

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :
of :
MICHAEL AND SONDRÁ ARTEAGA : DETERMINATION
: DTA NOS. 825700,
: 825813 AND 826811
for Redetermination of Deficiencies or for Refund of :
Personal Income Tax under Article 22 of the Tax Law :
for the Years 2008 through 2012. :
:

Petitioners, Michael and Sondra Arteaga, filed petitions for redetermination of deficiencies or for refund of personal income tax under article 22 of the Tax Law for the years 2008 through 2012.

On November 23, 2015 and December 2, 2015, respectively, petitioners, appearing by Teahan & Constantino, LLP (James P. Constantino, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Tobias A. Lake, Esq., of counsel) waived a hearing and submitted this matter based on documents and briefs to be submitted by February 29, 2016, which date began the six-month period for issuance of this determination.¹ After due consideration of the documents and arguments submitted, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

¹Previously, on August 28, 2014 and September 4, 2014, respectively, petitioners, appearing by Teahan & Constantino, LLP (James P. Constantino, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), waived a hearing and submitted the matter for determination. However, with the subsequent filing of a petition for a later tax year (DTA#826811), the parties agreed to consolidate all pending matters with the issuance of one determination herein.

ISSUE

Whether the Division of Taxation properly disallowed petitioners' claim for qualified empire zone enterprise real property tax credits for the years 2008 through 2012 on the basis that their business did not meet the employment increase factor.

FINDINGS OF FACT

1. Petitioners, Michael and Sondra Arteaga, are equal 50% shareholders of North Highland Properties LLC (North Highland). North Highland was formed for the business purpose of acquiring an unimproved parcel of real estate located at 3425 Route 9W, Highland, New York, and developing and constructing a multi-use sports and training complex and business office facility.

2. The North Highland property was acquired in November of 2001 and is located within the city of Kingston, Town of Ulster Empire Zone. North Highland was certified as a Qualified Empire Zone Enterprise (QEZE) property on June 13, 2002.

3. After being certified as a QEZE, North Highland developed an approximately 25,000 square foot sports and training facility and business office complex known as the All Sport Complex. On June 9, 2007, North Highland hired one full-time employee to provide real estate management and support services.

4. The hired employee was required to work 35 hours per week. Although he had an office at the All Sport Complex, the employment did not lend itself to a typical 9 a.m. to 5 p.m. schedule. The employee was required to be available at any time of the day, any day of the week. The employee lived approximately one hour from the facility, and he could perform routine and nonroutine tasks from a remote location with telephone, facsimile machine and computer

communication.

5. The Division of Taxation (Division) audited petitioners' income tax returns to determine the basis for QEZE real property tax credits (RPTC) claimed for the years 2008 through 2012. The Division conducted an audit of the QEZE credits claimed from the flow-through entity, North Highland.

6. The Division determined that there was no evidence that North Highland had an employee for computing the employment increase factor required under Tax Law § 15(d), because petitioners failed to establish that the employee was ever employed within the Empire Zone that included North Highland.

7. The Division's audit concluded that the employee was a Connecticut resident and was employed by a Connecticut engineering firm during the years 2008 through 2012. Petitioners did not maintain time cards to substantiate that the employee worked regularly within the Empire Zone at the North Highland property and did not establish that the employment was full time for at least one half of the taxable year within the Empire Zone. Therefore, the Division concluded that the employee did not meet the requirements to be included in the employment increase factor and the resulting increase was zero. Thus, the employee was disallowed for purposes of the employment increase factor for the years 2008 through 2012 and no credit was allowed.

8. During the audit, the Division also reduced petitioners' Tax Reduction Credits (TRC) for the years 2009 through 2011 based upon their ownership of All Sport of Ulster Health and Fitness Center, Inc. The TRC calculation was reduced based upon certain losses being added back to petitioners' adjusted gross income (AGI). On May 3, 2016 and May 5, 2016, the parties agreed to resolve the issue of adding back losses to petitioners' New York State AGI for the

purpose of computing the TRC. Therefore, this is not an issue addressed within this determination.

9. Notice of Deficiency, No. L-038365730, dated July 26, 2012, was issued to petitioners for the tax year 2008. This notice asserted additional tax due of \$63,058.00.² Based upon the stipulation regarding the loss add-back issue (Stipulation), the amount has been reduced to tax of \$47,550.00.

10. Notice of Deficiency, No. L-039217605, dated May 29, 2013, was issued to petitioners for the tax year 2009. This notice asserted additional tax due in the amount of \$49,201.01. Based upon the Stipulation, the amount has been reduced to tax of \$48,066.01.

11. Notice of Deficiency, No. L-039217468, dated May 29, 2013, was issued to petitioners for the tax year 2010. This notice asserted additional tax due in the amount of \$51,485.00. Based upon the Stipulation, the amount has been reduced to tax of \$49,828.00.

12. Notice of Deficiency, No. L-039217469, dated May 29, 2013, was issued to petitioners for the tax year 2011. This notice asserted additional tax due in the amount of \$27,753.00. Based upon the Stipulation, the amount has been reduced to tax of \$27,251.00.

13. Notice of Deficiency, No. L-042022259, dated December 5, 2014, was issued to petitioners for the tax year 2012. This notice asserted additional tax due in the amount of \$48,531.00. This amount was not further reduced by the Stipulation.

CONCLUSIONS OF LAW

A. Chapter 63 of the Laws of 2000 amended the Tax Law to provide benefits under the

²This tax amount was reduced at a conciliation conference within the Bureau of Conciliation and Mediation Services. Such amount is further reduced by the Stipulation.

Empire Zones Program Act, amending articles 9-A, 22, 32 and 33 of the Tax Law to provide new tax credits, which applied to taxable years beginning on or after January 1, 2001. Among various tax benefits under the program, Tax Law § 15(a), together with Tax Law § 606(bb), provide for the QEZE RPTC for eligible real property taxes for a taxpayer who is a member of a partnership that is a QEZE.

B. In this matter, petitioners are seeking a tax credit. A tax credit is a particularized species of exemption from tax (*Matter of New York Fuel Terminal Corp.*, Tax Appeals Tribunal, August 27, 1998; *Matter of Marriott Family Rests. v. Tax Appeals Trib.*, 174 AD2d 805 [1991], *lv denied* 78 NY2d 863 [1991]) and, thus, taxpayers bear the burden of establishing their entitlement thereto (*see e.g. Matter of Golub Serv. Sta. v. Tax Appeals Trib.*, 181 AD2d 216 [1992]). Petitioners must establish that, under the circumstances, their interpretation of the statute is the only reasonable interpretation (*Matter of Hucko Trust*, Tax Appeals Tribunal, September 19, 2013).

C. Subject to certain limitations not at issue, the amount of refundable QEZE credit for real property taxes in a given tax year is the product of three factors, one of which is the employment increase factor (*see* Tax Law § 15[b]). Consistent with the goals of the empire zone program, and as its name implies, the employment increase factor measures increases in employment by comparing the QEZE's employment number in the year in which the credit is claimed to its employment number in a test year. The specific manner by which this factor is calculated is set forth in Tax Law § 15(d) as follows:

“The employment increase factor is 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."

As used in Tax Law § 15(d), employment number generally means "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" (Tax Law § 14[g][1]).

D. In this case, the Division disallowed the credit for real property taxes for two reasons. First, the Division states that petitioners failed to establish that their employee was employed full-time by the enterprise for at least one-half of the taxable year and, secondly, that petitioners' employee did not perform his employment duties within the empire zone as required by Tax Law § 15(d)(1).

Petitioners argue that their employee was a full-time salaried employee required to work 35 hours per week with defined and detailed responsibilities. Petitioners point out that the employee had an office at the All Sport Complex, yet performance of his duties did not lend itself to a conventional work schedule, as he needed to be available at any time. Moreover, as a salaried employee, petitioners point out that there is no requirement for the maintenance of daily time records or work logs.

E. With respect to whether North Highland's employee was full time, it appears that the

Division was not satisfied that the employee was required to work 35 hours because this employee had a full-time job in a neighboring state coupled with the fact that petitioners failed to maintain records of the employee's daily log or time records. However, petitioners have sufficiently demonstrated through their affidavits that the employee was required to work 35 hours per week, and as a salaried employee, daily time records were not maintained for him. The employee's job duties were easily accomplished by telecommuting and, as such, it is concluded that the employee satisfies the requirement that the employment was full time.

F. The crux of this case is whether the performance of employment duties by an employee of the QEZE must be rendered fully within the location of the certified QEZE, in this case, the town of Ulster. As stated above, Tax Law § 15(d) describes the specific manner by which the employment increase factor is calculated. The employment number generally means the average number of employees that are employed full-time *by the enterprise* for at least one-half of the taxable year (*see* Tax Law § 14[g][1]).

The Division interprets this section as requiring that the employees perform their job duties within the empire zone. Clearly, the statute does not impose this restriction. Rather, the statute merely states that the employee be employed by the QEZE, without reference to whether the fulfillment of such job duties be performed within the location of the empire zone. Therefore, petitioners have demonstrated that their interpretation of the statute is the only reasonable interpretation (*Matter of Hucko Trust*).

G. Accordingly, the petitions of Michael and Sondra Arteaga are granted, and the notices of deficiency are hereby cancelled.

DATED: Albany, New York
August 25, 2016

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE