

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
PAUL SOLIS-COHEN : DECISION
for Redetermination of a Deficiency or for Refund : DTA NO. 825097
of New York State Personal Income Tax under :
Article 22 of the Tax Law for the Year 2010. :

Petitioner, Paul Solis-Cohen, filed an exception to the determination of the Administrative Law Judge issued on June 5, 2014. Petitioner appeared by Berardi, Gottstine & Miller, CPAs, P.C. (William F. Berardi, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was heard in Albany, New York on September 10, 2015, which date began the six-month period for the issuance of this decision.

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

ISSUE

Whether the Division of Taxation properly disallowed petitioner's claim for qualified empire zone enterprise real property tax credit for the year 2010 on the ground that his business did not meet the employment increase factor.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 1, 2, 4, and 5 to more fully reflect the record. The Administrative Law Judge's findings of fact and the modified findings of fact appear below.

1. Petitioner, Paul Solis-Cohen, and his wife filed a joint New York State resident income tax return for the year 2010. The return included a claim for refundable QEZE¹ credit for real property taxes in the amount of \$65,339.00. The QEZE business named on the form was Level Realty LLC (Level Realty), an entity that was certified as a QEZE in the Dutchess County empire zone effective July 31, 2002. In order to qualify for any QEZE real property tax credit, there must be, among other things, an increase in employment and this, in turn, is determined by comparing the current year's employment with the test year employment level. To the extent at issue in this proceeding, petitioner reported that the current year employment number within the empire zone in which he was certified was 1.00. The next step is to calculate the employment increase factor. Petitioner had one full-time employee for the current year and since he had no employees during the test year, he reported an employment increase factor of one.

2. Petitioner owned 100% of Level Realty, which was organized as a single-member limited liability company. Level Realty operated as a real estate holding and management company. He also owned 100% of another entity known as Catskill Art and Office Supply (Catskill Art).

3. The Division of Taxation (Division) conducted an audit of the QEZE credit reported on petitioner's income tax return and also examined Level Realty. In the course of the audit, the

¹ The term QEZE refers to a qualified empire zone enterprise.

Division ascertained that the one employee reported on the tax form was Ms. Rebekah Waterman. It also learned that, within the previous 60 months, Ms. Waterman worked for Catskill Art.

4. The Division was aware that, in order to calculate the amount of the QEZE credit, one is required to multiply three factors, the employment increase factor, the benefit period factor and the amount of real property taxes that were actually paid. Since the Tax Law excludes individuals employed by a related entity within the past 60 months from the calculation of the employment number, the Division concluded that the employment increase factor was zero. It followed that since one of the factors was zero, when the three factors were multiplied together, the product, which was the amount of the allowable credit, was also zero.

5. On the basis of the foregoing audit, the Division denied petitioner's claim for refund of real property tax credit by letter dated June 17, 2011. Additionally, the Division issued an account adjustment notice, dated July 5, 2011, which explained that the amount of the refund requested in petitioner's New York State income tax return had been reduced from \$67,135.00 to \$1,801.77.

6. In or about 1978, petitioner started Catskill Art in Woodstock, New York. Thereafter, he opened stores in Kingston and Poughkeepsie, New York.

7. Level Realty was formed to enable petitioner to acquire and develop distressed properties in order for the properties to become productive assets of the community. Petitioner hoped to accomplish this goal through a process wherein he would not suffer a significant financial loss.

8. Petitioner became interested in a distressed property that was located on Main Street in the Town of Poughkeepsie. The building, which consisted of approximately 7,500 square feet,

was in disrepair and a blight upon the community. Petitioner and his wife, who is an architect, felt that with the assistance of a QEZE credit, they could accomplish their goal of restoring the building and creating jobs.

9. Petitioner spent close to two million dollars renovating the building, which included installation of a photovoltaic solar energy system on the roof. The impetus for installing the photovoltaic solar energy system was to be responsive to the community and set an example by creating a renewable energy resource.

10. The QEZE credit was an important part of the financial planning for the renovation of the building because petitioner needed the tax credit in order to meet the substantial mortgage obligation that he incurred.

11. On March 20, 2003, Level Realty entered into a lease of the renovated property on Main Street in Poughkeepsie with Advance Stores Company, Incorporated. This firm, which operated a national chain of stores, ultimately created 20 jobs. Paragraph 14 (b) of the lease directed the landlord to maintain all common areas in good repair and keep the common areas reasonably free of snow, ice and debris.

12. The leased property is located in an urban environment and the common areas require constant upkeep. Among other things, there are gardens to maintain, occasional snow removal, periodic cleaning of scattered debris and vagrancy issues. In order to comply with his obligations under the lease, petitioner hired a property manager. The position required the hiring and supervision of outside contractors to keep the property safe and compliant with the lease at all times.

13. In November 2009, the employee who performed the property management service for Level Realty left without notice. Petitioner viewed the vacancy of this position as an emergency

because the tenant required that the property be managed. In order to solve this problem, petitioner contacted Rebekah Waterman, who had worked as a clerk for Catskill Art from May 14, 2007 until February 21, 2009 when she resigned to take a position with another employer. Ms. Waterman's prior position with Catskill Art led her to become familiar with the property. Petitioner offered Ms. Waterman the job and she accepted.

14. Ms. Waterman fulfilled her duties for a period of time and, when she was no longer needed, she accepted other employment. Thereafter, petitioner hired another individual.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that the QEZE real property tax credit is calculated by multiplying three factors, one of which, the employment increase factor, was the focal point of the dispute in the present matter. The Administrative Law Judge concurred in the Division's audit finding that Level Realty's sole employee during 2010, Ms. Waterman, was not eligible to be included in that entity's employment number for the year at issue because she was previously employed by Catskill Art, a related person as defined in the statute, within the prior 60-month period. He further determined that such ineligibility results in a zero employment increase factor for Level Realty and, therefore, a zero real property tax credit. The Administrative Law Judge noted that the statutory language was unambiguous and simply not flexible enough to accommodate petitioner's circumstances. The Administrative Law Judge thus sustained the Division's denial of petitioner's claim for refund and denied the petition.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner continues to characterize the circumstances of Ms. Waterman's hiring as an emergency because of Level Realty's obligations to maintain the property. He also asserts that her hiring was a temporary situation. As he did below, he contends that, as Ms. Waterman's

hiring did not affect Level Realty's contribution to the empire zone program's goal of economic development, there should be room in the Tax Law for commonsense flexibility; that form should not control over substance; and that unforeseen and involuntary acts should not result in such negative tax consequences. Accordingly, petitioner contends that his claim for refund should be granted.

The Division contends that the Administrative Law Judge properly determined, pursuant to the plain statutory language, that petitioner did not qualify for the QEZE real property tax credit during the year at issue.

OPINION

The legislature enacted the empire zone program to spur economic growth and job creation (*see* General Municipal Law § 956; *Matter of Hucko Trust*, Tax Appeals Tribunal, September 19, 2013). Among various tax benefits under the program, Tax Law § 15, together with Tax Law § 606 (bb), provides a tax credit for eligible real property taxes to an individual taxpayer who is a sole proprietor of a QEZE.²

Preliminarily, we observe that “a tax credit is ‘a particularized species of exemption from taxation’ (*Matter of Grace v New York State Tax Commn.*, 37 NY2d 193, 197 [1975], *lv denied* 37 NY2d 816 [1975]) and, therefore, petitioner bore the burden of showing ‘a clear cut entitlement’ to the statutory benefit (*Matter of Luther Forest Corp. v McGuinness*, 164 AD2d 629, 632 [1991])” (*Matter of Golub Serv. Sta. v Tax Appeals Trib. of State of N.Y.*, 181 AD2d 216, 219 [1992]; *see also Matter of Piccolo v New York State Tax Appeals Trib.*, 108 AD3d

² As a single-member LLC, Level Realty was a disregarded entity and thus treated as a sole proprietorship for income tax reporting purposes.

107 [2013]). Indeed, petitioner must establish that, under the circumstances, his interpretation of the statute is the only reasonable interpretation (*Matter of Hucko Trust*).

Subject to certain limitations not at issue, the amount of refundable QEZE credit for real property taxes in a given tax year is the product of three factors, one of which is the employment increase factor (*see* Tax Law § 15 [b]). Consistent with the goals of the empire zone program, and as its name implies, the employment increase factor measures increases in employment by comparing the QEZE's employment number in the year in which credit is claimed to its employment number in a test year. The specific manner by which this factor is calculated is set forth in Tax Law § 15 (d) as follows:

“The employment increase factor is the amount, not to exceed 1.0, which is the greater of:

(1) the excess of the QEZE's employment number in the empire zones with respect to which the QEZE is certified pursuant to article eighteen-B of the general municipal law for the taxable year, over the QEZE's test year employment number in such zones, divided by such test year employment number in such zones; or

(2) the excess of the QEZE's employment number in such zones for the taxable year over the QEZE's test year employment number in such zones, divided by 100.

(3) For purposes of paragraph one of this subdivision, where there is an excess as described in such paragraph, and where the test year employment number is zero, then the employment increase factor shall be 1.0.”

As used in Tax Law § 15 (d), employment number generally means “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” (Tax Law § 14 [g]). Excluded from that number, however, are individuals “employed . . . within the immediately preceding

sixty months by a related person to the QEZE, as such term ‘related person’ is defined in [26 USCA § 465 (b) (3) (C)]” (*id.*).

Here, petitioner was the sole owner of both Level Realty and Catskill Art. Accordingly, those two entities were related persons for purposes of Tax Law § 14 (g) (*see* 26 USCA § 465 [b] [3] [C] [ii]). Furthermore, Ms. Waterman, Level Realty’s sole employee during the 2010 tax year at issue, was previously employed by Catskill Art from May 2007 through February 2009, or within the immediately preceding sixty months. Ms. Waterman is, therefore, properly excluded from Level Realty’s 2010 employment number as that term is defined in Tax Law § 14 (g).

The exclusion of Ms. Waterman from the employment number leaves Level Realty with a zero employment number for 2010 and, therefore, a zero employment increase factor for that year as computed pursuant to Tax Law § 15 (d). This, of course, results in zero allowable real property tax credit for the tax year at issue.

As to petitioner’s assertion that the foregoing conclusion amounts to an elevation of form over substance, we agree with the Administrative Law Judge that the relevant statutory language is unambiguous. Accordingly, such language must be construed so as to give effect to the plain meaning of the words used (McKinney’s Cons Law of NY, Book 2, Statutes § 97; *New York State Assn. of Counties v Axelrod*, 213 AD2d 18, 24 [1995], *lv dismissed* 87 NY2d 918 [1996]). As discussed, the plain language of Tax Law § 14 (g) excludes Ms. Waterman’s employment from Level Realty’s employment number.

Petitioner essentially seeks an exception to the 60-month look-back provision in Tax Law § 14 (g) where, as petitioner might put it, an unforeseen occurrence necessitates a temporary hire and where there is no artificial inflation of job numbers. Unfortunately for petitioner, the statute does not provide for such an exception.

Finally, we note that petitioner's argument rests, in part, on his assertion that the hiring of Ms. Waterman was a temporary solution to Level Realty's need for a property manager. Upon review of the record, however, we find that there is neither documentary nor testimonial evidence to show that Ms. Waterman's employment was intended to be, or in fact was, temporary. We note that the record indicates that Ms. Waterman was hired by Level Realty soon after the previous property manager left the job in November 2009; was employed as property manager for all of 2010; and does not indicate when her employment ended.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Paul Solis-Cohen is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Paul Solis-Cohen is denied; and
5. The denial of petitioner's refund claim, dated June 17, 2011, is sustained.

DATED: Albany, New York
March 3, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

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