STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	DETERMINATION DTA NOS. 824745, 824746
ANTOINETTE, CHRISTINA AND MARY RUBINO	:	AND 824747
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2006 and 2007.	:	

Petitioners, Antoinette, Christina and Mary Rubino, filed petitions for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 2006 and 2007.

On March 11, 2013 and March 18, 2013, respectively, petitioners, appearing by Harris Beach PLLC (Robert J. Ryan, Esq.,of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by August 30, 2013, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the documents and arguments submitted, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly disallowed petitioner Mary Rubino's claims for the Empire Zone real property tax credits claimed by Trans Express Coach, Inc., for the years

2006 and 2007, on the grounds that the employees of the corporation were employed by a related entity within the immediately preceding 60 months.

II. Whether the Division of Taxation properly disallowed petitioners' claims for the Empire Zone wage tax credits claimed by Rainbow Management Services, Inc., for the years 2006 and 2007, on the grounds that employees of the corporation were not qualified employees because they did not receive wages for over half of the taxable year.

FINDINGS OF FACT

1. Rainbow Management Services, Inc. (Rainbow) was organized on May 9, 2004 as a New York S-Corporation. It is owned by petitioner Mary Rubino (70%), petitioner Antoinette Rubino (15%) and petitioner Christina Rubino (15%). Rainbow was established for insurance purposes in order to operate a charter bus service. Trans Express Coach, Inc. (Trans Coach) was organized on March 4, 1993 as a New York S-Corporation and is owned 100% by petitioner Mary Rubino. Trans Coach is a real estate holding company that was established for liability purposes to own and lease property to Trans Express, Inc., an operating entity. Trans Express was organized on September 1, 1985 as a New York S Corporation and was initially owned 97% by Mary Rubino and 3% by Antoinette Rubino. From 2002 through the tax years at issue, Trans Express was owned by Mary Rubino (70%), Antoinette Rubino (15%) and Christina Rubino (15%). Trans Express operates a contract bus transportation service. In 1997, Trans Coach acquired 150 Conover Street, Brooklyn, New York (the business location), where all three businesses are located, and leased the property to Trans Express. Petitioner Mary Rubino is the president and chief executive officer (CEO) of Rainbow, Trans Coach and Trans Express.

2. The Division of Taxation (Division) certified Trans Express and Trans Coach as Qualified Empire Zone Enterprises (QEZE) effective March 19, 1997 and August 17, 2001,

respectively. The Division certified Rainbow as a Qualified Empire Zone Enterprise effective July 1, 2004. All were certified at 150 Conover Street, Brooklyn, New York, within the South West Brooklyn zone.

3. On April 1, 1994, Eric Isaac was hired by Mary Rubino to maintain the business location. He was placed on the payroll of Trans Express. At some point, Mr. Isaac's payroll was transferred from Trans Express to Trans Coach. Mr. Isaac continued to maintain the business location until his death in 2009.

4. Following the tax year 2004, Christina Rubino was transferred from the payroll of Trans Express to the payroll of Trans Coach.

5. On May 9, 2005, a new employee, Raimon Allenye, was hired to perform facility maintenance services at the business location and was placed on the payroll of Trans Express. In addition, another new employee, Leticia Cabantug, was hired on October 16, 2005 to perform bookkeeping services. Ms. Cabantug was included on the payroll of Trans Express.

6. Rainbow operated a charter bus service for the entire year, with quarterly revenue as follows for the years at issue:

	First	Second	Third	Fourth
2006	$997,516.88	$1,420,615.91	$1,248,185.02	$1,005,557.55
2007	$891,865.66	$1,254,360.55	$1,340,731.88	$1,134,655.85

Rainbow's quarterly fuel purchases for the years at issue were as follows:

	First	Second	Third	Fourth
2006	$85,915.15	$121,871.78	$113,086.17	$84,843.47
2007	$69,828.86	$106,406.27	$115,979.67	$122,267.83

7. For each of the tax years 2006 and 2007, petitioner Mary Rubino claimed Empire Zone real property tax credits under Tax Law § 15 by virtue of her 100% ownership of Trans Coach.

8. For each of the tax years, 2006 and 2007, all three petitioners claimed Empire Zone wage tax credits under Tax Law § 606(k) and Empire Zone real property tax credits under Tax Law § 15 by virtue of their respective ownership interests in Rainbow.

9. Following its review of petitioners' tax returns for the years 2006 and 2007, the Division disallowed the Empire Zone real property tax credits claimed by Mary Rubino through her ownership of Trans Coach after it determined that Trans Coach did not satisfy the employment increase factor because several of the claimed employees were previously on the payroll of Trans Express, a related entity.

10. In addition, the Division disallowed the Empire Zone wage tax credits claimed by each petitioner through Rainbow because it concluded that Rainbow did not qualify for such credits. The reason provided by the Division for that determination was that several of Rainbow's employees were not qualified employees for purposes of the Empire Zone wage tax credit because they had not received wages for over half of the taxable year.

11. Finally, the Division disallowed the portion of the Empire Zone real property tax credits claimed by the three petitioners through Rainbow because the entity did not own the property subject to the claim, and it had not been established that Rainbow was liable for the real estate taxes paid.[1]

12. The Division issued a Notice of Deficiency to petitioner Antoinette Rubino dated April 8, 2010, asserting personal income tax due in the aggregate amount of $2,007.30, plus

[1] Petitioners do not contest the Division's disallowance of the Empire Zone real property tax credits claimed through Rainbow.

interest, for 2006. On the same date, the Division issued a second Notice of Deficiency to petitioner Antoinette Rubino asserting personal income tax due in the amount of $1,308.45, plus interest, for 2007.

13. The Division issued a Notice of Deficiency to petitioner Christina Rubino dated April 8, 2010, asserting personal income tax due in the amount of $1,781.05, plus interest, for 2006. On the same date, the Division issued a second Notice of Deficiency to petitioner Christina Rubino asserting personal income tax due in the amount of $2,004.20, plus interest, for 2007.

14. The Division issued a Notice of Deficiency to petitioner Mary Rubino dated April 15, 2010, asserting personal income tax due in the amount of $29,535.04 plus interest for 2006. On the same date, the Division issued a second Notice of Deficiency to petitioner Mary Rubino asserting personal income tax due in the aggregate amount of $24,578.62 plus interest for 2007.

SUMMARY OF THE PARTIES' POSITIONS

15. Petitioners contend that Eric Isaac was placed on the payroll of Trans Express for administrative ease as Trans Coach was not maintaining a payroll system at such time. According to petitioners, at all times, including the years at issue, Mary Rubino directed and controlled the work performed by Mr. Isaac, which consisted of general ground and building maintenance and repair. Under these circumstances, and regardless of the fact that Trans Express maintained Mr. Isaac's payroll, Mr. Isaac was an employee of Trans Coach. In addition, petitioners contend that Mr. Isaac's payroll was transferred from Trans Express to Trans Coach on November 23, 2001, and falls outside the 60 month period prior to tax year 2007.

16. Petitioners further contend that Christina Rubino and Leticia Cabatung were concurrently employed by and performed management and administrative functions for Rainbow, Trans Coach and Trans Express. According to petitioners, the transfer of Christina Rubino's

payroll from Trans Express to Trans Coach was made to create a clearer distinction between employee and owner as Christina Rubino had no ownership interest in Trans Coach. As a result, Ms. Christina Rubino and Ms. Cabatung were employed concurrently by Rainbow, Trans Coach and Trans Express pursuant to a common paymaster relationship.

17. Petitioners assert that, at all times, including the years at issue, Mary Rubino directed and controlled the work performed by Mr. Alleyne, which consisted of general ground and building maintenance and repair and he was therefore employed by Trans Coach.

18. Petitioners contend that Rainbow is properly considered a seasonal employer as its sales are greatly impacted by seasonal demands.

19. In sum, petitioners' position is that: (I) Mr. Isaac and Mr. Allenye were actually employees of Trans Coach regardless of the fact that their payrolls were maintained by Trans Express; (ii) the exclusion of employees that worked for a related person within the immediately preceding 60 months as provided in the statutory definition of employment number in Tax Law § 14(g) does not apply to concurrent employment situations such as a common paymaster; and (iii) Rainbow was a seasonal business and its employees qualify as full-time based upon at least three months continuous duration.

20. The Division contends that Mr. Isaac and Mr. Allenye were employed by Trans Express until 2004 and 2007, respectively. In addition, the Division contends that Ms. Christina Rubino and Ms. Cabantung were employed by Trans Express through 2005 and 2007, respectively.

21. The Division further contends that Rainbow operated during all four quarters of the taxable years in question and therefore does not qualify as a seasonal business. As certain

employees did not receive wages for more than half the year, they cannot be considered full-time employees.

22. In sum, it is the position of the Division that Trans Coach "failed to meet the employment increase factor" and therefore failed to qualify for the Empire Zone real property tax credits claimed for the years 2006 and 2007 because certain of its employees were employed by a related entity within the immediately preceding 60 months. Furthermore, the Division contends that Rainbow "failed to meet the employment increase factor" and therefore failed to qualify for the Empire Zone wage tax credits claimed for the years 2006 and 2007 because certain of Rainbow's employees received wages for less than six months of the tax years in issue.

CONCLUSIONS OF LAW

A. Petitioner Mary Rubino seeks entitlement to the Empire Zone real property tax credits under Tax Law §§ 15 and 606(bb), which are claimed by Trans Coach, for the years 2006 and 2007. Such credits are available to New York S corporation shareholders through Tax Law § 606(I). As the sole shareholder of Trans Coach, Mary Rubino was entitled to claim 100 percent of that S corporation's credit base.

B. New York Tax Law § 15 allows for a credit against corporate and personal income taxes for a QEZE for eligible real property taxes. Tax Law § 15(b) provides that the amount of the credit shall be the product of the benefit period factor, the employment increase factor and the eligible real property taxes paid or incurred by the QEZE during the taxable year. Under Tax Law § 15(b)(1), for a QEZE certified before April 1, 2005, "the amount of the real property tax credit 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 Trans Coach 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 narrow question presented is whether Trans Coach is entitled to any Empire Zone real property tax credits based upon the calculation of the employment increase factor pursuant to Tax Law § 15(d).

C. Pursuant to Tax Law § 15(d), the term "employment increase factor" is defined as:

> 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.

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

> The term "employment number" shall mean the average number of individuals, excluding general executive officers (in the case of a corporation), employed full-time by the enterprise for at least one-half of the 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).

E. Section 465(b)(3)(C) of the Internal Revenue Code (IRC) provides, in part, that "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) . . . ." IRC § 267(b)(11) defines related persons as "[a]n S corporation and another S corporation if the same persons own more than 50 percent in value of the outstanding stock of each corporation. . . ."

F. A tax credit is a particularized species of exemption from tax (***Matter of New York Fuel Terminal Corp.***, Tax Appeals Tribunal, August 27, 1998). Statutes creating exemptions from tax are to be strictly construed (***see Matter of Grace v. New York State Tax Commn***., 37 NY2d 193, 371 NYS2d 715 [1975], ***lv denied*** 37 NY2d 708, 375 NYS2d 1027 [1975]; ***Matter of Blue Spruce Farms v. New York State Tax Commn***., 99 AD2d 867, 472 NYS2d 744 [1984], ***affd*** 64 NY2d 682, 485 NYS2d 526 [1984]). In addition, the statutory language providing the exemption must be construed in a practical fashion with deference to the legislative intent behind the exemption (***see Majewski v. Broadalbin-Perth Cent. School Dist***., 91 NY2d 577, 673 NYS2d 966 [1998]; ***Matter of Qualex, Inc***., Tax Appeals Tribunal, February 23, 1995). To determine legislative intent, courts must first look at the literal reading of the act itself (***see*** McKinney's Cons Laws of NY, Book 1, Statutes § 92).

G. 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, 386 NYS2d 366 [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]).

H. In order to calculate the employment increase factor under Tax Law § 15(d), it is necessary to know both the QEZE's employment number for the taxable year as well as the QEZE's test year employment number. The test year is the last taxable year of the business enterprise ending before the test date, or if the enterprise does not have such a taxable year, then it shall be deemed to have a test year consisting of either the last calendar year or the last fiscal year ending on or before the test date (Tax Law § 14[d]). The test date is, generally, the date the business enterprise was first certified under Article 18-B of the General Municipal Law (Tax Law § 14[e]). Therefore, Trans Coach's test year is 2000 and the test year employment number is zero. The only remaining question is how to identify Trans Coach's employment number for the tax years in issue.

I. Trans Express and Trans Coach were related persons as defined in Internal Revenue Code § 465(b)(3)(c) and therefore related persons for purposes of Tax Law § 15(d) because Mary Rubino owned 70 percent of the stock of Trans Express and 100 percent of the stock of Trans Coach.

J. The deficiency issued to Mary Rubino is premised, in part, on the Division's determination that several individuals (Mr. Isaac, Mr. Alleyn, Ms. Cabatung and Ms. Christina Rubino) are not properly includable in Trans Coach's employment number for the years at issue because they were employed by Trans Express, a related person, within the immediately preceding 60 months. The disallowance of these employees reduced Trans Coach's reported

employment number for the years 2006 and 2007 to zero, thereby reducing Trans Coach's employment increase factor for 2006 and 2007 to zero. As the employment increase factor is one of the three factors multiplied to compute the Empire Zone real property tax credit, a zero employment increase factor necessarily results in zero credit.

K. Mary Rubino's position is based on the allegation that certain of the individuals involved (Mr. Isaac and Mr. Alleyne) were actually employed by Trans Coach and not Trans Express despite the fact that their payrolls were maintained by Trans Express; that certain of the individuals involved (Ms. Christina Rubino and Ms. Cabantung) were concurrently employed; or the corporations used a common paymaster. Mary Rubino attempted to establish these arrangements through the introduction into the record of the affidavits of Mary Rubino, Christina Rubino, Raimon Alleyn and Leticia Cabantung, all dated in May 2013. However, given the lack of contemporaneous and corroborating evidence, the affidavits are insufficient to establish that such arrangements existed. As a result, Mary Rubino is not entitled to the Empire Zone real property tax credits claimed.

Mary Rubino's position is initially frustrated by the lack of any contemporaneous documentation in support of her factual claims. It is further undermined by the use of affidavits to provide the factual basis for these claims. There is no question that competent evidence can be submitted by affidavit, as authorized by the Tax Appeal Tribunal's regulations (20 NYCRR 3000.15[d][1]), and findings of fact may be made on the basis of affidavits (***see Matter of Orvis Co. V. Tax Appeals Tribunal***, 86 NY2d 165 [1995], ***cert denied*** 516 US 989 [1995]). However, the presentation of essential facts through the introduction of affidavits denies the trier of fact the opportunity to observe and evaluate the affiants' credibility and to have their assertions tested by cross examination. It also precludes the opportunity to question the affiants concerning matters

not addressed in the affidavits. In sum, Mary Rubino has failed to establish the facts necessary to be entitled to the Empire Zone real property tax credits claimed.

L. In addition, petitioners Antoinette, Christina and Mary Rubino seek a refund of the Empire Zone wage tax credit provided under Tax Law § 606(k), which are claimed by Rainbow for the years 2006 and 2007. Pursuant to Tax Law § 606(I), New York S corporation shareholders may claim a credit against personal income tax with respect to the credits enumerated in that subsection in an amount equal to the shareholder's pro rata share of the S corporation's credit base. The Empire Zone wage tax credit is among the credits listed in subsection (I). Tax Law § 606(k) provides for an Empire Zone wage tax credit against personal income tax "as hereinafter provided" where, as in the present matter, the taxpayer has been certified as a QEZE pursuant to Article 18-B of the General Municipal Law. Empire zone wages are wages paid by the taxpayer for full-time employment for more than half of the taxable year (Tax Law § 606[k][2], [4][i][I]). A "seasonal job" consisting of at least 35 hours per week "qualifies as a full-time employment position if such job is of at least three months continuous duration" (20 NYCRR 5-9.3[c]). It is undisputed that certain employees of Rainbow were full-time employees for less than a six-month period. The only issue to be determined herein is whether Rainbow may be considered a "seasonal business" and its employees seasonal in nature such that their full-time employment for at least three months continuous duration meets the eligibility requirements of Tax Law § 606(k)(4)(i)(I).

M. Tax Law § 606(k)(4)(i)(I) clearly states that empire zone wages are wages paid by the taxpayer for full-time employment for more than half of the taxable year. The regulations provide for an exception to this requirement where the wages are paid for full-time employment for at least three months continuous duration for seasonal employment. Although not defined in

either the Tax Law or the regulations, the instructions to the claim for QEZE tax reduction, form IT-604, describes a "seasonal business" as a business that regularly operates for less than an entire year. It is well established that the interpretation given to a statute by the agency authorized with its enforcement should generally be given weight and judicial deference if the interpretation is not irrational, unreasonable or inconsistent with the statute (***Matter of Trump-Equitable Fifth Avenue Co. v. Gliedman***, 62 NY2d 539, 478 NYS2d 846 [1984]).

N. Petitioners readily admit that during the years at issue, Rainbow operated for the entire year. Petitioners initially argue, however, that as a charter bus company, Rainbow's sales were greatly impacted by the seasons. Petitioners maintain that Rainbow's peak season is the second quarter of each year, and that its revenues drop 33% in the third quarter, 66% in the fourth quarter and 45% in the first quarter. According to petitioners, for one-half of any given year, Rainbow would have been operating at approximately one third to one half of its peak capacity. As a result, its employment was impacted by the operational requirements and Rainbow should be considered a "seasonal business" for purposes of the Empire Zone wage tax credit.

Initially, it is noted that Rainbow's revenue figures (***see*** Finding of Fact 6), as supplied by petitioners, do not support the percentages claimed. For 2006, and using the second quarter as peak capacity, Rainbow's revenues in the third, fourth and first quarters were approximately 88%, 71% and 70% of peak capacity, respectively. For 2007, the third quarter was the highest, and Rainbow's revenues in the fourth, first and second quarters were approximately 85%, 67% and 94% of peak capacity, respectively.

O. A taxpayer challenging the statutory interpretation of an administrative agency bears a heavy burden of proof.

> "As a general rule, 'the construction given statutes . . . by the agency responsible for their administration, if not irrational or unreasonable, should be upheld'" (citations omitted) (***Matter of Brooklyn Assembly Halls of Jehovah's Witnesses, Inc. v Department of Envtl. Protection of City of N.Y.***, 11 NY3d 327, 334 [2008]).

Therefore, in order to prevail, petitioners must establish either that the Division's interpretation is unreasonable or that their interpretation is the only reasonable one (***see e.g. Matter of County of Albany v Hudson River-Black Riv. Regulating Dist***., 97 AD3d 61 [3d Dept 2012]; ***see also Samiento v World Yacht Inc.***, 10 NY3d 70 [2008]).

Petitioners contend that its employment is logically impacted by the disparity in operational requirements throughout a particular year. However, this argument could be applied to almost all businesses that operate throughout the year. Most businesses are impacted not only by the change of seasons, but also by certain holiday seasons as well. To accept petitioners' interpretation would eliminate that portion of the statute that requires employment to be full-time employment for more than half of the taxable year.[2]

P. Petitioners have failed to establish that the Division unreasonably interpreted this statute. The parties' interpretations differ based on the meaning of the term "seasonal." The Division has interpreted this term as creating the requirement that for a business to be considered "seasonal," the business must operate for less than an entire year. This interpretation is clearly reasonable and consistent with the statute.

Petitioners failed to adduce any evidence proving that the Division's interpretation was unreasonable, given the clear language of the statute. Further, in light of such language,

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[2] Petitioners' interpretation seeks to eliminate the requirement that employers must pay wages to full-time employees for more than half of the taxable year from the statute (Tax Law § 606[k][2], [4][i][I]). This construction would permit an entity operating throughout the year to eliminate full-time employees from their payroll based upon seasonal fluctuations in income. This result is clearly incompatible with both the statutory language and legislative intent of the Empire Zones Program.

petitioners' interpretation leads to a result that is "out of harmony with or inconsistent with the plain meaning of the statutory language" (***Matter of Trump-Equitable Fifth Ave. Co. v Gliedman***, 57 NY2d 588, 595 [1982]). Accordingly, petitioners' interpretation of Tax Law § 606(k)(4)(i)(I) and 20 NYCRR 5-9.3[c] is rejected, and therefore, Rainbow cannot be considered a seasonal business for purposes of Tax Law § 606(k)(4)(i)(I).

Q. The petitions of Antoinette, Christina, and Mary Rubino are denied, and the notices of deficiency, dated April 8, 2010 issued to Antoinette and Christina Rubin and dated April 15, 2010 issued to Mary Rubino, are sustained.

DATED: Albany, New York
February 27, 2014

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE