

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>BERNE A. AND ROSE WATKINS</b>	:	ORDER
	:	DTA NO. 826476
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Years 2010 through 2012.	:	

---

Petitioners, Berne A. and Rose Watkins, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 2010 through 2012.

The Division of Taxation, appearing by Amanda Hiller, Esq. (Tobias A. Lake, Esq., of counsel), brought a motion filed on March 26, 2015, seeking an order of dismissal or, in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i), 3000.9(a)(1)(ii), 3000.9(a)(1)(vi), and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.<sup>1</sup> Accompanying the motion was the affirmation of Tobias A. Lake, Esq., dated March 25, 2015, and attached exhibits, and the affidavit of Randall Coburn, dated March 17, 2015. Petitioners appearing by Hiscock & Barclay, LLP (David G. Burch, Jr., Esq., of counsel) having been granted an extension of time, submitted an affirmation in opposition to the Division of Taxation's motion to dismiss the petition, dated May 7, 2015,

---

<sup>1</sup> While the Notice of Motion indicates that the Division of Taxation is seeking an order dismissing the petition, or summary determination, the supporting papers filed with the Notice of Motion relate to a motion to dismiss the petition only. As such, this motion record will be reviewed as a motion to dismiss the petition pursuant to 20 NYCRR 3000.9(a).

which date commenced the 90-day period for issuance of this order.

Based upon the motion papers and all pleadings and proceedings had herein, Winifred M. Maloney, Administrative Law Judge, renders the following order.

***ISSUE***

Whether the Division of Taxation's motion to dismiss the petition should be granted.

***FINDINGS OF FACT***

1. Brandon RE, Inc., (Brandon RE) is a New York corporation that elected to be treated as an S corporation. Rose Watkins is the sole shareholder of Brandon RE.

2. Pursuant to a Certificate of Eligibility issued on May 13, 2002, but effective as of August 23, 2001, Brandon RE became certified as eligible to receive benefits referred to in General Municipal Law § 966 in connection with the facilities located at 211 Liberty Street and 225 State Street, Schenectady, New York, within the boundaries of the Schenectady Empire Zone.

3. By letter dated March 14, 2014, the Division of Taxation's Income/Franchise Desk Audit Bureau denied a portion of the QEZE Credit for Real Property Taxes claimed by petitioners, Berne A. and Rose Watkins, for the year 2012. The letter stated, in part, as follows:

“The Director of the Empire Zone program has informed us, with supporting documentation, that your property at 211 Liberty Street was certified in 2001 and then subsequently decertified in 2003. In 2005 there was a recertification and 211 Liberty Street was not part of that process, therefore 211 Liberty Street was ineligible for QEZE credits after 2003.

Your property at 211 Liberty Street has been removed from your CT-606, Claim for QEZE Credit for Real Property Taxes, for the period ended 12/31/2012. This results in a decrease of your credit to \$78,801 and a decreased refund from \$100,597 to \$70,735.”

4. On May 27, 2014, the Division of Taxation (Division) issued to petitioners a Notice

Deficiency (Assessment ID No. L-041287325-7), asserting additional personal income tax due in the amount of \$49,931.00 plus interest for the year 2010. The computation section of this Notice of Deficiency states that “[t]his assessment is based on a decertification of 211 Liberty St. for the period ended December 31, 2010.”

5. On May 27, 2014, the Division also issued a Notice of Deficiency (Assessment ID No. L-041287351-2), asserting additional personal income tax due in the amount of \$40,417.59 plus interest for the year 2011. The computation section of this Notice of Deficiency states that “[t]his assessment is based on a decertification of 211 Liberty St. for the period ended December 31, 2011.”

6. In their petition, petitioners challenge the disallowance of their claimed Qualified Empire Zone Enterprise (QEZE) credits for real property taxes for the years 2010 through 2012 for real property taxes paid by Brandon RE on its real property located at 211 Liberty Street, Schenectady, New York, for the years 2010 through 2012. They claim that a letter, dated February 18, 2014, from the Department of Development for the City of Schenectady Empire Zone states that Brandon RE’s locations at 225 State Street and 211 Liberty Street in the city of Schenectady are located within the boundaries of the Schenectady Empire Zone. Petitioners also claim that the New York State Department of Economic Development a/k/a Empire State Development (ESD) took no steps to decertify Brandon RE from the city of Schenectady Empire Zone at either of its certified locations and never amended Brandon RE’s Certificate of Eligibility. They also assert that even if 211 Liberty Street was removed from the city of Schenectady Empire Zone at some point after Brandon RE was certified, Brandon is “grandfathered” pursuant to General Municipal Law § 957(d)(v), and is allowed the Empire Zone benefits for the remainder of its benefit period. Attachments to the petition included, among

other items, a copy of the February 18, 2014 letter from the Department of Development for the City of Schenectady Empire Zone.

7. In support of its motion, the Division submitted the affirmation of Tobias Lake, Esq., the Division's representative, with attached exhibits, and the affidavit of Randal Coburn, ESD's Senior Vice President for Economic Incentives.

8. Randal Coburn, who has held his current position since September 2013, began working in the Empire Zones Program in 2002 and was Director of the Program beginning in 2006. His current responsibilities include directing and overseeing the operations of several economic incentives programs, including the Empire Zones Program. Mr. Coburn's affidavit set forth a general overview of how the Empire Zone program functions.

A county or local government must first apply for designation of an area or areas within a municipality as an Empire Zone. The boundaries of an Empire Zone are initially set by the applicant pursuant to local law and concurring resolutions subject to an application process established by ESD and subject to review and approval by the Empire Zones Designation Board. Boundary revisions are subject to review and approval by ESD. After an Empire Zone is created, the applicant community is primarily responsible for administration of its Empire Zone. Administration comes from a locally designated zone administration board (Local Empire Zone Board) that is responsible for recommending business enterprises for certification and for monitoring, evaluating, and coordinating all Empire Zone benefits on behalf of the applicant community. A business that is located within a designated Empire Zone and that meets other criteria may be certified as an Empire Zone Enterprise. Once approved, a business is issued a certificate of eligibility that may entitle the business to special tax credits if it meets the eligibility requirements for those credits as defined in the Tax Law. Once certified, in order to maintain its

certification and continue to be eligible to receive tax credits, a business must submit a business annual report to the local zone administration board that must also be filed with ESD.

In addition to setting Empire Zone boundaries during the application process, a Local Empire Zone Board may subsequently seek to change the boundaries of its Empire Zone. To change an Empire Zone's boundaries the Local Empire Zone Board must pass a resolution and submit a request to ESD. In addition, any boundary change is subject to approval by the applicant community pursuant to local law and, where applicable, concurring resolutions from communities where Empire Zone lands are being designated. Statutory changes, enacted in 2005, required that all Local Empire Zone boards apply to the Empire Zone Designation Board to redesignate their zones into distinct and separate contiguous areas. Mr. Coburn asserted that businesses and their associated properties that could not be accommodated within the redesignated Empire Zones were allowed to remain certified provided the Local Empire Zone Board identified these grandfathered businesses and properties by December 30, 2005. He further asserted that if a business and its associated properties were not identified by the Local Empire Zone Board then the properties were not considered to be grandfathered and eligible to continued program benefits pursuant to General Municipal Law § 957(d)(v).

9. In his affidavit, Mr. Coburn claimed that when determining whether a property is located within an Empire Zone, ESD relies upon the boundary files of the applicant community and the Local Empire Zone Board. Mr. Coburn further claimed that those boundary files include copies of relevant local laws and electronic geographic information system files in the original designation, boundary revision, and redesignation records. Only one document, a copy of the 2003 Business Annual Report (2003 BAR) submitted by Brandon RE to the local zone administration board, was attached to Mr. Coburn's affidavit.

10. Petitioners filed the affirmation of David G. Burch, Jr., Esq., in opposition to the Division's Motion to Dismiss. Mr. Burch asserts that ESD confirmed that it never revised, rescinded or reissued the Certificate of Eligibility issued to Brandon RE to remove the address at 211 Liberty Street, and the Certificate of Eligibility Brandon RE holds today identifying 211 Liberty Street and 225 State Street remains in effect. He further asserts that the Department of Development for the City of Schenectady Empire Zone issued a letter, dated February 18, 2014, stating unequivocally that Brandon RE's locations at 225 State Street and 211 Liberty Street in the city of Schenectady are located within the boundaries of the Schenectady Empire Zone. As for Mr. Coburn's claim in his affidavit that Brandon RE voluntarily decertified its 211 Liberty Street location on its 2003 BAR, Mr. Burch contends that the individual who completed the 2003 BAR sought to change the location to which correspondence from ESD was to be mailed, and inadvertently completed this information on the line marked "In Zone Address Change" instead of "Mailing Address Change." He further contends that this does not equate to a request to decertify the entity at a particular location, and the notes written onto the business annual report cannot be interpreted to request such decertification. Mr. Burch noted that contrary to Mr. Coburn's assertion in his affidavit, it was ESD's practice to reissue a Certificate of Eligibility to a business when there was a change in locations certified within the Empire Zone, and Mr. Burch's office received such reissued certificates numerous times. Seven exhibits were attached to Mr. Burch's affidavit including copies of the February 18, 2014 letter from the Department of Development for the City of Schenectady Empire Zone, and a July 2, 2014 email from Thomas P. Regan, Associate Counsel, Empire State Development.

**CONCLUSIONS OF LAW**

A. The Division's motion seeks dismissal of the petition pursuant to 20 NYCRR 3000.9(a)(1)(i), (ii) and (vi) on the grounds that a defense is founded in documentary evidence, the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition, and the petition fails to state a cause for relief. 20 NYCRR 3000.9(c) provides in relevant part that "[w]here not otherwise in conflict with this Part, a motion to dismiss filed pursuant to this section shall be subject to the same provisions as motions filed pursuant to section three thousand two hundred eleven of the CPLR. . . ."

B. The grounds raised in the Division's motion to dismiss the petition all relate to QEZE Brandon RE's property located at 211 Liberty Street, Schenectady, New York. The Division contends that petitioners are not entitled to the relief claimed in the petition because Brandon RE's 211 Liberty Street property has not been in the Schenectady Empire Zone since 2003 and was never grandfathered, and Brandon RE voluntarily requested that the 211 Liberty Street property be removed as an "In Zone" location.

C. A motion to dismiss for failure to state a cause of action is permitted under CPLR 3211(a)(7). On a CPLR 3211(a)(7) motion, the court's sole inquiry is whether the facts alleged in the petition fit within any cognizable legal theory (*see Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]; *Virgem Enterprises, Inc. v. City of New York*, 290 AD2d 708, 708-709 [3d Dept. 2002]; *Matter of Schulz v. New York State Legislature*, 230 AD2d 578, 582 [3d Dept 1997], *lv denied* 95 NY2d 769 [2000]). I find that petitioners have alleged sufficient facts to state a claim or cause of action. The Department of Economic Development (ESD) issued a Certificate of Eligibility to Brandon RE certifying Brandon RE at both 211 Liberty Street and 225 State Street with the effective date of August 23, 2001. Relying on the February 18, 2014 letter from the Department

of Development for the City of Schenectady Empire Zone, petitioners allege that the 211 Liberty Street property is located within the boundaries of the Schenectady Empire Zone. They also allege that ESD never decertified Brandon RE at the 211 Liberty Street location. Petitioners also claim that even if 211 Liberty Street was removed from the city of Schenectady Empire Zone at some point after Brandon RE was certified, Brandon RE is grandfathered at the 211 Liberty Street location pursuant to General Municipal Law § 957(d)(v), and would be entitled to claim the QEZE real property tax credit at the grandfathered location. Pursuant to Tax Law § 15, a QEZE shall be allowed a tax credit for eligible real property taxes which pursuant to Tax Law § 15(e) are defined as “taxes imposed on real property which is owned by the QEZE and located in an empire zone with respect to which the QEZE is certified pursuant to article eighteen-B of the general municipal law. . . .” If 211 Liberty Street is located within the boundaries of the Schenectady Empire Zone, petitioners would be entitled to the QEZE real property tax credit. In addition, even if the 211 Liberty Street location was removed from the Schenectady Empire Zone at some point as the Division contends, if that location was grandfathered as petitioners allege, the 211 Liberty Street location would continue to be certified as Empire Zone property.

D. “A CPLR 3211(a)(1) motion ‘may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law’” (*Thomas Sbarra Real Estate, Inc. v. Lavelle-Tomko*, 84 AD3d 1570 [3d Dept 2011] [internal citations omitted]). Here, the Division submitted a copy of Brandon RE’s 2003 BAR submitted to the local zone administration board, and Mr. Coburn asserted that Brandon RE, in that 2003 BAR, voluntarily requested an address change that removed the 211 Liberty Street property from Brandon RE’s certificate of eligibility. Petitioners claim that Brandon RE was seeking to change the location to which correspondence was to be



mailed on its 2003 BAR, and was not requesting decertification of its 211 Liberty Street location on that form. They further claim that the individual who completed the form inadvertently completed the line marked “In Zone Address Change” instead of “Mailing Address Change.” The parties’ conflicting interpretations of the 2003 BAR present issues requiring further development. As such, the proffered documentary evidence does not resolve all factual issues as a matter of law, and conclusively dispose of petitioners’ claim.

E. After review, the Division’s motion to dismiss the petition on the ground that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition is denied. Petitioners are challenging the Division’s disallowance of their claimed QEZE real property tax credits related to the QEZE Brandon RE’s 211 Liberty Street location. They bear the burden of proving entitlement to the credits they claimed for the years 2010 through 2012. The hearing in this matter shall address all issues raised in the Division’s motion.

F. The Division of Taxation’s motion to dismiss the petition is denied, and a hearing on the issues will be scheduled in due course.

DATED: Albany, New York  
July 30, 2015

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE