STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
NRG ENERGY, INC.	:	DECISION DTA NO. 826921
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the period ending December 31, 2009.	:	

Petitioner, NRG Energy, Inc., filed an exception to the determination of the Administrative Law Judge issued on March 30, 2017. Petitioner appeared by Nixon Peabody LLP (Daniel J. Hurteau, Esq. and Jena R. Rotheim, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (David Markey, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard on September 14, 2017, which date began the six-month period for the issuance of this decision.

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

ISSUES

I. Whether the application of certain 2009 statutory amendments to the Empire Zones Program was retroactively applied to the beginning of the 2009 tax year.

II. If so, whether the retroactive application of the 2009 statutory amendments violated petitioner's rights under the Due Process Clause of the United States Constitution.

III. Whether there was selective enforcement of such amendments in violation of the

Equal Protection Clause of the United States Constitution.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact 3, 9, 10 and 22, which have been modified to more accurately reflect the record. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. Petitioner, NRG Energy, Inc., is a power provider that owns and operates power plants that generate power from any number of fuel sources including, coal, natural gas, solar and wind. Petitioner is the sole owner and sole member of Oswego Harbor Power LLC, the entity that owns and operates the Oswego Generating Station in Oswego, Oswego County, New York (the Plant).

2. Petitioner is a Delaware corporation and is authorized to do business in New York.

3. Petitioner was issued a certificate of eligibility under the New York State Empire Zones Act, General Municipal Law § 955 et seq., for the Plant. The certificate of eligibility was dated December 2, 2002, but petitioner's eligibility was effective as of August 8, 2002. A certificate of eligibility under the New York State Empire Zones Act, General Municipal Law § 955 et seq., for the Plant was also issued to Oswego Harbor Power LLC (certificate[s] of eligibility).

4. As an eligible participant in the Empire Zones Program, petitioner was eligible to apply for certain credits against its New York State corporate franchise taxes, including a credit for real property taxes paid during a tax year in connection with its Plant.

5. The credit for real property taxes is a refundable credit.

6. The Department of Economic Development (DED) administers the Empire Zones Program.

7. On April 7, 2009, legislation amending the Empire Zones Act to include new criteria

for continued certification under the Empire Zones Program was signed into law (the 2009 amendments).

8. In 2009, the DED reviewed all Empire Zone certified businesses to determine whether they should remain eligible to participate in the Empire Zones Program pursuant to the new criteria established by the 2009 amendments.

9. By letter dated June 29, 2009, DED notified petitioner that its certification for eligibility for the Plant was being revoked. By letter dated June 29, 2009, DED also notified Oswego Harbor Power LLC that its certification for eligibility was being revoked (together the decertification notices).

10. The decertification notices stated that petitioner's and Oswego Harbor Power LLC's certifications were being revoked for failing to meet the new criteria established by the 2009 amendments. Specifically, the certifications were being revoked because petitioner and Oswego Harbor Power LLC "failed to provide economic returns to the state in the form of total remuneration to [their] employees (i.e. wages and benefits) and investments in [their] facility greater in value to (sic) the tax benefits [the respective entities] used and had refunded to [them].

11. The decertification notices state that "[t]he effective date of revocation will be January 1, 2008."

12. Petitioner filed its 2008 tax return on or about November 11, 2009.

13. On or about November 9, 2012, petitioner filed an amended 2008 tax return in which it claimed a refund for the qualified empire zone enterprise (QEZE) credits for its payment of real property taxes relating to the Plant.

14. By letter dated March 14, 2013, the Division of Taxation (Division) advised that,

because it had no record of receiving from petitioner a retention certificate for the 2008 tax year (demonstrating petitioner's continued certification to participate in the Empire Zones Program), petitioner could not claim QEZE credits for 2008.

15. On June 4, 2013, the New York State Court of Appeals issued its decision in ***James Sq. Assoc. LP v. Mullen***, 21 NY3d 233 (2013).

16. On or about June 14, 2013, the Division advised petitioner that it was preparing to issue refunds of 2008 tax credits based upon the decision in ***James Sq. Assoc.*** Thereafter, on or about August 20, 2013, petitioner received a refund of its 2008 claimed QEZE credits.

17. On or about November 3, 2010, petitioner filed its 2009 form CT-3-A, general business corporation combined franchise tax return (CT-3-A), claiming a refundable QEZE credit in the amount of $24,014,753.00.

18. Petitioner's claim for the QEZE credit on its original 2009 tax return was based on the certification of eligibility for its facility located within the Town of Tonawanda Empire Zone and its facility located within the City of Dunkirk, Towns of Dunkirk and Sheridan Empire Zone, as identified on petitioner's 2009 form CT-606, claim for QEZE credit for real property taxes.

19. Petitioner received a refund for the 2009 tax year based on the refundable QEZE credit in the amount of $24,014,753.00.

20. On or about August 27, 2013, petitioner filed an amended 2009 CT-3-A return, in which it claimed a total QEZE credit in the amount of $29,869,127.00, amending its CT-3-A based on the certification of eligibility for the Plant located at 261 George Washington Boulevard, Oswego, New York, within the Oswego County Empire Zone.

21. Petitioner's claim for the QEZE credit on its amended 2009 CT-3-A represented an

increase in the amount of $5,854,374.00 based on the certification of eligibility for the Plant.

22. By letter dated April 16, 2014, petitioner was notified by the Division that, because the certification of eligibility for "NRG Oswego Harbor Power Operations, Inc." had been revoked, the additional refund amount of $5,854,374.00 claimed on petitioner's amended CT-3-A was disallowed.

23. Petitioner requested a conciliation conference at the Bureau of Conciliation and Mediation Services to challenge the denial of its 2009 refund claim. The conciliation conference was held on October 14, 2014, and a conciliation order dated February 13, 2015 was issued to petitioner. The conciliation order sustained the denial of its 2009 refund claim.

24. On or about April 28, 2015, petitioner timely filed a petition with the Division of Tax Appeals.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge explained that the purpose of the Empire Zones Program was to spur economic growth and job creation and that petitioner had been eligible for participation in the program since 2002, provided it met the criteria of the program each year. The Administrative Law Judge then noted that in April of 2009, the criteria for the program were changed by statutory amendments and that DED undertook a statutorily-required review of all program participants to determine whether they remained eligible under the new criteria.

The Administrative Law Judge noted that in June of 2009, DED revoked petitioner's certificate of eligibility for the Plant, effective January 1, 2008. The reason provided by DED for revoking petitioner's certification was that petitioner did not meet the new criteria contained in the 2009 amendments in that it had failed to provide economic returns to New York State.

Specifically, the wages and benefits that petitioner paid to its employees, together with the investments in its facility, amounted to less than the tax benefits petitioner received.

The Administrative Law Judge concluded that because this case involves tax year 2009, the application of the 2009 amendments to petitioner's circumstances was not a retroactive application. The Administrative Law Judge highlighted the fact that petitioner was notified of the revocation of its certification in June of 2009, well before the December 31 end of the tax year. The Administrative Law Judge discussed ***James Sq. Assoc. LP v Mullen***, wherein the Court of Appeals found that the 2009 amendments were unconstitutionally retroactively applied to the tax year 2008. The Administrative Law Judge found nothing in the ***James Sq. Assoc.*** decision that prohibited the Division from applying the 2009 amendments to the tax year 2009. As further support for her conclusion that there was no retroactive application of the statute in this case, the Administrative Law Judge noted that Tax Law § 14 (i) (1)[1] provides that a business ceases to be qualified to participate in the Empire Zones Program on the first day of the taxable year in which its certification is revoked, in this case January 1, 2009.

Finally, the Administrative Law Judge concluded that as petitioner had not proven any intentional plan by the Division to discriminate against petitioner by selectively enforcing the 2009 amendments, petitioner's claim of selective enforcement must also fail.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner argues that the Administrative Law Judge incorrectly relied upon Tax Law § 14 (i) (1) in determining that the application of the 2009 amendments to petitioner was not a

[1] References herein to Tax Law § 14 (i) (1) are former Tax Law § 14 (i) (1), which was effective until January 1, 2018.

retroactive application of a tax statute. Petitioner asserts that Tax Law § 14 (i) (1) was meant to apply to situations where a taxpayer's certification was revoked during the year because the taxpayer did not meet the requirements of certification that were in effect at the beginning of that same year. In petitioner's opinion, the application of Tax Law § 14 (i) (1) to the present circumstances, where petitioner's certification was revoked during the year because petitioner did not meet the requirements of certification that were changed partway through that year, would be unconstitutional under ***James Sq. Assoc.***

Petitioner disagrees with the Administrative Law Judge's conclusion that there was nothing in the court's holding in ***James Sq. Assoc.*** that precluded the application of the 2009 amendments to the 2009 tax year. Petitioner asserts that the Administrative Law Judge should have undertaken the same analysis as the court in ***James Sq. Assoc.*** and reviewed the same three factors as follows: (1) the taxpayer's forewarning of the change in the law; (2) the length of the period of retroactivity, and whether it was long enough for petitioner to have secured repose in the existing tax scheme; and (3) whether there was a valid public purpose in making the 2009 amendments retroactive in application. Petitioner argues that it had no forewarning of the change in the statute, that it was reasonably operating in reliance on the existing law and its past certifications, and that ***James Sq. Assoc.*** held that there was no valid public purpose to the retroactive application of the 2009 amendments.

Finally, petitioner argues that the Administrative Law Judge erred in dismissing its claim of selective enforcement in that proof of discrimination does not have to be overt. Petitioner argues that the Division's allowance of refund claims based upon the same circumstances, although dealing with smaller amounts of tax, whether intentional or due to a lack of attention, is

sufficient to prove a violation of petitioner's rights under the Equal Protection Clause of the United States Constitution.

The Division responded to petitioner's arguments by asserting that the Administrative Law Judge was not required to apply the three factors utilized by the court in ***James Sq. Assoc.*** unless the Administrative Law Judge first determined that the application of the 2009 amendments to petitioner constituted a retroactive application of the statute. The Division argues that the Administrative Law Judge correctly determined that the application of the 2009 amendments to the current situation did not constitute a retroactive application of such amendments. The Division notes that there is no question that DED was authorized to revoke petitioner's certification at any time after April 7, 2009. Thus, the revocation by DED of petitioner's certification in June of 2009 was valid and Tax Law § 14 (i) (1) required that the revocation be effective as of January 1, 2009.

The Division argues alternatively that even if the January 1, 2009 effective date of the revocation of petitioner's certification constituted a retroactive application of the 2009 amendments, such retroactive application is permissible under the three factors set forth in ***James Sq. Assoc.*** The Division asserts that petitioner had ample forewarning of the changes to the statute that occurred in April of 2009, that the period of retroactivity was not excessive and that the holding in ***James Sq. Assoc.*** that there was no valid legislative purpose for the retroactive application of the 2009 amendments to 2008, did not apply to the retroactive application of such amendments to 2009.

Finally, the Division argues that as petitioner has not proven that there was any intent on the part of the Division to discriminate against petitioner in its application of the 2009

amendments, petitioner's equal protection argument must also fail.

OPINION

The initial question to be addressed is whether the application of the 2009 amendments to petitioner's circumstances in the 2009 tax year constituted the retroactive application of a statute. We believe that it did.

It is true, as posited by the Division, that it is unclear from the various court decisions on the issue whether a statute adopted during an open tax year and made effective as of the first day of that year is considered to be the retroactive application of a statute (Steve R. Johnson, ***Retroactive Tax Legislation***, State Tax Notes, August 15, 2016, p 4 "[C]ourts have been unclear as to whether same-year changes are not retroactive or are retroactive but constitutional"]). It is also true, again as posited by the Division, that "tax legislation that is retroactive to the beginning of the year of enactment has routinely been upheld against due process challenges" (Erika K. Lunder, Robert Meltz, and Kenneth R. Thomas, ***Constitutionality of Retroactive Tax Legislation*** [Cong. Res. Serv. Oct. 25, 2012]). Thus, we can see the common sense exhibited in the Administrative Law Judge's conclusion that the application of the 2009 amendments to the 2009 tax year in this case does not constitute a retroactive application of a statute. However, there is no rule that a statute adopted during an open tax year and made effective as of the first of that year, automatically is determined not to have a retroactive effect. Rather, in determining whether the application of a statute is retroactive under a given set of circumstances, the question that must be addressed is "whether the new provision attaches new legal consequences to events completed before its enactment" (***see Landgraf v USI Film Prod.***, 511 US 244, 290 [1994]).

In this case, petitioner had participated in the Empire Zones Program with regard to the

operations of the Plant since 2002. The requirements of the Empire Zones Program were changed in April 2009 by the 2009 amendments to require that the wages and benefits that petitioner paid to its employees, together with the investments petitioner made in its facility, cannot amount to less than the tax benefits petitioner received. Any revocation of petitioner's certificate of eligibility to participate in the Empire Zones Program based upon the 2009 amendments was made effective as of January 1, 2009 through the operation of Tax Law § 14 (i) (1). Tax Law § 14 (i) (1) provides that "[A] business enterprise shall cease to be a qualified empire zone enterprise: . . . on the first day of the taxable year during which revocation of its certification under article eighteen-B of the general municipal law occurs."

In general, this means that a business whose certificate of eligibility is revoked during a given taxable year ceases to be qualified to participate in the Empire Zones Program as of the first day of that taxable year. Under normal circumstances, such a revocation would be based upon a business not meeting the requirements of the Empire Zones Program that were in effect on the first day of that taxable year. Thus, no question of retroactivity would arise.

However, we agree with petitioner that the application of the 2009 amendments to the tax year 2009 pursuant to Tax Law § 14 (i) (1) presents a unique situation. In the present case, the application of Tax Law § 14 (i) (1) renders petitioner unqualified to participate in the Empire Zones Program as of January 1, 2009 based upon program requirements that were not in effect until April of that year. Thus, the application of the 2009 amendments in the present case attached "new legal consequences" to actions of petitioner that occurred prior to the enactment of the 2009 amendments (***Landgraf v USI Film Prod.***) Accordingly, we find that the application of the 2009 amendments to the 2009 tax year constituted a retroactive application of the statute.

Having determined that the application of the 2009 amendments in this case constituted a retroactive application of a tax statute, the next question that must be addressed is whether the retroactive application of the 2009 amendments was constitutionally permitted. The analysis of this issue requires a review of the facts in this case under the factors enunciated in ***Matter of Replan Dev. v Department of Hous. Preserv. & Dev. of City of N.Y.*** (70 NY2d 451, 456 [1987] ***appeal dismissed*** 485 US 950 [1988]) (***see also James Sq. Assoc***., 21 NY3d at 246; ***Matter of Luizza***, Tax Appeals Tribunal, March 29, 2016). The Administrative Law Judge, having concluded that there was no retroactive application of the 2009 amendments, did not reach the issue of whether the retroactive application of the 2009 amendments was a constitutionally permitted retroactive application of a tax statute. In consonance with our two-stage tax appeals process, this matter is remanded to the Administrative Law Judge for consideration of this issue (***Matter of United States Life Ins. Co.***, Tax Appeals Tribunal, March 24, 1994 ["[t]he fullest possible development of an issue occurs in our two-stage hearing/exception process when an Administrative Law Judge renders a determination on an issue stating a complete rationale for the conclusion and the litigants debate the correctness of the Administrative Law Judge's rationale and conclusion on exception"]).

As both parties presented evidence and argument regarding the issue of whether the retroactive application of the 2009 amendments violated petitioner's rights under the Due Process Clause of the United States Constitution, there is no need for further proceedings on this issue other than for the Administrative Law Judge to issue a supplemental determination based upon the evidence and arguments currently in the record.

We will retain jurisdiction over this case based upon the exception already timely filed by

petitioner. After the Administrative Law Judge issues her supplemental determination, petitioner will be allowed to add to its existing exception and briefs so long as it does so within 30 days of the issuance of the supplemental determination, or requests an extension of time to do so within the 30-day period. The Division will be given an opportunity to respond to any additional submissions of petitioner. If the Division wishes to except to any portion of the Administrative Law Judge's supplemental determination, it will be required to submit a timely exception to the supplemental determination.

With regard to the issue of selective enforcement, we will withhold our decision on this issue until our decision on the determination on remand is issued. As this issue was addressed by the Administrative Law Judge and the parties, nothing further is required on remand.

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

DATED: Albany, New York
March 14, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner