

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petitions	:	
of	:	
<b>GLEN AND ANABELA SCUDERI</b>	:	DECISION
for Redetermination of Deficiencies or for Refund of	:	DTA NOS. 827974
Personal Income Tax under Article 22 of the Tax Law	:	AND 828614
for the Years 2012 through 2016.	:	

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Petitioners, Glen and Anabela Scuderi, filed an exception to the determination of the Administrative Law Judge issued on June 6, 2019. Petitioners appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Jennifer L. Hink-Brennan, Esq., of counsel).

Petitioners did not file a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a reply brief. Oral argument was heard in New York, New York, on January 9, 2020, 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.

***ISSUE***

Whether the Division of Taxation properly disallowed the empire zone real property tax credits claimed by petitioners for the years 2012 through 2016.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge, except that we have corrected an error in finding of fact 9. As so modified, the Administrative Law Judge's findings of fact appear below.

1. Petitioners, Glen and Anabela Scuderi, filed joint New York nonresident and part-year resident income tax returns (forms IT-203) for the years 2012 through 2016 (years at issue), on which they claimed, on a flow through basis, the qualified empire zone enterprise (QEZE) real property tax credit (RPTC) allegedly earned by 137 South 4<sup>th</sup> Avenue Management, LLC (the LLC), a disregarded entity owned by Glen Scuderi. Petitioners' forms IT-203 for 2012 through 2015 attached a claim for QEZE credit for real property taxes (form IT-606). The copy of petitioners' form IT-203 for 2016 in the record does not have any form IT-606 attached, but petitioners claimed the RPTC on line 12g of their attachment for other tax credits and taxes (form IT-203-att). On each of the forms IT-606, petitioners claimed that the LLC had a single full-time employee for each quarter in the year and a "0" base period employment number.

2. The LLC was certified as a QEZE effective January 22, 2004, pursuant to article 18-B of the General Municipal Law. While the parties do not discuss the nature of the LLC's business, it appears that, based on a rental agreement in the record, the LLC rented out a building in Mount Vernon, New York.

3. The Division of Taxation (Division) commenced an audit of petitioners' personal income tax returns for the years 2012 through 2014 by sending a letter, dated July 3, 2015, to petitioners, asking for documentation to verify the employee claimed for purposes of the RPTC, including information as to the employee's name, social security number, hire date, and the number of hours worked each quarter in those tax years, along with a copy of any employment agreement made between the employee and the LLC.

4. The Division received a packet of information from the petitioners on August 28, 2015. The handwritten cover letter, signed by Mr. Scuderi, stated that the requested documents were attached. A page in the packet stated the following:

137 SOUTH 4th AVENUE MANAGEMENT LLC  
EMPLOYEE LIST  
RALEIGH BELLAMY  
S.S. # [ ]  
HIRE: FEB. 2009-PRESENT  
HRS WORKED PER WEEK: 30 HRS FOR  
YEARS 2012, 2013, 2014”

Included in the packet for each year was a one-page document entitled “Timesheet,” by the payroll company Paychex, which listed Raleigh Bellamy as the employee of the LLC, and showed his wages to be “\$800.00/Pay Period.” The page had a box to report the employee’s “Regular hours.” Handwritten into that box was “30 hours/week.” The payroll information, along with a copy of a first page of the LLC’s quarterly combined withholding, wage reporting and unemployment insurance return-attachment (form NYS-45-ATT) for the last quarter of 2012, indicated that the LLC paid Mr. Bellamy \$9,600.00, \$8,000.00, and \$9,600.00 in total wages in, respectively, 2012, 2013, and 2014.

5. The Division sent a follow-up letter dated October 2, 2015, which asserted that an employee used to claim the RPTC must be employed full-time for at least 35 hours a week and asked petitioners to explain how Mr. Bellamy, therefore, could be claimed as a qualifying full-time employee in the empire zone based on the information provided.

6. The Division received a second packet of information from petitioners on November 30, 2015 in response to its October 2, 2015 letter. In the handwritten cover letter, Mr. Scuderi stated, in pertinent part, that “I had previously made a mistake with the hrs worked. The documents are attached for correction. There were 35 hrs per-week worked.” The documentation in the packet was the same as the documentation included in petitioners’ letter described in finding of fact 4, except that all references to “30” were changed to “35.”

7. The Division sent a follow-up letter dated December 10, 2015, requesting additional information, including a copy of the employment contract signed and dated by the claimed employee at the time of his hire, the scheduled work hours for the employee, and any information in regard to other benefits or compensation provided to the employee.

8. In response, as pertinent to the issues herein, Mr. Scuderi sent the Division, in February 2016, a copy of an employment agreement between the LLC and Mr. Bellamy, which was signed by Mr. Scuderi and Mr. Bellamy on March 4, 2009. The agreement was a 16-bullet point list of “Responsibilities,” which included cleaning the exterior premises and sweeping and mopping interior spaces on a daily basis, and “respond[ing] to tenant issues on site as needed.” The last bullet point in the list was the following: “Work hours are flexible during day and evening but will total 35 hours per week.”

9. By letter dated March 4, 2016, the Division advised petitioners that, based on its review of “the employee’s information and wages,” it had concluded that the LLC did not have a full-time employee for at least half the tax year for the tax years 2012 through 2014, thereby reducing the employment increase factor to zero, and requiring the claim for the RPTC to be denied. Based on that conclusion, the Division issued three notices of deficiency to petitioners asserting additional personal income tax due, plus interest, as shown in the following table:

Notice No.	Notice Date <sup>1</sup>	Year	Tax Asserted Due
L-044477626	March 3, 2016	2012	\$25,312.00
L-044477627	April 19, 2016	2013	\$17,668.00
L-044477628	April 19, 2016	2014	\$30,471.00

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<sup>1</sup> The determination mistakenly indicated that all three of these notices were dated March 3, 2016.

10. The Division also audited petitioners' 2015 and 2016 personal income tax returns. By letter dated May 24, 2017, the Division informed petitioners that "[a] review of the LLC's employee's wages indicated that there was not a full-time employee for at least half of the tax year for the years ended December 31, 2015, and December 31, 2016," which resulted in a full-time employment number of zero and the denial of the RPTC sought by the LLC. The audit reports for those years show that, in determining the number of hours worked by the LLC's employee, the auditor divided the total wages earned by the employee for the quarter in question by the minimum wage in effect for that quarter. While the analysis concluded that Mr. Bellamy did not work 35 or more hours for at least half the year in tax years 2015 and 2016, the audit reports do not disclose the source of the information as to the total quarterly wages paid by the LLC to Mr. Bellamy in those years.<sup>2</sup>

11. As a result of the above audits of petitioners' forms IT-203 for 2015 and 2016, the Division issued to petitioners two notices of deficiency (notice numbers L-046511469 and L-046512998), dated December 14, 2017, imposing respectively \$9,952.55 and \$16,561.00 in additional tax due for 2015 and 2016, plus interest.

12. In its submissions in this matter, the Division included a copy of the hearing memorandum that petitioners filed in this matter pursuant to § 3000.14 of the Tax Appeals Tribunal's Rules of Practice and Procedure, and several of the attachments thereto. In a letter to the Administrative Law Judge, dated July 17, 2018, and attached to that hearing memorandum, Mr. Scuderi stated in part:

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<sup>2</sup> The Division's letters to petitioners described in findings of fact 3, 5 and 10 all make note of the fact that, in the Division's view, petitioners also miscalculated the LLC's benefit period factor in computing their RPTC. Although petitioners' responses to these letters did not agree with that conclusion, their petitions did not contest the Division's benefit period adjustment. The determination thus did not address this issue, nor has it been raised on exception.

“For the years 2012-2015 I figured a 30-hour week for a full-time employee according to the Affordable Care Act. \* \* \* I figured the wages and credits for Mr. Bellamy would cover the full-time requirement. \* \* \* The Affordable Care Act is the only law which states that the minimum requirement for a full-time employee is 30 hours of service per week. This is [what] I base my original wage calculation on. \* \* \* Since the purpose of the Empire Zone program was to create jobs in the zone, I have met the requirement and paid a full-time wage.”

13. As part of their submissions in this matter, petitioners submitted an affidavit of Mr. Bellamy, dated October 24, 2018. In the affidavit, Mr. Bellamy asserted that he was hired in 2009 as a manager/superintendent for the building at 137 South 4<sup>th</sup> Ave, Mount Vernon, New York, and that he “worked 35 hours per week every other week for the years 2009-2016.”

14. In its submissions in this matter, the Division introduced an affidavit, dated September 17, 2018, of Bruce C. Mereness, a Tax Technician II who supervised the audit. Mr. Mereness’ affidavit presents an analysis using the annual wages the LLC reported to the Division to show that if the LLC paid the applicable minimum wage for each of the years at issue, it did not pay Mr. Bellamy for 35 or more hours per week of employment.

15. Official notice is taken of the fact that for the years 2012 through 2016, the instructions to the form IT-606 advised filers that “[f]ull-time employment means a job consisting of at least 35 hours per week or two or more jobs that together constitute the equivalent of a job of at least 35 hours per week.”<sup>3</sup>

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<sup>3</sup> The State Administrative Procedure Act § 306 (4) permits the taking of official notice in administrative proceedings if judicial notice could be taken. It is permissible to take official notice of instructions to Division tax forms because such instructions are “determinable from a source of indisputable accuracy” and are a matter of public record (*Matter of Piscopo*, Tax Appeals Tribunal, April 29, 2019 [citations omitted]).

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge observed that petitioners' eligibility for the credit at issue depends on whether the LCC's sole employee was, in the language of the relevant statute, "employed full-time by the enterprise for at least one-half of the taxable year" during the years at issue. The Administrative Law Judge found that the Division's interpretation of the quoted language, that the half-year period must be continuous, was reasonable. He also found that petitioners' argument that the Division's position was inconsistent with the economic policy goals that underlie the empire zone program offered no specific argument in favor of the reasonableness of their position that alternate-week employment for a full year satisfies the "one-half of the taxable year" requirement. The Administrative Law Judge thus concluded that, as petitioners did not show that their interpretation of the statute was the only reasonable one, the Division's interpretation must prevail. Accordingly, the Administrative Law Judge found that the LLC did not have a full-time employee during the years at issue and that petitioners' credit claims must be denied.

The Administrative Law Judge also determined, alternatively, that petitioners' claims must be denied as a matter of proof. The Administrative Law Judge noted the conflicting accounts in the record regarding Mr. Bellamy's work hours and concluded that Mr. Bellamy's affidavit was insufficient to prove the assertion therein that he worked 35 hours every other week. The Administrative Law Judge observed that petitioners bore the burden of proof in this matter and that they took a risk in choosing to submit this matter with the consequent reliance on the affidavit to make their case.

The Administrative Law Judge rejected the Division's analysis comparing Mr. Bellamy's reported annual wages with the significantly greater annual wages of a hypothetical

person earning the minimum wage and working 35 hours per week for 52 weeks per year. The Administrative Law Judge found that the Division offered no foundation for the presumption underlying this analysis; that is, that an employee must be paid at least the minimum wage for purposes of the credit at issue.

Finally, the Administrative Law Judge rejected petitioners' complaint that they successfully claimed the credit at issue for tax years preceding the audit period and that the Division now ignores this "precedent." Framing this complaint as an estoppel argument, the Administrative Law Judge noted that such claims are restricted to truly unusual fact situations, and that, here, the Division never advised petitioners that they were entitled to the claimed credits.

#### ***ARGUMENTS ON EXCEPTION***

Petitioners contend that the Division's and the Administrative Law Judge's interpretation of the statutory phrase "for at least one-half of the year" essentially adds "continuous," a word not found therein, and thereby unreasonably and arbitrarily changes the meaning of employed full-time as used in the statute.

Petitioners object to the Administrative Law Judge's conclusion that the Bellamy affidavit is insufficient to prove that Mr. Bellamy worked 35 hours every other week as claimed. Petitioners contend that they could have established this fact at a hearing but that they were not aware of any risks associated with submitting a case and that they were persuaded and coerced by the Division's representative into waiving a hearing.

Petitioners also contend that the LLC's employment of Mr. Bellamy accomplished the stated goal of the empire zone policy to spark economic development and to create jobs.



The Division contends that its interpretation of the relevant statute to require continuous full-time employment for at least six months of the year to qualify for purposes of the credit is reasonable. The Division notes that this interpretation is consistent with the Division's position in technical memoranda issued prior to the years in dispute.

The Division also contends that petitioners' changing position as to Mr. Bellamy's work hours undermines the credibility of this factual claim.

The Division asserts that petitioners freely chose to proceed in the present matter by submission.

While not disputing that the purpose of the empire zone program was to encourage economic growth and job creation, the Division contends the petitioners simply failed to prove that they met the statutory criteria for the credit.

### ***OPINION***

When the Division issues a notice of deficiency to a taxpayer, a presumption of correctness attaches to the notice and the burden of proof is on the taxpayer to show, by clear and convincing evidence, that the proposed deficiency is erroneous (*see e.g. Matter of Greenfeld*, Tax Appeals Tribunal, March 7, 2019; Tax Law § 689 [e]; 20 NYCRR 3000.15 [d] [5]).

As a QEZE-certified enterprise, the LLC was eligible for certain tax credits, including the RPTC, under Tax Law § 15. Any such credits were properly claimed by the LLC's sole owner, petitioner Glen Scuderi, against his personal income tax because the LLC was a disregarded entity for tax reporting purposes (Tax Law §§ 2 [6], 606 [bb]).

As the LLC was certified as a QEZE before April 1, 2005, the amount of RPTC available to the LLC during the years at issue was the product of (i) the benefit period factor,

(ii) the employment increase factor, and (iii) the eligible real property taxes paid or incurred by the enterprise during the taxable year (Tax Law § 15 [b] [1]).

The employment increase factor is relevant here. Generally, the employment increase factor is the excess of an enterprise's employment number in the empire zone during a given taxable year over its test year employment number during its test year (Tax Law § 15 [b] [1]). As relevant here, employment number means "the average number of individuals . . . employed full-time by the enterprise for at least one-half of the taxable year" (Tax Law §§ 14 [g] [1], 15 [h]).<sup>4</sup>

On audit, the Division concluded that Mr. Bellamy, the LLC's sole employee, did not work full-time for at least half the tax year for any of the years at issue. As a result, the Division determined that the LLC's employment number for each year at issue was zero and that its employment increase factor for each such year was zero. The Division thus found that the LLC was not eligible for any RPTC during any of the years at issue and denied petitioners' credit claims accordingly.

The Division interprets the statutory language "employed full-time by the enterprise for at least one-half of the taxable year" as meaning employed for at least 35 hours per week for at least 6 consecutive months. Petitioners do not contest the Division's position that full-time employment means at least 35 hours per week.<sup>5</sup> Rather, petitioners contest the Division's

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<sup>4</sup> Test year is defined in Tax Law § 14 (d). The parties agree that the LLC's test year employment number was zero.

<sup>5</sup> The Division's "at least 35 hours per week" interpretation is set forth in a technical memorandum as follows: "Employed full-time" means a job consisting of at least 35 hours per week and includes two or more jobs which together constitute the equivalent of a job of at least 35 hours per week" (TSB-M-01[1][1]). This "at least 35 hours per week" standard also appeared in the instructions to form IT-606 for the years at issue.

interpretation of the “for at least one-half of the taxable year” part of the statute. Petitioners contend that this phrase includes alternate-week employment for a full year.

We first address the factual question of whether petitioners have established their contention that Mr. Bellamy worked for the LLC for 35 hours per week during every other week throughout the years at issue. As the Administrative Law Judge noted, the only evidence in the record supportive of this assertion is the statement in Mr. Bellamy’s affidavit, as quoted in finding of fact 13. As may be observed, this non-contemporaneous statement lacks any detail and is uncorroborated. Contrary to petitioners’ argument on exception, the Administrative Law Judge did not “disallow” the affidavit as proof, he simply found it insufficient to establish the fact asserted therein. We reach the same conclusion. Like the Administrative Law Judge, we note that the affidavit is at odds with the employment agreement. That document indicates that Mr. Bellamy’s work hours will total 35 hours per week and lists certain tasks to be performed daily (*see* finding of fact 8). The employment agreement makes no reference, express or implied, to alternate week employment. The credibility of petitioners’ assertion is further undermined by Mr. Scuderi’s changing responses to the Division’s requests for information during the audit regarding his sole employee’s work hours, neither of which match the affidavit (*see* findings of fact 4 and 6). Considering the affidavit in the context of such other, contrary evidence, we conclude that petitioners have clearly failed to prove that Mr. Bellamy worked 35 hours per week every other week as claimed (*see* Tax Law § 689 [e]; 20 NYCRR 3000.15 [d] [5]). As the LLC’s employee’s work hours have not been established, we find that the Division properly denied petitioners’ claims for RPTC.

Although our decision on the factual issue resolves this matter, we nonetheless address the legal issue raised by petitioners to provide a complete record on appeal. Accordingly, we examine whether alternate week employment at 35 hours per working week falls within the meaning of “employed full-time by the enterprise for at least one-half of the taxable year” under Tax Law Tax Law § 14 (g) (1). For purposes of this discussion, we presume that Mr. Bellamy worked every other week at 35 hours per week as petitioners assert.

The RPTC is a type of exemption statute and is therefore strictly construed against the taxpayer (*Matter of Piccolo v New York State Tax Appeals Trib.*, 108 AD3d 107, 111 [3d Dept 2013]). Petitioners must establish an unambiguous entitlement to the credit (*Matter of United Parcel Serv., Inc. v Tax Appeals Trib. of State of N.Y.*, 98 AD3d 796, 798 [3d Dept 2012], *lv denied* 20 NY3d 860 [2013]). Indeed, petitioners must prove that their interpretation is the only reasonable construction (*Matter of American Food & Vending Corp. v New York State Tax Appeals Trib.*, 144 AD3d 1227, 1231 [3d Dept 2016]). The caveat to this standard is that the statute should not be interpreted so narrowly that it defeats its purpose (*Matter of Grace v New York State Tax Commn.*, 37 NY2d 193, 196 [1975], *rearg denied* 37 NY2d 816 [1975], *lv denied* 338 NE2d 330 [1975]).

Pursuant to the foregoing principles and the following discussion, we find that petitioners’ proposed interpretation of the statute is unreasonable. “The language of a statute is generally construed according to its natural and most obvious sense, without resorting to artificial or forced construction” (McKinney’s Cons Laws of NY, Book 1, Statutes § 94). In our view, the phrase “employed full-time by the enterprise for at least one-half of the taxable year” necessarily implies not only employment for a certain number of hours per week, but also weekly employment on a continuing basis. Petitioners’ proposed interpretation to

include alternate-week employment within the meaning of this phrase takes a circumstance that seems to epitomize part-time work (i.e., one week on, one week off) and artificially labels it full-time. Additionally, as the Administrative Law Judge noted, petitioners' proposed interpretation leads to unreasonable results. Specifically, according to petitioners, a person employed for 35 hours per week for 26 weeks of alternate-week employment would be included in the employment number. However, a person employed for 34 hours per week for 52 weeks would not, having failed to meet the 35-hour threshold, even though such a person would have worked nearly twice as many hours as the alternate-week employee during the year. Statutory construction should not lead to such an unreasonable result (McKinney's Cons Laws of NY, Book 1, Statutes § 143).

Contrary to petitioners' contention, the economic development purpose of the QEZE tax credit program offers no support to their position (*see* General Municipal Law § 956). Any job might well marginally further economic development. As the Administrative Law Judge noted, however, the legislature chose to limit the RPTC to enterprises that employed individuals on a full-time basis "for at least one-half of the taxable year." As discussed above, the LLC's employment of Mr. Bellamy did not meet this requirement.

In ruling against petitioners on the evidentiary issue, the Administrative Law Judge observed the tactical risk to petitioners of submitting their case on papers. In response on exception, petitioners contend that the Division deceived and coerced them into submitting this matter. Petitioners also request that this matter be remanded for a hearing since they were unaware of any risks associated with submission.

There is no evidence that petitioners were in any way deceived or coerced into agreeing to submit this matter to the Administrative Law Judge. Any risks associated with submitting

a case must be borne by the parties that freely agree to proceed in such a manner (*see Matter of Spiezio*, Tax Appeals Tribunal, July 19, 2016). Whether or not petitioners were aware of tactical risks associated with submission, their ignorance is not an excuse and thus not a justification for a new hearing (*see Matter of Nathel v Commissioner of Taxation & Fin. of State of N.Y.*, 232 AD2d 836 [3d Dept 1996] [a taxpayer is charged with knowledge of the law]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Glen and Anabela Scuderi is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Glen and Anabela Scuderi are denied; and
4. The notices of deficiency, dated March 3, 2016, April 19, 2016 and December 14, 2017, are sustained.

DATED: Albany, New York  
July 9, 2020

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

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

/s/ Anthony Giardina  
Anthony Giardina  
Commissioner