

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>ECR INTERNATIONAL, INC.</b>	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 822742
Corporation Franchise Tax under Article 9-A of the Tax	:	
Law for the Years 2005 and 2006.	:	

---

Petitioner, ECR International, 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 years 2005 and 2006.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 9, 2009 at 10:00 A.M., with all briefs to be submitted by February 5, 2010, which date began the six-month period for issuance of this determination. The six-month period was extended an additional three months pursuant to 20 NYCRR 3000.15(e)(1). Petitioner appeared by Hiscock & Barclay, LLP (Kevin R. McAuliffe, Esq., David G. Burch, Jr., Esq., and Amanda K. Davis, 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 credits for real property taxes for the years 2005 and 2006 because petitioner's wholly-owned subsidiary failed to satisfy the requirements of Tax Law § 14.

***FINDINGS OF FACT***

Pursuant to section 3000.15(d)(6) of the Rules of Practice and Procedure of the Tax Appeals Tribunal and section 307(1) of the State Administrative Procedure Act, both parties submitted proposed findings of fact. Petitioner submitted 47 proposed findings of fact and 13 conclusions of law. The Division of Taxation submitted 24 proposed findings of fact. The proposed findings of fact have been substantially incorporated into this determination with exceptions noted in the final two findings of fact.

1. Petitioner, ECR International, Inc. (ECR International), designs and manufactures heating, ventilating and air conditioning equipment, including, among other things, boilers, radiators, and furnaces, for residential and commercial markets. ECR International sells these products to third parties.

2. Incorporated in New York State, petitioner is a privately-held corporation with approximately 120 shareholders. It was created by the 1999 merger of two New York State companies, Dunkirk Radiator Corporation (Dunkirk Radiator) and The Utica Companies.<sup>1</sup> Both Dunkirk Radiator and The Utica Companies were formed in 1928. Initially, Dunkirk Radiator manufactured water boilers that were used to heat water for home heating and The Utica Companies manufactured the equipment (baseboards, etc.) that were used to transport the hot

---

<sup>1</sup> ECR International was chosen as the name for the merged company in honor of Earle Clifford Reed, the founder of both companies.

water through the building heating systems. However, Dunkirk Radiator and The Utica Companies, in later years, manufactured similar products and competed directly against each other. Sometime in 1998 merger talks began between Dunkirk Radiator and The Utica Companies and the merger was completed in 1999.

3. Dunkirk Radiator conducted manufacturing operations at its facility located at 85 Middle Road, Dunkirk, New York (Dunkirk property), and The Utica Companies conducted manufacturing operations at its facility located at 2201 Dwyer Avenue, Utica, New York (Utica property). In manufacturing boilers and radiators, both Dunkirk Radiator and The Utica Companies conducted foundry operations at their respective facilities. The on-site foundry operations of both companies were used for iron ore melting and casting. As part of the casting and the assembly of their respective boilers and radiators, Dunkirk Radiator and The Utica Companies each produced waste materials, including, among other things, foundry sand, sludge, dust and slag. To reduce manufacturing costs, The Utica Companies shut down its foundry operations in 1984 and purchased cast iron products from an unrelated vendor. Dunkirk Radiator shut down its foundry operations in 1987 and purchased cast iron products from the same unrelated vendor.

4. In 1979, the New York State Department of Environmental Conservation (DEC) conducted tests on Dunkirk Radiator's foundry sand, sludge, slag and dust and found these waste materials contained phenol, iron, cadmium, lead, zinc and chromium. An "Industrial Chemical Survey," dated June 6, 1981, submitted by Dunkirk Radiator to the DEC, reported that the following substances of concern were either used in the production of the radiators and boilers or were present in the foundry sand, slag, sludge and dust: toluene, xylene, phenol, cadmium, chromium, lead, zinc, and iron. As a result of analyses performed on Dunkirk Radiator foundry

sand, the DEC sent a letter, dated February 10, 1984, to the Town of Sheridan zoning officer, advising that “since the waste contains phenol in excess of 1 part per billion, any person wishing to use this sand must receive permission from this Department. In addition, a permit to transport the waste would be necessary.”

5. Waste materials from its former foundry casting process were used as fill material throughout the southern portion of Dunkirk Radiator’s Dunkirk property.

6. In 1995, Dunkirk Radiator was considering an expansion project at its Dunkirk, New York, location. The proposed project entailed the construction of an expansion building of approximately 60,000 square feet that would extend out of the existing southern wall of the main building. In or about August 1995, Dunkirk Radiator retained Leader Environmental, Inc. (Leader Environmental), to conduct an environmental site investigation (ESI) at the Dunkirk property because it anticipated that any lenders or public agencies involved with funding the proposed expansion would require an environmental assessment. Leader Environmental completed the ESI for Dunkirk Radiator in accordance with the March 5, 1996 scope-of-work letter that it submitted to the DEC. Specifically, the following activities were conducted at the Dunkirk site as part of the ESI: the installation of four test boring/monitoring wells; the excavation of eleven test pits to observe subsurface conditions and evaluate the composition of the overburden soil materials; the collection and analysis of four soil and groundwater samples collected from the test boring/monitoring wells; the measurement and surveying of the monitoring well locations; and the measurement of groundwater levels in all four monitoring wells. Leader Environmental prepared a report, dated May 16, 1996, setting forth the findings of the ESI regarding soil and groundwater conditions at the Dunkirk site (Leader Environmental Study).

7. The Leader Environmental Study summarized, among other things, the field activities performed, the analysis of the soil and groundwater samples taken from the Dunkirk site and the conclusions reached based on the findings from that analysis. Included as part of the study were supporting tables and figures, and four appendices containing logs of the field activities and analyses of the soil and groundwater at the Dunkirk site.

8. The findings of the Leader Environmental Study indicated that groundwater was flowing from a neighboring property commonly known as the Roblin Steel facility onto the Dunkirk site. The findings further indicated that vinyl chloride and petroleum hydrocarbons were detected in downgradient wells on the Roblin Steel site in 1991 at concentrations above DEC water quality standards. The Leader Environmental Study also indicated that the Roblin Steel site had completed a nonpetroleum/nonhazardous spill cleanup in May 1994. Soil and groundwater sampling results, contained in the Leader Environmental Study, indicated that metals and volatile organic compounds were detected in the soil and groundwater at the Dunkirk site. Specifically, arsenic, barium, cadmium, selenium, silver, lead, acetone, and ethylbenzene were detected at concentrations below DEC guidance values in one or more of the soil samples; chromium, mercury and xylene were detected at concentrations above DEC guidance values in one or more of the soil samples; barium, acetone, and bis (2-ethylhexyl) phthalate were detected at concentrations below DEC water quality standards in one or more of the ground water samples; and chromium, lead and xylene were detected at concentrations above DEC water quality standards in one or more of the ground water samples.<sup>2</sup>

---

<sup>2</sup> The Leader Environmental Study used soil guidance values set forth in Technical Administrative Guidance Memorandum No. 4046 issued by the DEC on January 24, 1994, and water quality standards set forth in 6 NYCRR Part 703, Class GA (Groundwater) Water Quality Standards and Guidance Values, September 25, 1990.

9. The Leader Environmental Study concluded that the fill material was nonhazardous and its constituents were not significantly impacting ground water, both on site and off site. It further concluded that “[t]he few detected analytes in soil and groundwater are typical of industrial property and, although some of the analytes detected are slightly above NYSDEC soil guidance or water quality standards, do not appear to warrant any additional investigation or remediation.”

10. The Leader Environmental Study was submitted to the DEC. After reviewing the Leader Environmental Study, the DEC issued a letter dated July 18, 1996 to Dunkirk Radiator (the July 18, 1996 DEC letter), which determined that immediate remediation was unnecessary, based upon its understanding that the contemplated use of the Dunkirk property would be for industrial purposes only. However, the letter indicated that the DEC, at some future point in time, could change its determination as to contamination on the Dunkirk site and the need to take any further remedial actions with regard to the contaminants known to exist at the site.

11. The main building at the Dunkirk property was never expanded by Dunkirk Radiator.

12. The Utica Companies never had any environmental tests performed at the Utica property.

13. After the 1999 merger, petitioner continued to conduct business operations at both the Dunkirk and Utica sites. Fabrication of the boilers and radiators took place at the Dunkirk facility. Final assembly of the boilers took place at the Utica facility, where completed products awaiting sale and shipment were stored. Petitioner’s corporate headquarters were also located at the Utica site.

14. On December 23, 1998, petitioner became eligible to access the benefits referred to in General Municipal Law § 966 in connection with the facilities located at Middle Avenue, Dunkirk, New York, within the boundaries of the City of Dunkirk, towns of Dunkirk and

Sheridan Economic Development Zone. On March 2, 2000, petitioner became eligible to access the benefits referred to in General Municipal Law § 966 in connection with the facilities located at Dwyer Avenue, Utica, New York, within the boundaries of the Utica Economic Development Zone. Subsequently, petitioner claimed and received various Empire Zone benefits.

15. Timothy Reed, currently vice chairman of ECR International's board of directors (Board of ECR International), first began working for The Utica Companies in 1983 as a manufacturing supervisor and rose to the rank of president of ECR International's predecessor, The Utica Companies, in 1994, a post he held until 2006. Since Mr. Reed's involvement in the management of The Utica Companies, and later ECR International, there have always been discussions about potential environmental liabilities. With respect to the Utica site, Mr. Reed explained that, historically, the building had been used as a machine screw facility (prior to its use by The Utica Companies), and had been surrounded by another foundry operation, a meat packing facility, two large auto salvage operations, and the old Barge Canal (the Erie Canal). The concern over environmental liabilities also grew out of the fact that ECR International's predecessors had been involved in a manufacturing process that involved oils, slag and the melting of metals. Further, metals being melted were of questionable purity in that they were scraps, including engine blocks that were infused with leaded gasoline. The first time Mr. Reed reviewed the Leader Environmental Study was during the due diligence that took place prior to the merger of The Utica Companies and Dunkirk Radiator in 1999.

16. Volatile organic compounds (VOCs) are vapor gases that are emitted during processing. VOCs were involved in at least one operation at the Dunkirk site. Vapor intrusion occurs when gases push through porous or semi-porous surfaces, including when gases migrate

into buildings from the soil. According to Mr. Reed, standards for VOCs in the workplace have changed over time.

17. Since the merger in 1999, petitioner's board of directors have held meetings four times a year and Mr. Reed estimated that the issue of environmental liability problems was discussed during at least two meetings a year.

18. Stephen Sweet is currently the chairman of the board of ECR International. Before holding this position, and since 1987, Mr. Sweet was on the Board of ECR International and one of its predecessors, The Utica Companies. Since the late 1980s, environmental liabilities were a frequent topic of discussion by the boards of ECR International and The Utica Companies. Environmental liabilities were a concern because the Board of ECR International was aware of the prior property owners' operations and The Utica Companies' operation of the Utica property as a foundry.

19. Asbestos-related liabilities have also been a "huge concern" of petitioner's board of directors for a number of years. Petitioner and its predecessors have been sued on a number of occasions for product-liability issues relating to the possible use of asbestos in some products manufactured by Dunkirk Radiator and The Utica Companies prior to 2002. Mr. Reed estimated that approximately 1,200 such suits have been commenced relating to allegations of asbestos use by petitioner's predecessors. The asbestos lawsuits were all brought against petitioner. Because it was concerned that the asbestos claims would exceed the company's insurance coverage for such claims, petitioner's board of directors was continuously looking for a way to segregate asbestos-related liabilities from petitioner's future profits in order to protect the shareholders' future earnings.

20. ECR International's quarterly board of directors meetings are held on two days, with the audit committee and the outside directors meeting for discussions on Monday and then the formal board of directors meeting taking place on Tuesday. Petitioner's board of directors also conduct special meetings as needed.

21. In 2002, petitioner had 82,107 shares outstanding, which were held by approximately 120 shareholders. At petitioner's annual shareholders meeting held on March 19, 2002, Thomas Reed, Timothy Reed, Earle Reed, Andrew Dorn, Andrew Burns, Stephen Sweet, Frederick Hager, Richard Foss, and Parker Weld were elected members of the board of directors for the ensuing year. Messrs. Dorn, Burns, Sweet, Hager, Foss and Weld were considered outside directors who did not have significant share ownership of petitioner.

22. At the hearing, Mr. Sweet explained that the possibility of transferring the Dunkirk and Utica properties to a subsidiary corporation was discussed at the June 10, 2002 regular board of directors meeting of ECR International, and possibly in a committee meeting of outside directors the day before. This initial discussion centered on whether the transfer of the properties into a subsidiary company that was a Qualified Empire Zone Enterprise (QEZE) would lead to any tax benefits. Although petitioner's board of directors found the proposal interesting, they felt there needed to be a better reason for the transfer of properties into a subsidiary company, and company management was directed to go back and see if there was "something else that we could wrap our arms around" instead of just the tax reason. At that point, petitioner's board of directors deferred making any decision on whether to transfer the properties to allow additional time for investigation and deliberation. Subsequently, John Lauchert, petitioner's former chief financial officer, advised board members that the transfer of the Utica and Dunkirk sites to a wholly-owned real estate holding company could segregate the liabilities associated with

potential environmental contamination and with the possible use of asbestos. Based upon that advice, it was Mr. Sweet's understanding that by transferring ownership of the properties, petitioner's board of directors could protect the value of the physical locations from the liabilities vested in petitioner. In addition, the opposite was also true, such that if liability vested in the wholly-owned real estate holding company, petitioner's assets would be protected from liability.

23. On July 3, 2002, ECR Properties, Inc. (ECR Properties), was incorporated in New York State. At that time, directors and officers of the corporation were elected. As of July 3, 2003, ECR Properties' board of directors accepted the subscription for 100 common shares from ECR International, and authorized the issuance of an appropriate share certificate to the subscriber upon the delivery of consideration. At that time, ECR Properties' board of directors also adopted banking resolutions.

24. During a special meeting of the board of directors held on July 24, 2002 at 1:00 P.M. via a telephone conference call, petitioner's board of directors, including Mr. Sweet, ratified the formation of ECR Properties, consented to the transfer of the Dunkirk and Utica sites to ECR Properties and to petitioner's lease of said properties from ECR Properties. Petitioner's board of directors minutes from the July 24, 2002 special meeting provide, in pertinent part, that:

[B]ased on recommendations of management, the Board of Directors has determined it to be advisable to convey title to all real property relating to the Corporation's Dunkirk, New York and Utica, New York operations to a special purpose entity wholly-owned by the Corporation, and to lease said properties back from ECR Properties, Inc.

Review of the minutes from the July 24, 2002 special meeting indicate that petitioner's board of directors also acted upon five additional unrelated matters.

25. During a board of directors meeting held on July 24, 2002 at 2:00 P.M. via a telephone conference call, ECR Properties' board of directors authorized the acquisition of title to all real

property owned by petitioner in Dunkirk, New York, and Utica, New York, “commonly known as 85-135 Middle Road, Dunkirk, New York and 2201 Dwyer Avenue, Utica, New York;” and the lease of said properties to petitioner “on terms and conditions mutually acceptable to the officers of this Corporation and ECR International.”

26. Title to the Dunkirk facility was held by petitioner and title to the Utica facility was held by the Oneida County Industrial Development Agency (Oneida County IDA). There were no written purchase and sale agreements between the parties. On July 30, 2002, petitioner conveyed title to the Dunkirk property to ECR Properties by a bargain and sale deed. On July 31, 2002, for \$1.00 and “other good and valuable consideration,” the Oneida County IDA conveyed title to the Utica property to ECR Properties by a bargain and sale deed. The deeds for both properties were recorded in the Oneida County Clerk’s Office. All the real property owned by petitioner was transferred to ECR Properties in exchange for the stock of ECR Properties. Only the real property was transferred to ECR Properties; none of the equipment or other assets of petitioner were transferred to ECR Properties. After the transfer, petitioner was engaged in the business of manufacturing heating, ventilating and air conditioning products and did not own real property for lease to other entities.

27. ECR Properties did not manufacture or sell any products. It had no business activity other than the ownership and leasing of its real property. ECR Properties leased the Dunkirk and Utica properties to petitioner under an oral triple net lease, deriving rental income from the properties. In negotiating the lease arrangements for the properties, Mr. Lauchert represented both petitioner and ECR Properties, and Michael Stephens, Esq., represented Oneida County IDA. There has never been a written lease agreement between petitioner and ECR Properties for

petitioner's use of the Dunkirk and Utica properties. Petitioner continues to use the Dunkirk and Utica properties for its business operations under an oral lease arrangement.

28. In 2002, petitioner had approximately 500 employees involved in the manufacturing and sale of its products to third parties. In 2002, ECR Properties had two employees whose duties and responsibilities included general janitorial services at the properties.

29. On July 30, 2002, ECR Properties was certified under the Empire Zones Program (the Program) with respect to the Utica property. ECR Properties was certified under the Program on July 31, 2002 with respect to the Dunkirk property.

30. On March 11, 2003, ECR Properties held a board of directors meeting at which a slate of officers was nominated and accepted for the coming year. In March of each subsequent year, including the years 2005, 2006 and 2007, ECR Properties held a board of directors meeting at which a slate of officers was nominated and accepted. ECR Properties' board of directors also met on September 14, 2004 regarding a banking resolution.

31. Petitioner and its subsidiaries file federal and state consolidated corporate income tax returns. Beginning with the 2002 tax year, ECR Properties was included in the combined New York State corporation franchise tax returns filed by petitioner.

32. QEZE credits for real property taxes paid on the Dunkirk and Utica properties were claimed on the combined corporation franchise tax returns filed by petitioner for the years 2002, 2003 and 2004. After desk audit reviews of those returns, the Division determined that ECR Properties was entitled to QEZE real property tax credits for the years 2002, 2003 and 2004, and the amounts claimed by petitioner were allowed.

33. In the years 2005 and 2006, petitioner was engaged in the business of manufacturing heating, ventilating and air conditioning products and did not own real property for lease to other

entities. Documents in the record indicate that petitioner had approximately 250 employees in New York State during the years 2005 and 2006.

34. In the years 2005 and 2006, ECR Properties, petitioner's wholly-owned real estate holding company, held title to the Dunkirk and Utica properties worth in excess of \$2,000,000.00 in asset value. It had no business activity other than the ownership and leasing of its real estate. ECR Properties leased its real property assets to petitioner, and derived gross rental income in the amount of \$498,000.00 for each of the years 2005 and 2006. ECR Properties had one employee during the years in issue.

35. For the year 2005, petitioner and its subsidiaries filed a form CT-3-A, General Business Corporation Combined Franchise Tax Return. Along with the CT-3-A, petitioner also included a form CT-606, Claim for QEZE Credit for Real Property Taxes, on which a credit in the amount of \$178,057.00 was claimed. The Empire Zone certified entity filing the claim was ECR Properties and listed empire zones in Dunkirk and Utica. Petitioner also attached to the tax form a notarized "Statement of Business Purpose" from Mary Wuest, petitioner's treasurer, that stated:

The entity was formed for the purpose of limiting potential legal liabilities of the affiliated manufacturing companies for which ECR Properties, Inc. holds, maintains and manages the properties. The land and buildings currently held by ECR Properties, Inc. were previously held by affiliated manufacturing companies that have significant potential for product liability and workers compensation liability claims. ECR Properties, Inc. was formed solely to own these assets and insulate them and limit potential legal liabilities.

On line 100a of the form CT-3-A, entitled "Refund of unused tax credits," petitioner claimed a refund of \$178,057.00, the amount of the unused QEZE real property tax credits. Petitioner also claimed EZ wage tax credits, QEZE tax reduction credits, EZ investment tax credits and EZ employment incentive credits, none of which are at issue in this proceeding. This

2005 combined corporate franchise tax return was signed by Ms. Wuest. The certified public accounting firm of Fust Charles Chambers, LLP, prepared petitioner's federal and state corporate income tax returns for the year 2005.

36. For the year 2006, petitioner and its subsidiaries filed a form CT-3-A, General Business Corporation Combined Franchise Tax Return. Along with the CT-3-A, petitioner also included a form CT-606, Claim for QEZE Credit for Real Property Taxes, on which a credit in the amount of \$186,827.00 was claimed. The Empire Zone certified entity filing the claim was ECR Properties and listed empire zones in Dunkirk and Utica. Petitioner also attached to the tax form a notarized statement of business purpose from Ms. Wuest, the contents of which were identical to Ms. Wuest's notarized statement of business purpose attached to petitioner's 2005 combined corporate franchise tax return. On line 100a of the form CT-3-A, entitled "Refund of unused tax credits," petitioner claimed a refund of \$186,827.00, the amount of the unused QEZE real property tax credits.

37. On or before May 3, 2007, the Division of Taxation (Division) commenced a desk audit of petitioner's corporate franchise tax return for the year 2005. The audit focused on, among other things, ECR Properties' eligibility for the QEZE credit for real property taxes for the year 2005. In a letter dated May 3, 2007 to petitioner, the auditor requested additional supporting information for the creation of ECR Properties including the purchase and sale agreement for any property transferred into the QEZE, the lease agreement for the transferred property and the identity of the parties who negotiated the lease agreement, and "any correspondence with consultants, representatives or outside third parties who advised the transferor on the setup of the separate legal entity."

38. On behalf of petitioner, by letter dated July 18, 2007, Angela Franco, CPA, responded to the auditor's letter. Along with the letter, Ms. Franco included a number of attachments, some of which concerned the transfers of the Dunkirk and Utica properties into ECR Properties (the deeds). In response to the auditor's request, Ms. Franco's letter set forth the following detailed explanation of the valid business purpose for ECR Properties' formation:

As determined by the Board of Directors of ECR International, Inc., ECR Properties, Inc. was formed to manage the environmental risk associated with the Dunkirk and Utica properties located at 85 Middle Road, Dunkirk, NY and 2201 Dwyer Ave., Utica, NY, respectively, as a result of historical foundry operations at each site and to facilitate commercial financing arrangements of ECR International, Inc.

39. To aid in his evaluation of whether the formation of ECR Properties passed the valid business purpose requirement, the auditor, in a letter dated August 9, 2007 to Ms. Franco, requested copies of petitioner's board of directors minutes pertaining to the formation of ECR Properties as a separate legal entity, and copies of petitioner's and ECR Properties' board of directors minutes for all meetings pertaining to the operation of ECR Properties since its inception.

40. On September 6, 2007, Ms. Franco sent to the auditor, as requested in his August 9, 2007 letter, copies of petitioner's and ECR Properties' board of directors minutes for all meetings pertaining to the formation of ECR Properties and its operation since inception. Ms. Franco also sent a copy of the July 18, 1996 DEC letter as supporting "contemporaneous documentation relative to the potential environmental problems at the Dunkirk manufacturing site."

41. By letter dated September 19, 2007, the auditor requested copies of all documentation prior to the formation of ECR Properties that illustrated the potential for petitioner's legal

liabilities and how the formation of a real estate holding subsidiary would affect these potential liabilities; copies of all recommendations prepared by petitioner's management that were reviewed by petitioner's board of directors regarding the formation of ECR Properties and the subsequent transfer of assets; and copies of minutes of all of petitioner's board of directors meetings held between January 1, 2002 and July 3, 2002.

42. In response to the auditor's September 19, 2007 request, Ms. Franco submitted 127 pages of documentation related to the Dunkirk site and Dunkirk Radiator's former foundry operations, including a copy of the Leader Environmental Study; and copies of the minutes of all ECR International's board of directors meetings held between January 1, 2002 and July 3, 2002. In the letter dated December 20, 2007 accompanying the documentation, Ms. Franco stated, in pertinent part, that:

A review of the information attached and the information previously provided establishes the following:

1. The sites in question have been utilized for the manufacture of boilers and radiators for private and commercial heating applications for many decades.
2. ECR International Inc. began monitoring the environmental impact of its operations as early as 1984 and continued its environmental audit activities through 1995.
3. The potential environmental risks continue to exist and the creation of ECR Properties, Inc. provides an additional layer which insulates the property's [*sic*] from the assets of the operating entity.

Ms. Franco, in her letter, also advised that petitioner had been unable to locate written recommendations prepared by management that were reviewed by petitioner's board of directors regarding the formation of ECR Properties and the subsequent transfer of assets.

43. On January 29, 2008, the Division issued a letter to petitioner disallowing its claims for refund of the unused QEZE credit for real property taxes for the years 2005 and 2006. The letter stated, in pertinent part, as follows:

Per your *Certificate of Eligibility*, ECR Properties, Inc. was certified under Article-18-b of the General Municipal Law as of July 30, 2002. As ECR Properties, Inc. was first certified prior to August 1, 2002 and has a base period of zero years, for tax periods beginning on or after January 1, 2005 the corporation can only be deemed a new business if it was formed for a valid business purpose.

Per your submitted valid business statement, as attached to form CT-606 for the period ended December 31, 2005, you stated ECR Properties, Inc. *was formed for the purpose of limiting potential legal liabilities of the affiliated manufacturing companies for which ECR Properties, Inc. holds, maintains and manages the property.* Additionally, in Ms. Angela Franco's (Fust Charles Chambers LLP) letter dated July 18, 2007, ECR Properties, Inc. *was formed to manage the environmental risk associated with the Dunkirk and Utica properties . . . and to facilitate commercial financing arrangements of ECR International, Inc.*

As stated in ECR International, Inc.'s Board of Directors minutes of July 24, 2002, *based on the recommendations of management, the Board of Directors has determined it to be advisable to convey title to all real property relating to the Corporation's Dunkirk, New York and Utica, New York operations to a special purpose entity wholly-owned by the Corporation, and to lease said properties back from ECR Properties, Inc...*

In the Tax Department's letters dated May 3, 2007, August 9, 2007 and September 19, 2007, the Tax Department requested additional information to support the stated business purpose of forming ECR Properties, Inc. Specifically, in our letter dated September 19, 2007, the Tax Department requested all documentation prior to the formation of ECR Properties, Inc. which illustrates the potential for ECR International Inc.'s legal liabilities and copies of all recommendations prepared by management which were reviewed by ECR International Inc.'s Board of Directors regarding the formation of ECR Properties, Inc.

In response to the Tax Department's September 19, 2007 request, Ms. Franco submitted an Environmental Site Investigation report prepared by Leader Environmental, Inc. dated May 16, 1996. As stated in the conclusion of this report on page 6-2, the results of the testing performed *do not appear to warrant any additional investigation or remediation.* Additionally as stated by Ms. Franco, *ECR International has been unable to locate written recommendations prepared by management.*

After reviewing the information submitted by Ms. Franco, the Tax Department's position is that you have not provided evidence written prior to the formation of ECR Properties, Inc. which supports your stated valid business purpose for forming the corporation. As we have been unable to substantiate your claimed valid business purpose, ECR Properties, Inc. will no longer be eligible to receive QEZE benefits in tax periods beginning on or after January 1, 2005. (Emphasis in original.)

44. During the audit, the auditor did not make any determination that the creation of ECR Properties was solely to gain empire zone benefits. The auditor's analysis of what petitioner considered as the business purposes for the creation of ECR Properties was based upon what was analyzed and considered by petitioner in 2002 at the time ECR Properties was created.

45. During the audit, the auditor and his supervisor were the only individuals from the Division to review the Leader Environmental Study. Based upon their review, the auditor and his supervisor determined that the Leader Environmental Study indicated that there was no environmental risk associated with the Dunkirk property. The auditor also reviewed the DEC letter and determined that the DEC did not have any concerns regarding environmental risks at the Dunkirk site.

46. At the hearing, the auditor admitted that he did not read every page of the Leader Environmental Study when he performed the audit because he lacked the necessary technical background. The auditor also admitted that he had no background or experience in determining the segregation of liabilities.

47. According to Mr. Sweet, petitioner's board of directors believes that in any potential litigation involving either petitioner or ECR Properties, the existence of ECR Properties provides them with a fighting chance to preserve assets for the shareholders.

48. Petitioner submitted proposed findings of fact numbered 1 through 47 and 13 conclusions of law. Proposed findings of fact 2, 31 and 47 are rejected for being in the nature of

argument or a conclusion of law. Proposed findings of fact 19, 22, 25, 28, 37, 38, 39, 40, 41, 43 and 44 have been rejected as unnecessary to the determination. Proposed findings of fact 10 and 27 are not supported by the record and are therefore rejected. In ruling on petitioner's proposed findings of fact, if any part of a proposed finding is unsupported by the record the proposed finding has been rejected in its entirety. The State Administrative Procedure Act does not require a ruling upon proposed conclusions of law.

49. The Division submitted proposed findings of fact numbered 1 through 24. Proposed findings of fact 11 and 24 have been rejected as unnecessary to the determination. Proposed findings of fact 15, 16, 18 and 21 are not supported by the record and are therefore rejected. In ruling on the Division's proposed findings of fact, if any part of a proposed finding is unsupported by the record the proposed finding has been rejected in its entirety.

#### ***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. Tax Law § 14(a) provides that a business enterprise which is certified under Article 18-B of the General Municipal Law and meets the employment test shall be a "qualified empire zone enterprise."

B. There is no dispute that ECR Properties met the above requirements when petitioner claimed the QEZE credit for real property taxes for the years 2002, 2003 and 2004. Indeed, after desk audit reviews, the Division allowed the claimed QEZE real property tax credits for those years. However, commencing with tax years beginning on or after January 1, 2005, chapter 161 of the Laws of 2005 amended Tax Law § 14(b)(1) to provide that:

For entities first certified prior to August first, two thousand two, if the entity had a base period of zero years or zero employment in the base period, then the employment test will be met only if the enterprise qualifies as a new business under subdivision (j) of this section.

C. Tax Law § 14(j)(1) provides that “[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.”

Tax Law § 14(j)(4)(B) provides that:

Notwithstanding any provisions of this subdivision to the contrary and notwithstanding subdivision c of section eighteen of part CC of chapter eighty-five of the laws of two thousand and two, a corporation or partnership, which was first certified under article eighteen-B of the general municipal law before August first, two thousand two, has a base period of zero years or zero employment for its base period, and is similar in operation and in ownership to a business entity or entities taxable, or previously taxable, under sections specified in paragraph one or two of this subdivision . . . shall not be deemed a new business if it was not formed for a valid business purpose, as such term is defined in clause (D) of subparagraph one of paragraph (o) of subdivision nine of section two hundred eight of this chapter and was formed solely to gain empire zone benefits.

D. 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]).

E. The language of Tax Law § 14(j)(4)(B) is clear and unambiguous and therefore can and should be read literally. In order to be subject to the new business test provided in Tax Law § 14(j)(4)(B), a corporation must be certified under Article 18-B of the General Municipal Law prior to August 1, 2002; have a base period of zero years or zero employment for its base period; and be similar in operation and in ownership to a business entity or entities taxable under Article 9-A of the Tax Law. ECR Properties was certified eligible to receive Empire Zone benefits effective July 30, 2002 and had a base period of zero years. Although a separate and distinct legal entity, ECR Properties is a wholly-owned subsidiary of petitioner. Since petitioner and ECR Properties are identical in ownership the remaining issue is whether it is identical in operation to petitioner during the years in issue. After careful review of the record, I find that the companies were not substantially similar in operation. ECR Properties was a real estate holding company, holding title to the Dunkirk and Utica properties, which it acquired by deeds from petitioner and the Oneida County IDA. It then leased the properties back to petitioner pursuant to an oral triple net lease that yielded rental income to ECR Properties. It is noted that ECR Properties would be able to use a parol lease to recover reasonable compensation from a tenant for its use and occupation of the real properties (*see* Real Property Law § 220). Additionally, ECR Properties had its own employee.

ECR Properties' only business activity was the holding of title to real estate that it then leased to earn income. Petitioner's only business activity was manufacturing and sales. It neither owned nor leased real property. It is apparent that the two entities are not substantially similar in

operation. Clearly, ECR Properties was a new business (Tax Law § 14(j)(1)) and was not subject to the provisions of Tax Law § 14(j)(4)(B) for the years 2005 and 2006. Since ECR Properties qualified as a new business under Tax Law § 14(j), it met the employment test under Tax Law § 14(b)(1) and was a QEZE for the years 2005 and 2006. Therefore, petitioner is entitled to the claimed QEZE credits for real property taxes for the years 2005 and 2006.

F. The petition of ECR International, Inc., is granted, and the Division of Taxation is directed to grant the QEZE credits for real property taxes for the years 2005 and 2006, more fully described in Findings of Fact 35 and 36 above, that had been disallowed by the Division by letter dated January 29, 2008.

DATED: Troy, New York  
November 4, 2010

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE