STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
NRG ENERGY, INC.	:	DECISION SUBSEQUENT TO REMAND
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.	:	DTA NO. 826921

Petitioner, NRG Energy, Inc., filed an exception to the determination on remand of the Administrative Law Judge issued on November 8, 2018. 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 May 30, 2019, in Albany, New York. At the conclusion of oral argument, the parties were given 15 days to submit comments regarding a Tribunal decision issued after the date of petitioner's reply brief. The final comments were received on June 17, 2019, 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 retroactive application of the 2009 statutory amendments violated petitioner's rights under the Due Process Clause of the United States Constitution.

II. 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 on remand, except for findings of fact 25 and 26, which have been modified to more completely reflect the record. The Administrative Law Judge's findings of fact and the modified finding 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 stated 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.

25. A hearing was held on July 17, 2016 and a determination was issued on March 30, 2017. The determination held that the application of the 2009 amendments to the tax year 2009 was not retroactive and, thus, the issue concerning whether a retroactive application was in violation of petitioner's due process rights was not addressed. The determination also rejected petitioner's argument that its equal rights had been violated as a result of selective enforcement of the 2009 amendments on the basis that petitioner had not proven any intentional plan of discrimination on the part of the Division in denying petitioner's claim for credit.

26. Petitioner filed a timely exception to the determination of the Administrative Law Judge. On March 14, 2018, the Tax Appeals Tribunal (Tribunal) reversed the Administrative Law Judge on the issue of retroactivity and remanded the matter for a determination on the issue of whether the retroactive application of the 2009 amendments to the tax year 2009 violated petitioner's due process rights. The Tribunal withheld its decision on the selective enforcement

issue pending further proceedings after the determination on remand.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE ON REMAND

The Administrative Law Judge explained that the Tribunal had determined that the application of the 2009 Amendments constituted a retroactive application of a tax statute. The Administrative Law Judge then determined that the retroactive application of the 2009 Amendments was not an impermissible retroactive application under due process standards.

The Administrative Law Judge reached this determination based upon an application of the three-factor test set forth 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]). With regard to the first factor, whether petitioner had reason to be aware of the possibility of a change in the law and whether it was reasonable for petitioner to rely on the old law, the Administrative Law Judge found that this factor was not entitled to any weight under the circumstance of this case as there was no action that petitioner could have taken to avoid the issuance of the decertification notice.[1]

The Administrative Law Judge then addressed the second factor, the length of the period of retroactivity, and determined that the short period of retroactivity in this case, which ran from the enactment of the 2009 Amendments on April 7, 2009 back to January 1, 2009, would not lead to the conclusion that the retroactive application of the 2009 Amendments was an impermissible retroactive application arising to a violation of petitioner's due process rights.

In addressing the third factor, the Administrative Law Judge noted that the Tribunal, in

[1] For purposes of clarifying the record, we note that there was a typographical error in the second full paragraph on page 7 of the determination. The sentence reads "Additionally, given the short period of retroactivity, petitioner's expectations to continue to receive QEZE tax credits in 2009 were 'unreasonably disappointed,'" when the sentence was obviously meant to state that petitioner's expectations were *not* unreasonably disappointed.

Matter of Hale (Tax Appeals Tribunal, June, 14, 2018), found that as the 2009 Amendments were adopted for the purposes of curtailing abuses of the empire zones program and achieving budget savings for 2009, and a prospective application of the statute would have accomplished such purposes, a retroactive application of the 2009 Amendments was in violation of petitioner's due process rights.

In weighing the short retroactive period against the lack of public purpose, the Administrative Law Judge noted that there was no precedent for finding that a statute retroactive to the beginning of the year in which it was enacted violated a taxpayer's due process rights and concluded that no such violation occurred here.

THE INITIAL DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In the initial determination in this matter, the Administrative Law Judge concluded that petitioner's claim of selective enforcement of the 2009 Amendments must also fail as petitioner had not proven any intentional plan by the Division to discriminate against petitioner.

ARGUMENTS ON EXCEPTION

Petitioner explains that the analysis by the Administrative Law Judge of the third factor in the ***Matter of Replan Dev.*** in which the Administrative Law Judge found that there was no public purpose to the retroactive application of the 2009 Amendments weighs in favor of petitioner and is not at issue. However, petitioner argues that the analysis of the Administrative Law Judge was incorrect regarding the first and second factors.

Petitioner argues that it had no forewarning of the "dramatic" change that would occur to the program or that it would lead to petitioner's decertification. Petitioner argues that it made sure it met the employment requirements of the previous program each year and that it had no reason to believe it was not acting in accordance with program requirements prior to having its

certification revoked half-way through 2009. Indeed, petitioner argues that it thought it was still in conformance with program requirements even after the revocation of its certification as evidenced by its appealing DED's finding to the New York State Appellate Division. Petitioner asserts that the Administrative Law Judge's reliance on ***Matter of Hale*** was misplaced as the Tribunal's decision in that case was limited to the circumstance where the relevant certification was revoked as a result of having engaged in shirt-changing in 2002. As such, there were no actions that could have been taken by petitioners in ***Matter of Hale*** to have prevented the revocation of the certification. Petitioner herein argues that its certification was revoked for failure to provide economic returns to the state, in the form of remuneration to its employees and investments in its facilities, greater than the tax benefits petitioner received under the program. This, petitioner argues, is a situation it could have corrected through modifications to its annual budget approved in December of 2008. Petitioner explains that it did not engage in questionable behavior like the petitioners in ***Matter of Hale***, and thus, it was reasonable for petitioner to believe it was following the requirements of the program even after the 2009 Amendments.

Petitioner argues that the period of retroactivity also weighs in its favor in this case. Initially, petitioner asserts that the period of retroactivity in this case is calculated from January 1, 2009 until its decertification on June 29, 2009. It argues that the shorter 97-day period of retroactivity found in ***Matter of Hale*** was based upon the fact that petitioners in that case were automatically disqualified as of the passage of the 2009 Amendments, but that petitioner here was not automatically disqualified. In either event, petitioner argues that ***James Sq. Assoc.*** made clear that the relevant inquiry was whether the retroactive period was long enough that petitioner "gained a reasonable expectation that [it] would 'secure repose' in the existing tax scheme (***James Sq. Assoc.***, 21 NY3d at 249 (citations omitted). Petitioner urges that as it had

been continuously considered a qualifying program participant and it was not automatically deemed disqualified by the 2009 Amendments, the period of retroactivity in this case was unacceptable. Petitioner contends that this tax credit was one that it had received for years and it was reasonable to rely on the assumption that it would receive it in 2009 barring any changes to its relevant operations. Petitioner asserts that it was decertified based upon budgeting decisions that were made at the end of 2008 that followed existing law, such law petitioner could reasonably rely on as remaining intact.

Finally, 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 enough to prove a violation of petitioner's rights under the Equal Protection Clause of the United States Constitution. Furthermore, 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, but "may appear from a convincing showing of a grossly disproportionate incidence" of non-enforcement compared to enforcement (***Matter of 303 W 42nd St. Corp. v Klein***, 46 NY2d 686, 695 [1979]).

The Division argues that the retroactive application of the 2009 Amendments is permissible under the three factors set forth in ***James Sq. Assoc.*** The Division asserts that, although apparently agreeing with petitioner that it was decertified based upon its activities in 2009 and not 2002, petitioner had ample forewarning of the changes to the statute that occurred in April of 2009 to have made the necessary changes. The Division points out that it was noted in ***James Sq. Assoc.*** that a one-year period was not excessive (***James Sq. Assoc.*** at 246). The Division asserts that there is a public purpose in applying the 2009 Amendments to 2009 in that petitioner could have changed its behavior in 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

Having determined in our initial decision in this case that the application of the 2009 Amendments constituted a retroactive application of a tax statute (***Matter of Hale***), the question to be addressed herein is whether the retroactive application of the 2009 Amendments was constitutionally permissible.

It is agreed by the courts, the Administrative Law Judge and the parties, that in determining whether the retroactive application of a taxing statute violates the Due Process Clauses of the United States and New York Constitutions, the courts look to three factors: (1) "the taxpayer's forewarning of a change in the legislation and the reasonableness of . . . reliance on the old law," (2) "the length of the retroactive period," and (3) "the public purpose for the retroactive application" (***Matter of Replan Dev.*** at 456; ***see also James Sq. Assoc.*** at 246; ***Matter of Montante***, Tax Appeals Tribunal, May 2, 2019; ***Matter of Luizza***, Tax Appeals Tribunal, March 29, 2016). We now turn to such an analysis in the present case, bearing in mind that while the retroactive application of statutes is looked upon with disfavor, the retroactive application of tax statutes, particularly for short periods of time, is acceptable (***James Sq. Assoc.*** at 246).

Forewarning of change in the law and reasonable reliance on the old law

"This inquiry focuses on whether the taxpayer's 'reliance' has been justified under all the circumstances of the case and whether his 'expectations as to taxation [have been] unreasonably disappointed"' (***Matter of Replan Dev.*** at 456 [citations omitted]). This factor

protects a taxpayer who reasonably relied on the law in effect at the time an action was taken, but is not afforded the opportunity, due to lack of notice of the possible change in the law, to take any action to avoid the repercussions of the new law (***e.g. Matter of Replan Dev.*** at 453 [developer could have avoided repercussions of new law by not unreasonably relying on old law in undertaking renovations of two vacant buildings]).

The Administrative Law Judge concluded that based upon this Tribunal's decisions in ***Matter of Hale*** and ***Matter of Montante***, the forewarning and reasonable reliance factor of ***Matter of Replan Dev.*** should be disregarded and given no weight in the analysis of whether the retroactive application of the statute in this case was constitutionally permissible. The Administrative Law Judge based this conclusion upon her finding that like the circumstances in ***Matter of Hale*** and ***Matter of Montante***, there did not appear to be any action that petitioner could have taken that would have avoided the revocation of their certification of eligibility under the Empire Zones program. We disagree.

In ***Matter of Hale***, the revocation of the certificate of eligibility was based upon actions taken in 2001 and 2002, and in ***Matter of Montante***, petitioners did not even claim that there were any actions they could have taken to have avoided revocation of the certificate of eligibility. In the present case, petitioner effectively argues that it could have avoided revocation of its certificates of eligibility in 2009 through alterations in its annual budget adopted in December of 2008, had it known that such changes would be required (Oral argument tr p 7-9, 22, 23). Indeed, the Division admits that petitioner had the ability to take actions that might have avoided the revocation of petitioner's certifications (Division's brief p 8; Oral argument tr p 16, 17). In reaching this conclusion, we are cognizant of the fact that petitioner's decertification was based upon reports it filed with DED prior to 2008, and that the statute and regulations

governing decertification provided that decertification be based upon 2001 to 2007 reports, which is an indication that there were no actions available to petitioner in 2008 that could have avoided the revocation of its certification. However, the statute and regulation also provide that DED could consider "other economic, social and environmental factors when evaluating the costs and benefits of a project to the state and whether continued certification is warranted based upon such factors" (General Municipal Law § 959 [w]; 5 NYCRR 11.9 [c] [2]). In that petitioner could have taken action that might have prevented the revocation of its certification, we conclude that under the circumstances of this case, the forewarning and reasonable reliance factor of ***Matter of Replan Dev.*** should be given weight and included in our analysis.

In reviewing this factor, we turn first to what the Court of Appeals had to say in ***James Sq. Assoc.***, when considering this factor in terms of the retroactive application of the 2009 Amendments to 2008:

> "The 2009 Amendments were not introduced in the legislature until January 2009. Though the 2004 and 2007 reports from the Comptroller pointed out weaknesses in the Empire Zones Program, it did not spell out the new criteria on shirt-changing and 1:1 benefit-cost calculations to be implemented for existing Program participants in 2009." (***James Sq. Assoc.*** at 248)

The Division's arguments that petitioner should have foreseen the changes to the Empire Zones Program are based primarily upon the same empirical evidence available to the taxpayer in ***James Sq. Assoc.*** Petitioner, as the taxpayer in ***James Sq. Assoc.***, would not have had knowledge of the new requirements of the Empire Zones Program until January 2009, beyond the time when it could have changed its budget for the year or taken any actions to forestall the revocation of its certification. The Division has not convinced us that the analysis and conclusion in ***James Sq. Assoc.*** do not control here. Furthermore, as in ***James Sq. Assoc.***, petitioner in this case "appeared to have conducted their business affairs in a manner consistent

with existing Program requirements in 2008, justifiably relying on the receipt of the tax benefits that were then in effect" (***id.***). Although petitioner herein did not change the conduct of its business affairs after the introduction of the legislation proposing to change the Empire Zone Program requirements in January of 2009, it is uncontested that such changes would have to have been made in December of 2008 when petitioner's budget was adopted. Accordingly, the first ***Replan Dev.*** factor weighs in favor of a finding that the retroactive application of the 2009 Amendments is violative of petitioner's due process rights (***see id.***).

Length of retroactive period

We have previously held the retroactive period at issue herein was a period of 97 days, from the April 7, 2009 enactment of the 2009 Amendments back to January 1, 2009 (***Matter of Hale, Matter of Montante***). Petitioner asserts, however, that the retroactive period applicable under the present circumstances should run to the date of the revocation of its certification of eligibility by DED in June of 2009. Petitioner has provided no legal authority, nor do we find any logical reason, to extend the end of the retroactive period beyond the date that the 2009 Amendments were adopted (***Matter of Hale, Matter of Montante***).

The relatively short retroactive period factor weighs in favor of the constitutionality of the retroactive application of the 2009 Amendment (***Matter of Varrington Corp. v City of N.Y. Dept. of Fin.***, 85 NY2d 28, 32 [1995] [citations omitted] [emphasis added] ["Retroactive tax legislation may be treated as valid, unless it reaches *so far into the past* . . . as to constitute a deprivation of property without due process"]). The 97-day retroactive period at issue in this case cannot be held to reach "so far into the past" that it would render this retroactive application of a statute a violation of petitioners' due process rights (***Matter of Hale, Matter of Montante***).

Public purpose for the retroactive application

We again find, as we did in ***Matter of Hale and Matter of Montante***, that the public purpose for the retroactivity of the statute is controlled by ***James Sq. Assoc.*** The court in ***James Sq. Assoc.*** found that the legislative purposes in adopting the 2009 Amendments were to "stem abuses in the Empire Zones Program (increasing the benefits to the public relative to the cost of the credits) and to increase tax receipts" (***James Sq. Assoc.*** at 250). As noted by the Court:

> "retroactively denying tax credits to plaintiffs did nothing to spur investment, to create jobs, or to prevent prior shirt-changing. The retroactive application of the 2009 Amendments simply punished the Program participants more harshly for behavior that already occurred and that they could not alter" (***James Sq. Assoc.*** at 250).

The Division contends that the application of the 2009 Amendments to the 2009 tax year, as opposed to the 2008 tax year at issue in ***James Sq. Assoc.***, distinguishes the facts of this case from the holding in ***James Sq. Assoc.*** that there was no valid public purpose in the retroactive application of the 2009 Amendments. However, the Division fails to explain why this is a distinction with a difference. As previously discussed, petitioner could not alter its behavior after December 2008, meaning that retroactive application of the 2009 Amendments to January 1, 2009 "simply punished Program participants more harshly for behavior that already occurred and that they could not alter" (***id.***) In short, we find no reason here to depart from our previous holdings that the public purpose factor of ***Replan Dev.*** weighs in favor of a finding that the retroactive application of the 2009 Amendments is violative of petitioner's due process rights.

Factor analysis

In summation, we have found that: (1) the forewarning and reasonable reliance factor of the ***Matter of Replan Dev.*** analysis supports a finding that the retroactive application of the 2009 Amendments was violative of petitioner's due process rights; (2) the length of the retroactive

period factor of the ***Matter of Replan Dev.*** analysis supports a finding that the retroactive application of the 2009 Amendments was constitutional; and (3) the public purpose factor of the ***Matter of Replan Dev.*** analysis supports a finding that the retroactive application of the 2009 Amendments was violative of petitioners' due process rights.

In weighing the competing factors, we need to consider that the ***Matter of Replan Dev.*** analysis is simply a method of determining whether the retroactive application of the 2009 Amendments is "so harsh and oppressive as to transgress constitutional limitation" (***Welch v Henry***, 305 US 134, 147 [1938], ***reh denied*** 305 US 675 [1938]). It is also true that courts have been far less likely to invalidate the retroactive imposition of a taxing statute when it involves the changing of a tax rate, or an exemption or credit than they are when the issue is the imposition of a new tax (***see United States v Darusmont***, 449 US 292, 298-300 [1981]; ***Fein v United States***, 730 F2d 1211, 1212-1214 [8th Cir 1984], ***cert denied*** 469 US 858 [1984]; ***Honeywell, Inc. v United States***, 973 F2d 638, 642-643 [8th Cir 1992], quoting ***Fein v United States*** at 1213). In the instant case, we are dealing with the elimination of a tax credit rather than a new tax (***Honeywell, Inc.*** at 642-43 ["This kind of tinkering, though certainly annoying to taxpayers and their advisers, is a regular feature of the tax-law landscape . . . . The change of which plaintiff complains here is, we think, closer in kind and in effect to a mere increase in the tax rate than to the enactment of a wholly new tax"]). Furthermore, we note 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***, Congressional Research Service, Oct. 25, 2012 at 2]; ***see also James Sq. Assoc.*** at 249 [in finding a retroactive period of 16 to 32 months excessive, the court noted "one year of retroactivity is not considered excessive according to ***Replan*** . . . ."]).

However, even after taking into account all of those considerations, it is difficult to see how the application of the 2009 Amendments to the 2009 tax year under the circumstances of this case is substantively different ***than*** the application of those same amendments to the 2008 tax year in ***James Sq. Assoc.*** Once it is determined that petitioner could not take any action that would have forestalled the revocation of its certification of eligibility by DED after December of 2008, there are no distinguishing facts between the decisions that would give rise to different conclusions.

Furthermore, while it is unusual to find a retroactive application of a tax statute held violative of a taxpayer's due process rights when the period of retroactivity is less than a year, it is not unheard of. In ***Chrysler Properties, Inc. v Morris*** (23 NY2d 515 [1969]), the Court of Appeals has found a retroactive application of a statute to be unconstitutional when the period of retroactivity was barely over a month. In that case, the State Tax Commission ordered that a taxpayer be given a refund of mortgage recording tax previously paid to New York City. As of the March 20, 1967 date of the order, the City of New York had no statutory right to obtain judicial review of State Tax Commission decisions. That right was granted by an amendment to the Tax Law that took effect on April 24, 1967, which was made retroactive to State Tax Commission decisions issued after January 1, 1967. The Court of Appeals found that after balancing the various factors, absent a showing of a public purpose to be served by the retroactive application, such application was unconstitutional despite the short period of retroactivity (***Chrysler Properties, Inc. v Morris*** at 522).

Accordingly, we conclude "the taxpayer's forewarning of a change in the legislation and the reasonableness of . . . reliance on the old law," and the lack of a "public purpose for the retroactive application" outweigh the short "length of the retroactive period," and, under the

circumstances of this case, hereby hold that the retroactive application of the 2009 Amendments violates petitioner's due process rights (***Matter of Replan Dev.*** at 456).

Finally, although it is not necessary to address the selective enforcement issue, as we have found in petitioner's favor on the retroactivity issue, we note for the record that petitioner has failed to meet its burden of proof regarding the discriminatory enforcement issue. We agree with the Administrative Law Judge that petitioner needs to prove selectivity of enforcement and that the selectivity arose from "an intentional invidious plan of discrimination on the part of the Division" (***Matter of Goetz Energy Corp.***, Tax Appeals Tribunal, November 18, 1999, quoting ***Matter of Petro Enters.***, Tax Appeals Tribunal, September 19, 1991). There is no finding of fact, nor has petitioner requested a finding of fact on exception, that refunds were not denied for all businesses whose certificates of eligibility were revoked by DED under the 2009 Amendments. It would be difficult to make any such finding, as the record contains only general testimony that other taxpayers may have received refunds, with no clear reasons as to why such refunds may have been granted (Hearing tr p 445-45, 70-71,73). Even assuming this testimony proved selective enforcement, it does not prove any intentional discrimination on the part of the Division. Finally, petitioner urges that it need only show "grossly disproportionate incidence of nonenforcement" to prove discriminatory intent on the part of the Division (***Matter of 303 West 42nd St. Corp. v Klein***). Based on the record in front of us, petitioner has not shown any disproportionate incidence of nonenforcement. Accordingly, petitioner has failed to meet its burden of proof on the selective enforcement issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of NRG Energy, Inc. is granted;

2. The determination on remand of the Administrative Law Judge is reversed;

3. The petition of NRG Energy, Inc. is granted; and

4. The refund disallowance is canceled.

DATED: Albany, New York
December 17, 2019

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner