

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**LITTMAN INDUSTRIES, INC.** : DETERMINATION  
for Revision of a Determination or for Refund of Sales : DTA NO. 825538  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Years 2009 and 2010. :

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Petitioner, Littman Industries, Inc., filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the years 2009 and 2010.

On February 4, 2014 and February 21, 2014, respectively, petitioner, appearing by Martha Orlando, Controller, and the Division of Taxation, appearing by Amanda Hiller, Esq. (Osborne Jack, Esq., of counsel), waived a hearing and submitted the matter for determination based upon documents and briefs to be submitted by August 6, 2014, which date commenced the six-month period for issuance of this determination. After due consideration of the evidence and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation properly denied petitioner's claims for refund on the basis that petitioner failed to provide a Qualified Empire Zone Enterprise (QEZE) sales tax certification for sales tax exemption.

***FINDINGS OF FACT***

1. Pursuant to a Certificate of Eligibility issued on May 19, 2004, but effective as of March 17, 2004, petitioner, Littman Industries, Inc., became certified as eligible to access the benefits referred to in General Municipal Law § 966 in connection with the facilities located at 1126 River Road, New Windsor, New York, designated as Empire Zone property on June 3, 1998, within the boundaries of the Newburgh-Stewart, Orange County Empire Zone.

2. Empire State Development issued to petitioner an Empire Zone Retention Certificate (EZRC) (retention certification) “[r]equired to claim Empire Zone and Qualified Empire Zone Enterprise tax credits for tax year 2008 and later.”

3. On January 3, 2012, the Division of Taxation (Division) received two applications for credit or refund of sales and use tax - Qualified Empire Zone Enterprise (QEZE) (Form AU-12), dated December 29, 2012, totaling \$8,229.76. These refund requests pertained to sales tax paid on consumer utility services, i.e., electricity and natural gas, and covered the period January 1, 2009 through December 31, 2010. With the applications for credit or refund of sales and use tax, petitioner included an Employment Test for Businesses Certified by Empire State Development (ESD) Before April 1, 2005 (form AU-12.1) (Employment Test) for each period covered, i.e., January 1, 2009 through December 31, 2009, and January 1, 2010 through December 31, 2010, spread sheets detailing the amounts to be refunded for each period, copies of invoices issued by Central Hudson Gas & Electric Corporation for the period December 4, 2008 through December 4, 2010, and invoices issued by Hess Corporation, bearing dates January 11, 2010 through December 10, 2010. Petitioner also included copies of its certificate of eligibility and its retention certificate. However, petitioner did not include a Qualified Empire Zone Enterprise (QEZE) Sales Tax Certification (form DTF-81) (QEZE sales tax certification).

4. On the Employment Test included with each application for credit or refund of sales or use tax, petitioner entered its certificate of eligibility number in the space designated for its seven-digit QEZE certification number from the QEZE sales tax certification issued by the Division.

5. The Division assigned one claim number, 2012-01-0060, to both applications for credit or refund of sales or use tax. As part of its review of petitioner's request for refund of sales tax paid on consumer utility services for the period January 1, 2009 through December 31, 2010, Susan A. Jones, an employee in the Division's Audit Division - Transaction Desk Audit Bureau, sent a letter dated April 17, 2012 to Littman Industries. In her letter, Ms. Jones requested the following information:

“In order to claim a refund of sales and use tax, you must provide a copy of you [sic] Qualified Empire Zone Enterprise (QEZE) Certification. This certification is issued to a business enterprise who has been approved to receive sales and use tax exemptions on purchases of certain property and services to be used or consumed within empire zones in which is [sic] has been certified to receive benefits.

The Qualified Empire Zone Enterprise (QEZE) Certification must include the exemption number, the QEZE Effective Date and the Certification Date.”

Ms. Jones further requested that the information be sent to her within 30 days in order for her to continue review of petitioner's claim. Her letter also advised that additional information might be requested as needed.

6. Subsequently, by letter dated June 8, 2012, the Division's Audit Division - Transaction Desk Audit Bureau denied petitioner's refund claim in full because the QEZE certification was not provided.

7. In protest of the refund denial, petitioner timely filed a petition with the Division of Tax Appeals. In its petition, petitioner asserts that a third-party expert was hired to fill out all

paperwork and information required by New York State for the Empire Zone program. Petitioner further asserts that it believed the expert prepared and filed everything correctly because it received an Empire Zone certification number and certificate of eligibility. Petitioner avers that its claims for refund of sales tax paid on consumer utility services were denied because the expert failed to prepare and send its application for QEZE sales tax certification to the Division.

8. On July 29, 2009, Anchin Economic Development LLC (Anchin Economic Development) issued an invoice to petitioner for professional services rendered as follows:

“Fees for New York State Empire Zone Real Estate Tax Program benefits for year ended 2007 as per agreement	\$27,800.00
Fees for New York State Empire Zone Wage and Sales Tax program benefits for year ended 2007 as per agreement	\$2,040.00
Fees for New York State Empire Zone Wage and Sales Tax Program benefits for year ended 2008 as per agreement	\$2,040.00
Allowance	-\$4,782.00

This invoice represents your final obligation under our agreement.

Total Amount Due:	<u>\$27,098.00”</u>
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The record does not include the agreement referenced in this invoice or any documentation allegedly filed on petitioner’s behalf for any of the Empire Zone programs referenced in the above invoice.

9. By checks dated July 27, 2009 and August 10, 2009, petitioner paid \$27,098.00, the total amount due per the invoice, to Anchin Economic Development.

10. The record does not include a QEZE sales tax certification issued to petitioner.

***SUMMARY OF PETITIONER'S POSITION***

11. Petitioner contends that it hired Anchin Economic Development to assist it with regard to Empire Zone matters, including sales tax benefit programs. Petitioner further contends that it believed that all necessary forms were filed by Anchin Economic Development based upon receipt of the Empire Zone Retention Certificate of Eligibility and Certificate of Eligibility, and petitioner's filing of Empire Zone Business annual reports. It asserts that Anchin Economic Development's failure to file petitioner's application for QEZE sales tax certification was discovered when petitioner filed the claims for refund of the sales tax paid on consumer utility services. Petitioner maintains that it tried to remedy the situation and apply for QEZE sales tax certification, but was informed by Ms. Jones, of the Division's Audit Division - Transaction Desk Audit Bureau, that QEZE sales tax certification was no longer available. Petitioner requests that consideration be given to the special efforts that it undertook to comply with the Empire Zone programs, and that the refund of sales tax paid on consumer utility services for the years 2009 and 2010 be granted.

***CONCLUSIONS OF LAW***

A. Sales tax is imposed on the receipts from every sale, other than sales for resale of gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature (Tax Law § 1105[b][1][A]).

B. For the period prior to September 1, 2009, Tax Law former § 1115(z)(1) provided an exemption from tax, stating in part, as follows:

“Receipts from the retail sale of tangible personal property described in subdivision (a) of section eleven hundred five of this article, receipts from every sale of services described in subdivisions (b) and (c) of such section eleven hundred five and consideration given or contracted to be given for, or for the use of, such tangible personal property or services shall be exempt from the taxes

imposed by this article where such tangible personal property or services are sold to a qualified empire zone enterprise . . . .”<sup>1</sup>

C. For the period on or after September 1, 2009, Tax Law § 1119(d)(1) provides, in pertinent part, as follows:

“Subject to the conditions and limitations provided for in this section, a refund or credit will be allowed for taxes imposed on the retail sale of tangible personal property described in subdivision (a) of section eleven hundred five of this article, and on every sale of services described in subdivisions (b) and (c) of such section, and consideration given or contracted to be given for, or for the use of, such tangible personal property or services, where such tangible personal property or services are sold to a qualified empire zone enterprise . . . .”

D. Tax Law § 14(h) provides, in pertinent part, as follows:

“Sales and use tax. (1) In addition to the other requirements of this section, for business enterprises certified pursuant to article eighteen-B of the general municipal law prior to April first, two thousand nine, in order for an exemption under subdivision (z) of section eleven hundred fifteen of this chapter or credit or refund described in subdivision (d) of section eleven hundred nineteen of this chapter or any like exemption or credit or refund imposed pursuant to the authority of article twenty-nine of this chapter to apply with respect to a qualified empire zone enterprise, such enterprise shall apply to the commissioner of taxation and finance for the issuance of a qualified empire zone enterprise certification in the manner prescribed by the commissioner. If such commissioner grants such certification, such certification shall be subject to conditions specified by such commissioner. . . . The commissioner shall not grant any certifications pursuant to this subdivision after June thirtieth, two thousand ten.

(2) A business enterprise, certified as an empire zone business under article eighteen-B of the general municipal law prior to April first, two thousand nine, and certified as a qualified empire zone enterprise by the commissioner of taxation and finance prior to August first, two thousand nine, is eligible to claim the exemption under subdivision (z) of section eleven hundred fifteen of this chapter or any exemption from tax imposed pursuant to the authority of article twenty-nine of this chapter until September first, two thousand nine, provided that the other requirements of the statute are met. A business enterprise certified as an empire zone business under article eighteen-B of the general municipal law prior to April first, two thousand nine, and certified as a qualified empire zone enterprise by the commissioner of taxation and finance as of or prior to June

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<sup>1</sup> Tax Law § former 1115(z)(1) was repealed by Laws of 2009 (ch 57, pt. S-1, § 30, eff. September 1, 2009).

thirtieth, two thousand ten, is eligible to claim the credit or refund under subdivision (d) of section eleven hundred nineteen of this chapter or any like credit or refund imposed pursuant to the authority of article twenty-nine of this chapter, provided that the other requirements of the statute are met during the term of its sales and use tax benefit period notwithstanding the expiration of the empire zones program under article eighteen-B of the general municipal law.”

E. Statutes creating exemptions from tax are to be strictly construed against the taxpayer (*see Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193 [1975], *lv denied* 37 NY2d 708 [1975]; *Matter of Blue Spruce Farms v. New York State Tax Commn.*, 99 AD2d 867 [1984], *affd* 64 NY2d 682 [1984]). Exemptions must be clearly indicated by the statutory language (*see Matter of Fagliarone, Grimaldi & Associates v. Tax Appeals Tribunal*, 167 AD2d 767 [3d Dept 1990]). The taxpayer bears the burden of demonstrating clear and unambiguous entitlement to the statutory exemption (*see Matter of Golub Serv. Sta. v. Tax Appeals Tribunal*, 181 AD2d 216 [1992]) and showing that its interpretation of the law is not only plausible, but the only reasonable construction (*see Matter of Federal Deposit Ins. Corp. v. Commissioner of Taxation & Fin.*, 83 NY2d 44 [1993]).

F. In addition, 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 [1984]). However, 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 [1988]; *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 or of all statutes relating to the same general subject matter (*see McKinney's Cons*

Laws of NY, Book 1, Statutes § 92). The legislative intent is to be ascertained from the words and language used in the statute, and if the language thereof is unambiguous and the words plain and clear, there is no occasion to resort to other means of interpretation (McKinney's Cons Law of NY, Book 1, Statutes § 92[b]; *see DiMarco v. Hudson Valley Blood Services*, 147 AD2d 156 [1<sup>st</sup> Dept 1989]).

G. The language of Tax Law § 14(h) is clear and unambiguous. In order to qualify for an exemption under Tax Law former § 1115(z)(1) or a refund under Tax Law § 1119(d), a business enterprise certified pursuant to article eighteen-B of the general municipal law prior to April 1, 2009 must apply to the Division for QEZE sales tax certification.

The record clearly shows that petitioner received a Certificate of Eligibility, effective March 17, 2004, to participate in the Empire Zones Program, and an Empire Zone Retention Certificate required to claim Empire Zone and QEZE tax credits for tax year 2008 and later. However, petitioner never received QEZE sales tax certification or a QEZE sales tax certification number. Indeed, petitioner admits that it did not apply for such certification prior to filing the applications for refund of the sales tax paid on consumer utility services for the years 2009 and 2010. Since petitioner did not obtain QEZE sales tax certification, it is not entitled to the exemption under Tax Law former § 1115(z)(1) or the refund under Tax Law § 1119(d)(1). Accordingly, the Division's denial of petitioner's applications for refund of sales tax paid on consumer utility services for the years 2009 and 2010 was proper.

H. The petition of Littman Industries, Inc. is denied and the Division's June 8, 2012 denial of petitioner's refund applications, dated December 29, 2012, is sustained.

DATED: Albany, New York  
January 29, 2015

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE