STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHAPIN MANUFACTURING, INC.	:	
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Years Ended August 31, 2006 and August 31, 2007.	:	DETERMINATION DTA NO. 822653

Petitioner, Chapin Manufacturing, Inc., filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended August 31, 2006 and August 31, 2007.

A hearing was held before Timothy Alston, Administrative Law Judge, at 183 East Main Street, Rochester, New York, on June 24, 2009, with all briefs submitted by October 7, 2009, which date began the six-month period for the issuance of this determination. Petitioner appeared by Pietra G. Lettieri, Esq., and Robert G. Murray, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Nicholas A. Behuniak, Esq., of counsel).

ISSUE

Whether petitioner has established entitlement to the QEZE credit for real property taxes as claimed on its franchise tax returns for the tax years at issue.

FINDINGS OF FACT

1. Petitioner, Chapin Manufacturing, Inc., has been in business since 1884. Petitioner patented the first pump sprayer in the United States in 1902. It has been engaged in the

manufacture and sale of compressed air sprayers since that time. Petitioner manufactures and distributes substantially all of its products from its headquarters in Batavia, New York. It distributes its products in the U.S., Canada, and worldwide to a variety of markets. Petitioner was incorporated in New York in 1935.

2. In or around 1997, petitioner became aware that the Home Depot Company was planning to open stores in the nation of Chile. This made Chile an attractive market for petitioner to expand its business. Petitioner subsequently became one of Home Depot's suppliers in Chile. In order to more effectively supply its stores in Chile, Home Depot asked its suppliers to set up companies in Chile that would maintain inventory in that country.

3. Petitioner formed a wholly-owned subsidiary, Chapin International, Inc. (CII), a Delaware corporation, on February 6, 1998. Petitioner and CII formed a partnership, Chapin International Limitada (Chile) (Limitada), to enable petitioner to make sales to Home Depot in Chile. Petitioner formed CII and Limitada in response to Home Depot's request to maintain inventory in Chile.

4. Acting through Limitada, petitioner and CII contracted with a company called Puente Sur to receive and warehouse product in Chile and to ship product to Home Depot stores in Chile. Puente Sur was also responsible for invoicing and collecting on such shipments to Home Depot. Puente Sur had no authority to release shipments to Home Depot without authorization from petitioner. Puente Sur had no authority to set prices; petitioner authorized all pricing. Puente Sur had no authority to issue credit for defective products without approval from petitioner.

5. Home Depot subsequently expanded to Argentina and in 2000, petitioner and CII formed a second partnership, Chapin SRL (Argentina) (SRL), to enable petitioner to make sales

to Home Depot in Argentina. The method of operation between petitioner and Home Depot in Argentina was similar to the operation in Chile.

6. Petitioner had a 99 percent interest in the Limitada and SRL partnerships. CII had a 1 percent interest in the partnerships. The partnership agreement for Limitada indicates that petitioner is responsible for the management of the partnership and that the partnership is to be domiciled in Santiago, Chile. An English translation of the partnership agreement for SRL is not in the record.

7. The management of Limitada and SRL was carried out in petitioner's Batavia, New York, office. Such management was controlled by three individuals: Mr. Dave Ward, Mr. Dave Raponi and Mr. Robert Urrutia.

8. Mr. Ward (president of both petitioner and CII) and Mr. Raponi (CFO of petitioner and secretary of CII) directed and managed CII and the foreign partnerships.

9. Mr. Urrutia monitored the day-to-day sales activities of the partnerships as part of his duties as petitioner's international sales manager. Mr. Urrutia reported to Mr. Ted Brush, petitioner's vice president of sales and marketing, who, in turn, reported to Mr. Ward. It was through Mr. Urrutia's office that petitioner communicated with Puente Sur in Chile (***see*** Finding of Fact 4).

10. At no point did either petitioner or CII establish any sales or administrative offices in South America.

11. Although both Limitada and SRL operated from their inception, neither of these partnerships proved profitable for petitioner. According to petitioner's Financial Analysis report for the fiscal year ended August 31, 2002, any expansion of sales in Chile was precluded by Home Depot's cessation of operations in that country. Home Depot also pulled out of Argentina

at about the same time. Additionally, according to the Financial Analysis report, petitioner's business in Argentina was severely hurt by the devaluation of the Argentinian peso. Hence, as of August 31, 2002, petitioner decided to exit from both Chile and Argentina as soon as possible.

12. Petitioner wrote off its remaining foreign investment in fiscal year ended August 31, 2003. At that point all existing inventory was abandoned and these operations ceased.

13. Neither Limitada nor SRL ever obtained a federal tax identification number because their operations were all outside of the United States.

14. CII became authorized to do business in New York on June 11, 2003.

15. At a meeting of the board of directors of CII on July 23, 2003, the board passed a resolution authorizing CII to accept the contribution of substantially all of the assets of petitioner, other than petitioner's patents, trade names, trademarks and other intellectual property; to assume substantially all of the liabilities and obligations of petitioner; and to enter into a licensing agreement with petitioner whereby, for a mutually agreeable royalty, petitioner would grant CII a license for the use of petitioner's intellectual property to the extent required for the manufacture and sale of products of the type previously sold by petitioner. At the same meeting, the board authorized CII to take all action required to become certified as a New York State Qualified Empire Zone Enterprise (QEZE) and to obtain all benefits available to the company which may arise from such status.

16. On September 1, 2003 CII acquired the assets of petitioner referred to in the July 23, 2003 corporate resolution. Specifically, CII accepted the contribution of substantially all of the assets and liabilities of petitioner, other than petitioner's patents, trade names, trademarks and other intellectual property. As part of the same transfer, CII accepted substantially all of the liabilities and obligations of petitioner.

17. On September 4, 2003 CII was certified as a New York State Qualified Empire Zone Enterprise in the Genesee County Empire Zone effective September 4, 2003.

18. Prior to the September 1, 2003 transfer of assets from petitioner to CII, all of CII's officers were also officers of petitioner. All such officers were also employees of petitioner and were paid by petitioner. They were not employees of CII and were not paid by CII. Additionally, during this same period, Mr. Urrutia was employed by and paid by petitioner. He was not an employee of CII and was not paid by CII.

19. Also prior to the September 1, 2003 transfer of assets from petitioner to CII, CII did not lease any property, own any property or have any employees.

20. Real property was included in the September 2003 transfer of assets from petitioner to CII. The Real Estate Transfer Tax return (Form TP-584) filed in respect of this transfer indicated that the conveyance consisted of a "mere change of identity or form" of ownership.

21. CII filed its first tax return with New York State for the fiscal year ended August 31, 2003. The return indicates that CII was a holding company with no receipts, no payroll and minimal assets of $415.00. The tax paid pursuant to this return was the fixed dollar minimum.

22. From CII's incorporation in February 1998 through the year ended August 31, 2004, petitioner filed separate New York franchise tax returns.

23. Petitioner and CII filed combined New York State franchise tax returns beginning with the year ended August 31, 2005 and continuing through the years at issue in this matter.

24. Petitioner and CII filed consolidated U.S. corporation income tax returns from the time of CII's incorporation through the years at issue.

25. Petitioner timely filed a New York Form CT-3-A entitled "General Business Corporation Combined Franchise Tax Return," in the name of "Chapin Manufacturing, Inc. &

Subsidiaries" for the year ended August 31, 2006 (the 2006 CT-3-A). On the 2006 CT-3-A, petitioner claimed a credit for QEZE real property taxes in the amount of $155,166.00. On its 2006 CT-3-A petitioner applied $5,669.00 of the QEZE real property tax credit to reduce its tax liability and applied $9,725.00 of the credit as an overpayment to the 2007 tax year. Petitioner sought a refund of the remaining $139,772.00.

26. On its Form CT-606 (Claim for QEZE Credit for Real Property Taxes) attached to the 2006 CT-3-A, CII reported an "employment number" for the current year of 32, that is, a quarterly average of 32 full-time employees within empire zones. CII also reported "base period" employment of zero and zero test year employees. Additionally, CII reported zero New York State employees outside of empire zones and zero base period employees outside of empire zones.

27. Petitioner timely filed a New York Form CT-3-A entitled "General Business Corporation Combined Franchise Tax Return," in the name of "Chapin Manufacturing, Inc. & Subsidiaries" for the year ended August 31, 2007 (the 2007 CT-3-A). On the 2007 CT-3-A, petitioner claimed a credit for QEZE real property taxes in the amount of $163,175.00. Petitioner claimed a refund of the full amount of the credit on its 2007 CT-3-A.

28. On its Form CT-606 (Claim for QEZE Credit for Real Property Taxes) attached to the 2007 CT-3-A, CII reported an "employment number" for the current year of 28.25. CII also reported "base period" employment of zero and zero test year employees. Additionally, CII reported zero New York State employees outside of empire zones and zero base period employees outside of empire zones.

29. The computation of the amount of credit for QEZE real property taxes on petitioner's 2006 and 2007 CT-3A's is not at issue.

30. In 2007, the Division commenced a desk audit of petitioner's franchise tax return for the year ended August 31, 2006. In response to Division requests, petitioner provided certain information and documentation, including information and documentation regarding petitioner's claimed QEZE credit for real property taxes. Following a review of such information and documentation, the Division advised petitioner by letter dated November 30, 2007 of a reduction in petitioner's tax liability for that year by $3,431.00. Schedules attached to the letter noted various audit adjustments to petitioner's return for the year ended August 31, 2006, including the denial of claimed QEZE credits.

31. By letter dated December 20, 2007 petitioner's representative advised the Division of petitioner's agreement with the adjustments indicated in the November 30, 2007 letter, except for the denial of QEZE credits, with respect to which petitioner disagreed. The December 20, 2007 letter also stated that, following a review of the facts and circumstances, it was petitioner's position that CII should have filed New York franchise tax returns for the years ended August 31, 1998 through August 31, 2002 and requested that any additional tax for those periods be incorporated into the audit findings.

32. By letter dated February 8, 2008, following a review of documentation and information provided by petitioner, the Division advised petitioner of its denial of claimed QEZE credit for real property taxes for the years ended August 31, 2006 and August 31, 2007.

33. Previously, in 2006, the Division conducted a field audit to review petitioner's franchise tax return for the year ended August 31, 2005. Petitioner, filing on a combined basis with CII, had claimed QEZE real property tax credits similar to the credits at issue herein. Following its audit, the Division allowed such QEZE credits for the year ended August 31, 2005.

34. The result of its South American ventures notwithstanding, since 2003 petitioner has continued to seek ways to expand its business. Petitioner acquired Heath Manufacturing, a Michigan-based company that sells bird feeders, suet products and American flags. Petitioner also acquired subsidiaries in Hong Kong and China to supply components for both CII and Heath. The dates of such acquisitions are unclear from the record, but petitioner's federal 1120 for the year ended August 31, 2007 indicates that the Asian subsidiaries were incorporated in late 2006 and early 2007. According to James H. Grant, petitioner's vice president of finance, fiscal year ended August 31, 2008 was petitioner's fifth straight year of record sales, pushed in part by petitioner's expansion into new product lines, a focus on international growth and its purchase of Heath. Also according to Mr. Grant, as of the date of the hearing in this matter, petitioner had approximately 175 employees.

35. According to data excerpted from withholding, wage reporting and unemployment insurance returns, petitioner's average number of employees for the five-year period September 1, 1997 through August 31, 2002 was approximately 270, and petitioner's quarterly average number of employees for the year ended August 31, 2003 was 264. According to the same data, CII's quarterly average number of employees for the year ended August 31, 2006 was 231.75 and for the year ended August 31, 2007 was 217.50.

36. The Division submitted proposed findings of fact numbered 1 through 64. The following of the Division's proposed findings are accepted and have been incorporated, in substance, into the Findings of Fact herein: 1-3, 7, 8, 10-15, 17, 18, 20-23, 30-32, 39-41, 44-48, 52-58, 61, and 63. Proposed findings of fact 9 and 16 have been modified to better reflect the record. Proposed findings of fact 4-6, 24-29, and 33-38 note portions of the undisputed procedural history of this case; it is unnecessary to recite these facts herein. Proposed findings of

fact 19, 42, 43, 49-51, 62, and 64 assert legal arguments and conclusions and are therefore not properly included in the findings of fact. Proposed findings of fact 59 and 60 are rejected as irrelevant.

SUMMARY OF THE PARTIES' POSITIONS

37. Petitioner contends that it qualified for the QEZE credit for real property taxes during the tax years at issue because, whether or not it was doing business in New York, CII had a "base period" (as defined in Tax Law § 14[c]) of greater than zero years and was therefore not subject to the "new business test" under Tax Law § 14(j). Accordingly, CII passed the "employment test" under Tax Law § 14(b)(1) and thus qualified for the credit. Petitioner concedes that CII would not pass the new business test (and therefore would not qualify for the credit) if it were subject to that test.

38. The Division contends that CII had a base period of zero years and was therefore subject to the new business test, which it failed. CII thus failed the employment test and thereby failed to qualify for the subject credit.

39. Alternatively, petitioner contends that CII was in fact doing business in New York from the time of its incorporation through its acquisition of assets from petitioner and that therefore CII had a base period in excess of zero years, was not subject to the new business test and qualified for the credit.

40. In response, the Division asserts that CII was not doing business in New York before it acquired petitioner's assets. CII's base period was therefore zero and it failed to qualify for the credit.

CONCLUSIONS OF LAW

A. Petitioner claims entitlement to the QEZE credit for real property taxes under Tax Law § 15. "[A] tax credit is 'a particularized species of exemption from taxation'(***Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193, 197, 371 NYS2d 715 [1975]) and, therefore, petitioner bore the burden of showing 'a clear-cut entitlement' to the statutory benefit (***Matter of Luther Forest Corp. v. McGuiness***, 164 AD2d 629, 632, 565 NYS2d 570 [3d Dept. 1991])" (***Golub Service Station v. Tax Appeals Tribunal*** 181 AD2d 216, 585 NYS2d 864 [3d Dept. 1992]).

B. In order to qualify for the QEZE real property tax credit under Tax Law § 15, Tax Law § 14(a) requires that a business enterprise must be (1) certified under article 18-B of the General Municipal Law as a qualified empire zone enterprise and (2) must meet the employment test as defined in Tax Law § 14(b)(1). CII was certified as a New York State Qualified Empire Zone Enterprise in the Genesee County Empire Zone effective September 4, 2003 (***see*** Finding of Fact 17) and has thereby met the first condition for qualification for the subject credit. Petitioner's entitlement to the claimed credits thus turns on whether CII met the employment test contained in Tax Law § 14(b)(1). Whether CII has met the employment test depends on whether its base period as defined in Tax Law § 14(c) is zero years or greater than zero years. A base period of zero triggers the "new business test" under Tax Law § 14(b)(1), which, as noted, CII would fail. Avoidance of the new business test under the facts herein means petitioner gets the credit it seeks. The proper measure of CII's base period depends on the statutory definition of "taxable year" in Tax Law § 14(e).

C. In order to answer the questions presented in the preceding paragraph it is necessary to review the relevant statutory terms:

Tax Law § 14(b)(1) defines employment test as:

> [T]he employment test shall be met with respect to a taxable year if the business enterprise's employment number in the empire zones for such taxable year equals or exceeds its employment number in such zones for the base period, and its employment number in the state outside of such zones for such taxable year equals or exceeds its employment number in the state outside of such zones for the base period. . . . [I]f the base period is zero years and the enterprise has an employment number in such zone of greater than zero with respect to a taxable year, then the employment test will be met only if the enterprise qualifies as a new business under [Tax Law § 14(j)].

Tax Law § 14(c) defines base period as:

> [T]he five taxable years immediately preceding the test year. If the business enterprise has fewer than five such years, then the term "base period" means such smaller set of years.

Tax Law § 14(d) defines test year as:

> [T]he last taxable year of the business enterprise ending before the test date. If a business enterprise does not have a taxable year that ends on or before the test date, such enterprise shall be deemed to have a test year which shall be either the last calendar year ending on or before its test date, or if the enterprise has as its taxable year a fiscal year, the last such fiscal year ending on or before its test date (whether or not the enterprise in fact had a taxable year during that period).

As relevant herein, Tax Law § 14(e) defines test date as:

> [T]he date prior to [July 1, 2011] on which the business enterprise was first certified under article 18-A of the general municipal law.

Tax Law § 14(f) defines taxable year as:

> [T]he taxable year of the business enterprise under section [183, 184, 185 or former section 186 of article 9, or under article 9-A, 22, 32 or 33 of the Tax Law]. If a business enterprise does not have a taxable year because it is exempt from taxation or otherwise not required to file a return under any of such sections of article nine or under article [9-A, 22, 32 or 33], then the term "taxable year" means (i) the business enterprise's federal taxable year, or, (ii) if the enterprise does not have a federal taxable year, the calendar year.

Tax Law § 14(j)(1) defines new business in relevant part as:

> A new business shall include any corporation, except a corporation which is substantially similar in operation and in ownership to a business entity (or entities) taxable, or previously taxable, under . . . article [9-A].

D. Pursuant to Tax Law § 14(e), and as stipulated by the parties, CII's test date is September 4, 2003 (***see*** Finding of Fact 17). Pursuant to Tax Law § 14(d), and as also stipulated by the parties, CII's test year is CII's fiscal year ended August 31, 2003.

E. As noted, the Division asserts that CII's base period, i.e., the five taxable years immediately preceding the test year, is zero. The Division contends that taxable year as defined in Tax Law § 14(f) includes only those years that CII, a foreign corporation, was doing business in New York and was thus subject to New York State franchise tax. According to the Division, CII began doing business in New York as of September 1, 2003, when it acquired substantially all of petitioner's assets. Under this interpretation, CII had no taxable years prior to its test year; hence, its base period is zero years. With a base period of zero, CII was subject to the new business test pursuant to Tax Law § 14(b)(1). As petitioner concedes in its brief and as the record clearly shows, CII was substantially similar in ownership and operation to petitioner and therefore would not qualify as a new business under Tax Law § 14(j). If CII did not qualify as a new business it would thereby fail the employment test and thus fail to qualify for the credits at issue.

Petitioner argues that CII had taxable years preceding its test year and therefore had a base period greater than zero. Petitioner contends that taxable year as defined in Tax Law § 14(f) includes federal taxable years. Since petitioner and CII filed consolidated U.S. corporation income tax returns from the time of CII's incorporation through the test year, petitioner asserts that CII had federal taxable years preceding the test year and therefore had a base period equal to its federal taxable years ended August 31, 1998 through August 31, 2003. Petitioner thus

contends that CII's base period was greater than zero, the new business test was not implicated and, accordingly, CII is entitled to the QEZE credits at issue.

F. Resolution of the instant matter thus ultimately turns on the meaning of taxable year as defined in Tax Law § 14(f). This is a matter of statutory construction, the fundamental rule of which is to effectuate the intent of the Legislature (***Matter of 1605 Book Center, Inc. v. Tax Appeals Tribunal***, 83 NY2d 240, 244, 609 NYS2d 144, 146 [1994], ***cert denied*** 513 US 811, 130 L Ed 2d 19 [1994]). Where the statutory language is clear and unambiguous it should be construed so as to give effect to the plain meaning of the words used (***Patrolmen's Benevolent Assn. v. City of New York***, 41 NY2d 205, 208, 391 NYS2d 544, 546 [1976]). Statutes authorizing tax exemptions or tax credits are to be strictly and narrowly construed against the taxpayer (***see Matter of International Bar Assn. v. Tax Appeals Tribunal***, 210 AD2d 819, 620 NYS2d 582 [3rd Dept 1994], ***lv denied*** 85 NY2d 806, 627 NYS2d 323 [1995]).

G. In the present matter, the clear and unambiguous language of Tax Law § 14(f) compels a finding in favor of petitioner. While the first sentence of Tax Law § 14(f) defines taxable year as the business enterprises's taxable year under 9-A and thereby comports with the Division's interpretation, the second sentence expands that definition, providing that if an enterprise does not have such a taxable year because "it is exempt from taxation *or otherwise not required to file a return under [Article 9-A]*" (emphasis added), then taxable year means either the enterprise's federal taxable year or, if the enterprise does not have a federal taxable year, the calendar year. The statute thus provides for an alternate definition of taxable year where a business corporation is not required to file a return under Article 9-A.

Here, CII did not file any returns under Article 9-A for any years prior to its test year. Assuming that CII was not doing business in New York during this time, then CII was not

required to file any such returns.[1] Under such circumstances, that is, where a business enterprise is "otherwise not required to file a return under [Article 9-A]," the statute defines taxable year as the enterprise's federal taxable year or, absent a federal taxable year, the calendar year. CII filed consolidated federal returns with petitioner from the time of its incorporation in 1998. CII thus had a federal taxable year and therefore a taxable year under Tax Law § 14(f) throughout that time.

H. The first four of CII's taxable years, i.e., the years ended August 31, 1998 through August 31, 2002, precede CII's test year and therefore fall within CII's base period pursuant to Tax Law § 14(c). Accordingly, CII's base period is greater than zero and the new business test under Tax Law § 14(b)(1) is not triggered.

Since CII's base period employment is zero (***see*** Finding of Fact 19) and its employment number in each of the credit years is greater than zero (***see*** Findings of Fact 26 and 28), CII has met the employment test under Tax Law § 14(b)(1) and thus qualifies for the QEZE real property tax credit at issue. It is noted that the Division conceded that if CII was not subject to the new business test it would qualify for the credit at issue.

I. As noted, the Division contends that "taxable year" as defined in Tax Law § 14(f) includes only those years that CII was doing business in New York and was thus subject to tax under Article 9-A. In other words, the Division asserts that the phrase "or otherwise not required to file a return under [Article] 9-A" as used in Tax Law § 14(f) is not applicable to CII notwithstanding that CII was, in fact, not required to file a return under Article 9-A prior to its

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[1] Petitioner's alternative argument that it was in fact doing business in New York from the time of its incorporation in 1998 and was required to file New York returns in respect of those years and therefore had a taxable year under Article 9-A is noted. This conclusion addresses petitioner's statutory construction argument and therefore assumes, as the Division asserts, that CII was not doing business in New York prior to its acquisition of petitioner's assets on September 1, 2003.

test year. Rather, the Division asserts that the second sentence of Tax Law § 14(f), which was added along with several other amendments to Tax Law § 14 by Laws of 2002 (ch 85, pt CC), "appears to have been targeted to accommodate not-for-profits and other tax exempt entities which typically do not have to file New York State tax returns due to their exempt status." The Division, however, offers no authority for this position, which runs contrary to the plain wording of the statute. While the Division's proposed interpretation accounts for the statutory reference to exempt entities, it would render the phrase "or otherwise not required to file a return under Article 9-A" a nullity. Such a construction is to be avoided (***see Matter of General Electric Company***, Tax Appeals Tribunal, September 9, 1988).

J. The Division cites a Technical Services Memorandum dated February 2, 2006 (TSB-M-06[1]C) in support of its position which provides, in relevant part, "The base period is zero years for a business enterprise which is first doing business in New York State in the tax year that the enterprise is first certified."

Technical Services memoranda are "informational statements of the Division of Taxation's policies" (20 NYCRR 2375.6[a][1]). As such, they are "advisory in nature" and "do not have legal force or effect" (20 NYCRR 2375.6[c]). (See also ***Matter of Friesch-Groningsche Hypotheekbank***, Tax Appeals Tribunal, December 28, 1990, ***confirmed*** 185 AD2d 466, 585 NYS2d 867 [3d Dept 1992], ***lv denied*** 80 NY2d 761, 592 NYS2d 670 [1992]). Accordingly, the Technical Service memorandum cited by the Division is accorded little weight herein. Similarly, Division forms and publications (e.g., 2003 and 2004 CT-604-I, 2005 CT-604-I and CT-606-I, 2006 CT-604-I and CT-606-I, and 2007 CT-604-I and CT-606-I) which may comport with the TSB and the Division's position herein are also accorded little weight.

K. In reference to the package of amendments to Tax Law § 14 enacted by Laws of 2002 (ch 85, pt CC) (including the changes to Tax Law § 14[f] discussed above in Conclusion of Law I), the Division asserts that such amendments were designed to prevent the "'reincorporating' of an existing entity and the mere transfer of employees from one related entity to another in order to 'artificially' inflate employment numbers." The Division asserts that this is precisely what petitioner has done and cites a letter to former Governor Pataki, dated May 20, 2002, from former Commissioner of Taxation and Finance Arthur J. Roth, which discussed those "parts of the bill that affect this Department," in relevant part as follows:

> Part CC - Empire Zones
>
> Part CC makes a number of necessary and clarifying amendments to the qualified Empire Zone enterprise (QEZE) tax credit and exemption provisions . . . [A] number of the clarifying changes are specifically intended to curb the potential for abuse by taxpayers of these tax benefits . . . . In relation to both the QEZE tax reduction credit and the QEZE credit for real property taxes, a QEZE will not be entitled to the benefit of automatically meeting the employment increase requirement unless it meets the "new business" test added to the statute. This provision is intended to prevent a taxpayer from simply "reincorporating" itself in order to obtain this employment increase benefit. The employment tests under both the QEZE and the wage credit provisions are amended to specifically exclude from the employment count individuals who were employed by a related entity within the immediately preceding 60 months. This provision is intended to prevent a taxpayer from transferring employees from one related entity to another simply to artificially inflate the taxpayer's employment number.

While resort to extrinsic aids such as former Commissioner Roth's letter to determine legislative intent is inappropriate where, as here, the statutory language is clear and unambiguous (***see Matter of Schein***, Tax Appeals Tribunal, November 6, 2003), it should be noted that the Division's concerns are unfounded. Petitioner did not "simply reincorporate" itself as CII. Rather, petitioner reorganized its operations and sold its assets to its subsidiary, a preexisting corporation. Tax Law § 14 does not preclude such reorganizations from qualifying for the QEZE

credit and, as discussed previously, such reorganizations do not trigger the new business test under Tax Law § 14(b)(1). Indeed, it would appear that concerns regarding the inflation of employment numbers and the transfer of employees between related entities noted in former Commissioner Roth's letter were addressed by the amendment to Tax Law § 14(g) (***see*** L 2002, ch 85, pt CC), pursuant to which individuals who were employed by a related entity within the immediately preceding 60 months were excluded from the "employment number" for purposes of the employment test under Tax Law § 14(b)(1).[2]

Furthermore, the Division's stated concerns regarding "reincorporation" and inflated employment numbers notwithstanding, the Division's statutory construction argument in this matter does not propose that the sort of reorganization undertaken by petitioner and CII should necessarily trigger the new business test and thereby a failure to qualify for QEZE credit. The Division's position in this matter rests upon its contention that CII, a foreign corporation, was not doing business in New York and was therefore not required to filed a return under Article 9-A for any years prior to its test year. If CII had been a New York corporation, it would have been required to file a return under Article 9-A (***see*** Tax Law § 209[1]) and, consistent with the Division's statutory argument, would have qualified for the QEZE credit. The economic reality of the situation, however, including the reality of the employment numbers, would be unchanged. The Division's policy argument thus appears to be at odds with its statutory argument.

L. Pursuant to the preceding conclusions of law, it is not necessary to address petitioner's alternative argument for the credit at issue.

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[2] CII's claims for QEZE credit for real property taxes appear to reflect this 60-month exclusion provision (***see*** Findings of Fact 26, 28 and 35).

M. The petition of Chapin Manufacturing, Inc. is granted and the Division of Taxation is directed to apply the QEZE credit for real property taxes as indicated on petitioner's franchise tax return for the year ended August 31, 2006 and to refund such QEZE credit as claimed on petitioner's returns for the years ended August 31, 2006 and August 31, 2007, together with such interest as may be applicable.

DATED: Troy, New York
April 1, 2010

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE