpret a statute in the ordinary, everyday sense of the meanings of the words used.

The Administrative Law Judge concluded that the \$185,784.96 payment made by FC Yonkers to the City of Yonkers satisfied the definition of eligible real property taxes. The Administrative Law Judge reasoned that the payment was made pursuant to a tax benefit leaseback agreement between FC Yonkers and YIDA, a municipal public benefit corporation,

that provided for a payment in lieu of taxes (PILOT) should the project not be completed by the end of June 2009. According to the Administrative Law Judge, the terms of this agreement met the requirements of Tax Law § 15 (e) and thus the payments qualified as eligible real property taxes for purposes of the QEZE credit. However, for this same reason, the \$4,462.93 payment by FC Yonkers to YIDA failed to meet the definition of an eligible real property tax because the parcel for which the payment was made was not included in the description of the parcels in the attachment to the tax benefit leaseback agreement providing for the PILOT for the other parcels.

Next, the Administrative Law Judge examined whether the waste disposal taxes and sewer valuation taxes qualified as eligible real property taxes for purposes of the QEZE credit. The Administrative Law Judge agreed with petitioner that the self-contained definition of “tax” for purposes of Tax Law § 15 (e) applied with regard to the waste disposal tax, and therefore the tax qualified as eligible real property taxes for purposes of the statute, as the tax was for the public welfare and imposed at a like rate against all property in the territory. However, the Administrative Law Judge found that the sewer valuation taxes included the costs of maintaining, repairing and operating the county sewer systems, and therefore the maintenance and interest charge exception applied with regard to such sewer valuation taxes. Because the enacting legislation that amended Tax Law § 15 was retroactive except with respect to these interest and maintenance charges, the Administrative Law Judge reasoned that the meaning of “eligible real property taxes” under Tax Law former § 15 applied. As the term was undefined under Tax Law former § 15, the Administrative Law Judge applied the meaning of the term as adopted from the Real Property Tax Law under our prior decisions. The Administrative Law Judge found that “tax” under the Real Property Tax Law was defined as a “charge imposed upon real property by or on behalf of a county, city, town, village or school district for municipal or school district

purposes,” but that the definition excluded special assessments and ad valorem levies. The Administrative Law Judge found that the sewer districts here at issue qualified as special districts, and thus the charges for maintenance for these district improvements were excluded from the definition of “tax” under the Real Property Tax Law. As such, the Administrative Law Judge concluded that the sewer valuation taxes did not qualify as eligible real property taxes for purposes of the QEZE real property tax credit.

Lastly, the Administrative Law Judge examined whether the frontage tax assessed by the City of Yonkers qualified as an eligible real property tax for the purpose of the QEZE program. Citing to the city charter, the Administrative Law Judge distinguished water rents, which fund operation of the water works, interest on water bonds and the water bond sinking fund, from frontage taxes, which only impact properties abutting a street or alley with a current or future water main. Because the tax benefits the properties against which it is assessed, the Administrative Law Judge concluded that the frontage tax cannot be an eligible real property tax for purposes of the QEZE program.

The Administrative Law Judge granted petitioner’s petition with regard to finding that FC Yonkers met the employment increase factor required to qualify for the QEZE credit and that the \$185,784.96 payment made pursuant to the tax benefit leaseback agreement made between FC Yonkers and YIDA providing for the PILOT payments and the Westchester County waste disposal taxes qualified as eligible real property taxes for purposes of the QEZE credit. The Administrative Law Judge observed that the Division conceded the \$13,468.94 paid with respect to 1 Grassy Sprain Road qualified as eligible real property taxes and acknowledged that the two partial payments made by FC Yonkers with regard thereto should be taken into consideration by the Division, but otherwise denied the petition.

ARGUMENTS ON EXCEPTION

The Division argues on exception that the Administrative Law Judge's determination that FC Yonkers qualified for the QEZE real property tax credit was incorrect on the basis that the Administrative Law Judge misapplied the burden of proof required of petitioner. In support thereof, the Division states that FCRC represented itself as Mr. Russell's common law employer through its tax filings with the Division and actually exercised direction and control over the employment relationship, and as a result, the Division reasonably determined that FCRC was Mr. Russell's employer rather than FC Yonkers. The Division disagrees with the Administrative Law Judge's determination that the waste disposal fees qualified as eligible real property taxes for purposes of the QEZE program. Finally, the Division agrees with the Administrative Law Judge that Tax Law former § 15 applies to the analysis of whether the sewer valuation taxes and frontage taxes are eligible real property taxes, and therefore petitioner is incorrect in its assertion that the Administrative Law Judge erred in determining that such taxes are not eligible real property taxes for tax year 2009.

Petitioner agrees with the Administrative Law Judge's conclusions that FC Yonkers qualified for the QEZE credit for real property taxes paid or incurred because its employment increase factor was equal to one, which was ultimately based on a finding that Mr. Russell was a common law employee of FC Yonkers during tax year 2009, and that the PILOT payments FC Yonkers made pursuant to a tax benefit leaseback agreement qualified as eligible real property taxes for purposes of the QEZE program. Similarly, petitioner agrees with the Administrative Law Judge's determination that the waste disposal fees qualify as eligible real property taxes. However, petitioner argues on exception that the Administrative Law Judge's determination that the sewer valuation taxes and frontage taxes did not qualify as eligible real property taxes within

the meaning of Tax Law § 15 was incorrect. In furtherance of this argument, petitioner states that the 2010 amendments to Tax Law § 15 do not codify the Division's policy that special assessments and ad valorem levies are not included in "eligible real property taxes" for purposes of the QEZE program for tax year 2009.

OPINION

We begin by observing that a tax credit, like the QEZE real property tax credit here at issue, is a "particularized species of exemption from taxation" (*Matter of Grace v New York State Tax Commn.*, 37 NY2d 193 [1975], *rearg denied* 37 NY2d 816 [1975], *lv denied* 338 NE2d 330 [1975]). Generally, tax statutes authorizing exemptions are strictly construed against the taxpayer, who bears the burden of demonstrating unambiguous entitlement to such exemption (*Matter of United Parcel Serv., Inc. v Tax Appeals Trib. of State of N.Y.*, 98 AD3d 796 [3d Dept 2012], *lv denied* 20 NY3d 860 [2013]; *Matter of Golub Serv. Sta. v Tax Appeals Trib. of State of N.Y.*, 181 AD2d 216 [3d Dept 1992]; *Matter of Luther Forest Corp. v McGuinness*, 164 AD2d 629 [3d Dept 1991]; *see also* Tax Law § 1089 [e]). In order to prevail, the petitioner must prove that the Division's interpretation is irrational and that the petitioner's interpretation of the statute is the only reasonable construction (*Matter of American Food & Vending Corp. v New York State Tax Appeals Trib.*, 144 AD3d 1227 [3d Dept 2016]; *Matter of Brooklyn Navy Yard Cogeneration Partners, L.P. v Tax Appeals Trib. of State of N.Y.*, 46 AD3d 1247 [3d Dept 2007], *lv denied* 10 NY3d 706 [2008]).

The primary issue presented, namely whether petitioner is entitled to the QEZE credit it claimed,¹⁹ ultimately depends on whether FC Yonkers was able to show that it employed at least one individual full-time for at least half of tax year 2009 who was not employed in New York

¹⁹ Petitioner is claiming the QEZE credit here at issue based on its ownership interest in FC Yonkers, a New York limited liability company that had been certified as a New York State QEZE, as a pass-through of the QEZE tax credit allocated pursuant to FC Yonkers' amended operating agreement (*see* finding of fact 35).

State by a “related person” as such term is defined in the Internal Revenue Code (IRC) (26 USC) § 465 (b) (3) (C) during the prior sixty months (*see* Tax Law § 15 [d]). Because FC Yonkers’ test year employment number was zero, petitioner need only show that it employed one individual during tax year 2009 to meet the statutory requirements for eligibility for the QEZE credit (*see* Tax Law § 15 [d] [1]).

In determining Mr. Russell’s employment status with FC Yonkers, the Administrative Law Judge examined several factors included in an IRS revenue ruling discussing factors that demonstrate a common-law employer-employee relationship (*see* Rev Rul 87-41; *see also* Treas Reg [26 CFR] § 31.3401 [c]-1). We have also applied these factors in our prior decisions in determining whether a worker was an employee of a taxpayer (*see Matter of Knowledge Learning Corp. and Kindercare Learning Ctrs., Inc.*, Tax Appeals Tribunal, September 18, 2014 [“[t]he indicia of such a relationship are well-established and include the authority to hire and fire, authority to control and direct the work of the employee, and the payment of wages”]; *Matter of Manhattan Fire Extinguisher, Inc.*, Tax Appeals Tribunal, September 18, 1997; *Matter of O’Keh Caterers Corporation*, Tax Appeals Tribunal, June 3, 1993). We note here, as we have before, that “various aspects of the [employment] relationship may be considered in arriving at the conclusion in a particular case” (*Matter of Manhattan Fire Extinguisher, Inc.*, *citing Matter of Liberman v. Gallman*, 41 NY2d 774 [1977]).

We recognize that several factors discussed in the Administrative Law Judge’s determination would lead to the conclusion that Mr. Russell was a common-law employee of FC Yonkers, thereby making FC Yonkers, and vicariously petitioner, eligible to claim the QEZE credit. However, we must give pause and consider the record as a whole. Of particular note is the relationship between FCRC and FC Yonkers, which are separate, but related, companies. Also a significant factor in the Administrative Law Judge’s determination was the fact that

FCRC billed FC Yonkers for a monthly site management fee and was reimbursed therefor which was then adjusted on a quarterly basis, thus seemingly finding economic substance as indicative of an employment relationship between a company and a worker. The record also shows, however, that FCRC paid Mr. Russell's wages and provided the benefits described in its formal offer of employment to him both before and during the Ridge Hill project.

While we have no reason to doubt petitioner that keeping Mr. Russell on FCRC's payroll and paying FCRC a site management fee in reimbursement for its costs related to Mr. Russell's wages and benefits was more economical, we are reminded of our prior decisions in which we held that where a tax benefit is concerned, it is the form chosen by the taxpayer that controls (*Matter of Gropper*, Tax Appeals Tribunal, December 19, 2002, *confirmed* 9 AD3d 796 [3d Dept 2004]; *Matter of Chanry Communications, Ltd.*, Tax Appeals Tribunal, March 7, 1991, *confirmed sub nom Matter of Henry v Wetzler*, 183 AD2d 57 [3d Dept 1992] *aff'd* 82 NY2d 859, *cert denied* 511 US 1126 [1994]). Merely the fact that a taxpayer could have chosen a different form which would have had different tax consequences does not convert a taxable transaction into a nontaxable one (*Matter of Gropper*, *see also Sverdlov v Bates*, 283 App Div 487 [3d Dept 1954]). This rationale applies equally with reference to eligibility for exemptions or credits (*Matter of Gropper*).

We think that the Court of Appeals' decision in *Matter of 107 Delaware Associates v New York State Tax Commn.* (64 NY2d 935 [1985] *reversing* 99 AD2d 29 [3d Dept 1984]) regarding a similar transactional structure as the one here at issue is informative. There, a building was owned by a partnership whose members consisted of a corporation and individual partners who were also the sole owners of the corporation's stock. The corporation, which operated a hotel on the premises, provided maintenance and cleaning services to the entire building by employees carried on its payroll. The partnership, which operated offices and commercial space on the

premises, reimbursed the corporation for its pro rata costs for maintenance and cleaning staff. The sales taxability of such services to the partnership turned on whether the staff members were employees of the partnership. As the rationale for its decision, the Court adopted the dissenting opinion at the Appellate Division, which reasoned that despite the fact that the individual who was both managing partner and corporate president had authority to hire, fire and supervise cleaning and maintenance employees providing services to the partnership, such employees were not simultaneously employees of both the corporation and the partnership for purposes of the sales tax exclusion there at issue. In the dissent's view, there was "nothing irrational about the Tax Commission's determination which has the effect of binding the taxpayers to the form of business chosen by them" (99 AD2d at 34, *citing Matter of Ormsby Haulers v. Tully*, 72 AD2d 845 [3d Dept 1979]). The Court of Appeals, in adopting this view, affirmed the principle that, notwithstanding common ownership, it is the form that is chosen by the taxpayer that is controlling (*see also Matter of Great Lakes-Dunbar-Rochester v State Tax Commn.*, 65 NY2d 339 [1985], *reversing* 101 AD2d 1 [3d Dept 1984] [transactions in the course of a joint venture between two corporations were not excluded from sales tax where the parties' conduct evinced they were not services contributed to the joint venture]; *Matter of Hygrade Casket Corp. v Commissioner of Taxation & Fin.*, 212 AD2d 843 [3d Dept 1995] [sales tax properly imposed on sales to related companies]). The Court also thus rejected the common-law employer-employee relationship analysis underlying the majority Appellate Division decision in that case.

For these reasons, we think that it is the form here that controls rather than which entity may have ultimately borne the cost of Mr. Russell's wages and benefits. The record demonstrates that FC Yonkers reported no wages of any employees in 2009 to the Division, while FCRC reported Mr. Russell's wages to the Division for 2004 through 2010 (finding of fact 129). Under Revenue Ruling 87-41, payment of wages is a factor in determining an employment

relationship. Accordingly, considering *Matter of 107 Delaware Associates*, Mr. Russell's provision of site management services to FC Yonkers and FC Yonkers' bearing the costs associated with those services does not compel a conclusion that Mr. Russell was an employee of FC Yonkers.

Our reliance on petitioner's choice of the form of its business also includes FCRC's formal offer of employment to Mr. Russell, which was offered into evidence at the hearing below. The letter from Mr. Sanna on FCRC letterhead opens with the line "Forest City Ratner Companies is pleased to present this offer of employment for the position of Construction Project Manager." The letter provides for Mr. Russell's start date, that his salary would be paid according to "the Company's" regular payroll policy, that his annual review would be part of the company's normal salary review process, that the company offers a comprehensive benefit package, that Mr. Russell's leave time would follow company policy, and that this employment is "at-will" and will continue so long as it is mutually agreeable to Mr. Russell and the company. We note that the ability to hire and fire a worker is listed among the factors in Revenue Ruling 87-41. Mr. Russell's testimony confirmed that it was FCRC that extended the offer of employment prior to his working at the Quartermaster Plaza project in Pennsylvania (tr at 519-521, findings of fact 65, 66). FCRC continued paying Mr. Russell's wages after Mr. Sanna's assignment of Mr. Russell to the Ridge Hill project in New York. The Administrative Law Judge also found that Mr. Russell submitted his expenses to FCRC rather than FC Yonkers, yet another factor weighing in favor of a finding of an employment relationship under the factors described in Revenue Ruling 87-41 (*see* finding of fact 59). We think that these facts, taken together with the record as a whole, demonstrate that Mr. Russell's employer was, in fact, FCRC.

FC Yonkers was certified as the QEZE here at issue and it alone needed to comply with the requirements of the QEZE program in order to qualify for and pass through the tax credits to

petitioner. Petitioner was unable to show by clear and convincing evidence that Mr. Russell was an employee of FC Yonkers and not FCRC. As such, petitioner has not met its burden of showing that FC Yonkers met the employment requirements for the QEZE tax credit.

Although petitioner has not proven its entitlement to the QEZE real property tax credit for tax year 2009, we will address the questions of whether the waste disposal and sewer valuation taxes imposed by Westchester County and the frontage taxes imposed by the City of Yonkers and paid by FC Yonkers qualified as eligible real property taxes for purposes of the Empire Zone program for tax year 2009. The Administrative Law Judge found that the waste disposal tax qualified as an eligible real property tax while the sewer valuation and frontage taxes did not. We will address each of these taxes in turn.

Sewer Valuation Tax

Petitioner argues that the sewer valuation tax should be found to be an eligible real property tax because current Tax Law § 15, as amended in 2010, contains the definition of tax that should be applied in this instance. It claims that the Administrative Law Judge erred in determining that the sewer valuation tax included the costs of maintaining, repairing and operating the county's sewage system and thus applying Tax Law former § 15 as Tax Law § 15 as amended in 2010 was not retroactive with respect to maintenance and interest charges paid or incurred in tax year 2009 (*see* L 2010, Ch 57, Pt R, § 18). Specifically, petitioner avers that there is no factual basis in the record for the Administrative Law Judge to make such a determination and that her reasoning in applying Tax Law former § 15 was flawed. The Division agrees with the Administrative Law Judge's conclusion that the sewer valuation tax imposed in 2009 does not qualify as an eligible real property tax for purposes of the QEZE program, but would recast such charges as special ad valorem levies rather than special assessments.

In 2010, the legislature amended Tax Law § 15, in addition to passing other amendments

affecting the QEZE program (*see* L 2009, ch 57, Pt R). The amendments to Tax Law § 15 were effective immediately and applied to tax years starting after January 1, 2010 and were deemed to apply to all tax years for which the statute of limitations for a refund claim or assessment remained open, except with respect to maintenance or interest charges (*id.* at § 18). In concluding that Tax Law former § 15 applied in this instance, the Administrative Law Judge took notice of the fact that the sewer valuation charges as imposed by Westchester County included the costs of maintaining, repairing and operating the county's outlet sewers and sewage disposal plants, in addition to reimbursing Westchester County for payment of and interest on any obligations of the sewer districts (*see* Westchester County Code of Ordinances § 237.211 [2]). The Administrative Law Judge thus concluded that because the sewer valuation charges provide for maintenance as part of the assessment, the 2010 amendment to Tax Law § 15 does not apply.

Under the State Administrative Procedures Act (SAPA) § 306 (4), official notice may be taken of all facts of which judicial notice could be taken. Among the facts of which judicial notice may be taken without request of the parties are “ordinances and regulations of officers, agencies or governmental subdivisions of the State of New York or of the United States; and the laws of foreign countries or their political subdivisions” (CPLR 4511).

We find no error in the Administrative Law Judge's taking of notice of the Westchester County Code of Ordinances section relevant to the issue presented where taking notice of local ordinances is provided for under SAPA (SAPA § 306 [4]). In this case, the ordinance is clear that the sewer valuation taxes include maintenance and interest charges for the services the sewer districts provide (*see* Westchester County Code of Ordinances § 237.211 [2]). Whether a special assessment or an ad valorem levy, our previous decisions have held that such charges do not qualify as eligible real property taxes for purposes of the QEZE program (*see Matter of New Process Gear, Inc.*, Tax Appeals Tribunal, March 22, 2012; *Matter of Herrick*, Tax Appeals

Tribunal, August 4, 2011, *confirmed* 106 AD3d 1149 [3d Dept 2013]; *Matter of Piccolo*, Tax Appeals Tribunal, August 4, 2011, *confirmed* 108 AD3d 107 [3d Dept 2013]; *Matter of Stevenson*, Tax Appeals Tribunal, August 4, 2011, *confirmed* 106 AD3d 1146 [3d Dept 2013]).

This is because maintenance and interest charges are specifically exempted from retroactive application of Tax Law § 15 as amended in 2010, and thus Tax Law former § 15 applies. Faced with the statutory construction of an undefined term in Tax Law former § 15, we rely on the definition of tax as given in the Real Property Tax Law, which specifically excludes special assessments or ad valorem levies (RPTL § 102 [20]). Thus, we affirm the Administrative Law Judge's conclusion of law that the sewer valuation charges do not qualify as eligible real property taxes for purposes of the QEZE program.

Waste Disposal Tax

The Division asserts that the waste disposal tax failed to meet the definition of an eligible real property tax for purposes of the QEZE program because it was not assessed against all property owners within the City of Yonkers at a uniform rate. Furthermore, the Division claims that the Administrative Law Judge failed to analyze whether the waste disposal tax was assessed for municipal or school district purposes. Petitioner counters that the Division's assertion that the tax was not assessed at a uniform rate is misplaced, as one of the parcels the Division relies on in support of its argument lies outside the North Yonkers district, and therefore its associated tax bills do not show that the waste disposal tax was not uniformly assessed against all property in the territory. According to petitioner, with respect to the other parcel named by the Division, the tax bill was only for frontage taxes. Furthermore, petitioner argues that because the waste disposal tax was imposed by a municipality, namely Westchester County, under its authority to assess property taxes, the tax had a municipal purpose.

We affirm the determination of the Administrative Law Judge that the waste disposal tax qualifies as an eligible real property tax under Tax Law § 15. We agree with petitioner that the tax bills cited by the Division do not show that the waste disposal tax was not uniformly assessed at a like rate. Our examination of the record shows that the waste disposal tax was assessed by Westchester County at a uniform rate of \$11.75 per one thousand of assessed value for parcels within the North Yonkers territory. With respect to the Division's argument that the Administrative Law Judge failed to analyze whether waste disposal served a municipal purpose, we note that waste collection is provided in the City of Yonkers (*see* ch 91, Code of the City of Yonkers).

Frontage Tax

The Administrative Law Judge concluded that the frontage tax assessed by the City of Yonkers is not an eligible real property tax due to a holding of the Appellate Division that the presence of a water main provides a benefit to the properties it borders, which tends to enhance the value of the property so served (*see New York Cardiac Ctr. v Kondzielaski*, 84 AD2d 746 [2d Dept 1981]); *see also* Tax Law § 15 [e]). The Division argues that the frontage tax cannot be an eligible real property tax for purposes of the QEZE tax credit because it was kept separate from general revenue and is reported as part of the water fund of the City of Yonkers, which is used for the necessary expenses of operating and maintaining the waterworks and pay interest on the water bonds of the city. The Division also argues that the frontage tax is only assessed against properties that face a street or alley in which there is a current or future water main, thus the tax is not assessed against all properties in the territory over which the taxing authorities have jurisdiction. Petitioner claims that the frontage tax is collected and placed into the general fund, and is therefore assessed for the general welfare and should be considered an eligible real property tax. Petitioner relies on *Church of Christ the King v City of Yonkers* (115 Misc2d 461

[Sup Ct 1982]) in its argument that the frontage tax should qualify as an eligible real property tax.

We agree with the Administrative Law Judge's conclusion that the frontage tax does not qualify as an eligible real property tax. By its own terms, the frontage tax is not assessed against all properties in the City of Yonkers, but rather only those that abut a street or alley in which a water main is located or will be located (*see* Code of the City of Yonkers, § C9-14C). Because the tax does not necessarily reach all properties of the taxing jurisdiction, the frontage tax does not qualify as an eligible real property tax under Tax Law § 15 (e). We do not find *Church of Christ the King v City of Yonkers* as compelling a different interpretation insofar as that case merely stands for the proposition that the frontage tax is not a special assessment as defined under the Real Property Tax Law.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Forest City Enterprises, Inc. is denied;
2. The exception of the Division of Taxation is granted;
3. The determination of the Administrative Law Judge is reversed with respect to Issue I herein, but is otherwise affirmed;
4. The petition of Forest City Enterprises, Inc. is denied; and
5. The Division's letter dated April 22, 2013, disallowing the QEZE tax credits with respect to FC Yonkers Associates, LLC, is sustained.

DATED: Albany, New York
October 1, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner