

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petitions :  
of :  
**JAMES V. AND CATHERINE C. BREUER** :  
**AND JOHN ANDREW BREUER** :  
for Redetermination of Deficiencies or for Refund :  
of Personal Income Tax under Article 22 of the :  
Tax Law for the Years 2006 and 2007. :

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DETERMINATION  
DTA NOS. 823665,  
823663 AND 823664

In the Matter of the Petition :  
of :  
**DOUGLAS A. AND MARGARET J. MOONEY** :  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the :  
Tax Law for the Year 2007. :

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Petitioners James V. Breuer, Catherine C. Breuer and John Andrew Breuer filed petitions for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 2006 and 2007. Petitioners Douglas A. and Margaret J. Mooney filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2007.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 14, 2011, at 10:00 A.M., with all briefs to be submitted by March 9, 2012, which date commenced the six-month period for issuance of this determination. The time for issuance of the determination was

extended for three months pursuant to 20 NYCRR 3000.5(d). Petitioners appeared by Hiscock & Barclay, LLP (David G. Burch, Esq., and Kevin R. McAuliffe, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (David Gannon, Esq., of counsel).

### ***ISSUE***

Whether the Division of Taxation properly denied petitioners' claims for qualified empire zone enterprise credits based upon the determination that Hueber-Breuer Construction Co., Inc., from whom the credits were derived and passed through to petitioners, did not satisfy the requirements of Tax Law § 14(j).

### ***FINDINGS OF FACT***<sup>1</sup>

1. Petitioners are shareholders of a Hueber family business, and tax benefits incident to those relationships are at issue in this matter.

2. The Hueber family was involved in the construction industry since they immigrated to the United States from the Alsace-Lorraine area of Germany in the mid 1800s and settled in Minoa, New York. There, they initially worked as stonemasons, establishing the family business under the original name Hueber Construction Company, later to be known as Hueber Brothers Construction Company.

3. Francis Hueber, the grandfather of petitioner James V. Breuer, eventually assumed ownership and operation of Hueber Brothers Construction Company and operated it as a sole proprietorship until approximately 1948, when he invited his son-in-law, Vladimir Breuer, to join

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<sup>1</sup> Petitioners submitted 120 proposed findings of fact and 9 proposed conclusions of law. In accordance with State Administrative Procedure Act (SAPA) § 307(1), petitioners' proposed findings of fact have been generally accepted, some with minor modifications, and made a part of the Findings of Fact herein, with the following exceptions:

(i) proposed findings of fact 8, 10, 11, 58, 75, 119, and 120 have been eliminated as conclusory statements;  
(ii) proposed findings of fact 2, 14, 15, 16, and 17 have been eliminated in whole or in part as extraneous information; and  
(iii) SAPA does not require rulings to be made upon proposed conclusions of law and none are made herein.

the business. In 1958, the two men incorporated the family business under the laws of New York State as Hueber-Breuer Construction Co., Inc. (the predecessor corporation).

4. Petitioner James Breuer, whose father was Vladimir Breuer, began working for the predecessor corporation in 1964, as the fifth generation of the Hueber family to do so. James Breuer's responsibilities evolved over time, beginning with simple tasks, such as removing nails from boards, to more mature roles as a laborer, union operating engineer, estimator, assistant project manager, project manager, head estimator, vice president, and, eventually, in 1985, as president of the predecessor corporation. At the time of the hearing, petitioner James Breuer was president and chief executive officer of Hueber-Breuer Construction Co., Inc. (Hueber-Breuer), the predecessor corporation's successor-in-interest.

5. Throughout its duration, the predecessor corporation was a hard-bid, general contractor that directly hired tradespeople as employees and successfully secured contracts to provide general contracting services by submitting the lowest bid.

6. The predecessor corporation's role as a hard-bid, general contractor, like most general contractors who simply build structures for clients in compliance with plans and specifications prepared by third parties, was contradictory to James Breuer's preference to exercise his own creativity in planning and assisting customers in a different manner with their projects. In the 1990s, petitioner James Breuer began regularly considering options for providing his expertise to clients in a way that would allow him to do more than simply build what others had designed. About that time, he noticed a shift in the construction market away from hard-bid general contracting and toward the type of service Mr. Breuer believed he was better suited to provide, i.e., an active role in planning, assisting and realizing a client's construction project.

7. In addition to James Breuer's desire to change the role his company played in his clients' construction projects, he had several concerns relating to liabilities associated with the predecessor corporation, and a desire to address succession planning in order to effect a seamless transition of the company to the next generation of the Hueber family. Regarding the liabilities associated with the predecessor corporation, Mr. Breuer's particular concerns were with New York State Labor Law § 220, a major crane accident at the site of one of the predecessor corporation's construction projects, and New York State multi-union labor issues related to the predecessor corporation's employees. Mr. Breuer regularly had conversations with his construction matter counsel, Robert Silkey, Esq., regarding these and other liability concerns.

8. At hearing, petitioner James Breuer described Labor Law § 220 as relating to the liability of the employer for accidents of its construction employees and providing workers injured in the construction field certain advantages that are not exhibited in other personal injury cases. Mr. Breuer believed that a general contractor is viewed as guilty without any opportunity to provide a defense in cases involving an injury to an employee on the construction site and the only mitigation available to the general contractor is in establishing the worth of the injury. The reason Mr. Breuer was concerned about Labor Law § 220 as it related to him was that during the predecessor corporation's period of operation, it directly employed many field employees, leaving the predecessor potentially exposed to significant liability arising from the application of section 220 to injuries sustained by those employees in their field environment. In addition to the legal exposure, Mr. Breuer noted that the section 220 exposure also affected the company's ability to obtain general liability insurance, since many insurance companies that had previously been willing to provide general liability coverage to general contractors in New York were no longer willing to do business in New York, and what insurance the predecessor corporation was

able to obtain was at a very high cost. During or near 2002, the predecessor corporation's cost of insurance was approaching one percent of its sales.

9. The predecessor corporation was the general contractor for the State of New York in the construction of a building called the Institute for Human Performance, located on the Upstate Medical Campus. One day during that construction project, there was a major crane accident. While the crane was lifting a large piece of steel, the crane failed and toppled over the building under construction and across a major intersection in downtown Syracuse. The boom of the crane landed first on the hood of an occupied car and bounced off the hood landing on the trunk of the same vehicle. The woman in the car did not suffer any serious physical injuries. However, Mr. Breuer remained concerned that the woman might file a claim or commence an action for the trauma she suffered, and consequently, he was cognizant of the possibility of liability exposure attributed to the predecessor corporation throughout the time between the accident and the expiration of the statute of limitations for commencing a lawsuit.

10. The predecessor corporation, as a direct employer of unionized individuals performing work on construction sites, was a party to several multi-employer union agreements. The terms of these agreements obligated employers like the predecessor corporation for any shortcomings in the actuarial projections of the benefits that had to be paid and the sources of funds that were available to pay those benefits. The agreements required the predecessor corporation to contribute on an hourly basis for the health, welfare and pension benefits of the union employees, in addition to obligating the predecessor corporation to make further contributions if there failed to be ample funds to pay the benefits, regardless of the reason for the shortfall.

11. As previously noted, petitioner James Breuer was interested in addressing succession planning for Heuber-Breuer. It was and is Mr. Breuer's intent to turn the company over to his sons, John Andrew and Charles, both of whom currently work for Hueber-Breuer. Another consideration along the lines of succession planning involved the direction chosen by Patricia Smoyer, a shareholder in the predecessor corporation, who requested redemption of her stock. When Mr. Breuer considered his options for addressing the succession-planning issues, he relied on the advice he received from his consultants and attorneys, who advised him that a Delaware corporation made the process easier with respect to voting rules and regulations, in addition to some of the rules concerning the liabilities relative to a major shareholder. In addition to the succession plan, with the assistance of his consultants and attorneys, petitioner James Breuer put in place an estate plan for the transfer of stock. The formation of Hueber-Breuer as a Delaware corporation also provided the opportunity to set up grantor trusts.

12. In the early 2000s, James Breuer became aware of the Empire Zone Program (Program) and some of the benefits available through participation in the Program. Mr. Breuer's understanding of the Program's purpose was to encourage businesses and individuals to take risks, to start new businesses in New York, and to hire new employees and increase employment. He viewed participation in the Program as an opportunity to reduce some of the risks associated with implementing his vision of providing clients with the benefit of his expertise in an entirely different way than through hard-bid general contracting, which required starting a new business, hiring new employees, and increasing employment.

13. James Breuer's decision to change the long-established business operations of the Hueber family business was not an overnight process. He needed to devise a way to address each of his liability and succession concerns, while creating entirely new business operations. He

described his thought process as an entrepreneur as one that was in constant motion each and every day, and his decisions on how to best move forward with creating a new entity and pursue a new business were largely made by a process of continual contemplation, commencing in the 1990s. He did not make the decision to move forward with the creation of the new entity and pursuit of the new business operations until the early 2000s, noting that the opportunity to participate in the Program may have been the catalyst that finally made him move forward in that direction.

14. On July 18, 2002, Hueber-Breuer Construction Services, Inc., was incorporated in the State of Delaware. The name included the words “Construction Services” in an effort to identify the way it would primarily provide services to clients.

15. On July 30, 2002, Hueber-Breuer Construction Services, Inc., became eligible for Empire Zone benefits in the Syracuse Empire Zone pursuant to a certificate of eligibility (No. 1706887934) under the Program.

16. On December 30, 2002, the predecessor corporation, a New York corporation, was merged into Hueber-Breuer Construction Services, Inc. Subsequent to the merger, the company’s marketing group decided it was best to operate the new business under the name established in 1958 due to the name’s recognition in the community. Upon completion of the merger, the predecessor’s successor-in-interest was and remains known as Hueber-Breuer Construction Co., Inc.

17. Hueber-Breuer does not have a formal written business plan that sets forth the changes undertaken in the transition from the predecessor corporation’s operations to Hueber-Breuer’s operations.

18. Hueber-Breuer produces minutes of meetings solely to fulfill technical requirements of an auditor or accountant, not to document its day-to-day business decisions. While there were some group discussions about the changes ultimately undertaken, the decision to make those changes was Mr. Breuer's alone, and as such, no documentation was required.

19. Mr. Breuer had meetings with Mr. Silkey and others regarding different aspects of the transition of the family business's operations, but he did not ask for letters summarizing the substance of those meetings. Mr. Breuer does not generally ask his attorneys or advisors to provide written summaries of the matters discussed during meetings unless there is a point he did not understand or that requires clarification.

20. There are many differences between the services offered by a general contractor and those offered by a construction manager, and petitioner James Breuer described those differences at the hearing. A general contractor provides its clients construction services, i.e., the construction of a building based upon a set of construction documents prepared by others. A construction manager provides the oversight of all of the construction activities and participates in the preconstruction activities. This oversight and participation includes addressing such issues as site selection, resolution of environmental issues, obtaining necessary permits and approvals for the project, overall project design, and management of the individuals who ultimately undertake the actual day-to-day activities of the construction of the building.

21. The process of selecting a general contractor differs from the selection of a construction manager. Most general construction projects are hard-bid and the selection is made on the low bidder, whereas most construction management selections are made through consideration of a number of factors including reputation, experience, scope of services and



price. The price of a construction management contract includes a negotiated fee for the services the construction manager provides its clients.

22. There are technical differences in the processes employed between construction management and that of general contracting. The construction manager is brought in as part of the construction development's three-person team. The owner, the architect and the construction manager work together, either under separate contracts or under one contract, in a design-build case, to meet the goals of the project with respect to budget, quality and schedule. In contrast, a general contractor merely constructs a building based upon a set of construction drawings prepared by others.

23. The predecessor corporation operated as a hard-bid general contractor that directly employed all the tradespeople performing work at its construction sites. The predecessor corporation secured its work through the low-bid process, which involved its staff reviewing a set of construction documents prepared by third parties and estimating the cost of the work and schedule for completing the work. The staff would thereafter prepare a proposal that would reflect those costs and schedule and submit the proposal to the owner for consideration. Often, by the time the predecessor corporation prepared its proposal to perform the project's work, the owner and the owner's architect had been working on the project for years, and in all cases, the project was ready to be constructed. The predecessor corporation did not assist owners in creating a solution but rather it was informed of what needed to be done and how it would be done, and was usually part of the project because it had the lowest price.

24. Hueber-Breuer provides many services including construction management and design-build, with employees who are strictly management and do not perform any on-site physical labor. Hueber-Breuer does not directly employ any field personnel who provide on-site field

work, but instead, Hueber-Breuer's subcontractors are responsible for directly hiring all field personnel.

25. Hueber-Breuer secures its work by responding to requests for proposals (RFPs) and by offering its services directly to owners undertaking projects. Since its formation in 2002, Hueber-Breuer has prepared its responses to RFPs and direct solicitations for work in a format generally comprised of the following: (i) a table of contents, (ii) management proposal, (iii) project hour matrix, (iv) identification of the project team, (v) a detailed services overview, (vi) a safety overview, (vii) sample forms/reports, (viii) sample estimates, and (ix) reasons for hiring Hueber-Breuer. Hueber-Breuer provides its responses to RFPs and solicitations to owners very early in the project development process, generally in advance of the issuance of permits and approvals and the creation of construction drawings, and well before the project is ready for construction. Hueber-Breuer's management team identifies the specifics for each project at weekly meetings.

26. Hueber-Breuer's involvement in projects begins early in the life a project with strategy to go from the initial concepts of the project to the finished completion. Hueber-Breuer manages consultants that are necessary to address zoning and environmental issues if they exist, and assists the owner with his accounting and banking relationships in order to put together the best financing program that's available to them to make this capital investment. Once this phase is completed, Hueber-Breuer bids out the components of the construction and shares those bids with the owner, assists the owner in cost decisions, and in the process, Hueber-Breuer provides any alternatives or value engineering ideas that might incorporate things being done at a lower cost. Hueber-Breuer and the owner make decisions concerning final costs, and then it works with the bank, in determining how the project will be financed. Lastly, Hueber-Breuer, on behalf

of the owner, manages the execution of all work performed at the construction site. The predecessor corporation did not offer any of these services.

27. There are some circumstances when Hueber-Breuer brings its own design professionals to the table and contracts with the owner early on to both design and build their facility for a fixed price.

28. The predecessor corporation's contracts required it to construct a building in strict compliance with the construction documents prepared by third parties, allowing the predecessor corporation no flexibility to do anything other than what the contract stated absent a formal change order. Hueber-Breuer's contracts are different because, initially, there is only an agreement for Hueber-Breuer to consult with the owner to develop the project. The final documents from which construction occurs include some latitude as to not only performing the services that are directly shown on these documents, but also to perform the services that are inferred by the documents. Hueber-Breuer's responsibilities pursuant to its contract obligations differ in many aspects from those obligations associated with the predecessor corporation's contracts.

29. In order to implement the new business operations successfully, Hueber-Breuer had to redirect existing employees' responsibilities and hire experts in various fields for which the predecessor corporation had no use. Hueber-Breuer had employees well versed in the processes of the development of construction, but needed employees to fill roles the predecessor corporation never had, such as a certified public accountant (CPA), an expanded marketing department, Leadership in Energy and Environmental Design (LEED) accredited professionals, mechanical and electrical engineers, a construction management software expert, and computer-aided design (CAD) operators.

30. The predecessor corporation's management process was somewhat akin to a dictatorship. This is contrasted to Hueber-Breuer, which had an eight person senior management team comprised of a combination of original and new employees who worked together to be involved with owners early in the project process and to put together a comprehensive plan for accomplishing the project, rather than simply providing an owner a price to build a building.

31. The predecessor corporation's average annual gross payroll from 1999 to 2002 was \$4.8 million, while Hueber-Breuer's average annual gross payroll from 2003 to 2010 was \$8.3 million. Mr. Breuer attributed the difference in the size of the companies' payrolls to the increased number of employees, the higher salaries paid to individual employees with specialized expertise, and incentive payments that employees earned as they became more involved in the overall management.

32. Hueber-Breuer built a client base that differed from the clients of the predecessor corporation. Hueber-Breuer elected to develop expertise in areas with the most promise for business in its community, and it identified those areas as being the medical and educational fields. Since its formation in 2002, Hueber-Breuer's construction management expertise has evolved and advanced further with each project. One example involves the construction and renovation of hospitals, elder care projects, physicians' office buildings, and medical testing facilities that have extensive protocols that differ vastly from construction protocols for a standard office building. Hueber-Breuer was striving to develop the most qualified professionals in this field. Similarly, Hueber-Breuer developed an expertise in building projects for institutions of higher learning and that remains an area with a continued potential for great growth. Hueber-Breuer's expertise in these fields results in repeat business from owners for whom Hueber-Breuer previously provided construction management services. In contrast, the

predecessor corporation's business flow was driven largely by costs and being awarded projects for which it qualified as the lowest bidder, and not on the basis of expertise or repeat business.

33. Hueber-Breuer's formation as a Delaware corporation with entirely new business operations addressed Mr. Breuer's desires to change the way the family business provided its services to customers, his concerns with liability and succession planning, and resulted in other positive changes for the business. According to Mr. Breuer, if there was an injury on a construction site, not only was the present employer responsible, but pursuant to Labor Law § 220, Hueber-Breuer had some exposure as well, since the company acted in a supervisory capacity. However, because Hueber-Breuer does not directly employ any field employees, it is able to structure its contracts to obligate the field employees' employers to provide Hueber-Breuer with suitable indemnifications to protect Hueber-Breuer in instances of on-site injury or accidents. Hueber-Breuer's general liability insurance costs decreased dramatically after it began its new operations. In addition, Hueber-Breuer does not have any unionized field employees, and thus, it is not now nor has it ever been a party to a multi-employer agreement.

34. Mr. Breuer successfully implemented the changes recommended by his attorney relative to the creation of a Delaware entity. Grantor trusts and stock transfers presently take place pursuant to those plans, including the redemption of Mrs. Smoyer's stock in the predecessor corporation.

35. Hueber-Breuer's operations as a construction management firm, rather than a general contractor, necessitated certain physical changes to its offices to accommodate, among other things, increased staff, expanded technology needs, and meetings with owners, bankers and design professionals that were either very limited or nonexistent when acting as a general contractor.

36. Since Hueber-Breuer's existing office did not have suitable conference space to accommodate meetings with owners, bankers and other professionals, Hueber-Breuer signed a lease in July 2002 for space in a downtown Syracuse office building that had the necessary conference facilities. However, Hueber-Breuer eventually made a conscious decision to stay at its original location in a high poverty area of the south side of Syracuse in support of the community there, and undertook a redesign and significant expansion of its existing office building. Hueber-Breuer's staff actively participated in the redesign process and offered suggestions for accomplishing management's goal of having a better construction management design-build office.

37. Hueber-Breuer's office redesign and expansion increased its office space by approximately 50 percent, tripled its public spaces, included the incorporation of alternative energy projects, such as the installation of solar panels on the roof and the installation of a series of skylights to reduce the reliance on artificial light, and the utilization of a green program.

38. The technology upgrades needed to operate Hueber-Breuer as a construction management business began in mid-2003, and continued through the completion of the renovation. Those upgrades included an upgrade of desktop computers to the highest level platform available at that time, acquisition of the industry standard contract management software known as Expedition, remote connectivity to Expedition reports that Hueber-Breuer and authorized parties could access at any time, acquisition of computer aided design hardware, increased server capacity, and the acquisition and implementation of a sophisticated scheduling software that is the mainstay of the industry.

39. As Hueber-Breuer's expertise and reputation as a construction management firm developed, the number and size of the projects on which it worked increased.

40. The 2006 and 2007 New York S corporation franchise tax returns, Form CT-3-S, for Hueber-Breuer each include a claim for the Qualified Empire Zone Enterprise (QEZE) Tax Reduction Credit, Form CT-604 and accompanying CT-604 Schedule G statement, signed by James V. Breuer, president, which provided the following:

Hueber-Breuer Construction Co. Inc. was formed for valid business purposes. The corporation was formed for the following purposes: (i) to restructure the relationship between the business conducted by the corporation and the business of another entity that was subject to collective bargaining agreements; (ii) to assist in succession planning with respect to management and ownership; (iii) to take advantage of the provisions of Delaware law with respect to management control of the corporation; (iv) to assist the corporation in making certain capital expenditures; (v) to take advantage of Delaware's superior legal structure for the relationship of the shareholders and management through a transition in ownership and management personnel; and (vi) to isolate certain liabilities of the business operation. The corporation was not formed solely to obtain Empire Zone benefits.

41. The Division of Taxation (Division) commenced a desk audit of Hueber-Breuer's 2006 and 2007 tax returns, during which time the Division determined whether Hueber-Breuer satisfied the requirements of Tax Law § 14, as it reviewed Hueber-Breuer's eligibility for Empire Zone credits. In connection with this audit, the Division requested copies of all internal memoranda, e-mails and documentation regarding the CT-604 Schedule G statement concerning the business purpose for the formation of Hueber-Breuer, and all correspondence with consultants, representatives and other outside third parties who advised any shareholder regarding the formation of Hueber-Breuer. This requested documentation was not provided to the Division because it did not exist.

42. Hueber-Breuer provided documents, explanations and correspondence that the company believed supported its compliance with Tax Law § 14 to the Division's auditor on numerous occasions as requested. However, the auditor found the submissions unsatisfactory on

the basis that they failed to provide any contemporaneous documentation of Hueber-Breuer's compliance with Tax Law § 14.

43. According to the Division's auditor, the requirement that an entity be able to provide documentation prepared contemporaneously to the time of the entity's formation is merely "an internal procedure of how to audit these claims."

44. The Division concluded that Hueber-Breuer had not proven a valid business purpose for its corporate change, and thus correspondingly denied petitioners' claims for QEZE tax credits for 2006 and 2007. Since the tax returns had already been processed, the disallowance of the credits was effected by the issuance of the assessments herein.

45. The Division issued to petitioner John Andrew Breuer two statements of proposed audit changes dated January 7, 2010, one for 2006 and the other for 2007, indicating that for both years the Division was disallowing the QEZE tax reduction credit claimed on the Resident Income Tax Return, Form IT-201-X for 2006, and Form IT-201 for 2007. The reason provided for the disallowance was that, after the Division's review of the CT-604 QEZE tax reduction credit claimed for Hueber-Breuer Construction Co., Inc., the Division concluded that Hueber-Breuer did not provide a valid business purpose and was therefore not entitled to the credits that had been passed through to the S corporation shareholders. The corresponding tax due for the disallowed credits for 2006 is \$7,623.56, and for 2007 is \$4,191.79.

The Division issued two notices of deficiency to John Andrew Breuer asserting additional personal income tax due in the amounts of \$7,623.56 for 2006 and \$4,191.79 for 2007, plus interest, dated March 4, 2010, based upon the disallowance of QEZE based real property tax credits claimed for each of such years.



46. For the same reason, the Division issued two notices of deficiency to petitioners James V. and Catherine C. Breuer asserting additional personal income tax due in the amounts of \$117,542.78 for 2006 and \$64,734.36 for 2007, plus interest, dated March 4, 2010, based upon the disallowance of QEZE based real property tax credits claimed for each of such years.

47. Again, for the same reasons noted, the Division issued a Notice of Deficiency to petitioners Douglas A. Mooney and Margaret J. Mooney, asserting additional personal income tax due in the amount of \$3,767.01 for 2007, plus interest, dated March 4, 2010, based upon the disallowance of QEZE based real property tax credits claimed for that year.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

48. Petitioners assert that Hueber-Breuer differs significantly in operations from the predecessor corporation and as a result, the company passes the employment test that qualifies it for the Empire Zone benefits sought by them. Petitioners argue in the alternative that if it is determined that Hueber-Breuer and the predecessor corporation are substantially the same in operation, Hueber-Breuer still qualifies as a new business under Tax Law § 14(j)(4)(B), which is satisfied when an entity establishes that: (1) the subject entity was formed for a valid business purpose as defined under Tax Law § 208(9)(o)(1)(D) and (2) its formation was not motivated solely to acquire Empire Zone benefits. Petitioners assert that Mr. Breuer had several valid business reasons for forming Hueber-Breuer, and he did not form it solely for the purpose of gaining entitlement to the noted QEZE tax benefits. Petitioners do not dispute that gaining such tax benefits was a consideration in undertaking the reorganization, but claim that there were overriding purposes motivating the transaction and that Hueber-Breuer would have been created in any event to serve a variety of business needs.

49. The Division maintains that petitioners' argument that Hueber-Breuer is a substantially different company is without merit as there is no documentation to support this claim, and Hueber-Breuer's success after its formation does not provide an adequate basis to qualify petitioners for the benefits. In addition, the Division asserts that to prove entitlement to the QEZE benefits in question, petitioners must show that there was a "valid business purpose," as specifically defined in Tax Law former § 208(9)(o)(1)(D), for the creation of Hueber-Breuer such that this entity constituted a "new business." Specifically, the Division maintains that petitioners must prove that they had a purpose or purposes other than the avoidance or reduction of taxes, that the nontax purpose or purposes for which the reorganization was undertaken constituted the principal motivation for the formation of Hueber-Breuer, and that such reorganization resulted in a meaningful change in the economic position of the enterprise. In addition, petitioners must establish that the reorganization was not solely for the purpose of gaining QEZE tax benefits.

### ***CONCLUSIONS OF LAW***

A. The Economic Development Zone Program<sup>2</sup> (the Program), created by the Legislature in 1986 under Article 18-B of the General Municipal Law, was intended to stimulate private investment, private business development and create jobs in economically impoverished areas throughout the state (*see* General Municipal Law § 956). Qualified businesses, known as qualified empire zone enterprises, could become certified under Article 18-B of the General Municipal Law, and thus eligible to receive certain tax credits and exemptions directly linked to job creation (Tax Law § 14[a]). In very general terms, the level of tax benefit derived from job creation for a given period was determined by a comparison of the number of jobs a qualified and

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<sup>2</sup> The term "Economic Development Zone" was replaced with "Empire Zone" by chapter 63 of the Laws of 2000, which also created Qualified Empire Zone Enterprises, effective May 15, 2000.

certified business had in a base period to the number of jobs it had in a particular subsequent period (*see* Tax Law § 14[b][1]).

As is relevant to this matter, 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.” Tax Law § 15(a) provides that a taxpayer which is a QEZE subject to tax under Article 9-A of the Tax Law shall be allowed a credit against such tax for eligible real property taxes.

After the year 2000, the circumstance whereby an existing business could simply form a new entity (e.g., by reincorporation) so as to qualify for benefits that an existing business could not have received (or increase the level of QEZE tax benefits being received by the existing business), was identified by the Legislature as a loophole known as “shirt changing,” which was inconsistent with the intent of the Program, i.e., to stimulate private investment, private business development and create jobs in economically impoverished areas throughout the state. In response, on May 22, 2002 the Legislature acted to close this perceived loophole with respect to businesses created on or after August 1, 2002, by requiring such businesses to qualify as new businesses (Tax Law § 14[j], as added by L 2002, ch 85, pt CC, §§ 1D, 13-a). This legislative change resulted in a significant increase in the number of businesses being incorporated (or reincorporated) in the period between the May 22, 2002 change in the law and its August 1, 2002 “cutoff” date after which new business qualification was required. This increase in “new” business formation was itself perceived as an additional loophole opportunity, within a window period, to gain entitlement to, or an increase in, QEZE tax benefits. In response, the Legislature again amended the QEZE statutes (*see* Tax Law § 14[j][4][B], as added by L 2005, ch 63, pt A, § 5) whereby businesses first certified as eligible to receive QEZE tax benefits prior to August 1,

2002 had to establish that they had been created for a “valid business purpose,” as defined by Tax Law § 208(9)(o)(1)(D), and had not been created solely for the purpose of gaining QEZE tax benefits. Businesses certified prior to August 1, 2002 were entitled to continue receiving QEZE tax benefits until tax periods beginning on or after January 1, 2005, at which time the valid business purpose test became effective as to such businesses.

B. As described above, 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.

Tax Law § 14 requires that a certified entity pass the employment test to be eligible for certain Empire Zone benefits. An entity such as Hueber-Breuer, certified prior to August 1, 2002, with a base period of zero years or zero employment in the base period, passes the employment test only if it qualifies as a new business under Tax Law § 14(j). Tax Law § 14(j)(1) provides:

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 section one hundred eighty-three, one hundred eighty-four, one hundred eighty-five or one hundred eighty-six of article nine; article nine-A, article thirty-two or thirty-three of this chapter; article twenty-three of this chapter or which would have been subject to tax under such article twenty-three (as such article was in effect on January first, nineteen hundred eighty) or the income (or losses) of which is (or was) includable under article twenty-two of this chapter (emphasis added).

Although the New York State Legislature has not defined the phrase “substantially similar in operation,” the intent of the statute (to stimulate private investment, private business development and create jobs) is an indicator as to how the phrase should be interpreted. In other

words, when comparing the two companies, whether the creation of the second company resulted in the furtherance of such goals is likely to shed some light on the similarities or differences between the two companies. Furthermore, the Division has, in its analysis of circumstances involving taxpayers seeking like credits, looked to whether the original corporation and the new corporation were “making the same products, using the same facilities at the same location under the same management and with the same employees” (*Matter of Graphite Metallizing Holdings, Inc.*, Tax Appeals Tribunal, July 7, 2011), in its determination of whether that new corporation was substantially similar in operation and ownership to a business entity taxable or previously taxable under Article 9-A of the Tax Law. In this case, the actions and characteristics to consider are the different and expanded services of construction management offered by Hueber-Breuer, the leasing of additional corporate space in July 2002 to accommodate the new services, substantial redesign and renovation of its existing premises to accommodate a construction management/design-build office where Hueber-Breuer leaders would meet with other planning professionals, the technology changes and upgrades to accommodate construction management projects, including increased server capacity and the implementation of a sophisticated scheduling software needed in the construction management realm, and the change in management from a one-man leadership to a management team of eight.

C. In this case, petitioner argues that one can easily distinguish Hueber-Breuer from the predecessor corporation and reach the conclusion that the two corporations were not substantially similar in operation after the reorganization. The Division’s auditor agreed that a company need not have a valid business purpose to be formed if it is not substantially similar in operation to a prior entity. However, the auditor did not make any determination as to the whether Hueber-Breuer was similar in operation to the prior entity. In fact, the auditor did not exhibit much

understanding about the operations of each company. In its brief, the Division objects to a finding that Hueber-Breuer is a substantially different company from the predecessor corporation, claiming that it has not been shown exactly what the business activities were prior to the creation of Hueber-Breuer, following the creation of Hueber-Breuer, during the years at issue, and at the time of the hearing. Further, the Division maintains that there was no need for the creation of a new entity to effectuate any purported change in business activity, and downplays Hueber-Breuer's success in the new services provided by the company. As such, it would be instructive to compare the predecessor corporation to Hueber-Breuer.

The predecessor corporation operated as a hard-bid, general contractor that directly employed its own tradespeople to perform work at its construction sites. Hueber-Breuer, in contrast, provides a variety of services including construction management and design-build, with employees who are strictly management and do not perform any on-site labor. Hueber-Breuer did not directly employ any field personnel for on-site work, and Hueber-Breuer's subcontractors are responsible for directly hiring all field personnel.

The predecessor corporation secured its work through a low-bid process involving its staff reviewing a set of construction documents prepared by third parties and estimating the cost of the work and a schedule for completing the same, then preparing a proposal that would reflect the cost and schedule estimates, and then submit these to the owner for consideration. Often, by the time the predecessor corporation prepared its proposal to perform work for the project, the owner and the project's architect had already been working on the project for years, and when the predecessor corporation came on the scene, it was time for construction. Hueber-Breuer, on the other hand, secures its work by responding to RFPs, and by offering its services directly to owners undertaking projects. Since its formation in 2002, Hueber-Breuer prepares its responses

to RFPs and direct solicitation for work in a format generally comprised of a management proposal, project hour matrix, project team identification, a detailed services overview, a safety overview and the reasons for employing Hueber-Breuer, among other information. Hueber-Breuer's management team would identify the specifics for each project at weekly meetings. Different from the predecessor corporation, Hueber-Breuer provides its responses to RFPs and owner solicitation very early in the project development process, i.e., in advance of the issuance of permits and approvals, in advance of construction drawings and well before the project is ready for construction.

One of the primary differences between the predecessor corporation and Hueber-Breuer that was also a key factor in Mr. Breuer's decision to embrace a different direction for himself and for the family business involved his personal preference to assist owners in trying to solve their problems, rather than continue in a business where it was dictated to him what would be done, and where the company was chosen because it had the lowest price, and not necessarily because of its business reputation, and his design acumen. During the 1990s, Mr. Breuer began regularly considering options to redirect his own expertise, and likewise the services provided by the family business. The creation of Hueber-Breuer satisfied Mr. Breuer's desire to have involvement in projects early on, and gave the company the opportunity to map out a strategy from the initial concept of the project to its completion. Hueber-Breuer manages consultants responsible for zoning solutions and environmental issues, and assists the owner with accounting and banking relationships to put together the best financing program available to them for the particular capital investment. Hueber-Breuer manages the execution of all work performed at the construction site, and sometimes Hueber-Breuer would use its own design professionals to both

design and build for a fixed price. Importantly, the predecessor corporation offered none of these services.

The predecessor corporation's contracts required it to construct a building in strict compliance with the construction documents prepared by third parties, allowing the predecessor corporation no flexibility to do any thing other than that which the contract stated, and then required change orders to effectuate such approvals. Hueber-Breuer's contracts were much different because initially there is only an agreement for Hueber-Breuer to consult with the owner to develop the project. The final documents from which construction occurs include some latitude as to not only performing the services that are directly referred to, as well as the services implied by the agreements.

The Division's desire to attach a more date-specific time line to Hueber-Breuer's "exact business activities" constrains the analysis of the business transformation that existed here, and that must be acknowledged as part of a much larger picture. Mr. Breuer's testimony provided a very clear picture of this transformation from the early 1990s through the creation of Hueber-Breuer, and thereafter. Mr. Breuer transformed the predominant type of services offered as a general contractor to a company offering primarily construction management, expanded and renovated the physical location, created jobs that were not needed under the old structure, growing annual gross payroll from an average of \$4.8 million during the three years prior to the creation of Hueber-Breuer to an average of \$8.3 million in the seven years thereafter, added a management team to lead the company, and addressed a variety of other business concerns. The details of construction management and design-build projects undertaken between 2002 and the hearing, the description of the services offered by Hueber-Breuer, the documents showing the physical space renovations, the analysis of staff changes and employees added to the Hueber-



Breuer, along with the statistical analysis of the revenue and payroll growth, all document and support petitioners' position.

The Division further argues that there was no need for the creation of a new entity to effectuate any purported change in business activity. Although I am not in complete disagreement with the Division on this point, whether the same goals could be accomplished employing a different path is not the issue. There are many avenues in a business setting to accomplish the same results. In fact, given the transformation of the focus of the services offered, the desire to present to the public the change in services offered and a different level of industry involvement, the desire to utilize the business advantages offered by Delaware incorporation, coupled with the ability to claim the credits in issue, are many reasons that support the creation of a new entity. Perhaps it was not an absolute necessity to create Hueber-Breuer in order to accomplish this transformation and some of the goals; however, it certainly was not an imprudent business decision, or actions that appear to be a sham. The issue is whether Hueber-Breuer was a substantially different company after its incorporation than it was standing in the shoes of the predecessor corporation. The credible testimony and documents submitted as evidence substantiate the fact that the predecessor corporation and Hueber-Breuer had different visions and operations, had a vastly different set of management employees who performed for the company in a substantially different and renovated setting, and predominantly served the industry from a completely different perspective. Accordingly, I am in agreement with petitioners that Hueber-Breuer qualifies as a new business pursuant to Tax Law § 14(j)(1), and therefore passes the employment test required by Tax Law § 14(b)(1) in order for it to be eligible for the Empire Zone benefits sought by petitioners in this case.

D. Given the holding in Conclusion of Law C, petitioners' alternative argument is not addressed.

E. The petitions of James V. and Catherine C. Breuer, John Andrew Breuer and Douglas A. and Margaret J. Mooney are hereby granted, and the five notices of determination dated March 4, 2010, are canceled.

DATED: Albany, New York  
November 15, 2012

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE