STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TRANSCANADA FACILITY USA, INC.	:	DETERMINATION DTA NO. 827332
For Revision of a Determination or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Period January 1, 2010 through December 31, 2012.	: :	

Petitioner, TransCanada Facility USA, Inc., filed a petition for revision of a determination or for refund of corporation franchise tax under article 9-A of the Tax Law for the tax years 2010, 2011, and 2012.

On July 26, 2017, petitioner, appearing by Morrison & Foerster LLP (Craig B. Fields, Esq. and Irwin M. Slomka, Esq., of counsel), and on July 28, 2017, the Division of Taxation, appearing by Amanda Hiller, Esq. (Jennifer L. Baldwin, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by December 18, 2017, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, James P. Connolly, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether, during the years at issue, petitioner was subject to the $350,000.00 cap applicable to "qualified New York manufacturers" in computing the capital base of its corporation franchise tax liability in Tax Law former § 210 (1) (b) (1).

II. Whether petitioner has established that its filing position was substantially justified or that reasonable cause exists to support abatement of penalties.

FINDINGS OF FACT

Petitioner, TransCanada Facility USA, Inc., and the Division of Taxation (Division) entered into a joint stipulation of facts. These facts, as relevant, are included in the facts set forth below.

1. Petitioner, a Delaware corporation, provides wholesale energy through its wholly-owned limited liability companies, TC Ravenswood, LLC (Ravenswood) and, since May 2011, Coolidge Power LLC (Coolidge).

2. Petitioner acquired Ravenswood on August 26, 2008 from National Grid plc.

3. Ravenswood and Coolidge are disregarded entities treated as divisions of petitioner for federal income tax and New York State corporation franchise tax purposes.

4. Coolidge operates a power generating facility outside New York.

5. Ravenswood operates a 2,480 MW (megawatt) multiple unit generating facility located in Long Island City, New York (the Ravenswood generating station).

6. The Ravenswood generating station is a power plant consisting of four primary units (Units 10, 20, 30 and 40) that employ steam turbine, combined cycle and combustion turbine technology to generate electricity.

7. The Ravenswood generating station generates electricity that is sold to the New York Independent System Operator.

8. Units 10 and 20 at the Ravenswood generating station each has a single controlled circulation, dual furnace, balanced draft, Combustion Engineering boiler and a cross-compound General Electric turbine generator.

9. Unit 30 at the Ravenswood generating station has two identical controlled circulation, balanced draft, divided furnace, Combustion Engineering boilers and an Allis Chalmers/Westinghouse cross-compound turbine generator.

10. Unit 40 at the Ravenswood generating station consists of a General Electric 7FA combustion turbine generator with an ALSTOM steam turbine generator, a Kawasaki heat recovery system generator, and an air-cooled condenser.

11. Consolidated Edison of New York, Inc., constructed and placed in service Units 10, 20, and 30 in the 1960's, while KeySpan Corporation constructed and first placed Unit 40 in service in 2004.

12. Petitioner placed Units 10, 20, 30 and 40 in service in 2008 upon its acquisition of Ravenswood from National Grid plc.

13. Units 10, 20, 30 and 40 at the Ravenswood generating station are used 100% in the generation of electricity.

14. For each of the years at issue, petitioner filed a General Business Corporation Combined Franchise Tax Return (Form CT-3-A) and a General Business Corporation MTA Surcharge Return (Form CT-3M/4M) that included its wholly-owned subsidiary, TC Ravenswood Services Corp.

15. For each of the years at issue, petitioner's combined group's capital base yielded the highest tax of its four alternative tax bases. For each of those years, petitioner computed tax on

its combined group's capital base at the capped amount of $350,000.00 on the ground that it met the requirements of a "qualified New York manufacturer."

16. Petitioner reported and paid corporation franchise tax in the amount of $355,000.00, reflecting $350,000.00 of combined capital base tax and $5,000.00 of fixed dollar minimum tax attributable to TC Ravenswood Services Corp., and MTA surcharge in the amount of $60,350.00, for each of the years at issue.

17. The Division audited petitioner's New York State combined corporation franchise tax and MTA surcharge returns for each of the years at issue.

18. After an audit, the Division determined that petitioner's combined group did not meet the requirements of being a "qualified New York manufacturer" pursuant to Tax Law former § 210 (1) (b) (2) and disallowed the $350,000.00 cap on petitioner's tax computed on the combined group's capital base. The Division's April 30, 2015 letter to petitioner communicating this determination asserted that petitioner was a "manufacturer" for purposes of Tax Law § 210 (1) (b) (2), but not a qualified New York manufacturer.

19. Based on that audit determination, the Division recomputed petitioner's tax on the combined group's capital base without the $350,000.00 cap, issuing a notice of deficiency, notice number L-043802034, to petitioner, dated October 16, 2015 (Notice). The Notice asserted liability in the amount of $3,281,659.00, plus interest (computed to November 6, 2015) of $1,190,057.54 and Tax Law § 1085 (k) penalties of $328,165.00 for substantial understatement of tax in the amount of 10% of the asserted underpayment, for the years at issue.

20. Petitioner timely filed a petition, dated November 19, 2015, with the Division of Tax Appeals challenging the Notice in its entirety.

21. More than 50% of the gross receipts of petitioner's combined group, excluding intercorporate receipts, were derived from the sale of electricity that it generated at the Ravenswood generating station.

22. The property comprising Units 10, 20, 30 and 40 at the Ravenswood generating station (the Ravenswood Property) is tangible property and was acquired by petitioner by purchase, as defined by Internal Revenue Code (IRC) § 179 (d), in 2008.

23. The Ravenswood Property is depreciable pursuant to IRC § 167 and had an adjusted basis at the close of each of the years at issue for federal income tax purposes of at least $1 million.

24. The Ravenswood Property has a situs in New York and has a useful life of four years or more and is principally used by petitioner in the generation of electricity.

CONCLUSIONS OF LAW

A. Article 9-A of the Tax Law imposes a franchise tax on every corporation doing business in New York State (***see*** Tax Law § 209 [1]). In the case of a taxpayer filing on a combined basis, such as petitioner, the franchise tax is computed, in part, on the highest one of four alternative bases (***see*** Tax Law §§ 210 (1); 211 (4); 20 NYCRR 3-1.3).[1] The parties agree that, for the years at issue, the capital base yielded the greatest tax of the four alternative bases. During those years, Tax Law § 210 (1) (b) (1) provided that the tax imposed by the capital base on "qualified New York manufacturers" was not to exceed $350,000.00. The primary issue in

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[1] Article 9-A was extensively amended by chapter 59 of the Laws of 2014 and chapter 59 of the Laws of 2015. All references to provisions in Tax Law § 210 herein will therefore refer to the version in effect during the years at issue.

this matter is whether petitioner was a "qualified New York manufacturer" for the relevant years, as that term is defined in Tax Law § 210 (1) (b) (2).

B. Clearly petitioner has the burden of proof in this matter to show that the Notice is erroneous (***see*** Tax Law § 1089[e]). The parties dispute, however, what petitioner must show in this matter in order for its interpretation of "qualified New York manufacturer" to prevail. The Division contends that the liability cap applicable to qualified New York manufacturers in Tax Law § 210 (1) (b) (1) is in the nature of an exemption or exclusion and that, therefore, petitioner must show that its interpretation of the term "qualified New York manufacturer" is the "only reasonable construction," citing, *inter alia*, ***Matter of Brooklyn Navy Yard Cogeneration Partners, L.P.*** (Tax Appeals Tribunal, May 9, 2006, ***confirmed*** 46 AD3d 1247 [3d Dept 2007]). Given that the liability cap in Tax Law § 210 (1) (b) (1) relates to the computation of the tax and does not exempt or exclude any particular class of income or taxpayer, the Division's argument is rejected (***see Matter of Grace v New York State Tax Comm.***, 37 NY2d 193, 196 [1975] ["The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax"]; ***Matter of Bausch & Lomb, Inc.***, Tax Appeals Tribunal, December 20, 1997 [Tribunal expresses no deference to the Division's interpretation of phrase "[i]ncome, gains and losses from subsidiary capital" in Tax Law former § 208 (9) (a) (1)].

C. Tax Law § 210 (1) (b) (2) defines "manufacturer" as follows:

> "a taxpayer which during the taxable year is principally engaged in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing. Moreover, for purposes of computing the capital base in a combined report, the combined group shall be considered a 'manufacturer' for purposes of this

> subparagraph only if the combined group during the taxable year is principally engaged in the activities set forth in this subparagraph, or any combination thereof. A taxpayer or a combined group shall be 'principally engaged' in activities described above if, during the taxable year, more than fifty percent of the gross receipts of the taxpayer or combined group, respectively, are derived from receipts from the sale of goods produced by such activities. In computing a combined group's gross receipts, intercorporate receipts shall be eliminated."

That section defines a "qualified New York manufacturer" as follows:

> "a manufacturer that has property in New York that is described in [Tax Law § 210 (12) (b) (i) (A)] and either (i) the adjusted basis of that property for federal income tax purposes at the close of the taxable year is at least one million dollars or (ii) all of its real and personal property is located in New York."

Thus, under Tax Law § 210 (1) (b) (2), to be a qualified New York manufacturer and hence entitled to the capital base's liability cap for the years at issue, petitioner must show that (1) it was a manufacturer; (2) it had property in New York that is described in Tax Law § 210 (12) (b) (i) (A); and (3) either the adjusted basis of that property for federal income tax purposes is at least equal to $1 million or all of its real and personal property is located in New York. The parties have agreed that the adjusted basis of the Ravenswood Property was $1 million or more during each of the years at issue (***see*** Finding of Fact 23). The remaining issues, then, are whether petitioner is a manufacturer and whether it has "property that is described in clause (A) of [Tax Law § 210 (12) (b) (i)]."

D. In defending the position that the capital base liability cap does not apply to petitioner, the Division first argues that petitioner is not a "manufacturer" for purposes of Tax Law § 210 (1) (b) (2). The parties agree that more than 50% of the gross receipts of petitioner's combined group, excluding intercorporate receipts, were derived from the sale of electricity that it

generated at the Ravenswood generating station (***see*** Finding of Fact 21). Accordingly, the only issue with regard to petitioner's status as "manufacturer" is whether generating electricity qualifies as the "production of goods by manufacturing [or] processing" (Tax Law § 210 [1] [b] [2]). This definition of "manufacturer" derives from chapter 61 of the Laws of 2005, which amended Tax Law § 210 (1) (b) (1) to limit the $350,000.00 cap to "manufacturers" and defined the term in Tax Law § 210 (1) (b) (2). The Legislature took the quoted language in the definition of "manufacturer" in Tax Law § 210 (1) (b) (2) from the investment tax credit (ITC) provision, Tax Law § 210 (12) (b) (i). In a 1992 decision, the Tax Appeals Tribunal interpreted "production of goods by manufacturing [or] processing" in the latter provision to include the production of electricity (***see Matter of Clark***, Tax Appeals Tribunal, September 14, 1992; ***Matter of BT Capital Corp***., Tax Appeals Tribunal, October 1, 1992). In response, in 1993, the Legislature amended Tax Law § 210 (12) (b) (i) to exclude electricity producers by adding the following sentence: "[f]or purposes of this subdivision, the term 'goods' shall not include electricity" (L. 1993, chapter 57, § 127 [ITC limitation sentence]). The memorandum in support stated the following in relation to section 127:

> "It had long been held that the investment tax credits under Articles 9-A and 22 of the Tax Law are not available with respect to property if used principally in the production of electricity (see, Newport Hydro Associates, TSB-A-88(5)I) and that electricity is not a "good" as that term is used in sections 210.12(b) and 606(a) of the Tax Law. The Tribunal's reversal of this position is not consistent with the better tax policy long followed in this State and with the underlying legislative intent. Moreover, an examination of the provisions of the former Federal investment tax credit * * * demonstrates that, for purposes of the Federal investment tax credit, Congress did not consider the generation of electricity as either 'manufacturing' or 'production.' The absence of such a specific Law suggests the conclusion that, unlike the case with respect to the Federal credit, the generation of electricity was

> not intended to be covered by the State credits" (Memorandum in Support, Bill Jacket, L. 1993, ch. 57, pp. 25-26).

The Division cites this legislative history to argue that "[s]ince 1993 there is no doubt that 'the production of goods by manufacturing [or] processing' does not include the generation of electricity." According to the Division, the Legislature's use of that identical language in the definition of "manufacturer" in Tax Law § 210 (1) (b) (2) means that the capital base liability cap in Tax Law § 210 (1) (b) (1) does not apply to petitioner, which is primarily engaged in the production of electricity, because there is no indication that the Legislature intended the language to have a different meaning there.

This argument overlooks the principle, however, that the Legislature is presumed to be aware of judicial decisions in crafting statutory language (***see Conesco Indus., Ltd. v St. Paul Fire & Marine Ins. Co.***, 184 AD2d 956 [3d Dept 1992], citing McKinney's Cons Laws of NY, Book 1, Statutes § 191). Because the Legislature chose to use language that the Tribunal had interpreted to include the generation of electricity, without including an equivalent of the ITC limitation sentence, the Division's argument that the language excludes the generation of electricity is rejected.

E. The Division is on stronger ground, however, when it argues that, even if petitioner is a "manufacturer" for purposes of Tax Law § 210 (1) (b) (2), it is still not a "qualified New York manufacturer" because it does not have property in New York that is described in Tax Law § 210 (12) (b) (i) (A). As noted, Tax Law § 210 (12) (b) (i) provides:

> "A credit shall be allowed under this subdivision with respect to tangible personal property and other tangible property, including buildings and structural components

> of buildings, which are: depreciable pursuant to section one hundred sixty-seven of the internal revenue code, have a useful life of four years or more, are acquired by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code, have a situs in this state and are (A) principally used by the taxpayer in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing, . . . [(B) through (F) omitted]. * * * For purposes of this subdivision, the term 'goods' shall not include electricity."

The parties agree that the Ravenwood Property is depreciable pursuant to IRC § 167, has a useful life of four or more years, was acquired by purchase within the meaning of IRC § 179 (d), and has a situs in New York (***see*** Findings of Fact 22-24). Thus, the only issue is whether the Ravenswood Property was "principally used . . . in the production of goods by manufacturing [or] processing." The ITC limitation sentence in Tax Law § 210 (12) (b) (i) makes clear that the property of a manufacturer principally engaged in the production of electricity does not come within that provision and thus such manufacturers do not satisfy the requirement in Tax Law § 210 (1) (b) (2) of having "property in New York that is described in [Tax Law § 210 (12) (b) (i) (A)]." In view of this unambiguous language, petitioner was not a qualified New York manufacturer, and, therefore, the liability cap in the capital base does not apply to it for the years at issue.

F. In claiming that petitioner is a qualified New York manufacturer, petitioner focuses on a difference in language between Tax Law § 210 (1) (a) (vi), which provides a reduced tax rate for the entire net income (ENI) tax base applicable to "qualified New York manufacturers" and Tax Law § 210 (1) (b), which includes the capital base's liability cap. Both provisions provide special treatment for "qualified New York manufacturers." Moreover, under both, one of the

requirements for being a "qualified New York manufacturer" is being a "manufacturer." However, the two provisions differ in how they define "manufacturer." Tax Law § 210 (1) (a) (vi) defines "manufacturer" as follows:

> The term 'manufacturer' shall mean a taxpayer which during the taxable year is principally engaged in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horiculture, floriculture, viticulture or commercial fishing. *However, the generation and distribution of electricity, the distribution of natural gas, and the production of steam associated with the generation of electricity shall not be qualifying activities for a manufacturer under this subparagraph*" (emphasis added).

The only significant difference in the two provisions' definition of "manufacturer" is the presence of the emphasized sentence in Tax Law § 210 (1) (a) (vi) (the manufacturer exclusionary sentence) and its absence from Tax Law § 210 (1) (b) (2). Citing ***Matter of Branford House, Inc. v Michetti*** (81 NY2d 681 [1993]) and ***Matter of Coltec Indus.***, ***Inc.*** (Tax Appeals Tribunal, March 18, 2016), petitioner argues that that difference must be accorded a meaning under the rule of construction that statutes should be interpreted to avoid treating any language as superfluous (superfluous canon). According to petitioner, this means that Tax Law § 210 (1) (b) (2), which lacks the manufacturer exclusionary sentence, must be construed as not excluding electricity producers from its liability cap. Petitioner claims that this is to be accomplished by interpreting the ITC limitation sentence in Tax Law § 210 (12) (b) (i) "as having no effect on the definition of 'qualified New York manufacturer' for purposes of either the capital base or entire net income base."

One problem with petitioner's statutory construction argument is that it is not premised on there being any ambiguity in the provision being construed, the definition of a qualified New

York manufacturer in Tax Law § 210 (1) (b) (2). In interpreting a statute, the starting point is always the language of the statute, which is the surest guide to the Legislature's intent (***see State of New York v Patricia II.***, 6 NY3d 160, 162 [2006]). Where a statute is "clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (***Matter of Orens v Novello***, 99 NY2d 180, 185 [2002] [internal quotation marks and citations omitted]; ***see also Raritan Dev. Corp. v Silva***, 91 NY2d 98, 107 (1997), quoting ***Bender v Jamaica Hosp.***, 40 NY2d 560 [1976] ["'(a)bsent ambiguity the courts may not resort to rules of construction to broaden the scope and application of a statute,' because 'no rule of construction gives the court discretion to declare the intent of the law when the words are unequivocal'"]; McKinney's Cons. Laws of N.Y., Book 1, Statutes § 76, Comment at 168–169). Here, the capital base liability cap is only available to "qualified New York manufacturers" (***see*** Tax Law § 210 [1] [b] [1]). For a manufacturer to be a qualified New York manufacturer, the manufacturer must have "property in New York that is described in [Tax Law § 210 (12) (b) (i) (A)]." The referenced provision describes tangible personal property that, among other requirements, is "principally used by the taxpayer in the production of goods by manufacturing [or] processing." The last sentence of Tax Law § 210 (12) (b) (i) – the ITC limitation sentence – provides that electricity generators do not come within the scope of the provision by clarifying that "the term 'goods' shall not include electricity." There can be no doubt that the final sentence applies to clause (A) because clause (A) is in subdivision (12) of Tax Law § 210 and the final sentence says it applies "[f]or purposes of this subdivision." Because petitioner never identifies any ambiguity in that language, its resort to rules of construction beyond applying the plain

language of the statute is improper. Indeed, if anything, petitioner is using statutory construction to introduce an ambiguity into Tax Law § 210 (1) (b) (2) where none exists.

Moreover, the superfluous canon is not an invariable one, as generally an "if possible" phrase is appended (***see Friedman v Rice***, 30 NY3d 461, 477–78 [2017], quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes § 231 ["(i)n the construction of a statute, meaning and effect should be given to all its language, if possible, and words are not to be rejected as superfluous when it is practicable to give each a distinct and separate meaning"]; and McKinney's Cons. Laws of N.Y., Book 1, Statutes § 98 ["effect and meaning must, if possible, be given to the entire statute and every part and word thereof"]). This does not appear to be an appropriate occasion to invoke the principle, given that petitioner's method of avoiding the claimed redundancy in the reduced rate provision in the ENI base, Tax Law § 210 (1) (a) (vi), is to give no effect to the ITC limitation sentence in the capital base's definition of a qualified New York manufacturer, notwithstanding that the sentence clearly applies. Indeed, petitioner's argument amounts to the claim that, because Tax Law § 210 (1) (a) excludes electricity producers twice from the tax benefit it provides, while Tax Law § 210 (1) (b) only excludes electricity producers once from its tax benefit, the latter provision must be construed as not excluding electricity producers at all. The cases petitioner cites as applying the superfluous canon did not involve, as here, overriding clear statutory language in order to avoid treating language in another provision as redundant (***see Matter of Branford House, Inc.***, 81 NY2d 681 [1993] [Court of Appeals adopts a "a sensible and practical over-all construction" of a statutory provision and invokes superfluous canon to reject a contrary interpretation] [internal quotations omitted];

Matter of Coltec Indus., Inc., Tax Appeals Tribunal, March 18, 2016 [Tribunal accepts the Division's position because it is "plainly consistent with the ordinary meaning" of the key statutory term in the Tax Law provision at issue and invokes superfluous canon as one ground for rejecting petitioner's alternative interpretation of that provision]).

G. Petitioner also argues that its interpretation of the ITC limitation sentence as having no effect on the definition of a "qualified New York manufacturer" is supported by the legislative history of Tax Law § 210. In this regard, petitioner points out that part N of chapter 60 of the Laws of 2007 amended the ENI base by adding both the definition of "manufacturer," with the manufacturer exclusionary sentence, and the definition of a "qualified New York manufacturer" in the course of providing a reduced rate for qualified New York manufacturers. Petitioner argues that it makes no sense to conclude the Legislature excluded electricity producers from the reduced ENI rate twice, once by the manufacturer exclusionary sentence and again via the ITC limitation sentence through the reference to "property in New York that is described in [Tax Law § 210 (12) (b) (i) (A)]." Petitioner also points to the Governor's 2008-2009 budget bill, which would have conformed the definition of "manufacturer" in the capital base to the language used in the ENI base by adding a sentence essentially identical to the manufacturer exclusionary sentence. According to petitioner, the Legislature's "rejection" of the addition of that sentence to Tax Law § 210 (1) (b) (2) demonstrates that the Legislature intended to give producers of electricity the benefit of the capital base liability cap. Finally, petitioner points out that, while the Division has made clear that manufacturers principally engaged in producing electricity do not qualify for the reduced rate in the ENI base reserved for "qualified New York manufacturers,"

the Division has never made clear, whether in its memorandum summarizing the 2008 legislation that introduced the "qualified New York manufacturer" term into the capital base tax, or in its instructions to the form CT-3-A, that such manufacturers do not qualify for the liability cap in the capital base.

Petitioner's legislative history arguments also fail. The Court of Appeals has said on a number of occasions that "[w]e resort to legislative history 'only where the language is ambiguous or where a literal construction would lead to absurd or unreasonable consequences'" (***People v Barnes***, 26 NY3d 986, 989 [2015] quoting ***Matter of Auerbach v Board of Educ. of City School Dist. of City of N.Y.***, 86 NY2d 198, 204 [1995]). Here, as discussed, petitioner has not identified any ambiguity with regard to the statutory sections at issue, Tax Law § 210 (1) (b) (2) and the section referenced therein, Tax Law § 210 (12) (b) (i) (A). Nor has petitioner claimed, let alone shown, that not applying the liability cap to petitioner on the ground that it is a producer of electricity is an absurd result. Accordingly, petitioner's use of legislative history to construe those provisions is inappropriate.

In any event, petitioner's legislative history argument is not compelling. Petitioner is correct in pointing out that, on its face, part N of chapter 61 of the laws of 2007 excludes electricity producers from the ENI base's reduced rate provision twice, once by excluding them from the definition of "manufacturer" and a second time through the reference to Tax Law § 210 (12) (b) (i) (A), with its ITC limitation sentence. But this anomaly does not warrant the inference that the Legislature must not have meant the ITC limitation sentence to apply in determining whether a manufacturer is a qualified New York manufacturer under the Legislature's revision of

capital base's liability cap in part GG-1 of chapter 57 of the Laws of 2008, which only excludes electricity producers from the capital base's liability cap once. That inference requires this forum to assume that the Legislature did not intend what it clearly said in part GG-1, which itself contradicts the principle that a "court should not ignore the words of a statute, clear on its face, to reach a contrary result through judicial interpretation" (McKinney's Cons. Law of NY, Book 1, Statutes, § 76).

Petitioner's second legislative history argument turns on the fact that, in the course of amending Tax Law § 210 (1) (b) by otherwise adopting the Governor's proposal to limit the applicability of the capital base's liability cap to "qualified New York manufacturers," the Legislature declined to include a sentence paralleling the manufacturer exclusionary sentence in Tax Law § 210 (1) (a) (vi), which excluded electricity producers from the definition of "manufacturer." While "[a] court may examine changes made in proposed legislation to determine intent" (***see Majewski v Broadalbin-Perth Cent. Sch. Dist.***, 91 NY2d 577, 587 [1998]), such arguments must, nevertheless, be approached cautiously since "[w]e simply do not know what consequences the legislators expected to follow from the omission [of the proposed provision]" (***Tzolis v Wolff***, 10 NY3d 100, 108 [2008] [in deciding that derivative actions are allowed on behalf of limited liability companies, the majority declines to draw any inference from the omission in the final version of the Limited Liability Company Law of an article IX entitled "Derivative Actions" found in the version introduced in the Assembly]). Here, petitioner's explanation for the Legislature's omission of the sentence paralleling the manufacturer exclusionary sentence, as proposed by the Governor's budget bill, is just one

alternative. Another plausible explanation for that omission is that the Legislature spotted the fact that the proposed manufacturer exclusionary sentence was redundant in light of the reference to Tax Law § 210 (12) (b) (i) (A), with its ITC limitation sentence, and therefore declined to include it in the version of the bill it enacted. A third possibility is that the Legislature, noticing that the manufacturer exclusionary sentence excluded distributors of electricity and gas, which the ITC limitation sentence did not do, omitted the manufacturer exclusionary sentence for that reason. In sum, in the absence of any explanation of the omission of that sentence in a memorandum in support or other Legislative statement, no reliable inference can be drawn from its omission by the Legislature (***see also Clark v Cuomo***, 66 NY2d 185, 190–91 [1985] [noting that "'(l)egislative inaction,' as a basis for statutory construction because of its inherent ambiguity 'affords the most dubious foundation for drawing positive inferences,'" quoting ***United States v Price***, 361 U.S. 304, 310 (1960)]).

It also bears noting that if the Legislature had intended that the ITC limitation sentence was to have no effect on whether a manufacturer was a qualified New York manufacturer, it could easily have done so (***see Matter of Oswald N.***, 87 NY2d 98, 103 [1995] [rejecting an interpretation of CPL 330.20 that allows only two consecutive five-year orders of conditions, noting that "had the Legislature intended such a limitation, it could easily have so provided"] [internal quotation omitted]). For example, the Legislature could have added a "regardless" phrase to the cross-reference to Tax Law § 210 (12) (b) (i) (A) as follows: "A qualified New York manufacturer is . . . a manufacturer that has property in New York that is described in clause (A) of subparagraph (i) of paragraph (b) of subdivision (12) of [Tax Law § 210],

regardless of the last sentence of such subparagraph, and either . . . (added language in italics)." Indeed, the Legislature did just that in the very legislative act at issue, part GG-1of chapter 57 of the Laws of 2008, when it extended the capital base's liability cap to an "emerging technology company under paragraph (c) of subdivision one of [Public Authorities Law § 3202(e)] *regardless of the ten million dollar limitation expressed in subparagraph one of such subparagraph* (emphasis added)" (***see*** Tax Law § 210 [1] [b] [2]).

Moreover, the legislative history supports a strong argument in favor of the Division's view that Tax Law § 210 (1) (b) (2)'s reference to Tax Law § 210 (12) (b) (i) (A), with its ITC limitation sentence, must be read to exclude electricity producers from the capital base's liability cap. Specifically, there is no dispute that the Legislature added the ITC limitation sentence to Tax Law § 210 (12) (b) (i) (A) in 1993 expressly to exclude electricity producers from obtaining the ITC. The fact that the Legislature chose to tie a taxpayer's eligibility for the capital base's liability cap to Tax Law § 210 (12) (b) (i) (A), with that sentence in it, is persuasive evidence that the Legislature did not want to confer the benefit of the liability cap on electricity producers.[2]

H. The last issue presented concerns whether the Tax Law § 1085 (k) penalties imposed by the Division for substantial understatement of liability and negligence should be sustained. Petitioner argues that the penalties should be abated because its filing position was supported by

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[2] Petitioner also points out that the Division's technical memorandum summarizing the 2008 legislative amendments to the corporation taxes, TSB-M-08(12)C, fails to mention that part GG-1 excluded electricity producers from benefitting from the liability cap, whereas the Division's technical memorandum summarizing the 2007 legislative changes, TSB-M-08(1)C, did explain that electricity producers were excluded from the reduced ENI rate for qualified New York manufacturers. Petitioner also notes that the Division's instructions for the Form CT-3-A for the years at issue do not address whether electricity producers are excluded from the capital base's liability cap. The Division's silence with regard to the proper interpretation of Tax Law § 210 (1) (b) (2), with its cross-reference to 210 (12) (b) (i) (A), does not warrant a deviation from that provision's clear language.

"substantial authority" and because petitioner has established reasonable cause sufficient to support the abatement of tax. The burden of proof to show reasonable cause is on the petitioner, and in establishing reasonable cause, the taxpayer faces an onerous task (***see Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993). The Tribunal explained why the task is onerous as follows:

> "By first requiring the imposition of penalties (rather than merely allowing them at the Commissioner's discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [citations omitted] (***Matter of MCI Telecommunications Corp.***, Tax Appeals Tribunal, January 16, 1992)."

Petitioner argues that it fairly disclosed its position that it qualified for the capital base liability cap in Tax Law § 210 (1) (b) on its returns and that its interpretation of that provision was a reasonable one. However, the fact that a taxpayer exercises good faith in taking an incorrect legal interpretation does not constitute reasonable cause (***see Matter of Barker***, Tax Appeals Tribunal, January 26, 2012, citing ***Matter of Auerbach v State Tax Commn.***, Sup. Ct, Albany County, July 7, 1987 [Williams, J.], ***affd*** 142 AD2d 390 [1988]). Here, given that Tax Law § 210 (1) (b) was clear that the capital base liability cap was only available to qualified New York manufacturers and that taxpayers principally engaged in generating electricity did not constitute qualified New York manufacturers, petitioner's view of the statute was not reasonable. Also militating against finding the existence of reasonable cause here is that petitioner has not shown that it sought the Division's views on its interpretation of Tax Law § 210 (1) (b) (2) (***see Matter of CBS Corp. v Tax Appeals Tribunal***, 56 AD3d 908, 911 [3d Dept 2011] ***lv denied*** 12 NY3d 703 [2009] ["(a)dvancement of a reasonable legal theory in good faith or reliance upon

professional advice . . ., in the absence of inquiry to ascertain the position of the (Division), does not constitute reasonable cause"]). In sum, petitioner has not established reasonable cause for its substantial understatement of tax for the years at issue or that its filing position was supported by "substantial authority" and, therefore, the penalties imposed by the Division are sustained.

I. The petition of TransCanada Facility USA, Inc. is hereby denied and the notice of deficiency dated October 16, 2015, together with penalties and interest thereon, is sustained.

DATED: Albany, New York
June 7, 2018

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE