STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

MICHAEL AND ANDREA LEEDS :

for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2007. :

In the Matter of the Petition :

of : DETERMINATION
DTA NOS. 824986, 824987,

MICHAEL AND LEE DUBB : 824988 AND 824989

for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2006 and 2007. :

In the Matter of the Petition :

of :

LESLIE AND FAITH LERNER :

for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2006. :

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
ALVIN (DECEASED) AND DEBORAH BENJAMIN	:
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2006 and 2007.	:

Petitioners Michael and Andrea Leeds 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. Petitioners Michael and Lee Dubb filed a petition 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 Leslie and Faith Lerner 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 2006. Petitioners Alvin (deceased)[1] and Deborah Benjamin filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 2006 and 2007.

A consolidated hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, in Albany, New York, on November 1, 2013 at 10:30 A.M. All briefs were due by July 18, 2014,

[1]Although Alvin Benjamin was living at the time the 2006 and 2007 New York tax returns were filed, he passed away prior to the hearing and his estate has appointed Mr. Tenzer and Ms. Goldman as its representatives in this matter through a power of attorney executed on September 4, 2013.

which date began the six-month period for the issuance of this determination. Petitioners appeared by James Tenzer, Esq., and Lisa S. Goldman, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly modified the qualified empire zone enterprise (QEZE) refundable tax credits claimed by Benjamin Beechwood LLC and Courthouse Corporate Center LLC, thus reducing the credit claimed by petitioners on their respective personal income tax returns for the years 2006 and 2007, resulting in additional tax due.

FINDINGS OF FACT

Following the hearing, the parties entered into a stipulation that addressed an issue regarding the Division of Taxation's (Division) modification of petitioners' empire zone enterprise nonrefundable wage tax credits. The additional personal income tax that resulted from the modifications was included on the notices of deficiency in issue in this matter. By the terms of the stipulation, petitioners agreed that the amounts pertaining to the nonrefundable wage tax credits included in the notices in this matter are not being disputed and are not in issue. The parties have set forth the notice numbers and nonrefundable wage tax credit amounts for each year and petitioner as set forth below.

TAX YEAR 2006	NOTICE NUMBER	IT-601 AMOUNT
BENJAMIN	L-034614025	$11,437.00
DUBB	L-034657305	$4,452.00
LERNER	L-034657304	$698.00
LEEDS	None	no claim made

TAX YEAR 2007	NOTICE NUMBER	IT-601 AMOUNT
BENJAMIN	L-034687731	$11,500.00
DUBB	L-034687730	$2,600.00
LERNER	None	no claim
LEEDS	L-034687732[2]	$325.00

1. Each of the petitioners herein[3] had an interest in one or more partnerships that claimed QEZE tax credits during the years 2006 and 2007 (collectively, years in issue).

2. Alvin Benjamin held a 100 percent interest in Arlen Apartments, Inc., which owned a two-percent interest in Courthouse Corporate Center LLC (CCC). Mr. Benjamin also held a 98-percent interest in CCC, giving him a 100-percent controlling interest. Mr. Benjamin also held a 100-percent interest in Arlen Contracting Company of Central Islip, Inc., and Arlen Maintenance Corp.

3. In tax years 2006 and 2007, Mr. Benjamin owned a 99-percent direct interest in Benjamin Arverne LLC, which, together with the 1 percent interest owned by Arlen Apartments, Inc. in Benjamin Arverne LLC, gave him a 100-percent undivided interest in Benjamin Arverne LLC. Benjamin Arverne LLC owned a 50-percent interest in Benjamin Beechwood LLC (BBLLC), which made the majority of the claims for the QEZE refundable tax credits herein.

4. In tax year 2006, the remaining 50 percent ownership in BBLLC was owned by Beechwood Arverne Bldg. Corp., in which petitioner Mr. Leeds owned a 10-percent interest,

[2]The stipulation erroneously listed the notice number as L-03468773.

[3]Only the male spouses owned partnership interests. However, the notices were issued to both spouses based on the jointly filed returns.

petitioner Mr. Dubb owned a 69.1507-percent interest, petitioner Mr. Lerner owned a 10.8493-interest, and a nonpetitioner, Richard Rosenberg, owned a 10-percent interest.

5. In 2007, Beechwood Arverne Bldg. Corp. was owned by only three individuals with the following interests: Mr. Leeds, 10 percent; Mr. Dubb, 80 percent; and Mr. Rosenberg, 10 percent.

6. BBLLC was the sponsor of the project to develop, in phases, an area in Rockaway, Queens, known as the Arverne-By-The-Sea (Arverne). The project was located in Far Rockaway, Queens, New York, within a QEZE zone, and was scheduled to be completed in phases over many years. When complete, Arverne, a 127-acre site, was to consist of a self-contained neighborhood that included 2,300 homes, a retail center, a school, a 30,000 square foot community center and a transportation hub.

7. During the years 2006 and 2007, BBLLC was a qualified QEZE, having been issued a certificate of eligibility by New York State on December 4, 2002. On its New York partnership returns filed for the years in issue, it stated that it had no employees, either during the current year or in its test year. Further, its wage reporting profile was deactivated in 2002, indicating that there were no further reports that BBLLC had employees after that time. In a letter responding to an information request by the Division, received from the Benjamins' accounting firm, Raich Ende Malter Co. LLP, dated August 19, 2010, it was stated that BBLLC had no employees.

8. BBLLC utilized a related entity, Rockaway Beach Boulevard Construction Co. LLC (RBBC) to carry out many aspects of a general contractor on its behalf. RBBC was a licensed general contractor that had two partners, each owning a 50-percent interest in the LLC: Beechwood Arverne Building Corp. LLC, comprised of Michael Leeds, Michael Dubb, Leslie

Lerner and Richard Rosenberg, and Benjamin Arverne LLC, comprised of Alvin Benjamin and Arlen Apartments, a 100 percent-owned company of Alvin Benjamin. Thus, BBLLC and RBBC had the same owners with the same percentages of ownership.

9. RBBC was issued a QEZE certificate of eligibility on December 4, 2002. For both years in issue it claimed QEZE wage tax credits based upon its own employees for which it administered the payroll.

10. RBBC received most of its cash receipts from BBLLC, which funds were then used to pay its employees and subcontractors. RBBC also provided advisory services, which yielded a minimal profit for the partnership. BBLLC received funding from three sources: capital contributions from partners, bank loans, and unit sales. It utilized money from these sources to fund the operations of RBBC.

11. The Arverne project was managed and developed by several related partnerships and companies. Gerard Romski, Esq., provided background on the project. Mr. Romski was a lawyer by training who had previously worked for the New York City Law Department in its real estate litigation and development division, overseeing development projects. He then practiced law privately, specializing in real estate construction litigation, and met Michael Dubb, one of the petitioners herein. He gained a wide and deep knowledge of large-scale development projects and was also familiar with the Empire Zone program. He was appointed to the Dormitory Authority, the Sandy Resiliency Task Force and several other task forces.

In 2006 and 2007, Mr. Romski was the project executive counsel for BBLLC, monitoring the construction of the phases, legal matters and sales. He had authority to sign legal documents on the partnership's behalf. In demonstrating how the various related partnerships disregarded

their independent identities, he explained that it was typical for a related entity like Benjamin Beechwood 81st LLC to file a requisition for bank loan funds for a particular phase that would then be deposited into the account of RBBC. The sponsor and its related entities as well as the banks with which they dealt treated the different partnerships and companies as interchangeable for purposes of financing, apparently due to the same partners owning all of the partnerships.

12. Mr. Romski explained that RBBC was created as the general contracting arm of the sponsor and that it held a general contracting license as required by New York City regulations. He maintained that he directed the operations of RBBC from his position with BBLLC, which he believed was the only manner in which multiple phases could be managed simultaneously. Mr. Romski stated that it was an administrative convenience to take all of the payrolls for the various phases, the costs, and expenses attendant thereto and have them paid by RBBC. However, the record contains no contemporaneous evidence of the purported employer/employee relationship between BBLLC and RBBC. During the audit years, it was the practice of RBBC to hire one in every four employees from the local communities, helping to decrease local unemployment. In addition to those individuals hired by RBBC, the business growth in the area, such as the Stop and Shop, the YMCA and the retail transit plaza, also contributed to the lower unemployment.

13. BBLLC and the City of New York, through its Department of Housing Preservation and Development, entered into a land disposition agreement (LDA) by which the City, in order to encourage development of deteriorated properties and promote affordable housing, agreed to transfer property to BBLLC in phases and under strict provisions to ensure the proper and timely development of the project. One of the provisions applicable herein addressed the situation where the sponsor was a limited liability company. Specifically, BBLLC was prohibited from

dissolving, merging with another entity, permitting any managing member to withdraw, substituting any managing member, distributing capital to a managing member (even upon dissolution), and assigning, mortgaging or transfering any interest in property acquired under the LDA, without the prior consent of the City's Department of Housing Preservation and Development.

14. CCC, 100 percent controlled by Alvin Benjamin, was a qualified QEZE in the Islip Empire Zone as of July 11, 2000. CCC claimed QEZE credits for the years 2006 and 2007 that were passed through to the personal income tax returns of petitioners Alvin and Deborah Benjamin. However, upon examination, the Division determined that CCC had not satisfied the employment increase factor necessary to earn said credit.

15. With respect to petitioners Alvin and Deborah Benjamin, the Division performed an examination of their amended 2006 personal income tax return that revealed that the QEZE real property tax credit from the pass through entity, CCC, was invalid because the employees used to satisfy the employment number were employed by related entities within the preceding five years. The credit claimed was denied in full in the sum of $104,622.00. In addition, a review of the BBLLC return for the year 2006 revealed that the employment increase factor had been erroneously calculated and resulted in a denial of the credit claimed in the sum of $35,324.00. As a result, the Division issued a Notice of Deficiency for 2006, dated September 30, 2010, that asserted additional personal income tax due from petitioners Alvin and Deborah Benjamin in the sum of $151,382.53 plus interest.

A review of the 2007 personal income tax return filed by petitioners Alvin and Deborah Benjamin concluded that the same errors were made with regard to the calculation of QEZE

credits as had been made in 2006. The Division disallowed all of the credit claimed by CCC in the sum of $104,622.00 and $137,882.00 claimed by BBLLC. The Division issued a Notice of Deficiency for 2007, dated October 8, 2010, that asserted additional personal income tax due from petitioners Alvin and Deborah Benjamin in the sum of $254,044.40 plus interest.

For both 2006 and 2007, the parties do not dispute that CCC used an employee who had been employed by a related party in the 60 months immediately preceding the years in issue.

16. With respect to petitioners Michael and Andrea Leeds, the Division issued them a Notice of Deficiency for the year 2007, dated October 8, 2010, which asserted additional personal income tax due of $11,926.09 plus interest. The Division's explanation for the deficiency was that there were errors made in the calculation of the employment number for the Empire Zone tax credits claimed for RBBC and BBLLC.

17. With respect to petitioners Leslie and Faith Lerner, the Division issued them a Notice of Deficiency for the year 2006, dated October 4, 2010, which asserted additional personal income tax due of $4,528.59 plus interest. The Division's explanation for the deficiency was that there were errors made in the calculation of the employment number for the Empire Zone tax credits claimed for RBBC and BBLLC.

18. With respect to petitioners Michael and Lee Dubb, the Division issued them a Notice of Deficiency for the year 2006, dated October 4, 2010, which asserted additional personal income tax due of $4,452.00 plus interest. The Division's explanation for the deficiency was that there were errors made in the calculation of the employment increase factor for the Empire Zone tax credits claimed for BBLLC and in the calculation of the employment number for RBBC and BBLLC.

For the year 2007, the Division issued petitioners Michael and Lee Dubb a Notice of Deficiency, dated October 8, 2010, which asserted additional personal income tax due in the sum of $112,906.18 plus interest. The Division's explanation for the deficiency was that there were errors made in the calculation of the employment increase factor for the Empire Zone tax credits claimed for BBLLC and in the calculation of the employment number for RBBC and BBLLC.

SUMMARY OF THE PARTIES' POSITIONS

19. With respect to petitioners Alvin and Deborah Benjamin only, petitioners argue that because CCC became eligible to receive QEZE benefits in 2000, and the Tax Law in effect at that time contained no restrictions on employees previously employed by related companies, they should qualify for the benefits. Petitioners believe that they have the right to rely on the Tax Laws in effect at the time they qualified for QEZE benefits and that no subsequent amendments should apply to them and argue that application of any amendment to them is an unauthorized and improper retroactive application, constituting a violation of their due process rights.

Further, petitioners contend that real estate entities are unique in that they do not maintain employees after the completion of a project, and therefore, the related party rule should not apply to them.

20. With regard to all petitioners, there were several arguments proffered as to why the employment test was met. Petitioners urge that Arverne was a huge project that demanded the creation and use of multiple "brother-sister" entities, to perform discrete functions. This included BBLLC using RBBC to administer payroll, pay its project costs and expenses and supply the employees who provided construction services. Petitioners note that BBLLC set forth wages and costs on its income tax returns, since the labor and construction costs were capitalized

on Schedule A. Therefore, petitioners believed that allowing BBLLC to use the employment numbers of RBBC was proper and consistent with the goals and purposes of the Empire Zone Program.

Petitioners argue that the LDA lends support to their position that all the entities involved in the Arverne project are a single entity, ultimately controlled by the same individuals. Therefore, when BBLLC used RBBC for personnel purposes and reported it as its own operations, RBBC was merely operating as BBLLC's disbursing agent in an integrated enterprise.

Petitioners believe that BBLLC and RBBC comprise a single enterprise under the General Municipal Law and as such BBLLC may claim RBBC's employees as its own. In addition, petitioners note that they believe the employees were common law employees as that term has been interpreted under the Internal Revenue Code (IRC).

21. The Division maintains that BBLLC had no employees during its test year and the years in issue (the taxable years) and deactivated its wage reporting profile in 2002, demonstrating that it had no right to claim the QEZE real property tax credit.

22. The Division doubts that Mr. Romski planned and coordinated the daily functions of the tradesmen that worked for RBBC from his position as project counsel at BBLLC, challenging petitioners' argument that the 40 to 60 employees of RBBC were under the direction and control of BBLLC. The Division points out that the RBBC payroll reflected between 40 and 60 employees during the years in issue, each of whom received his form W-2 from RBBC, indicating that they were not employees of BBLLC. The Division also notes that there exists no

contemporaneous documentary evidence of direction and control of the RBBC employees by BBLLC.

23. The Division contends that there is no provision in the Tax Law that would recognize RBBC and BBLLC as a single enterprise based on ownership, which would permit the two enterprises to combine employees to qualify for the QEZE credit in issue.

24. With regard to the issue of petitioners Alvin and Deborah Benjamin, the Division argues that the amendment of Tax Law § 14(g)(1) in 2002 concerning the exclusion of individuals employed by a related person within the immediately preceding 60 months, was not retroactive but effective for 2002 and subsequent years. Since the years in issue were 2006 and 2007, any claim of retroactive application is without merit.

CONCLUSIONS OF LAW

A. Petitioners Alvin and Deborah Benjamin have not established entitlement to the QEZE real property tax credit with respect to their interest in CCC for the years 2006 and 2007. For both of these years, the Division determined that CCC did not pass the employment test. That test, set forth in Tax Law § 14(b), states that a business enterprise will meet the requirement if the business's employment number in all Empire Zones for the taxable year equals or exceeds its employment number in all Empire Zones for the base period and the employment number in New York State outside of the Empire Zones for the taxable year equals or exceeds its employment number in the State outside of the Empire Zones for the base period.

The Division discovered that CCC used an employee to pass the employment test that was previously employed by Arlen Contracting Company of Central Islip, Inc., 100 percent owned by Alvin Benjamin. However, for purposes of the employment test, for taxable years beginning on

or after January 1, 2002, the employment number for the taxable year and the base period does not include individuals employed within the immediately preceding 60 months by a related person to the QEZE (TSB-M-03[4]C). The term related person is defined by IRC § 267(b)(10) and includes a corporation and a partnership if the same persons own more than 50 percent in value of the outstanding stock of the corporation and more than 50 percent of the capital interest in the partnership. Here, Alvin Benjamin owned a 100 percent interest in CCC and Arlen Contracting Company of Central Islip, Inc.

Since the challenged employee was an employee of Arlen Contracting Company of Central Islip, Inc., in the 60 months immediately prior to the years in issue he was disqualified from use in the employment test numbers and, as a result, petitioners Alvin and Deborah Benjamin were not entitled to the QEZE real property tax credit through CCC.

B. Petitioners raise the argument that when CCC was certified as a QEZE in 2000, the employment test contained in Tax Law § 14(b) did not contain any restriction on the use of individuals from related persons in calculating the employment numbers in taxable years or base period. Since certification was granted for a period of 15 years (Tax Law § 14[a][1]), petitioners argue that they had the right to rely on the statutory language in effect as of date of CCC's certification as a QEZE and continuing until that certification expired. Petitioners reason that to make them subject to any amendment of the Tax Law is an invalid retroactive application of the statute and a violation of their constitutional due process rights.

Initially, it is concluded that the legislation petitioners seek to demonstrate brought them harm retroactively was not retroactive by the clear terms of the statute itself (L 2002, ch 85 § 10). The legislation was effective as of January 1, 2001 and the related person exclusion only applied

to taxable years on or after January 1, 2002 (L 2002, ch 85 § 10). "As a general rule, statutes are to be construed as prospective in operation only, and they are not to receive a retroactive construction" (McKinney's Cons Laws of NY, Book 1,Statutes § 51[b]).

Although petitioners believe that CCC's QEZE certification entitled them to the same benefits that were in effect at the time they qualified in July 2000 for the following 15 years, this simply is not the case. CCC's QEZE eligibility merely made it eligible to receive the benefits referred to in General Municipal Law § 966, including real property tax credits. CCC's entitlement to benefits has nothing to do with the administration of the Empire Zone program or the Legislature's prerogative to modify the requirements for obtaining those benefits on a prospective basis.

Even if the amendment to Tax Law § 14(g) were to be construed as retroactive, in general, retroactive application of a statute has been viewed by the courts with disfavor and distrust (***James Sq. Assoc. LP v. Mullen***, 21 NY3d 233, 246 [2013]; ***Caprio v. New York State Dept of Taxation and Fin.***, 117 AD3d 168 [2014]). Nevertheless, retroactivity has been permitted with respect to tax statutes unless the nature of the tax and the attendant circumstances render the imposition of the law so harsh and oppressive as to pass beyond constitutional boundaries (***Matter of Replan Dev. v. Department of Hous. Preserv. & Dev. of City of N.Y.***, 70 NY2d 451, 455 [1987] ***lv dismissed***, 485 US 950 [1988]).[4] That was not the case here and petitioners suffered no abridgment of their constitutional due process rights.

[4] Since the nature of the challenge pertains to the constitutionality of the statute as applied, the issue may be resolved in this forum (***see Matter of Brussel***, Tax Appeals Tribunal, June 25, 1992; ***Matter of Fourth Day Enters.***, Tax Appeals Tribunal, October 27, 1988).

In this matter, unlike in ***James Sq. Assoc. LP v. Mullen*** (21 NY3d at 246 [where a taxpayer was subject to decertification as a QEZE based on the retroactive application of a statute that specifically applied to prior tax years]), petitioners had the opportunity to know what the law would be after the enactment and conform their conduct accordingly. (***Landgraf v. USI Film Products***, 511 US 244, 265 [1994].) As such, petitioners were on notice of the change and could have remedied the problem and continued receiving their credits. However, failing any remedial action, the Division was correct in denying the credits under the circumstances presented, concluding that counting an employee who had been shifted from one commonly held business to another frustrates a primary legislative goal of the QEZE program: the hiring of new employees by new entities.

C. Petitioners' argument that the related person rule should not apply to real estate entities draws no support from statutory or case law, and none was cited. As the Division correctly notes, if the Legislature had intended stand-alone real estate entities to be shielded from the related person 60 month rule, it would have provided for it. (McKinney's Cons Laws of NY, Book 1, Statutes § 94.)

D. The Legislature passed the Empire Zones legislation in order to incentivize economic growth and new job creation (***see*** General Municipal Law § 956; ***Matter of Hucko Trust***, Tax Appeals Tribunal, September 19, 2013). The legislation provided certain tax benefits in the form of credits to QEZEs. In this case, petitioners, as flow-through recipients, claim the QEZE real property tax credit pursuant to Tax Law §§ 15 and 606(bb). The credit is based upon a formula that calculates increases in employment utilizing an employment increase factor. The formula

compares a business's "employment number" in a test year against its "employment number" in the year in which the QEZE tax credits are sought.

E. Petitioners are seeking a tax credit and bear the burden of proof to establish, through clear and convincing evidence, that they have an entitlement to the statutory benefit (***see e.g. Matter of Golub Service Station v. Tax Appeals Tribunal***, 181 AD2d 216 [3d Dept 1992]; ***Matter of The Golub Corporation***, Tax Appeals Tribunal, May 31, 2012, ***confirmed*** 116 AD3d 1261 [2014]); ***see also*** Tax Law §689[e]). In ***Matter of Hucko Trust***, the Tribunal noted:

> "[T]ax credits, such as those at issue, are a particularized species of exemption from tax (***Matter of Marriott Family Rests. v. Tax Appeals Trib. of State of N.Y.***, 174 AD2d 805 [1991], ***lv denied*** 78 NY2d 863 [1991]). "Statutes creating tax exemptions must be construed against the taxpayer" (***Matter of Federal Deposit Ins. Corp. v. Commissioner of Taxation & Fin.***, 83 NY2d 44, 49 [1993] [internal quotation marks and citation omitted]). Herein, petitioners must show clear entitlement to the QEZE real property tax credits at issue (***Matter of Stevenson v New York State Tax Appeals Trib.***, 106 AD3d 1146 [2013]), specifically, proving that under the circumstances, their "interpretation of the statute is not only plausible, but also that it is the only reasonable construction (***Id.*** at 1147, ***citing Matter of Moran Towing & Transp. Co. v New York State Tax Commn.***, 72 NY2d 166, 173 [1988])."

F. The term "employment increase factor" is defined in Tax Law § 15(d) 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."

G. 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 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.

BBLLC's New York partnership returns for the years in issue state that it had no employees during its test year, defined by the statute as the last taxable year ending before the test date (July 31, 2002), i.e., the later of July 1, 2000 or the date prior to July 1, 2001 on which the business was first certified under article 18-B of the General Municipal Law. (Tax Law § 14[f],[e].) Therefore, since the employment number for the subject years was zero, the employment increase factor for such years was also zero. Since the employment increase factor is one of the factors multiplied to compute the QEZE credits at issue, a zero employment increase factor necessarily results in zero credit.

H. Petitioners' central argument is that to abide by the clear language of the statute would be to elevate form over substance. In fact, BBLLC maintains that RBBC's employees were its employees under theories of common paymaster and common law employees.

Petitioners point to the fact that BBLLC capitalized the wage expenses of RBBC as proof that it was claiming the employees as its own. However, under the Uniform Capitalization rules of IRC § 263A these direct costs of labor were required to be capitalized. (IRC § 263A[a][1],[2]; Treas Reg § 1-263A-1[e][2][ii].) There is no doubt that BBLLC would have claimed and capitalized these costs since it paid for them, but the costs would have been

capitalized even if the direct labor costs were paid to an independent contracting entity. It does not prove that RBBC's employees were actually BBLLC's employees. It remains that wages were paid by RBBC to its employees, it issued forms W-2 to each of its employees and it filed for and received wage tax credits based on having its own employees.

Other factors exist that are inconsistent with petitioners' contention that RBBC's employees were actually BBLLC's employees: the partnership returns filed for BBLLC for the years in issue indicate no employees for the years in issue; in a response for information requested by the Division about BBLLC employees, the accounting firm for petitioners Alvin and Deborah Benjamin stated that Benjamin Beechwood LLC had no employees; and BBLLC's wage reporting profile was deactivated in 2002, indicating that there were no further reports that BBLLC had employees after that time.

These factors, coupled with the fact that RBBC and BBLLC were separate and distinct entities that each received QEZE certification and the fact that RBBC claimed QEZE wage tax credits for its employees, serve to support the conclusion that the employees were those of RBBC, not BBLLC.

I. Petitioners argue that the employees of RBBC were actually the common law employees of BBLLC on the basis of meeting requirements set forth in Rev Rul 87-41, 1987 CB 296. Treas Reg § 31.3306(i)-1(c) says that "[w]hether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case." (***See also*** 20 NYCRR 4-5.2[b].) To this end, a 20-factor test has been developed to help discern if an employer/employee relationship exists (Rev Rul 87-41).

Some of the factors referred to in the revenue ruling are: whether the worker is required to comply with an employer's instructions; whether the employer provides training; whether the worker's services are integrated into the employer's business; whether the worker can delegate his services to another; whether the employer and employee have a continuing relationship; whether the employer sets the work hours; whether the employee is required to work full time for the employer; whether the employee provides his services on the employer's premises; whether the employer controls the worker's sequence of work and scheduling; whether the worker has a risk associated with a profit or loss or simply work for wages; whether the employer has a right to discharge the worker; and whether an employee can terminate the relationship with the employer without liability.

Although petitioners claim that BBLLC's books, records, tax returns, financial statements project records and testimony of Mr. Romski and Mr. Smith establish that RBBC's employees are actually the employees of BBLLC under the guidelines, there simply was no credible testimony or documentary evidence offered to support the claim. Petitioners offered no contemporaneous documentation of any relationship between BBLLC and RBBC's employees. Mr. Romski, the project counsel gave no specifics of his role with respect to directing and controlling the employees of RBBC, other than a sweeping statement that he ran the day-to-day operations of RBBC. It does not seem feasible that the project's counsel, whose expertise is in legal matters and who was responsible for all legal affairs and sales of the project, also managed the day-to-day operations of a firm with construction professionals and laborers alike.

Mr. Romski noted in his testimony that he was versed in the QEZE legislation at the time of its passage and brought the benefits to the attention of Mr. Dubb. With this knowledge of the

QEZE credits and his significant expertise in real estate development, it is perplexing that he did not express concern when BBLLC chose to have and report no employees on its books and to state such on its application for QEZE real property tax credit on the tax returns filed for the years in issue. Further, petitioners' belief that using a separate QEZE certified entity as the construction arm of the project and the employer of its laborers was a justified administrative convenience, nullified BBLLC's ability to claim the QEZE real property tax credit.

It is a harsh result that the credit has been lost to petitioners in this manner. However, it is well established that: "[i]t is the form chosen by the taxpayer which is controlling and the fact that a taxpayer could have chosen a different form which would have had different tax consequences does not convert a taxable transaction into a nontaxable one" (***Matter of Chanry Communications, Ltd.,*** Tax Appeals Tribunal, March 7, 1991, ***confirmed Matter of Henry v. Wetzler,*** 183 AD2d 57, ***affd*** 82 NY2d 859 ***cert denied*** 511 US 1126 ***citing Sverdlow v. Bates,*** 283 App Div 487). This rationale applies equally with reference to eligibility for exemptions or credits.

J. The petitions of Michael and Andrea Leeds, Michael and Lee Dubb, Leslie and Faith Lerner, and Alvin (deceased) and Deborah Benjamin are denied and the six notices of deficiency, dated September 30, 2010, October 4, 2010 and October 8, 2010, are sustained.

Dated: Albany, New York
January 15, 2015

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE