

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	DETERMINATION
GLOBALFOUNDRIES U.S. INC.	:	DTA NO. 829184
for Refund of Corporation Franchise Tax under Article	:	
9-A of the Tax Law for the Years 2012 and 2014.	:	

Petitioner, GlobalFoundries U.S. Inc. filed a petition for a refund of corporation franchise tax under article 9-A of the Tax Law for the years 2012 and 2014.

On September 3, 2020, petitioner, appearing by Greenberg Traurig, LLP (Glenn Newman, Esq., and Harold Iselin, Esq., of counsel), and on September 17, 2020, the Division of Taxation, appearing by Amanda Hiller, Esq. (Bruce D. Lennard, Esq., of counsel), waived a hearing and submitted the matter for determination pursuant to 20 NYCRR 3000.12 based on documents and briefs to be submitted by January 20, 2021, which date commenced the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioner is entitled to be paid refunds of the remaining 50% of its Empire Zone investment tax credits for the years 2012 and 2014 on the basis that it is both a “new business” and a qualified investment project or significant capital investment project pursuant to Tax Law § 210-B (3) (d)¹ resulting in a combined 100% refund.

¹ Tax Law former § 210 (12-B) (d) was renumbered 210-B (3) (d) by the Laws of 2014, chapter 59, part A.

II. If so, whether petitioner's refund claim for the tax year 2012 was timely filed.

III. Whether petitioner made an informal claim for refund for the tax year 2012.

FINDINGS OF FACT

The parties executed a stipulation of facts and submitted joint exhibits in connection with this matter, many of which provide a historical background of the Empire Zones Program and the resulting legislation enacted. Such stipulated facts have been substantially incorporated into the findings of fact set forth herein. In addition, the Division of Taxation (Division) submitted 59 proposed findings of fact based upon the affirmation of Deborah R. Liebman, Esq. Proposed findings of fact numbered 1 through 3 have been accepted and incorporated into the findings of fact set forth herein. Proposed findings of fact 4 through 43 and 53 through 59 address the legislative history in much more detail than the background historical facts that the parties agreed to in their stipulation, as well as citations to specific statutes. Pursuant to State Administrative Procedure Act § 306 (4), official notice is taken of the various historical versions of the New York State statutes and legislative history, yet these proposed findings of fact are not properly findings of fact and they will be referenced in the conclusions of law to the extent necessary. Proposed findings of fact 44 through 52 relate to the understanding by, and intention relayed to, Ms. Liebman and her staff during the legislative process and are rejected as irrelevant since the enacted legislation is the best indication of legislative intent.

1. Petitioner, GlobalFoundries U.S. Inc., operates a manufacturing facility within a designated Empire Zone in Malta, New York.

2. Petitioner seeks a refund of Empire Zone investment tax credits (EZ-ITCs) in the amount of \$219,684,307.00 for its taxable years 2012 and 2014. Specifically, the refund

claimed for taxable year 2012 is \$67,332,179.00 and the refund claimed for taxable year 2014 is \$152,352,128.00.

3. Petitioner's refund claim for a total of \$219,684,307.00 was made by its filing of an amended 2014 form CT-3, general business corporation franchise tax return, signed and dated July 18, 2018 and, in particular, an amended 2014 form CT-603, claim for EZ investment tax credit and EZ employment tax credit. The Division issued a refund denial letter dated August 10, 2018.

4. After audit of its taxable year 2012, petitioner had \$138,075,926.00 of EZ-ITC available for carryforward of which 50% was refunded as an overpayment of tax and, in its taxable year 2014, petitioner had \$304,704,256.00 of EZ-ITC available for carryforward of which 50% was also refunded as an overpayment of tax.

5. Petitioner's combined refund claim of \$219,684,307.00 seeks a refund of the remaining 50% of EZ-ITC available for carryforward for each of petitioner's taxable years 2012 and 2014. Petitioner claims that it is entitled to be refunded 50% of its EZ-ITC amounts from its taxable years 2012 and 2014 as a "new business" in an Empire Zone and, additionally, to be refunded the remaining 50% of its EZ-ITC amount from each of these years as an owner of a qualified investment project (QUIP) or significant capital investment project (SCIP).

6. On August 10, 2018, the Division denied the refund claim. The Division stated that 50% of petitioner's carryover EZ-ITCs for taxable years 2012 and 2014 had been refunded as overpayments of tax and it concluded that petitioner was not entitled to any additional refunds. Additionally, the Division concluded that because petitioner was refunded 50% of its EZ-ITC available to be carried forward, no amount was deferred and the claim for refund for the 2012 tax year was untimely.

7. Subsequently, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services in protest of the refund denial letter. A conciliation order was issued, on February 1, 2019, sustaining the denial of the refund. On February 19, 2019, petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order.

HISTORICAL BACKGROUND OF THE EMPIRE ZONES PROGRAM

8. Article 18-B of the General Municipal Law is known and can be cited as the "New York State Empire Zones Act" (Act). The Act was added by chapter 686 of the Laws of 1986 at which time the New York State Legislature (Legislature):

"found and declared that there exist within the state certain areas characterized by persistent and pervasive poverty, high unemployment, limited new job creation, a dependence on public assistance income, dilapidated and abandoned industrial and commercial facilities, and shrinking tax bases. These severe conditions required state government to target for these areas extraordinary economic and human resource development programs in order to stimulate private investment, private business development and job creation" (General Municipal Law § 956).

Therefore, the Legislature found and declared that it was, and is:

"the public policy of the state to offer special incentives and assistance that will promote the development of new businesses, the expansion of existing businesses and the development of human resources within these economically impoverished areas and to do so without encouraging the relocation of business investment from other areas of the state."

The Legislature "further found and declared that it is the public policy of the state to achieve these goals through the mutual cooperation of all levels of state and local government and the business community."

9. The special incentives and assistance to be offered to stimulate private investment, private business development and job creation within Empire Zones include various tax

incentives and benefits, including sales and use tax exemptions, credits for real property taxes, tax reduction credits, and EZ-ITCs.

10. Beginning in the early 1990s, Governor Mario Cuomo had the vision that high technology manufacturing could be brought to upstate New York through a combination of creating educational opportunities in nanotechnology and providing an environment for high technology industries to develop and grow in a region in need of economic revitalization.

11. In an effort to revitalize upstate New York and go beyond the traditional manufacturing base, the state identified leading-edge manufacturing industries that would transform and drive economic growth. Studies performed identified five key industries as viable targets for next-generation opportunities for upstate New York based upon the existing infrastructure and asset base: advanced materials, clean energy, nanotechnology/semiconductors, information technology and biotechnology/life sciences.

12. Nanotechnology and semi-conductor manufacturing were selected as an initial area of focus based on the historical corporate presence in New York of International Business Machines Corporation and its interest in having a world-class research partner, and New York's existing asset base. The increasing importance of proximity to research for manufacturing was a key factor in the Capital Region's pursuit of a semiconductor fabrication facility.

13. To attract a semiconductor wafer fabrication facility, the region needed to provide a site that was competitive with other locations nationally and globally in terms of construction readiness, incentives, available workforce and proximity to research and development. New York State created a proactive marketing and outreach campaign to communicate that upstate New York could support semiconductor manufacturing and would be an excellent place for

business to locate and invest. This marketing effort included collaboration with regional, state and economic development partners.

14. The incentives that New York State created to encourage development of a semiconductor manufacturing facility in Saratoga County included grants, tax exemptions and tax credits, some which were refundable tax credits, enacted in Tax Law §§ 14, 15, 16 and 210. These incentives were carefully crafted in order to ensure that they were sufficient to induce the major investment required for developing the high technology facilities required to produce semiconductor chips.

15. In chapter 108 of the Laws of 2006, approved on June 23, 2006, the Legislature appropriated the sum of \$500 million for costs associated with the development of a semiconductor manufacturing facility including but not limited to the construction, purchase and installation of equipment, or other state costs required pursuant to a letter of intent executed by the chairman of the New York State Urban Development Corporation and Advanced Micro Devices, Inc. (AMD); and the sum of \$150 million for research and development activities of AMD.

16. On that same day, Friday, June 23, 2006, Governor George Pataki announced a state financing deal under which AMD would build a computer microchip manufacturing center in a high-technology industrial park in Malta, Saratoga County, New York.

17. In a July 20, 2006 press release, AMD announced that it had received a non-binding \$900 million cash incentive package consisting of grants and tax credits from the State of New York to build its next fabrication facility in Luther Forest, Saratoga County, New York.

18. In its U.S. Securities and Exchange Commission (SEC) form 10-K for the fiscal year ended December 31, 2006, AMD reported that, in anticipation of the potential need for increased

manufacturing capacity over the longer term, on December 22, 2006, it had entered into a Grant Disbursement Agreement with the New York State Urban Development Corporation d/b/a Empire State Development Corporation (ESDC), in connection with a potential new 300-millimeter wafer fabrication facility on the Luther Forest Technology Campus in Saratoga County, New York. Under the agreement, AMD would be able to construct a new facility designed to produce 300-millimeter wafers using 32-nanometer process technology between July 2007 and July 2009.

19. In its SEC form 10-K, for the fiscal year ended December 29, 2007, AMD reported its agreement in connection with its potential new 300-millimeter wafer fabrication facility on the Luther Forest Technology Campus in Saratoga County, New York.

20. In its SEC form 10-K, for fiscal year ended December 27, 2008, AMD reported that, on October 6, 2008, it had entered into a Master Transaction Agreement, which was further amended on December 5, 2008, with Advanced Technology Investment Company LLC (ATIC) to form a manufacturing joint venture, The Foundry Company.

21. In its SEC form 10-K, for the fiscal year ended December 26, 2009, AMD reported that on March 2, 2009, together with ATIC and West Coast Hitech L.P. (WCH), acting through its general partner West Coast Hitech G.P., Ltd., AMD had formed GLOBALFOUNDRIES, Inc. (GF), a manufacturing joint venture that manufactures semiconductor products and provides certain foundry services to AMD.

22. Tax Law §§ 14, 15 and 16 address the Empire Zones program and sales and use tax exemptions, credits for real property taxes and tax reduction credits for Qualified Empire Zone Enterprises (QEZE).

23. QEZE's are business enterprises certified under Article 18-B of the General Municipal Law that meet an "employment test" specified in Tax Law § 14 (b).

24. Pursuant to Tax Law § 14 (b) (4), as effective April 12, 2005 to April 27, 2006, in the case of a business enterprise which is first certified under Article 18-B of the General Municipal Law, on or after April 1, 2005, the employment test is met with respect to a taxable year if the business enterprise's employment number in the State and the Empire Zones for such taxable year exceeds its employment number in the state and the Empire Zones, respectively for a "base period."

25. Section 2 of part AA of chapter 62 of the Laws of 2006, approved on April 28, 2006, amended Tax Law § 14 (j) by adding a new paragraph 5. This newly added paragraph provided that a business enterprise which placed in service property (or a project that includes such property) for which, at the time the property is placed in service by a taxpayer, the basis for Federal income tax purposes equals or exceeds \$750 million, shall be "deemed to be a new business" so long as such new business shall have received certification by December 31, 2007.

26. By approving this newly added paragraph 5 of Tax Law § 14 (j) on April 28, 2006, the Legislature intended to, and did, extend to business enterprises placing in service property with a basis equal to or exceeding \$750 million the sales and use tax exemptions, credits for real property taxes and tax reduction credits for QEZE's provided for by Tax Law §§ 14, 15 and 16 by allowing these business enterprises to be deemed to be new businesses for purposes of Tax Law § 14 (b) (4) when they were not otherwise new businesses.

27. Tax Law § 210 (12-B), as effective April 28, 2006 to June 22, 2006, created an EZ-ITC. Tax Law § 210 (12-B) (d) provided that this credit could not reduce the tax due for any taxable year to less than the higher of the amounts prescribed in Tax Law § 210 (1) (c) and

(d). In the event the amount of the credit allowed under section 210 (12-B) for any taxable year reduced the tax to such amount, a credit not deductible in that tax year could be carried over to the following year or years and deducted from the taxpayer's tax for such year or years. In lieu of a carryover, the taxpayer qualifying as a "new business" under Tax Law § 210 (12) (j) could elect, on its report for the taxable year with respect to which the credit was allowed, to treat fifty percent of the amount of such carryover as an overpayment of tax to be credited or refunded in accordance with the provisions of Tax Law § 1086.

28. Section 8 of part N of chapter 61 of the Laws of 2006, approved on April 20, 2006, further amended Tax Law § 14 (j) (5), as added by section 2 of Part AA of chapter 62, to provide that a business enterprise which placed in service property (or a project that includes such property) for which at the time the property is placed in service by a taxpayer, the basis for Federal income tax purposes equals or exceeds \$750 million, shall be "deemed to be a new business" under Tax Law §§ 14, 210 (12) and 606 (a) (10).

29. Part V-1 of chapter 109 of the Laws of 2006, approved on June 23, 2006, amended the General Municipal Law and the Tax Law in relation to extending Empire Zone benefits to QUIPs and SCIPs.

30. General Municipal Law § 957 provides definitions for words and terms used in Article 18-B of the General Municipal Law, which addresses New York State Empire Zones.

31. Section 1 of part V-1 of chapter 109 of the Laws of 2006 amended General Municipal Law § 957 by adding new subdivisions (s) and (t).

32. Newly added subdivision (s) of General Municipal Law § 957 defines a QUIP to mean a project (i) located within an Empire Zone; (ii) at which 500 or more jobs will be created, provided such jobs are new to the State and are in addition to any other jobs previously created

by the owner of such project in the State; and (iii) which will consist of tangible personal property and other tangible property, including buildings and structural components of buildings, described in subparagraphs (i), (ii), (iii), (iv) and clause (A) or (C) of subparagraph (v) of Tax Law § 210-B (3) (b), the basis of which for Federal income tax purposes will equal or exceed \$750 million. However, the owner of such project must not employ more than 200 persons in the state at the time the project is commenced.

33. Newly added subdivision (t) of General Municipal Law § 957 defines a SCIP to mean a project (i) located within an Empire Zone, (ii) which will be either a newly constructed facility or a newly constructed addition to or expansion of a QUIP, consisting of tangible personal property and other tangible property, including buildings and structural components of buildings, described in subparagraph (i), (ii), (iii), (iv) and clause (A) or (C) of subparagraph (v) of Tax Law § 210-B (3) (b), the basis of which for Federal income tax purposes will equal or exceed \$750 million, (iii) which is constructed after the basis for Federal income tax purposes of the property comprising such QUIP equals or exceeds \$750 million, and (iv) at which 500 or more jobs will be created, provided such jobs are new to the State and are in addition to any other jobs previously created by the owner of such project in the State.

34. By approving sections 1, 2 and 4 of part V-1 of chapter 109 of the Laws of 2006, the Legislature intended to, and did, specifically: (1) newly establish the concepts of, and define, a QUIP and a SCIP; (2) assign to the Commissioner of Economic Development the responsibility to approve applications for qualification of a business enterprise as the owner of a QUIP or a SCIP; and (3) extend to business enterprises approved as the owners of QUIPs or SCIPs the tax benefits provided for in Tax Law §§ 14, 15 and 16.

35. Tax Law § 210 (12-C), effective January 1, 2006 to April 27, 2006, addressed the Empire Zone employment incentive credit (EDZ-EIC) and provided that in no event shall the EDZ-EIC be allowed in an amount which will reduce the tax payable to less than the amount prescribed in Tax Law § 210 (1) (d). However, if the amount of credit allowable under this subdivision for any taxable year reduces the tax to such amount, any amount of credit not deductible in such taxable year may be carried over to the following year or years and may be deducted from the taxpayer's tax for that year or years.

36. Section 9 of part N of chapter 61 of the Laws of 2006, approved on April 20, 2006, amended Tax Law § 210 (12-C) (c) to add that, in lieu of such carryover, a taxpayer deemed to be a new business under Tax Law § 14 (j) (5) may elect, on its report for its taxable year with respect to which such credit is allowed, to treat fifty percent of the amount of the carryover as an overpayment of tax to be credited or refunded in accordance with the provisions of Tax Law § 1086.

37. Section 7 of part V-1 of chapter 109 of the laws of 2006, approved on June 23, 2006, further amended Tax Law § 210 (12-C) (c) to provide that, in lieu of such carryover, any taxpayer approved as the owner of a QUIP or a SCIP, may elect, on its report for its taxable year with respect to which such credit is allowed, to treat fifty percent of the amount of the carryover as an overpayment of tax to be credited or refunded in accordance with the provisions of Tax Law § 1086.

TAX FILINGS AND REFUND CLAIMS

38. By letter dated July 20, 2018, from petitioner's Vice President for Tax, William C. Barrett, petitioner sought a refund of EZ-ITC from its taxable year 2012 in the amount of

\$67,332,179.00 and a refund of EZ-ITC from its taxable year 2014 in the amount of \$152,352,128.00

39. Petitioner's aggregate refund claim for \$219,684,307.00 was made by its filing of an amended 2014 form CT-3, General Business Corporation Franchise Tax return, signed and dated July 18, 2018 and, in particular, an amended 2014 form CT-603, claim for EZ investment tax credit and EZ employment tax credit.

40. Mr. Barrett's July 20, 2018² letter and petitioner's amended 2014 form CT-3 and amended 2014 form CT-603, among other forms, were sent to the Division by certified mail in an envelope postmarked July 18, 2018 and delivered to the Division on July 19, 2018. The refund claim was denied by letter dated August 10, 2018.

41. After audit of its taxable year 2012, petitioner had \$138,075,926.00 of EZ-ITC available for carryforward of which 50% was refunded as an overpayment of tax and, in its taxable year 2014, petitioner had \$304,704,256.00 of EZ-ITC available for carryforward of which 50% was also refunded as an overpayment of tax.

42. Petitioner's combined refund claim of \$219,684,307.00 seeks a refund of the remaining 50% of EZ-ITC available for carryforward for each of petitioner's taxable years 2012 and 2014.

43. For its taxable year 2012, petitioner electronically filed with the Division a 2012 form CT-3, a 2012 form CT-603 and a 2012 form CT-500, corporation tax credit deferral form, among other forms. These forms were received by the Division on October 12, 2013.

² It is noted that the date of the correspondence from Mr. Barrett is two days after the letter and the amended returns were mailed to the Division. It is concluded that this discrepancy is immaterial.

44. In its taxable year 2012, after audit, petitioner had an available EZ-ITC of \$138,080,250.00. From this amount, \$4,324.00 was applied against tax and \$138,075,926.00 of EZ-ITC was available for carryforward.

45. Fifty percent of this \$138,075,926.00 of EZ-ITC available for carryforward, or \$69,037,963.00, was also refundable and \$1,650,007.00 of that amount was refunded to petitioner for its taxable year 2012.

46. Refund of the remaining amount of petitioner's refundable EZ-ITC from its taxable year 2012, i.e. \$67,387,956.00, was deferred from petitioner's taxable year 2012 but later paid to petitioner during its taxable years 2013, 2014 and 2015, respectively.

47. After receiving a refund of 50% of its EZ-ITC of \$138,075,926.00 available for carryforward from its taxable year 2012, petitioner had available the remaining EZ-ITC carryforward from that year of \$69,037,963.00.

48. Petitioner did not file an amended 2012 form CT-603 at any time.

49. For its taxable year 2013, petitioner electronically filed with the Division a 2013 form CT-603, among other forms. These forms were received by the Division on October 10, 2014.

50. Petitioner did not file an amended 2013 form CT-603 at any time.

51. For its taxable year 2014, petitioner originally electronically filed with the Division a 2014 form CT-603, among other forms. These forms were received by the Division on September 12, 2015.

52. After recapture of its line 4 amount, it had \$372,036,434.00 of EZ-ITC.

53. On line 19 of its amended 2014 form CT-603, petitioner reported this \$372,036,434.00 amount as EZ-ITC available for carryforward in its taxable year 2014.

54. On lines 20a and 20b of its amended 2014 form CT-603, petitioner reported that it was claiming a refund of the full \$372,036,434.00 of EZ-ITC that it reported on its line 19. This amount included a claim for refund of petitioner's line 2 amount from its original and amended 2014 forms CT-603.

55. On line 20b of its amended 2014 form CT-603, petitioner claimed a refund of the \$69,037,963.00 it had as an available non-refundable EZ-ITC carryforward from its taxable year 2012, minus the \$1,705,784.00 of EZ-ITCs petitioner took in previous periods leaving \$67,332,179.00 of unrefunded credits at issue in this proceeding.

56. Petitioner is an article 9-A taxpayer.

57. The filing of petitioner's amended 2014 form CT-603, in combination with its amended 2014 form CT-3 and the letter from Mr. Barrett, all on or about July 19, 2018, was a claim that petitioner made for refund of the EZ-ITC amount of \$67,332,179.00 that petitioner had carried forward from its taxable year 2012 to its taxable year 2013 and to its taxable year 2014.

58. The filing of petitioner's amended 2014 form CT-603, in combination with its amended 2014 form CT-3 and the letter from Mr. Barrett, all on or about July 19, 2018, was a claim petitioner made for refund of the EZ-ITC amount of \$152,352,128.00 that petitioner had carried forward from its taxable year 2014.

59. The Division submitted the affirmation of Deborah R. Liebman, Esq., in support of its case. Ms. Liebman is employed by the Division and has been since 1983. She is currently Deputy Counsel in the Office of Counsel and was serving in that role in 2006. Her duties and responsibilities as Deputy Counsel included the development and review of drafts of possible legislative proposals on behalf of the Division of Budget and the Governor's Counsel's Office.

60. Ms. Liebman's affirmation is based upon her personal involvement, and the supervision of others, in the development, drafting and administration of the Tax Law provisions relating to the qualified empire zone enterprise credit for real property taxes, the Empire Zone program, the EZ-ITC, the empire zone employment incentive credit and the empire zone wage credit. She affirms that she was specifically involved in the development, drafting and administration of the amendments made to Tax Law § 210 (12-B) (d) enacted into law by chapter 109 of the Laws of 2006 on June 23, 2006.

CONCLUSIONS OF LAW

A. The first issue to address is whether petitioner is entitled to be paid refunds of the remaining 50% of its EZ-ITCs for the years 2012 and 2014, on the basis that it is both a "new business" and as an owner of a QUIP or SCIP pursuant to Tax Law § 210-B (3) (d), resulting in a combined 100% refund.

Tax Law § 210-B (3) (d) states as follows:

"Carryover. The credit allowed under this subdivision for any taxable year shall not reduce the tax due for such year to less than the fixed dollar minimum amount prescribed in paragraph [d] of subdivision one of section two hundred ten of this article. Provided, however, that if the amount of credit allowed under this subdivision for any taxable year reduces the tax to such amount or if the taxpayer otherwise pays tax based on the fixed dollar minimum amount, any amount of credit not deductible in such taxable year may be carried over to the following year or years and may be deducted from the taxpayer's tax for such year or years. In lieu of such carryover, any such taxpayer which qualifies as a new business under paragraph [f] of subdivision one of this section may elect, on its report for its taxable year with respect to which such credit is allowed, to treat fifty percent of the amount of such carryover as an overpayment of tax to be credited or refunded in accordance with the provisions of section one thousand eighty-six of this chapter. In addition, any taxpayer which is approved as the owner of a qualified investment project or a significant capital investment project pursuant to subdivision [w] of section nine hundred fifty-nine of the general municipal law, on its report for its taxable year with respect to which such credit is allowed, in lieu of such carryover, may elect to treat fifty percent of the amount of such carryover which is attributable to the credit allowed under this

subdivision for property which is part of such project as an overpayment of tax to be credited or refunded in accordance with the provisions of section one thousand eighty-six of this chapter. Provided, however, such owner shall be allowed such refund for a maximum of ten taxable years with respect to such qualified investment project and each significant capital investment project, starting with the first taxable year in which property comprising such project is placed in service. Provided, further, however, the provisions of subsection [c] of section one thousand eighty-eight of this chapter notwithstanding, no interest shall be paid thereon.”

The issue devolves to whether petitioner, having been refunded 50% of its EZ-ITC for the years 2012 and 2014, is entitled to a refund of the remaining 50% of its EZ-ITC based upon a plain reading of Tax Law § 210-B (3) (d).

B. Resolution of this question is a matter of statutory interpretation, the purpose of which is to ascertain and give effect to the intent of the Legislature (*Patrolmen’s Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205 [1976], citing *Matter of Petterson v Daystrom Corp.*, 17 NY2d 32 [1966]). The language of the statute “is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning” (*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660 [2006]). Ultimately, proper statutory construction focuses on “the precise language of the enactment in an effort to give a correct, fair and practical construction that properly accords with the discernable intention and expression of the Legislature [citation omitted]” (*Matter of 1605 Book Ctr. v Tax Appeals Trib. of State of N.Y.*, 83 NY2d 240, 244, 245 [1994], *cert denied* 513 US 811 [1994]; *see McKinney’s Cons Laws of NY*, Book 1, Statutes § 92).

Tax credit statutes are similar to, and should be construed in the same manner as, statutes creating tax exemptions (*see Matter of Piccolo v New York State Tax Appeals Trib.*, 108 AD3d 107 [3d Dept 2013]). That is, such statutes must be strictly construed against the taxpayer (*see e.g. Matter of 677 New Loudon Corp. v State of N.Y. Tax Appeals Trib.*, 19 NY3d 1058 [2012],

rearg denied 20 NY3d 1024 [2013], *cert denied* 571 US 952 [2013]). However, construction of an exemption or credit statute should not be so narrow as to defeat the provision's settled purpose (*Matter of Grace v New York State Tax Commn.*, 37 NY2d 193 [1975], *rearg denied* 37 NY2d 816 [1975], *lv denied* 338 NE2d 330 [1975]).

Petitioner has the burden to establish "unambiguous entitlement" to the claimed statutory benefit (*Matter of United Parcel Serv. v Tax Appeals Trib. of State of N.Y.*, 98 AD3d 796, 798 [3d Dept 2012], *lv denied* 20 NY3d 860 [2013]). In order to prevail, therefore, petitioner must prove that the Division's interpretation of the statute is irrational and that its interpretation is the only reasonable construction (*Matter of American Food & Vending Corp. v New York State Tax Appeals Trib.*, 144 AD3d 1227 [3d Dept 2016]; *Matter of Brooklyn Navy Yard Cogeneration Partners v Tax Appeals Trib. of State of N.Y.*, 46 AD3d 1247 [3d Dept 2007], *lv denied* 10 NY3d 706 [2008]).

C. In accordance with the foregoing principles, petitioner has failed to show that its interpretation is the only reasonable construction of the statute.

Petitioner argues that the words "in addition" clearly establish that a taxpayer that is both a new business under Tax Law § 210-B (1) (f) and the owner of a QUIP or SCIP may elect to treat 100% of its EZ-ITC as an overpayment of tax to be refunded. However, the statute makes no reference at all to the ability for a single taxpayer to be able to receive 100% of its overpayment of tax as a refund. The clear language of the statute states that in lieu of a carryover, any taxpayer "which qualifies as a new business under paragraph (f) of subdivision of one this section" may elect to treat 50% of the amount of such carryover as an overpayment to be refunded. The next sentence of the statute presents another way for a taxpayer to qualify for the refundable credits. Such sentence, in pertinent part, states:

“In addition, any taxpayer which is approved as the owner of a qualified investment project or a significant capital investment project pursuant to subdivision [w] of section nine hundred fifty-nine of the general municipal law, on its report for its taxable year with respect to which such credit is allowed, in lieu of such carryover, may elect to treat fifty percent of the amount of such carryover which is attributable to the credit allowed under this subdivision for property which is part of such project as an overpayment of tax to be credited or refunded in accordance with the provisions of section one thousand eighty-six of this chapter.”

The last sentence of the statute places additional requirements for a taxpayer that makes an election under this statute as an owner of a QUIP or SCIP.

Tax Law § 210-B (3) (d) clearly sets forth that a taxpayer can elect to treat 50% of its EZ-ITC as an overpayment of tax to be refunded. The statute then sets forth the parameters for making such an election. The language clearly provides that a qualifying new business under Tax Law § 210-B (1) (f) may elect this treatment. The statute also provides for an owner of a QUIP or SCIP with the election to treat 50% of its EZ-ITC as an overpayment of tax to be refunded. If the Legislature had intended for a taxpayer to be able to receive a 100% refund of its overpayments, it could have explicitly provided for that in the statute (*see* McKinney’s Cons Laws of NY, Book 1, Statutes § 74). However, it did not.

D. Although it has been determined that petitioner was not entitled to an additional refund of its remaining 50% EZ-ITC, the issue regarding a timely filed refund claim for the year 2012 is addressed below.

Petitioner argues that its refund claim for 2012 was affected by amendments to the Tax Law in 2010. Petitioner states that the Laws of 2010 created a temporary deferral of certain tax credits by the addition of sections 33 and 34 of the Tax Law. The 2010 amendments to Tax Law § 33 (1) (a) provide that:

“For taxable years beginning on or after January first, two thousand ten and

before January first, two thousand thirteen, the excess over two million dollars of the total amount of the tax credits specified in subdivision three of this section that in each of those taxable years would otherwise be used to reduce the taxpayer's tax liability to the amount otherwise specified in this chapter or be refunded or credited as an overpayment will be deferred to and used or refunded in taxable years beginning on or after January first, two thousand thirteen in accordance with the provisions of section thirty-four of this article. Interest shall not be paid on the amount so of credit deferred."

The EZ-ITC was made part of this temporary deferral program by its inclusion in Tax Law § 33

(3) (a).

To reconcile the deferral of the tax credits codified in section 33, a new section 34 was added. Section 34 provides that:

"1. The amounts of nonrefundable credits that are deferred pursuant to section thirty-three of this article in taxable years beginning on or after January first, two thousand ten and before January first, two thousand thirteen shall be accumulated and constitute the taxpayer's temporary deferral nonrefundable payout credit. The taxpayer may first claim this credit in the taxable year beginning on or after January first, two thousand thirteen and before January first, two thousand fourteen. The taxpayer shall be allowed to claim this credit until the accumulated amounts are exhausted. The credit shall be allowed against the taxpayer's tax as provided in the provisions referenced in paragraph (a) of subdivision three of this section.

2. The amounts of refundable credits that are deferred pursuant to section thirty-three of this article in taxable years beginning on or after January first, two thousand ten and before January first, two thousand thirteen shall be accumulated and constitute the taxpayer's temporary deferral refundable payout credit. In the taxable year beginning on or after January first, two thousand thirteen and before January first, two thousand fourteen, the taxpayer shall be allowed to claim a credit equal to fifty percent of the amount accumulated. In the taxable year beginning on or after January first, two thousand fourteen and before January first, two thousand fifteen, the taxpayer shall be allowed to claim a credit equal to seventy-five percent of the balance of the amount accumulated. In the taxable year beginning on or after January first, two thousand fifteen and before January first, two thousand sixteen, the taxpayer shall be allowed to claim a credit equal to the remaining balance of the amount accumulated. The credit shall be allowed against the taxpayer's tax."

For the tax year 2012, petitioner originally electronically filed its 2012 form CT-3, form

CT-603 and form CT-500, corporation tax credit deferral form, among other forms on October 12, 2013. In 2012, after audit, petitioner had an available EZ-ITC of \$138,080,250.00. From this amount, \$4,324.00 was applied against tax in 2012 and \$138,075,926.00 of EZ-ITC was available for carryover. Consistent with Tax Law § 210-B (3) (d), 50%, i.e. \$69,037,963.00, was refundable and \$1,650,007.00 of that amount was, in fact, refunded to petitioner in 2012. Refund of the remaining \$67,387,956.00 was deferred from petitioner's taxable year 2012, pursuant to Tax Law § 33, but later paid to petitioner during 2013, 2014 and 2015, pursuant to Tax Law § 34 (2). Petitioner then had \$69,037,963.00 as non-refundable EZ-ITC available for carryover from 2012. On line 20b of its amended 2014 form CT-603, petitioner claimed a refund of this amount minus the \$1,705,784.00 of EZ-ITC that it took in previous tax periods. It is this remaining \$67,332,179.00 of EZ-ITC from 2012 that petitioner now claims is refundable.

A review of column D of schedule B attached to petitioner's 2012 form CT-500 shows that, before audit, it originally reported \$67,423,426.00 of refundable credits actually deferred under Tax Law § 33. The amount of reported refundable credits on its originally filed form ties back to lines 20a and 20b of part 2 of schedule B of form CT-603 whereon petitioner reported \$69,072,618.00 of EZ-ITC available for refund and to be refunded. Notably, on line 19, petitioner reported, before audit, that it had \$138,140,913.00 of EZ-ITC available for carryforward and, on line 21, \$69,068,295.00 of EZ-ITC available for carryforward after refund of the \$69,072,618.00 amount.

Petitioner now argues that what it originally reported as available EZ-ITC for carryforward after refund is part of its "temporary deferral refundable payout credit" (*see* Tax Law § 34 [2]). However, this amount was not reported in column D of schedule B of its 2012 form CT-500. As such, petitioner's \$67,332,179.00 of EZ-ITC available for carryforward after

refund was not subject to Tax Law § 34 (2) and was not available to be claimed in 2013, 2014 or 2015.

E. Alternatively, petitioner sets forth a second argument to establish that its refund claim for 2012 was timely. It is undisputed that petitioner specifically sought a refund of EZ-ITC from 2012 in the amount of \$67,332,179.00 and a refund of EZ-ITC from 2014 in the amount of \$152,352,128.00, for a total refund claim in the amount of \$219,684,307.00, by its filing of an amended 2014 form CT-3, signed and dated July 18, 2018. As such, the Division argues that the statute of limitations has run with respect to the refund claim for 2012. Petitioner claims, however, that it made a timely informal refund claim for 2012 prior to its filing an amended 2014 form CT-3.

Tax Law § 1087 addresses the statute of limitations for credit or refund claims under article 9-A. As pertinent to the present matter, that section provides that any such credit or refund claim must be filed within three years from the time the return was filed (Tax Law § 1087 [a]).

Petitioner filed its 2012 forms CT-3 and CT-603 on October 12, 2013. Pursuant to Tax Law § 1087 (a), petitioner had three years from filing its return, or until October 12, 2016, within which to file its refund claim. Clearly, the filing of its amended 2014 form CT-3, seeking a refund of tax for the year 2012 was not timely filed. Therefore, in order for the refund claim for 2012 be considered, petitioner must demonstrate that it filed a timely informal refund claim prior to October 12, 2016.

As set forth in *Matter of Accidental Husband Intermediary, Inc.* (Tax Appeals Tribunal, April 11, 2019), an informal claim for refund has three elements: (1) it must provide the taxing authority with notice that the taxpayer is asserting a right to a refund; (2) it must

describe the legal and factual basis for the requested refund; and (3) it must have a written component (*see New England Elec. Sys. v United States*, 32 Fed Cl 636, 641 [1995], citing *Am. Radiator & Sanitary Corp. v United States*, 162 Ct Cl 106, 113-114 [1963]). In considering a claim pursuant to the informal refund claim doctrine “courts have held that under certain circumstances, it is sufficient that the taxpayer submit a so called ‘informal claim’ within the statutory period, and then, outside of the limitation period, submit a formal claim” (*Donahue v United States*, 33 Fed Cl 600, 608 [1995]). “The determination of whether a taxpayer has satisfied the requirements for an informal claim is made on a case-by-case basis and is based on the totality of the facts [citation omitted]” (*id*).

Petitioner argues that the Division was on notice as early as June 27, 2016 that it was seeking a refund for the tax year 2012. Petitioner cites to a single conversation held between it and members of the Division’s Office of Tax Policy as well as with Ms. Liebman that discussed whether petitioner could claim refundable credits as both a new business and as the owner of a QUIP or SCIP. Petitioner states that there was also a discussion regarding certain tax credits that were deferred by Tax Law § 34.

This discussion, as described, falls short of putting the Division on notice that petitioner was seeking a refund claim for tax year 2012. Petitioner does not allege that it notified the Division during that conversation that it sought a refund nor was such intention put in writing. Petitioner asserts that the Division audited each and every tax return filed by it beginning in 2010 and approved the credits for the years in issue. However, as the Division points out, petitioner’s filing for 2012 is consistent with the interpretation that petitioner elected to treat 50% of its EZ-ITC as an overpayment to be refunded. Petitioner states that the Division had all the information necessary to identify the amounts of its 2012 and 2014 refund claims through

continuous audits it conducted of petitioner. However, the fact that the Division had enough information in its possession to be able to deduce whether a refund is warranted is not enough to put the Division on notice that petitioner was seeking a refund (*see Matter of Mobil Corp. v United States*, 67 Fed Cl 708 [2005] [wherein court held that documents which are merely a normal part of the administrative process and which do not apprise the Internal Revenue Service that the taxpayer is presently seeking a refund do not constitute an informal refund request]). Therefore, it is determined that petitioner failed to make a timely informal claim for refund for the tax year 2012.

F. The petition of GlobalFoundries U.S. Inc. is denied and the refund denial letter, dated August 10, 2018, is sustained.

DATED: Albany, New York
July 15, 2021

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE