

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**CARL MANISON** : DETERMINATION  
for Redetermination of a Deficiency or for Refund of : DTA NO. 824362  
Personal Income Tax under Article 22 of the Tax Law for :  
the Year 2007. :

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Petitioner, Carl Manison, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2007.

On November 8, 2012 and November 26, 2012, respectively, petitioner, appearing by Harris Beach PLLC (Robert Ryan, Esq., of counsel), and the Division of Taxation appearing by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based upon documents and briefs to be submitted by July 30, 2013, which date commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation properly disallowed petitioner's claim for the Qualified Empire Zone Enterprise credit for real property taxes claimed by Clam Realty Corp., for the year 2007, on the ground that the corporation did not meet the employment increase factor.

***FINDINGS OF FACT***

The parties entered into a stipulation of facts, which has been substantially incorporated into the Findings of Fact below.

1. Petitioner, Carl Manison, is a 100% shareholder of Clam Realty Corp. (Clam Realty) and Choice Building Supplies of Westchester Co. (Choice Building Supplies), both flow-through sub-chapter S corporations.

2. Incorporated by petitioner in New York State on June 8, 1994, Choice Building Supplies operates a building supply store at 677 Nepperhan Avenue, Yonkers, New York (the Premises).

3. Petitioner incorporated Clam Realty on January 14, 1997 as a real estate holding company to acquire and manage properties and for accounting and liability purposes.

4. Choice Building Supplies leased the Premises from an unrelated entity, the New York State Department of Transportation (NYSDOT), until April of 1997 at which time Clam Realty acquired the Premises from the NYSDOT. Since April of 1997, Clam Realty has leased the Premises to Choice Building Supplies.

5. Choice Building Supplies was empire zone certified at the Premises on June 11, 1997. Clam Realty was empire zone certified at the Premises on March 18, 2002.

6. By virtue of common ownership, Choice Building Supplies and Clam Realty are “related persons” as defined in Internal Revenue Code (IRC) § 465(b)(3)(C).<sup>1</sup>

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<sup>1</sup> IRC § 465(b)(3)(C) provides the following: “Related person. For purposes of this subsection, a person (hereinafter in this paragraph referred to as the ‘related person’) is related to any person if — (i) the related person bears a relationship to such person specified in section 267(b) or section 707(b)(1), or (ii) the related person and such person are engaged in trades or business under common control (within the meaning of subsections (a) and (b) of section 52). For purposes of clause (i), in applying section 267(b) or 707(b)(1), ‘10 percent’ shall be substituted for ‘50 percent’.”

7. James Corbett was hired full time by Choice Building Supplies on July 1, 1994, and he remained employed full time by Choice Building Supplies through the entire 2007 tax year in question. His duties included sales and purchasing for Choice Building Supplies.

8. Mr. Corbett was also hired full time by Clam Realty on June 16, 2004 to take over the bookkeeping and administrative functions of Ms. Linda Keeling, who resigned from Clam Realty in 2004. Mr. Corbett remained employed full time by Clam Realty through the entire 2007 tax year in question and was Clam Realty's sole employee.

9. Clam Realty's Qualified Empire Zone Enterprise (QEZE) test date is March 18, 2002, its test year is 2001 and its base period is 1997 through and including 2000.

10. Clam Realty had no employees in its test year of 2001 and had no employees during its base period of 1997 through and including 2000.

11. On or after June 3, 2008, Clam Realty filed its New York State - Empire State Development Empire Zones Program 2007 Business Annual Report, on which it listed one full-time job, zero part-time jobs, zero full-time equivalent jobs and zero net new jobs created in the zone in 2007. It also listed gross annual wages and benefits for the zone location, 677 Nepperhan Avenue, Yonkers, New York, in the amount of \$18,200.00, capital investments in the total amount of \$525,000.00, and a QEZE real property tax credit in the amount of \$26,325.00 for the year 2007

12. In tax year 2007, Clam Realty claimed no other Empire Zone tax credits other than the QEZE credit for real property taxes in the amount of \$26,325.00.

13. On their joint New York State personal income tax return filed for the year 2007, petitioner and his wife, Michele T. Manison, reported total New York State and Yonkers nonresident taxes due in the amount of \$7,603.57, other refundable credits of \$26,325.00,

consisting of the QEZE real property tax credit from the flow-through entity, Clam Realty, and a refund due in the amount of \$18,898.00, which amount was refunded on or about October 3, 2008.

14. The Division of Taxation (Division) conducted a desk audit of the resident personal income tax return filed by petitioner and Mrs. Manison for the year 2007. During that audit, the Division reviewed the QEZE credit for real property taxes claimed by petitioner for the year 2007, and determined that the flow-through entity, Clam Realty, did not meet the annual employment test required for the QEZE credit for real property taxes. As a result, the Division denied Clam Realty's claim for a QEZE credit for real property taxes for the year 2007.

15. As a result of its audit, on June 14, 2010, the Division issued to petitioner and Mrs. Manison a Notice of Deficiency asserting tax due in the amount of \$26,324.57 for the year 2007. Pursuant to this Notice of Deficiency, the Division claimed that Clam Realty did not meet the QEZE employment increase factor because the one claimed employee, Mr. Corbett, worked for a related entity, Choice Building Supplies, within the previous 60 months and thereby denied Clam Realty's claim for a QEZE credit for real property taxes for the taxable year 2007.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

16. Petitioner maintains that he is entitled to the pass-through of the QEZE credit for real property taxes for the year 2007. He contends that the exclusion of employees that worked for a "financially related" entity within the immediately preceding 60 months from the definition of "employment number" contained in Tax Law § 14(g) does not apply to concurrent employment situations whereby the employee works concurrently for two or more related entities and as such the employment is not transferred from one entity to another. Petitioner further contends that Mr. Corbett is eligible to be included within Clam Realty's employment number and should not be

excluded because the Division is misapplying the exclusionary provision of Tax Law § 14(g)(1), which provision was added to curb the abuse of companies that reincorporated and transferred existing employees in order to maximize Empire Zone benefits (a/k/a “shirt-changers”).

17. The Division maintains that Clam Realty’s employment number for the year 2007 is zero because Mr. Corbett cannot be counted due to his previous employment within the immediately preceding 60 months by a related entity, Choice Building Supplies. The Division contends that Tax Law § 14(g) makes no distinction between concurrent employment of persons who were employed by “financially related” entities or any other related person employment situation, and to make such a “distinction reads something into the statutory language that simply does not exist.”

#### ***CONCLUSIONS OF LAW***

A. Petitioner seeks entitlement to the QEZE credit for real property taxes under Tax Law § 15, claimed by Clam Realty for the year 2007. Pursuant to Tax Law § 15(b)(1), for a QEZE certified before April 1, 2005, “the amount of credit for real property taxes shall be equal to the product of (i) the benefit period factor, (ii) the employment increase factor, and (iii) the eligible real property taxes paid or incurred by the QEZE during the taxable year.” The parties agree that Clam Realty was certified as a QEZE before April 1, 2005, and with reference to the Tax Law § 15(b)(1) criteria, neither the benefit period factor nor the eligible real property taxes paid are in dispute. The sole question presented is whether Clam Realty is entitled to a credit for real property taxes for the year 2007 based upon the calculation of the employment increase factor for such year.

B. Tax Law § 15(d) defines the term “employment increase factor” as follows:

the amount, not to exceed 1.0, which is the greater of :

(1) the excess of the QEZE's employment number in the empire zones with respect to which the QEZE is certified pursuant to article eighteen-B of the general municipal law for the taxable year, over the QEZE's test year employment number in such zones, divided by such test year employment number in such zones; or

(2) the excess of the QEZE's employment number in such zones for the taxable year over the QEZE's test year employment number in such zones, divided by 100.

(3) For purposes of paragraph one of this subdivision, where there is an excess as described in such paragraph, and where the test year employment number is zero, then the employment increase factor shall be 1.0.

C. Tax Law § 14(g)(1) defines the term "employment number" as follows:

The term 'employment number' shall mean the average number of individuals, excluding general executive officers (in case of a corporation), employed full-time by the enterprise for at least one-half of the taxable year. Such number shall be computed by determining the number of such individuals employed by the taxpayer on the thirty-first day of March, the thirtieth day of June, the thirtieth day of September and the thirty-first day of December during the applicable taxable year, adding together the number of such individuals determined to be so employed on each of such dates and dividing the sum so obtained by the number of such dates occurring within such applicable taxable year. *Such number shall not include individuals employed within the state within the immediately preceding sixty months by a related person to the QEZE, as such term 'related person' is defined in subparagraph (c) of paragraph three of subsection (b) of section four hundred sixty-five of the internal revenue code.* For this purpose, a 'related person' shall include an entity which would have qualified as a 'related person' to the QEZE if it had not been dissolved, liquidated, merged with another entity or otherwise ceased to exist or operate. (Emphasis added.)

D. The parties agree that Clam Realty's 2001 test year employment number is zero because it had no employees in 2001. Petitioner contends that Clam Realty's 2007 tax year employment number is 1.0 based upon the full-time employment of Mr. Corbett. He further contends that Clam Realty's employment increase factor in tax year 2007 is 1, based upon the following calculations: "1.0 (tax year) minus 0 (test year) = 1, which is divided by 0. This result is deemed to be 1. (*See* Tax Law § 15[d])." The Division maintains that Clam Realty's

employment number for the year 2007 is zero, and thus, there was no increase in employment. It contends that the exclusionary provision within Tax Law § 14(g)(1) disqualifies Mr. Corbett from the calculation because he was employed within the immediately preceding 60 months by Choice Building Supplies, a “related person” to Clam Realty. Petitioner argues that the exclusionary provision within Tax Law § 14(g)(1) does not apply to concurrent employment situations whereby the employee works concurrently for two or more related entities and as such the employment is not transferred from one entity to another.

E. Resolving this matter turns on the interpretation of the term “employment number” under Tax Law § 14(g)(1). Statutory rules of construction provide that “[t]he legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction” (McKinney’s Cons Laws of NY, Book 1, Statutes § 94). Where the statute is clear, the courts must follow the plain meaning of its words, and “there is no occasion for examination into extrinsic evidence to discover legislative intent . . .” (McKinney’s Cons Laws of NY, Book 1, Statutes § 120; *see Matter of Raritan Dev. Corp. v. Silva*, 91 NY2d 98, 667 NYS2d 327 [1997]; *Matter of Schein*, Tax Appeals Tribunal, November 6, 2003). Where, as here, words of a statute have a definite and precise meaning, it is not necessary to look “elsewhere in search of conjecture so as to restrict or extend that meaning” (*Matter of Erie County Agricultural Society v. Cluchey*, 40 NY2d 194, 201, 386 NYS2d 366, 369 [1976]). As the language of the statute is clear, it is appropriate to interpret its phrases in their ordinary, everyday sense (*Matter of Automatique v. Bouchard*, 97 AD2d 183, 470 NYS2d 791 [1983]).

F. The language of Tax Law § 14(g)(1) is clear and unambiguous and therefore can and should be read literally, where it states, in part, that:

Such number shall not include individuals employed within the state within the immediately preceding sixty months by a related person to the QEZE, as such term 'related person' is defined in subparagraph (c) of paragraph three of subsection (b) of section four hundred sixty-five of the internal revenue code. For this purpose, a 'related person' shall include an entity which would have qualified as a 'related person' to the QEZE if it had not been dissolved, liquidated, merged with another entity or otherwise ceased to exist or operate.

G. The plain language of this exclusionary provision within Tax Law § 14(g)(1) clearly limits the types of individuals who may be included within the "employment number." This exclusionary provision makes no distinction between an individual's concurrent employment within New York State by a related person and an individual's previous employment in New York State by a related person within the immediately preceding 60 months. There is no dispute that Mr. Corbett was hired full time by Choice Building Supplies in July of 1994 and remained employed full time by Choice Building Supplies during the 2007 tax year. There is also no dispute that Mr. Corbett was also hired full time by Clam Realty in June of 2004 and remained employed full time by Clam Realty, as its sole employee, through the entire 2007 tax year. Given Mr. Corbett's status as Clam Realty's full time employee and his concurrent employment by Choice Building Supplies, a related person, during the 2007 tax year, he must be excluded from the calculation of Clam Realty's employment number and the employment increase factor for such year. Mr. Corbett's exclusion from Clam Realty's employment number adversely affects its employment increase factor, making it zero, and its claimed credit for real property taxes for the year 2007 (*see* Tax Law § 15[b][1]). As such, the Division properly disallowed the QEZE credit for real property taxes claimed by Clam Realty for the year 2007 and ultimately passed through to petitioner for such year.

H. The petition of Carl Manison is denied, and the Notice of Deficiency dated June 14, 2010 is sustained.

DATED: Albany, New York  
January 30, 2014

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE