STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BIRDS EYE FOODS, INC.	:	DETERMINATION DTA NO. 822701
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 June 25, 2005 and June 24, 2006.	:	

Petitioner, Birds Eye Food, 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 June 25, 2005 and June 24, 2006.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at 183 Main Street, Rochester, New York, on July 8, 2009 at 9:15 A.M., with all briefs to be submitted by November 6, 2009, which date began the six-month period for the issuance of this determination. Petitioner appeared by McConville, Considine, Cooman & Morin, PC (Edward C. Daniel, III, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Nicholas A. Behuniak, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly disallowed claimed qualified empire zone enterprise (QEZE) credits for real property taxes for the years in issue because petitioner's wholly-owned subsidiary failed to satisfy the requirements of Tax Law § 14.

FINDINGS OF FACT

The parties entered into a stipulation of facts containing 43 numbered findings, all of which have been incorporated into the Findings of Fact below, except paragraph 17, which was unnecessary for the determination of the issues herein; paragraphs 23, 24 and 25, which referenced procedural history and are unnecessary; and 42, which was comprised of legal argument. Petitioner submitted 9 additional proposed findings of fact that have been incorporated into the Findings of Fact below, except 7, which has been modified to better reflect the record. The Division of Taxation submitted 8 additional proposed findings of fact which have been incorporated into the Findings of Fact below, except 48, which has been modified to better reflect the record, and 50 and 51, which are deemed irrelevant to the determination in this matter.

1. Birds Eye Foods, Inc. (petitioner) was a Delaware corporation during the fiscal years ending June 25, 2005 and June 24, 2006, authorized to do business in New York with an office at 90 Linden Oaks, Rochester, New York 14625. It was engaged in the business of food processing and did not own real property for lease to other entities.

2. BEMSA Holding, Inc. (BEMSA) was a Delaware corporation and a wholly-owned subsidiary of petitioner, although a separate and distinct legal entity. BEMSA was formed under Delaware law on June 4, 1998 and its stock was acquired by Agrilink Foods, Inc. (Agrilink) on September 23, 1998. In January 2003, Agrilink changed its name to Birds Eye Foods, Inc. As a wholly-owned subsidiary of petitioner, BEMSA has an identity of ownership with petitioner. BEMSA was the real estate holding company for petitioner during the credit years (defined below), leasing its real estate assets exclusively to petitioner. It held title to several parcels of real estate containing processing facilities worth millions of dollars in asset value. BEMSA had

acquired the properties in 2003, receiving them by deed from petitioner. It had no business activity other than the ownership and leasing of its real estate.

3. BEMSA leased the real estate and facilities to petitioner, deriving rental income from the property. There were written leases between BEMSA and petitioner confirming the rental terms and arrangements. The leases were standard triple net commercial leases under which petitioner paid rent and assumed responsibility for payment of taxes, utilities, insurance and other expenses related to the use and occupation of the properties.

4. Following its acquisition of the property in 2003, BEMSA hired new employees from the outside who were not related to either BEMSA or petitioner. During the years in issue, BEMSA had approximately 3 employees while petitioner had approximately 601 employees.

5. Petitioner and BEMSA filed New York State general business corporation franchise tax returns on a combined basis, using a 52-week taxable year ending in June of each year. They filed on a combined basis for every taxable year beginning with the year ending June 2003 through and including June 2006. These entities also filed federal consolidated income tax returns for every year beginning with the taxable year ending in June 1999 through and including the taxable year ending in June 2006.

6. BEMSA was granted authority to do business in New York pursuant to an application filed with the New York State Department of State on May 9, 2003.

7. On July 1, 2003, BEMSA acquired fee title to certain parcels of real property and improvements located within the Genesee County Empire Zone in the Village of Oakfield and the Village of Bergen, County of Genesee, State of New York (Genesee County Properties), which were used by petitioner in its business during the credit years and then sold by BEMSA on December 21, 2006.

8. On July 1, 2003, BEMSA acquired fee title to a certain parcel of real property and improvements located within the Fulton County Empire Zone in the City of Fulton, County of Fulton, State of New York (Fulton County Property), which was used by petitioner in its business during the credit years.

9. On June 1, 2004, BEMSA acquired fee title to a certain parcel of real property and improvements located within the Monroe County Empire Zone in the Village of Brockport, County of Monroe, State of New York (Monroe County Property), which was used by petitioner in its business during the credit years and later sold by BEMSA on December 21, 2006.

10. The real properties acquired by BEMSA from petitioner in Genesee, Fulton and Monroe Counties, more fully described above, were the basis for the QEZE claims at issue. After their acquisition in 2003, they were immediately leased back to petitioner and considered an integral part of petitioner's business activities.

11. On August 8, 2003, BEMSA was certified under the Empire Zones Program (the Program) with respect to the Fulton County Property. This was the first time it had received a certification under the Program. BEMSA was certified under the Program with respect to the Genesee County Properties on July 27, 2004 and then again on February 22, 2005 with respect to the Monroe County Property.

12. On June 14, 2006, petitioner and BEMSA filed a combined New York State General Business Corporation Franchise Tax Return for their taxable year ending June 25, 2005, which reflected a claim of the QEZE credit for real property taxes (the credit) in the amount of $655,024.00.

13. On June 8, 2007, petitioner and BEMSA filed a combined New York State General Business Corporation Franchise Tax Return for their taxable year ending June 24, 2006, which

reflected a claim of the QEZE credit for real property taxes (the credit) in the amount of $748,151.00.

14. These taxable years ending June 25, 2005 and June 24, 2006 are collectively referred to as the credit years.

15. On December 26, 2007, the Division of Taxation (Division) issued a Notice of Disallowance (the denial), denying petitioner's claim of the credits for both credit years. The letter stated, in part, that:

> We have reviewed the information in your letters and the facts in this case, and it is our finding that BEMSA Holding, Inc. ("BEMSA") does not meet the employment test under section 14(b) of the New York State Tax Law, and therefore is not eligible for QEZE credits.

16. BEMSA, a Delaware corporation, was first certified as an Empire Zone on August 8, 2003. Its test date was August 8, 2003 and its test year is the fiscal year ended June 28, 2003, the first fiscal year prior to its test date. The terms taxable year, test year and base period are defined in Tax Law § 14 for purposes of the program.

17. BEMSA was not subject to tax in New York State and did not file tax returns in New York or pay franchise taxes prior to its test year. It did not do business, own or lease property, employ capital, have any employees or maintain an office in New York prior to July 1, 2003. Prior to the fiscal year ended June 2003, petitioner filed New York State tax returns without BEMSA.

18. BEMSA's first filing in New York State was Form CT-3-A/C, Report by a Corporation Included in a Combined Franchise Tax Return, filed on June 14, 2005, for the fiscal year ended June 28, 2003. On the CT-3-A/C, BEMSA reported gross payroll in the amount of

zero, total receipts in the amount of zero, average value of gross assets in the amount of zero and a fixed dollar minimum tax in the amount of $800.00.

19. Zero income or loss, zero receipts, zero property and zero wages were reported for BEMSA on schedule CT-3-A/B of the Amended CT-3-A filed by petitioner for the fiscal year ended June 28, 2003. There was no income or loss, capital, receipts, property or wages reported for BEMSA on the amended New York State General Business Corporation Combined Franchise Tax Return filed on June 14, 2005, for the fiscal year ended June 28, 2003.

20. For the fiscal year ended June 25, 2005, petitioner was engaged in the business of food processing.

21. For the fiscal year ended June 25 2005, BEMSA held title to certain real estate and processing facilities used by petitioner in New York State.

22. For the fiscal year ended June 25 2005, the employees of petitioner and BEMSA were engaged in petitioner's food processing business.

23. With respect to the periods ended June 25, 2005 and June 24, 2006, BEMSA had an employment number in New York empire zones which was greater then zero.

24. Petitioner filed a General Business Corporation Combined Franchise Tax Return, form CT-3-A, for the fiscal year ended June 25, 2005 that was received by the Division of Taxation on June 15, 2006. The return included a Claim for QEZE Credit for Real Property Taxes, Form CT-604, in the amount of $655,024.00. The Empire Zone certified entity filing the claim was BEMSA and listed empire zones of Genesee, Monroe and Fulton counties. The form also recited the date of first certification as August 8, 2003.

25. On line 100a of the CT-3-A, a refund of unused tax credits was requested in the amount of $658,796.00. The amount was comprised of the unused QEZE credit for the real property taxes and IMB credit, in the respective amounts of $655,024.00 and $3,772.00.

CONCLUSIONS OF LAW

A. Tax Law § 15(a) provides that a taxpayer which is a qualified empire zone enterprise subject to tax under Article 9-A of the Tax Law shall be allowed a credit against such tax for eligible real property taxes.

In this matter, petitioner would be eligible to claim the credits if its wholly-owned subsidiary, BEMSA, was a qualified empire zone enterprise. To attain this status, BEMSA must have been certified under Article 18-B of the New York General Municipal Law and met the employment test set forth in Tax Law § 14(b). (Tax Law § 14[a].) As recited in the stipulation, the parties agreed that BEMSA was certified under the Empire Zones Program as early as August 8, 2003. The parties continue to dispute whether or not BEMSA met the employment test.

B. Tax Law § 14(b)(1) recites the employment test as applicable to the instant matter, in pertinent part, as follows:

> General. In the case of a business enterprise which is first certified under article eighteen-B of the general municipal law before April first, two thousand five, the 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. For entities first certified between August first, two thousand two and March thirty-first, two thousand five, if 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 subdivision (j) of this section.[1]

The employment test as set out in Tax Law § 14(b)(1) has two distinct parts. The first part requires that the qualified business enterprise have an employment number in the empire zone for the taxable year which equals or exceeds the employment number in the base period and that the employment number in the state outside of the empire zones equals or exceeds its employment number in the state outside of the empire zones for the base period. Since the parties stipulated that BEMSA had no employees in New York State prior to July 1, 2003 and did have more employees than zero for the years in issue, it appears that petitioner satisfied the employment test. However, part two of the employment test requires that, if the base period is zero years, and the enterprise has an employment number in the empire zone of greater than zero with respect to the taxable year, then the test requires that the enterprise qualify as a new business under Tax Law § 14(j), i.e., it must clear an additional hurdle if its base period is determined to have zero years.

The term base period is defined in Tax Law § 14(c) as the five taxable years immediately preceding the test year. If the business has fewer than five such years then the term is interpreted to mean such smaller set of years. The parties stipulated that BEMSA's test year was the fiscal year ended June 28, 2003. The five years immediately preceding the test year were the fiscal years ended June of 2002, 2001, 2000, 1999 and 1998. As stipulated by the parties, petitioner and BEMSA filed federal consolidated income tax returns for every year beginning with the fiscal year ended June 1999 through and including June 2006. Therefore, BEMSA had been filing federal income tax returns for four years immediately preceding the test year.

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[1]The part of section 14 reproduced, was amended by chapter 63 of the Laws of 2005 and is applicable to tax years beginning on or after January 1, 2005. Therefore, it would only apply to fiscal year ended June 24, 2006. The applicable language of section 14, rewritten by chapter 85 of the Laws of 2002, for the fiscal year ended June 25, 2005 was materially unchanged for purposes of the analysis herein.

Petitioner contends that filing the federal returns demonstrates that BEMSA had taxable years immediately preceding the test year, while the Division argues that the term taxable years includes only those years in which BEMSA was doing business and subject to taxation in New York. For the reasons set out below, it is determined that petitioner was entitled to claim the credits in issue.

C. Tax Law § 14(f) defines the term taxable year, in pertinent part, as follows:

> The term taxable year means the taxable year of the business enterprise under . . . article nine-a . . . . 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 . . . article nine-a, . . ., 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.

BEMSA did not file returns and was not required to file returns under Article 9-A of the Tax Law for any of the years in its base period. As stated in the facts, BEMSA was not subject to tax in New York State and did not file tax returns in New York or pay franchise taxes prior to its test year (the fiscal year ended June 28, 2003). It did not do business, own or lease property, employ capital, have any employees or maintain an office in New York prior to July 1, 2003.

Given these factors, it follows that the plain language of Tax Law § 14(f) dictates that BEMSA's taxable year is its federal taxable year. Since petitioner and BEMSA filed consolidated income tax returns for every year beginning with the taxable year ended June 1999 through and including the taxable year ended June 2006, it is evident that it did have more than zero taxable years in its base period, i.e., the taxable years ended 1999, 2000, 2001 and 2002, all of which preceded the test year.

The definitions contained in Tax Law § 14(c) and (f) applied to the facts herein support a conclusion that petitioner had a base period of four years within which it had no employees in either its empire zones or in the State of New York. As a business enterprise that was first

certified under article 18-B of the General Municipal Law before April 1, 2005, it met the employment test with respect to the years in issue, and having met that test, it is unnecessary to apply the new business test set forth in Tax Law § 14(j).

The Division has raised several arguments to support its contrary statutory interpretation, but they are not persuasive in light of the clarity and unambiguous nature of the statutory provisions which can and should be read literally.

Statutory rules of construction provide that "[t]he legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction" (McKinney's Cons Laws of NY, Book 1, Statutes § 94). Where the statute is clear, the courts must follow the plain meaning of its words, and "there is no occasion for examination into extrinsic evidence to discover legislative intent . . ." (McKinney's Cons Laws of NY, Book 1, Statutes § 120; ***see Matter of Raritan Dev. Corp. v. Silva***, 91 NY2d 98, 667 NYS2d 327 [1997]; ***Matter of Schein***, Tax Appeals Tribunal, November 6, 2003). Where, as here, words of a statute have a definite and precise meaning, it is not necessary to look elsewhere in search of conjecture so as to restrict or extend that meaning (***Matter of Erie County Agricultural Society v. Cluchey***, 40 NY2d 194, 386 NYS2d 366 [1976]). As the language of the statute is clear, it is appropriate to interpret its phrases in their ordinary, everyday sense (***Matter of Automatique v. Bouchard***, 97 AD2d 183, 470 NYS2d 791 [1983]).

D. The Division interprets the statutory definition of taxable year as used in the definition of base period to be those years in which BEMSA was doing business and subject to New York taxation. With this interpretation, BEMSA would have no taxable years prior to its test year and therefore the base period would have zero years.

The Division's only authority for this construction is a Technical Services Memorandum, TSB-M-06(1)C, dated February 2, 2006, which was intended as a summary of changes to the Empire Zones Program resulting from the chapters 63 and 161 of the Laws of 2005 and additional amendments for taxable years beginning on or after January 1, 2005, affecting business enterprises first certified after April 1, 2005. In the Memorandum's discussion of applicable general definitions, it reiterated the definition of base period set forth above in Conclusion of Law B. However, in a note to this general definition, the Memorandum set forth the following:

> 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.

It is generally recognized that the interpretation of a statute by an agency charged with its enforcement is entitled to great weight to the extent that its interpretation relies on its special competence. (***Matter of Jennings v. Commissioner of Social Services***, _ AD3d _ , 893 NYS2d 103, 111[2010].) Further, the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld. (***Matter of Garofolo v. Rosa***, _ Misc 2d _, 891 NYS2d 899 [Sup Ct, Kings Cty 2009].)

However, a pure legal interpretation of clear and unambiguous statutory terms requires no deference to interpretation of an agency charged with the statute's enforcement, inasmuch as there is little or no need to rely on any special expertise on the agency's part. ***(Matter of Lewis Family Farm, Inc. v. New York State Adirondack Park Agency***, 64 AD3d 1009, 882 NYS2d 762 [2009].) In fact, "an administrative practice contrary to or inconsistent with the statute is without legal effect and will be disregarded by the courts." (***In re Billings' Estate***, 70 NYS2d 191 [1947].)

In the instant matter, the Division, through its Memorandum, has modified the statutory definition of base period and taxable year, intentionally or unintentionally, restricting a taxpayer's ability to claim a credit to which it was entitled under the clear and unambiguous language of the statute. Since it has been determined that the ultimate issue is one of pure, legal interpretation, deference to the Division is not required, and this forum is charged with the responsibility of construing the clear and unambiguous statutory language as to give effect to the plain meaning of the words used. (***Matter of Brown v. New York State Racing and Wagering Board***, 60 AD3d 107, 871 NYS2d 623, 629 [2009].)

It is determined that the clear terms of the employment test contained in Tax Law § 14(b) and the definitions of base period and taxable year set forth in Tax Law § 14(c) and (f), respectively, indicate that BEMSA had a base period of four years, given its federal taxable years ended June 1999, 2000, 2001 and 2002. Since this interpretation recognizes that the employment test has been satisfied, petitioner is not required to also satisfy the new business test under Tax Law § 14(j).

E. The Division further contends that its Memorandum "builds on precedent set by Tax Law . . . § 14, as originally enacted. . . ." The logic of this argument is difficult to fathom, since Tax Law § 14, as originally enacted in 2000 was amended by Laws of 2002 (ch 85, part CC), and it was that amended version of the statute that is applicable to the instant matter. Specifically, the definition of taxable year in subdivision (f) contained in the original legislation only provided that it meant the taxable year of the business enterprise under Article 9-A, without the critical language, added in 2002, which provided for business enterprises without taxable years because they were not required to file a return under Article 9-A, and providing that for such enterprises the term taxable year meant the enterprise's federal taxable year. There is no

precedential value in a statute that is not applicable to the years in issue, much less a statutory provision that has been significantly amended in such a way that its application to the current facts is radically changed.

F. The Division cites a letter of the Commissioner of Taxation and Finance, dated May 20, 2002, in which the amendment to Tax Law § 14 was discussed, and it was noted that the changes were clarifying in nature and intended to curb taxpayer abuse of the QEZE benefits. (Letter of Commissioner of Tax and Finance, Arthur J. Roth, dated May 20, 2002, Bill Jacket, L 2002 ch 85, at 25-26.) The Division argues that the 2002 amendments were made in an attempt to prevent shifting an existing entity in order to manipulate the employment increase test. However, although it raises this valid legislative intent, the Division never charges petitioner with having done this, much less offer any substantiating proof.

G. Since it is concluded that petitioner satisfied the employment test of Tax Law § 14(b), it has demonstrated that it is entitled to the credits. However, even if it had not successfully satisfied the employment test, it would have satisfied the new business test in Tax Law § 14(j) and thus qualified for the credits.

Tax Law § 14(j)(1) defines the term new business as follows:

> 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 nine-A . . . of this chapter . . . .

The statute clearly states that BEMSA would be considered a new business unless it is substantially similar in ownership and in operation to another taxable entity. Since petitioner and BEMSA are identical in ownership the remaining issue is whether it is identical in operation to petitioner during the years in issue. The evidence adduced at hearing proved that the two companies were not substantially similar in operation. BEMSA was a real estate holding

company, holding title to several parcels of real estate, which it acquired by deed from petitioner. It then leased the property, including processing facilities, back to petitioner pursuant to triple net leases which yielded rental income to BEMSA. Further, BEMSA hired new employees who had not previously worked for petitioner or BEMSA.

BEMSA's only business activity was the holding of title to real estate, which it then leased to earn income. Petitioner's only business activity was food processing, marketing and sales. It neither owned nor leased real property. It is apparent that the two entities are not substantially similar in operation.

The Division of Taxation devoted one paragraph of its brief to its argument that BEMSA was substantially similar in operation to petitioner. It contends that the holding and real estate operations were a continued, integral part of petitioner's operations. It also concluded that the fact that BEMSA received title to the real property and leased it back to petitioner on the same day was indicative of a seamless continuity that belied a new business and noted that the new employees performed work for both companies.

The Division cited no authority for its conclusions and the Opinion of Counsel it cited (August 12, 2003) relied on different facts and cited no authority for its position and conclusions. Therefore, it is the language of Tax Law § 14(j)(1) that must control and the plain language supports a finding that the two companies were not similar in operation. None of the criteria which the Division attached to the definition of substantially similar in operation appears in the statute, a regulation promulgated thereunder or in precedent, and this forum will not sustain such conjecture.

> A court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as an

indication that its exclusion was intended. (McKinney's Cons Laws of NY, Book 1, Statutes § 74; ***Matter of Prego v. City of New York***, 147 AD2d 165, 541 NYS2d 995 [1989].)

H. The petition of Birds Eye Foods, Inc. is granted and the Division of Taxation is directed to grant the QEZE credits for real property taxes for the fiscal years in issue, more fully described in Findings of Fact 11 and 12 above, which had been disallowed by the Division by letter dated December 26, 2007.

DATED: Troy, New York
April 8, 2010

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE