STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NRG ENERGY, INC.	:	DETERMINATION ON REMAND DTA NO. 826921
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the period ending December 31, 2009.	:	

Petitioner, NRG Energy, Inc., filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under article 9-A of the Tax Law for the period ending December 31, 2009.

A hearing was held before Donna M. Gardiner, Administrative Law Judge, in Albany, New York, on June 17, 2016. Petitioner appeared by Nixon Peabody LLP (Daniel J. Hurteau, Esq. and Jena R. Rotheim, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (David Markey, Esq., of counsel). Upon review of the entire record, a determination was rendered on March 30, 2017, which denied the petition and sustained the denial of the claim for refund.

Petitioner filed an exception to the determination and, in a decision dated March 14, 2018, the Tax Appeals Tribunal remanded this matter to the Administrative Law Judge for further analysis of the issue set forth below.

ISSUE

Whether the retroactive application of the 2009 amendments to the tax year 2009 violated petitioner's rights under the Due Process Clause of the United States Constitution.

FINDINGS OF FACT

The following findings of fact are incorporated herein from the decision of the Tax Appeals Tribunal in ***Matter of NRG Energy, Inc.*** (Tax Appeals Tribunal, March 14, 2018). There are also two additional facts.

1. Petitioner, NRG Energy, Inc., is a power provider that owns and operates power plants that generate power from any number of fuel sources, including coal, natural gas, solar and wind. Petitioner is the sole owner and sole member of Oswego Harbor Power LLC, the entity that owns and operates the Oswego Generating Station in Oswego, Oswego County, New York (the Plant).

2. Petitioner is a Delaware corporation and is authorized to do business in New York.

3. Petitioner was issued a certificate of eligibility under the New York State Empire Zones Act, General Municipal Law § 955 et seq., for the Plant. The certificate of eligibility was dated December 2, 2002, but petitioner's eligibility was effective as of August 8, 2002. A certificate of eligibility under the New York State Empire Zones Act, General Municipal Law § 955 et seq., for the Plant was also issued to Oswego Harbor Power LLC (certificate[s] of eligibility).

4. As an eligible participant in the Empire Zones Program, petitioner was eligible to apply for certain credits against its New York State corporate franchise taxes, including a credit for real property taxes paid during a tax year in connection with its Plant.

5. The credit for real property taxes is a refundable credit.

6. The Department of Economic Development (DED) administers the Empire Zones Program.

7. On April 7, 2009, legislation amending the Empire Zones Act to include new criteria for continued certification under the Empire Zones Program was signed into law (the 2009 amendments).

8. In 2009, DED reviewed all Empire Zones certified businesses to determine whether they should remain eligible to participate in the Empire Zones Program pursuant to the new criteria established by the 2009 amendments.

9. By letter dated June 29, 2009, DED notified petitioner that its certification for eligibility for the Plant was being revoked. By letter dated June 29, 2009, DED also notified Oswego Harbor Power LLC that its certification for eligibility was being revoked (together the decertification notices).

10. The decertification notices stated that petitioner's and Oswego Harbor Power LLC's certifications were being revoked for failing to meet the new criteria established by the 2009 amendments. Specifically, the certifications were being revoked because petitioner and Oswego Harbor Power LLC "failed to provide economic returns to the state in the form of total remuneration to [their] employees (i.e. wages and benefits) and investments in [their] facility greater in value to (sic) the tax benefits [the respective entities] used and had refunded to [them]."

11. The decertification notice states that "[t]he effective date of revocation will be January 1, 2008."

12. Petitioner filed its 2008 tax return on or about November 11, 2009.

13. On or about November 9, 2012, petitioner filed an amended 2008 tax return in which it claimed a refund of the qualified empire zone enterprise (QEZE) credits for its payment of real property taxes relating to the Plant.

14. By letter dated March 14, 2013, the Division of Taxation (Division) advised that, because it had no record of receiving from petitioner a retention certificate for the 2008 tax year (demonstrating petitioner's continued certification to participate in the Empire Zones Program), petitioner could not claim QEZE credits for 2008.

15. On June 4, 2013, the New York State Court of Appeals issued its decision in ***James Sq. Assocs. LP v Mullen***, 21 NY3d 233 (2013).

16. On or about June 14, 2013, the Division advised petitioner that it was preparing to issue refunds of 2008 tax credits based upon the decision in ***James Sq. Assoc***. Thereafter, on or about August 20, 2013, petitioner received a refund of its 2008 claimed QEZE credits.

17. On or about November 3, 2010, petitioner filed its 2009 form CT-3-A, general business corporation combined franchise tax return (CT-3-A), claiming a refundable QEZE credit in the amount of $24,014,753.00.

18. Petitioner's claim for the QEZE credit on its original 2009 tax return was based on the certification of eligibility for its facility located within the Town of Tonawanda Empire Zone and its facility located with the City of Dunkirk, Towns of Dunkirk and Sheridan Empire Zone, as identified on petitioner's 2009 form CT-606, claim for QEZE credit for real property taxes.

19. Petitioner received a refund for the 2009 tax year based on the refundable QEZE credit in the amount of $24,014,753.00.

20. On or about August 27, 2013, petitioner filed an amended 2009 CT-3-A return, in which it claimed a total QEZE credit in the amount of $29,869,127.00, amending its CT-3-A based on the certification of eligibility for the Plant located at 261 George Washington Boulevard, Oswego, New York, within the Oswego County Empire Zone.

21. Petitioner's claim for the QEZE credit on its amended 2009 CT-3-A represented an increase in the amount of $5,854,374.00 based on the certification of eligibility for the Plant.

22. By letter dated April 16, 2014, petitioner was notified by the Division that, because the certification of eligibility for "NRG Oswego Harbor Power Operations, Inc." had been revoked, the additional refund amount of $5,854,374.00 claimed on petitioner's amended CT-3-A was disallowed.

23. Petitioner requested a conciliation conference at the Bureau of Conciliation and Mediation Services to challenge its denial of the 2009 refund claim. The conciliation conference was held on October 14, 2014 and a conciliation order dated February 13, 2015 was issued to petitioner. The conciliation order sustained the denial of its 2009 refund claim.

24. On or about April 28, 2015, petitioner timely filed a petition with the Division of Tax Appeals.

25. A hearing was held on July 17, 2016 and a determination was issued on March 30, 2017. The determination held that the application of the 2009 amendments to the tax year 2009 was not retroactive and, thus, the issue concerning whether a retroactive application was in violation of petitioner's due process rights was not addressed.

26. Petitioner filed a timely exception to the determination of the Administrative Law Judge. On March 14, 2018, the Tax Appeals Tribunal (Tribunal) reversed the Administrative

Law Judge on the issue of retroactivity and remanded the matter for a determination on the issue of whether the retroactive application of the 2009 amendments to the tax year 2009 violated petitioner's due process rights.

CONCLUSIONS OF LAW

A. The Tribunal has determined that the application of the 2009 amendments in this case constituted a retroactive application of a tax statute (***Matter of NRG Energy, Inc***). Therefore, the issue that must be addressed is whether the retroactive application of the 2009 amendments was constitutionally permitted.

In determining whether the application of a taxing statute violates the Due Process Clauses of the United States and New York Constitutions, the courts look to three factors: (1) "the taxpayer's forewarning of a change in the legislation and the reasonableness of . . . reliance on the old law," (2) "the length of the retroactive period," and (3) "the public purpose for the retroactive application" (***Matter of Replan Dev. v Department of Hous. Preserv. & Dev. of City of New York***, 70 NY2d 451 [1987], ***appeal dismissed*** 485 US 950 [1988]).

B. The first factor addresses whether there was a forewarning of change in the new law and reasonable reliance on the old law. "This inquiry focuses on whether the taxpayer's 'reliance' has been justified under all of the circumstances of the case and whether its 'expectations as to taxation [have been] unreasonably disappointed'" (***Matter of Replan Dev.*** at 456 [citations omitted]).

Petitioner argues that the 2009 amendments were not introduced in the Legislature until January of 2009. Petitioner states that its 2009 budget was already set and had been approved by its board of directors. Petitioner claims that, until such time that it received the decertification

notice, it had no reason to believe that it was conducting its business in any manner that put its receipt of Empire Zone tax credits at risk. Petitioner argues that even after it received the decertification notice, it continued to believe that it was qualified as a Program participant because its calculation of the total remuneration and benefits paid to the Plant employees exceeded the tax benefits it received under the Program.

In ***Matter of Hale*** (Tax Appeals Tribunal, June 14, 2018), the Tribunal held that the forewarning and reasonable reliance factor of the ***Matter of Replan Dev.*** analysis should not be accorded any weight. The Tribunal stated, in pertinent part, that:

> "This factor protects a taxpayer who reasonably relied on the law in effect at the time an action was taken, but is not afforded the opportunity, due to lack of notice of the possible change in the law, to take any action to avoid the repercussions of new law . . . . Such protection could never have been afforded petitioners under the circumstances of this case."

Petitioner herein was certified as a participant in the Program effective August 8, 2002. As petitioner was operating in the same manner in 2009 as it was in 2002 when it was certified, there does not appear to be any action that could have been taken by petitioner to avoid the decertification notice. Additionally, given the short period of retroactivity, petitioner's expectations to continue to receive QEZE tax credits in 2009 were "unreasonably disappointed" (***Matter of Replan Dev.*** at 456).

C. The next factor to address is the length of the retroactive period. The Tribunal previously held that the length of the retroactive period was only a few months (***Matter of NRG Energy, Inc.***). The enactment of the 2009 amendments was April 7, 2009 and was retroactive to January 1, 2009. This relatively short retroactive period cannot be held to reach "so far into the past" that it would render this retroactive application of a statute to be in violation of petitioner's

due process rights" (***Matter of Varrington Corp. v City of N.Y. Dept. of Fin.***, 85 NY2d 28, 32 [1995]).

D. The last factor to address in the ***Matter of Replan Dev.*** analysis is the public purpose for the retroactive application. The 2009 amendments to the Empire Zones Program commenced with the Governor's 2009-2010 budget plan. In December of 2008, it was announced that the Program would be reformed to "ensure that participants are providing a clear benefit to the State" (2009 NY Executive Budget, December 16, 2008, p. 48; ***see Matter of James Sq. Assoc.*** at 241). The stated purposes for the 2009 amendments included curtailing perceived abuses in the Program, reining in the scope of the Program and thereby lessening the fiscal impact of the Program as a savings measure for the then-upcoming 2009-2010 budget year.

In ***Hale***, the Tribunal determined that since the 2009 amendments were meant to curtail abuses of the program and to raise revenue, a prospective application of a statute would accomplish that purpose and it held that the retroactive application was in violation of petitioner's due process rights.

E. In ***Hale***, the Tribunal reasoned, in pertinent part, that:

> "the ***Matter of Replan Dev.*** analysis is simply a method of determining whether the retroactive application of the 2009 Amendments is 'so harsh and oppressive as to transgress constitutional limitation' [***Welch v Henry***, 305 US 134, 147 (1938), ***reh denied*** 305 US 675 (1938)]. It is also true that courts have been far less likely to invalidate the retroactive imposition of a taxing statute when it involves the changing of a tax rate, or an exemption or credit than they are when the issue is the imposition of a new tax [citations omitted]. In the instant case, we are dealing with the elimination of a tax credit rather than a new tax [***Honeywell, Inc. v United States***, 973 F2d 638, 642-43 (8th Cir 1992)]."

The Tribunal also noted that there is no precedent for concluding that a tax statute retroactively applied to the beginning of the year in which it was enacted violates a taxpayer's due process

rights. Therefore, it is concluded that the extremely short period of retroactivity outweighs the lack of a public purpose under the circumstances of this case and, as such, the application of the 2009 amendments does not violate petitioner's due process rights.

F. The petition of NRG Energy, Inc., is denied and the denial of the refund claim is sustained.

DATED: Albany, New York
November 08, 2018

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE