STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
JOSEPH HUCKO AND SURIA TAWIL AND JOSEPH H. HUCKO TRUST	:	DECISION DTA Nos. 823873 and 823874
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2005, 2006 and 2007.	:	

Petitioners, Joseph Hucko and Suria Tawil, and Joseph H. Hucko Trust, filed an exception to the amended determination of the Administrative Law Judge issued on December 20, 2012. Petitioners appeared by Bousquet Holstein, PLLC (Philip S. Bousquet, Esq. and Paul M. Predmore, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

Petitioners did not file a brief in support of their exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioners filed a letter brief in lieu of a formal reply brief. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly disallowed petitioners' claims for the qualified empire zone enterprise real property tax credits claimed by WL, LLC, for the years 2005, 2006 and 2007, on the ground that the company did not meet the employment increase factor.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for finding of fact "4," which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

In April 2000, a New York limited liability company known as WL, LLC (WL), was formed. Petitioners Joseph Hucko and Joseph H. Hucko Trust, among others, were partners of WL, and as such, derived tax benefits therefrom. Suria Tawil, though not a partner of WL, is a petitioner in this matter by virtue of her filing a joint federal income tax return with her husband, Joseph Hucko.

The Division of Taxation (Division) certified WL as a qualified empire zone enterprise (QEZE) effective May 9, 2000.

Commencing in January 2001, and continuing throughout each of the tax years in issue, WL had one full-time employee, i.e., Albert Bradwell. Mr. Bradwell never worked for WL until he became a full-time employee at that time.

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

> From 1998 through 2003, Mr. Bradwell was a part-time employee of Washington Street Partners, Inc. (WSP) because his employment never exceeded 35 hours per week for WSP during these years.[1]

By virtue of common ownership, WSP and WL are "related persons" as defined in Internal Revenue Code (IRC) § 465 (b) (3) (C).[2]

---

[1] We modify this fact to clarify the record.

[2] IRC § 465 (b) (3) (C) provides the following: "Related person. For purposes of this subsection, a person (hereinafter in this paragraph referred to as the 'related person') is related to any person if— (i) the related person bears a relationship to such person specified in section 267(b) or section 707 (b)(1), or (ii) the related person and

For each of the tax years, 2005, 2006 and 2007, WL claimed real property tax credits under Tax Law § 15 in the amounts of $86,293.00, $90,207.45 and $92,054.29, respectively. By virtue of their respective ownership interests in WL, each petitioner was allocated a portion of those credits.

After the Division's review of WL's tax returns for 2005, 2006 and 2007, it was concluded that the company could not satisfy the employment increase factor pursuant to Tax Law § 15 (b). The sole basis for that determination was that Mr. Bradwell could not be counted in the employment number calculated under Tax Law § 14 (g), because he had been employed part-time by WSP, a "related person" to WL.

The Division issued a Notice of Deficiency to Joseph H. Hucko Trust, dated June 29, 2009, asserting personal income taxes due in the amount of $17,259.00 plus interest for 2005.

Petitioner, Joseph H. Hucko Trust, had submitted a claim for refund for the 2006 and 2007 tax years in the total amount of $73,670.00 (Refund Claim No. X877069587). By a Notice of Disallowance, dated June 26, 2009, the trust's claim for refund in the amount of $17,517.00 for 2006 was denied. The Division also issued a Statement of Tax Refund for 2007 to the trust, dated July 10, 2009, reflecting a disallowance of a portion of its refund claim in the amount of $56,153.00.

The basis for the assessment for 2005, and the amounts disallowed for 2006 and 2007, was that the employee claimed by WL did not meet the employment increase factor criteria, resulting in a disallowance of the associated QEZE real property tax credits.

---

such person are engaged in trades or business under common control (within the meaning of subsections (a) and (b) of section 52). For purposes of clause (i), in applying section 267(b) or 707 (b)(1), '10 percent' shall be substituted for '50 percent'."

The Division issued a Notice of Deficiency to Joseph Hucko and Suria Tawil, dated September 2, 2008, asserting personal income taxes due in the amount of $36,319.00 plus interest for 2005. The corresponding statement of audit changes indicated that the basis for this assessment was twofold: (1) $31,928.00 represented disallowed QEZE real property tax credits from WL for its failure to meet the employment increase factor; and (2) $4,391.00 represented special assessments included in the eligible taxes for the QEZE real property tax credits claimed. Only the disallowance of $31,928.00 is contested.

The Division issued a Notice of Deficiency to Joseph Hucko and Suria Tawil, dated September 2, 2008, asserting personal income taxes due in the amount of $35,559.00 plus interest for 2006. The corresponding statement of audit changes indicated that the basis for this assessment was twofold: (1) $33,377.00 represented disallowed QEZE real property tax credits from WL for its failure to meet the employment increase factor; and (2) $2,182.00 represented special assessments included in the eligible taxes for the QEZE real property tax credits claimed. Only the disallowance of $33,377.00 is contested.

The Division issued two additional Notices of Deficiency to Joseph Hucko and Suria Tawil, dated November 27, 2009 and November 5, 2009, for tax years 2006 and 2007, respectively, assessing $18,883.00 and $18,433.95 plus interest, which are also petitioned in this case. The corresponding statements of audit changes indicated that the basis for these assessments was that there were special assessments included in the eligible taxes for the QEZE real property tax credits claimed. The Division determined that these special assessments were not qualified charges and the credits associated therewith were disallowed. Petitioners no longer contest these assessments for tax years 2006 and 2007.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Petitioners challenged the Notices of Deficiency, dated June 29, 2009 and September 2, 2008, the Notice of Disallowance, dated June 26, 2009, and the Statement of Tax Refund Disallowance, dated July 10, 2009 (together, the "Notices"). The parties disputed no material facts. Rather, the sole issue in this matter was whether WL was entitled to the QEZE real property tax credits for the years at issue.

The Administrative Law Judge reviewed the formula for calculating the credits and noted that resolving this matter turns on whether the "employment number" excludes all former employees of "related persons" or only full-time former employees. After reviewing the relevant legal standards, the Administrative Law Judge determined that petitioners failed to carry their burden of proving that their interpretation was the only reasonable reading of Tax Law § 14 (g) (1). In so doing, the Administrative Law Judge noted that petitioners' interpretation would defeat the plain meaning of the exclusionary provision. Accordingly, the Notices were sustained.

ARGUMENTS ON EXCEPTION

Petitioners do not dispute any facts, and take exception only to the conclusion that the exclusionary provision within Tax Law § 14 (b) (1) prevents the inclusion of all employees of "related persons," regardless of full or part time status, within the "employment number." In so doing, they raise the same argument presented before the Administrative Law Judge. Petitioners argue that the exclusionary provision of this statute refers back to the "employment number," which only includes full-time employees, and not part-time employees of related entities. As Mr. Bradwell was only a part-time employee of WSP, an entity related to WL, petitioners contend that he should be included in the "employment number" of WL for 2005, 2006 and 2007, raising

its employment number from "0" to "1." Accordingly, petitioners contend that they are entitled to the QEZE real property tax credits for the years at issue.

The Division maintains that the Administrative Law Judge properly sustained the subject Notices. Adopting the conclusions in the determination, it contends that petitioners' construction of Tax Law § 14 (g) (1) must be rejected because it requires narrowing the "related person" employment exclusion by importing language that is not present in that clause. The Division also notes that petitioners' position runs contrary to the plain meaning of the exclusionary provision. As such, the Division requests that the Tribunal affirm the Administrative Law Judge's determination and sustain the Notices.

OPINION

We affirm the determination of the Administrative Law Judge for the reasons set forth in this opinion.

The Legislature passed the Empire Zones legislation in order to incentivize economic growth and new job creation (***see*** General Municipal Law § 956). The program provides certain tax benefits to QEZEs based upon a formula, which calculates increases in employment. The formula compares a business' "employment number" in a test year against its "employment number" in the year in which the QEZE real property tax credit is sought (Tax Law § 15). Thus, the definition of the "employment number" forms a key component of the calculation.

The issue herein is whether petitioners are entitled to the QEZE real property tax credits under Tax Law § 15, claimed by WL for the years 2005, 2006 and 2007. It is undisputed that WL had an employment number of "0" for the test year. Petitioners' position remains that its employment number for the tax years 2005, 2006 and 2007 is "1" because it had one full-time employee, Mr. Bradwell. The Division maintains that WL's "employment" number for the years

at issue is "0" and, thus, there was no increase in employment. It contends that the exclusionary provision within Tax Law § 14 (g) (1) disqualifies Mr. Bradwell from the calculation because he was employed by WSP, a "related person" to WL. Petitioners counter by arguing that this language does not apply because, under the statute, the "employment number" only counts full-time employees, and, therefore, the exclusionary provision must also apply only to full-time employees of "related person[s]."

Resolving this matter turns on the interpretation of the term "employment number" under Tax Law § 14 (g) (1). In this case, our goal is to "effectuate the intent of the Legislature" (***Majewski v Broadalbin-Perth Cent. School Dist.***, 91 NY2d 577, 583 [1998] [internal quotation marks omitted]), and we note that the plain meaning of the statute's language constitutes the "clearest indicator of the legislative intent" (***see e.g. Matter of New York County Lawyer's Assn v Bloomberg***, 19 NY3d 712, 721 [2012], ***rearg denied*** 20 NY3d 983 [2012]).

In order to prevail, petitioners must overcome the presumption of correctness, which attaches to the Notices, by proving them clearly erroneous (***Matter of Gilmartin v Tax Appeals Trib.***, 31 AD3d 1008 [2006]). Further, tax credits, such as those at issue, are a particularized species of exemption from tax (***Matter of Marriott Family Rests. v Tax Appeals Trib. of State of N.Y.***, 174 AD2d 805 [1991], ***lv denied*** 78 NY2d 863 [1991]). "Statutes creating tax exemptions must be construed against the taxpayer" (***Matter of Federal Deposit Ins. Corp. v Commissioner of Taxation & Fin.***, 83 NY2d 44, 49 [1993] [internal quotation marks and citation omitted]). Herein, petitioners must show clear entitlement to the QEZE real property tax credits at issue (***Matter of Stevenson v New York State Tax Appeals Trib.***, 106 AD3d 1146 [2013]), specifically, proving that under the circumstances, their "interpretation of the statute is

not only plausible, but also that it is the only reasonable construction" (***Id.*** at 1147, ***citing Matter of Moran Towing & Transp. Co. v New York State Tax Commn.***, 72 NY2d 166, 173 [1988]).

We now address whether petitioners carried their burden of proving that theirs is the only reasonable interpretation of Tax Law § 14 (g) (1). This statute defines the term "employment number" as follows:

> "The term 'employment number' shall mean the average number of individuals, excluding general executive officers (in the case of a corporation), employed full-time by the enterprise for at least one-half of the taxable year. Such number shall be computed by determining the number of such individuals employed by the taxpayer on the thirty-first day of March, the thirtieth day of June, the thirtieth day of September and the thirty-first day of December during the applicable taxable year, adding together the number of such individuals determined to be so employed on each of such dates and dividing the sum so obtained by the number of such dates occurring within such applicable taxable year."

In the next sentence, Tax Law § 14 (g) (1) limits the types of individuals who may be included within the "employment number":

> "*Such number shall not include individuals employed within the state within the immediately preceding sixty months by a related person to the QEZE, as such term 'related person' is defined in subparagraph (c) of paragraph three of subsection (b) of section four hundred sixty-five of the internal revenue code.* For this purpose, a 'related person' shall include an entity which would have qualified as a 'related person' to the QEZE if it had not been dissolved, liquidated, merged with another entity or otherwise ceased to exist or operate" (emphasis added).

The interpretation of this provision, which excludes employees of "related person[s]" from being included in the "employment number" (the exclusionary provision), is the only issue disputed by the parties.[3]

Petitioners interpret the exclusionary provision as a continuation of the initial calculation of the "employment number." Specifically, they construe the term "individuals employed within

---

[3] While the "related person" employment exclusion includes other factors (i.e., that the employment occur within the past 60 months and in New York State), these elements are not discussed in this decision because they are not disputed by the parties.

the state," located in the exclusionary provision, to be the exact same term as "individuals . . . employed full-time by the enterprise for at least one-half of the taxable year," which is found in the first sentence of Tax Law § 14 (g) (1).

As such, petitioners contend that the exclusionary provision only disqualifies individuals who could be included within the "employment number," to wit, individuals who are or were employed "full-time" by a "related person" to the QEZE. This interpretation would allow Mr. Bradwell to be included in WL's "employment number" because he was employed only part-time by WSP. This would create an employment increase for which petitioners would be entitled to QEZE real property tax credits.

We find that a plain reading of Tax Law § 14 (g) (1) fails to support this construction. Contrary to petitioner's interpretation, the exclusionary provision is not a continuation of the initial sentence, but an independent provision of the statute. The terms "individuals employed within the state" and "individuals . . . employed full-time" are not the same because the former lacks the full-time distinction. We must infer that the absence of this distinction was intentional (McKinney's Cons Laws of NY, Book 1, Statutes § 240; ***Goodwin v Pretorius***, 105 AD3d 207, 216 [2013]). This inference is also supported by the Legislature's election to distinguish full-time employees in the first sentence of Tax Law § 14 (g) (1), and by referring back to that distinction in the second sentence, using the term "such individuals." As such, the plain language of the statute contradicts petitioners' position.

The interpretation proffered by petitioners changes this statute by importing the word "full-time" into the exclusionary provision of Tax Law § 14 (g) (1). Under their construction, this sentence would effectively read as follows:

> "Such number shall not include individuals employed *'full-time'* within the state within the immediately preceding sixty months by a related person to the QEZE,

> as such term "related person" is defined in subparagraph (c) of paragraph three of subsection (b) of section four hundred sixty-five of the internal revenue code" (emphasized language inserted).

This construction contravenes the statute's plain meaning because it interpolates a nonexistent distinction into the exclusionary clause, which petitioners believe should have been put there by the Legislature (McKinney's Cons Laws of NY, Book 1, Statutes § 363). As such, petitioners position violates long-standing principles of statutory construction:

> "[A] court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact. More particularly, a court cannot, by implication, read or supply in a statute a provision which it is reasonable to suppose the Legislature intentionally omitted" (***id.***).

By essentially importing the term "full-time" into the exclusionary provision, the proffered construction violates this rule and disregards the plain meaning of the statutes' words.[4]

We conclude that petitioners failed to demonstrate that, "as applied to the attendant circumstances, [their interpretation] is the only rational interpretation possible" (***Matter of United Parcel Serv., Inc. v Tax Appeals Trib. of the State of N.Y.***, 98 AD3d 796, 802 [2012], ***lv denied*** 20 NY3d 860 [2013]). They have not carried their burden of proving clear entitlement to the tax credits at issue, or that the Notices were clearly erroneous. Therefore, we conclude that the Division reasonably interpreted Tax Law § 14 (g) (1) in denying petitioners the QEZE real property tax credits for the years at issue.

For the reasons set forth in this opinion, we conclude that the Administrative Law Judge properly sustained the Notices.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

---

[4] We note that if, in fact, the legislative intent was to exclude only individuals employed full-time by "related persons" from the "employment number," then proper remedy lies with the Legislature, not this body (McKinney's Cons Laws of NY, Book 1, Statutes § 363, ***supra***).

1. The exception of Joseph Hucko and Suria Tawil, and Joseph H. Hucko Trust is denied;

2. The determination of the Administrative Law Judge is affirmed for the reasons set forth herein;

3. The petitions of Joseph Hucko and Suria Tawil, and Joseph H. Hucko Trust are denied;

4. The Notices of Deficiency, dated June 29, 2009 and September 2, 2008, the Notice of Disallowance, dated June 26, 2009 and the Statement of Tax Refund Disallowance, dated July 10, 2009, are sustained.

DATED: Albany, New York
September 19, 2013

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ Roberta Moseley Nero
Roberta Moseley Nero
Commissioner