STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LISA A. WEBER	:	DECISION DTA NO. 825857
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2008 and 2010.	:	

Petitioner, Lisa A. Weber, filed an exception to the determination of the Administrative Law Judge issued on August 13, 2015. Petitioner appeared by Barclay Damon LLP (David G. Burch, Jr., Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard in Albany, New York on February 25, 2016, which date began the six-month period for the issuance of this decision.

After reviewing the entire record, the Tax Appeals Tribunal renders the following decision. Commissioner Scozzafava took no part in the consideration of this matter.

ISSUE

Whether, where each of petitioner's two separately certified empire zone businesses was a single-member disregarded entity, the Division of Taxation properly determined that the later-certified entity must use the certification date of the earlier-certified entity; that, as a result, the later-certified entity's benefit period for claiming empire zone wage tax credits was expired as of the years at issue; and that, accordingly, the claimed credits must be disallowed.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified finding of fact 1, 2 and 3 and have added additional findings of fact, numbered 10 and 11 herein, to more fully and accurately reflect the record. The Administrative Law Judge's findings of fact, the modified findings of fact, and the additional findings of fact are set forth below.

1. During the years in issue, petitioner, Lisa A. Weber, was the sole member of Timeless Décor, LLC (Timeless Décor). Timeless Décor began operations in 2008 and produced custom frames that were used to preserve art. Its customers included independent retailers, hotels, hospitals, nursing homes, restaurants, museum shops and independent framers. Timeless Décor employed a technologically trained and skilled labor force.

2. Timeless Décor was certified as an empire zone enterprise under Article 18-B of the General Municipal Law by the City of Watertown Empire Zone and the New York State Department of Economic Development as of October 7, 2008. Timeless Décor's certificate of eligibility indicates that it is eligible to access empire zone benefits in connection with facilities located at a specific address in Watertown.

3. Petitioner was also the sole member of LCO Destiny, LLC d/b/a Timeless Frames (Timeless Frames). Timeless Frames was formed on November 4, 1999 and, through the employment of unskilled labor, engaged in the mass production of picture frames. It was approved as a certified business enterprise under the empire zone program with an effective date of November 22, 1999. Timeless Frames' certificate of eligibility indicates that it is eligible to access empire zone benefits in connection with facilities located at three Watertown addresses.

4. For income tax purposes, petitioner chose to treat both Timeless Décor and Timeless Frames as disregarded entities.

5. Petitioner filed a 2008 amended resident income tax return (form IT-201-X). On this return, petitioner claimed through Timeless Décor an empire zone (EZ) wage tax credit in the amount of $145,625.00 and an EZ investment tax credit, $1,139.00 of which was refundable in the current year.

6. Petitioner filed a 2010 amended resident income tax return (form IT-201-X) wherein she similarly claimed EZ wage tax credits on her personal income tax return that flowed through to her from Timeless Décor. Petitioner also claimed an EZ investment tax credit and a QEZE tax reduction credit claimed through Timeless Décor utilizing a benefit period factor of 1.0.

7. On December 14, 2010, the Division issued a notice of disallowance with respect to petitioner's claim for an additional EZ wage tax credit and EZ investment tax credit from Timeless Décor for the year 2008. The notice explained that:

> "A single member LLC (SMLLC) that is a disregarded entity and its single member, for purposes of the empire zone tax credits, are regarded as the same taxpayer, and the certification of one will be imputed to the other. If an entity is a member of more than one certified SMLLC/disregarded entity, the certification date for the single member and all SMLLCs and disregarded entities will be the earliest certification date of the single member and all the disregarded entities. Additional SMLLCs subsequently created or acquired by the single member would all use the same base period, test year, test date and employment increase factors."

8. The Division then noted that Timeless Frames was an SMLLC that became eligible to receive empire zone benefits on November 22, 1999 and the single member was petitioner. It also pointed out that Timeless Décor was also an SMLLC that became eligible to receive empire zone benefits on October 7, 2008 and that petitioner was its single member. On the basis of the foregoing, the Division concluded that the certification date of any member of the group was

November 22, 1999 and that Timeless Frames' fifth year of claiming the EZ wage tax credit was 2004. Since the EZ wage tax credit and the refundable portion of the EZ investment tax credit is allowed for only five taxable years, the EZ wage tax credit in the amount of $145,625.00 and the refundable portion of the EZ investment tax credit in the amount of $1,139.00 were denied. The adjustments resulted in the denial of a refund of $73,952.00 and the denial of $72,812.00 in carry forward wage tax credits.

9. On August 29, 2011, the Division issued a notice of disallowance to petitioner with respect to the year 2010. The notice explained that petitioner's income tax return was selected for review of the empire zone credits claimed through Timeless Frames and Timeless Décor. Following the same reasoning as that utilized for 2008, the Division concluded that the effective date of certification for Timeless Frames applied to Timeless Décor since petitioner owned 100 percent of the membership interests of both firms and both firms are disregarded entities for tax purposes. Consequently, the Division denied the EZ wage tax credit for Timeless Décor. In addition, the Division recalculated the QEZE tax reduction credit attributable to Timeless Décor as if Timeless Décor was in the eleventh year of its benefit period under the Empire Zone program instead of the third year of its benefit period pursuant to its 2008 certification date. As a result of the adjustments, petitioner was denied a refund of $67,813.00 in EZ wage tax credits, denied $67,812.00 in carry-forward EZ wage tax credits and denied a $6,300.00 QEZE tax reduction credit.

10. The parties have resolved issues related to the denial of the refundable portion of petitioner's claimed EZ investment tax credit for 2008 and the denial of petitioner's claimed QEZE tax reduction credit for 2010. Accordingly, only the Division's denial of petitioner's claimed EZ wage tax credit for the years at issue remains in dispute.

11. Timeless Frames and Timeless Décor have separate employer identification numbers. The two LLCs also file separately for New York withholding, wage reporting and unemployment insurance purposes. Additionally, they filed separate business annual reports with Empire State Development as required under the empire zones program. Such reports document each entity's respective employment data and investment in the empire zone, as well as the tax credits for which each entity qualified. Petitioner also filed separate schedule Cs for Timeless Frames and Timeless Décor as part of her income tax returns for the years at issue.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge concluded that the Division properly disallowed petitioner's claims for EZ wage tax credits. The Administrative Law Judge premised this conclusion on the fact that Timeless Décor and Timeless Frames were organized as single-member LLCs that were disregarded entities for tax reporting purposes. The Administrative Law Judge noted that petitioner, as owner of these disregarded entities, has income tax liability, and that the entities themselves do not. He concluded, therefore, that it would be incongruous to find that one of the disregarded entities could have a credit independent of the disregarded firm's owner. The Administrative Law thus found that the certification date for both of the disregarded entities is the earliest of their respective certification dates. Hence, the Administrative Law Judge determined that the Division's disallowance of EZ wage tax credits claimed through Timeless Décor was proper.

The Administrative Law Judge also rejected petitioner's assertion that the application of the Tax Law in the present matter violates her constitutional right to equal protection under the law. Noting that the result herein flows from petitioner's choice to organize her businesses as

disregarded entities, the Administrative Law Judge cited the well-established principle that taxpayers must face the consequences of the business form that they choose.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner asserts that the Tax Law does not permit the Division to impute the empire zone certification date of one disregarded entity to another disregarded entity under the facts and circumstances present here. Petitioner notes that Tax Law §§ 14, 15 and 16 refer to certified entities as business enterprises without regard to the manner in which such enterprises are organized. According to petitioner, these provisions thus support her contention that her LLCs should be treated separately for empire zone tax credit purposes. Petitioner notes further that she separately applied for and was separately granted certification as an empire zone business enterprise for each of her LLCs. Petitioner also notes that each of her businesses was required to submit a business annual report with Empire State Development. Petitioner reasons that, if the Tax Law required multiple disregarded entities to share the same certification date, then she would not have been required to submit a separate application for certification or a business annual report with respect to Timeless Décor, her later-certified enterprise. Petitioner also observes that, according to the Division, Timeless Décor's five-year benefit period for EZ wage tax credit expired before that business enterprise ever commenced operations.

The Division contends that the Administrative Law Judge properly determined that the certification date for petitioner's two disregarded entities was the earlier of petitioner's two enterprises; that is, Timeless Frames' November 22, 1999 certification date. In support, the Division notes that Tax Law § 606 (k) (3) provides that a subsequent certification of a taxpayer pursuant to Article 18-B of the General Municipal Law does not extend the five-year period during which EZ wage credits are available. The Division also cites Treasury regulation (26

CFR) § 301.7701-2 and an advisory opinion (TSB-A-09[6]C) in support of its position. Additionally, the Division asserts, as it did below, that the business operations of the two entities indicate a lack of distinction between the two and that this fact supports the Administrative Law Judge's conclusion.

Petitioner contends that the Treasury regulation cited by the Division in support of its position actually supports her argument because it provides that disregarded entities should be respected for tax credit purposes. Petitioner asserts that the advisory opinion cited by the Division is distinguishable. Additionally, petitioner argues that the business operations of the two entities are irrelevant to a determination of whether the Timeless Frames' earlier certification date should be imputed to Timeless Décor. Petitioner also contends, alternatively, that the operations of the two businesses were distinct.

Petitioner also continues to assert that the Division's application of the Tax Law in the present matter violates her constitutional right to equal protection under the law. Specifically, petitioner contends that the treatment accorded disregarded entities under the Division's application of the law, as opposed to its treatment of businesses organized as pass-through entities such as partnerships or S corporations, is not rationally related to any legitimate governmental purpose.

The Division denies that the Administrative Law Judge's interpretation of the relevant statutes violates petitioner's right to equal protection. It notes the heavy burden faced by taxpayers in establishing an equal protection violation in tax matters. It also notes the rule that taxpayers must face the consequences of the business form that they choose.

OPINION

Tax credit statutes, such as the EZ wage tax credit at issue are similar to, and should be construed in the same manner as, statutes creating tax exemptions (***see Matter of Piccolo v New York State Tax Appeals Trib***., 108 AD3d 107 [2013]). That is, such statutes must be strictly construed against the taxpayer (***see e.g. Matter of 677 New Loudon Corp. v State of N.Y. Tax Appeals Trib.***, 19 NY3d 1058 [2012], ***rearg denied*** 20 NY3d 1024 [2013], ***cert denied*** 134 SCt 422 [2013]). Petitioner has the burden to establish "a clearcut entitlement" to the statutory benefit (***Matter of Golub Serv. Sta. v Tax Appeals Trib. of State of N.Y.***, 181 AD2d 216, 219 [1992]). Indeed, petitioner must prove that the Division's interpretation is irrational and that its interpretation of the statute is the only reasonable construction (***Matter of Brooklyn Navy Yard Cogeneration Partners, L.P. v Tax Appeals Trib. of State of N.Y.***, 46 AD3d 1247 [2007], ***lv denied*** 10 NY3d 706 [2008]). However, construction of an exemption or credit statute should not be so narrow as to defeat the provision's settled purpose (***Matter of Grace v New York State Tax Commn.***, 37 NY2d 193, 196 [1975], ***rearg denied*** 37 NY2d 816 [1975], ***lv denied*** 338 NE2d 330 [1975]).

The Legislature enacted the empire zones program to spur economic growth and job creation (***see*** General Municipal Law § 956; ***Matter of Solis-Cohen***, Tax Appeals Tribunal, March 3, 2016).[1] Under the program, the commissioner of economic development is authorized to certify "business enterprises" as eligible to receive various tax benefits available only to such certified enterprises (***see*** General Municipal Law § 959 [a]). Pursuant to such authority, Timeless

[1] Although the program expired on July 1, 2010, a business enterprise certified pursuant to Article 18-B of the General Municipal Law as of June 30, 2010 may continue to claim EZ wage credits for subsequent years so long as it meets the relevant eligibility requirements, but no such credit is allowed for tax years beginning on or after July 1, 2014 (***see*** Tax Law § 606 [k] [3]).

Décor was certified as an empire zone enterprise as of October 7, 2008 (***see*** finding of fact 2) and Timeless Frames was so certified as of November 22, 1999 (***see*** finding of fact 3).

The EZ wage tax credit against personal income tax under Tax Law § 606 (k) is one of the tax benefits available under the empire zones program.[2] Enacted in 1986 as part of the economic development zones program (***see*** L 1986, c 686),[3] the EZ wage tax credit may be claimed where a "taxpayer" has (1) been certified pursuant to article 18-B of the General Municipal Law; (2) pays empire zone wages to employees; and (3) meets an employment test (***see*** Tax Law § 606 [k] [1] and [3]). The amount of the credit is computed pursuant to Tax Law § 606 (k) (4).

The second undesignated paragraph of Tax Law § 606 (k) (3) defines the benefit period for the EZ wage tax credit as follows:

> "The credit shall be allowed only with respect to the first taxable year during which payments of empire zone wages are made and the conditions set forth in this paragraph [i.e., the employment test] are satisfied, and with respect to each of the four taxable years next following (but only, with respect to each of such years, if such conditions are satisfied), in accordance with [Tax Law § 606 (k) (4)]. *Subsequent certifications of the taxpayer pursuant to article eighteen-B of the general municipal law, at the same or a different location in the same empire zone or zone equivalent area or at a location in a different empire zone or zone equivalent area, shall not extend the five taxable year time limitation on the allowance of the credit set forth in the preceding sentence.* Provided further, however, that no credit shall be allowed with respect to any taxable year beginning more than four years following the taxable year in which designation as an empire zone expired or more than ten years after the designation as a zone equivalent area (emphasis added)."

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[2] As single-member LLCs, Timeless Décor and Timeless Frames were disregarded entities and thus treated as sole proprietorships for income tax reporting purposes. Accordingly, items of income and expense for these entities were reported on separate schedule Cs (***see*** finding of fact 11) and the income or losses from each was reported on petitioner's personal income tax return.

[3] The economic development zones program was renamed and became part of the empire zones program in 2000 (***see*** L 2000, c 63).

The second sentence in the quoted paragraph is at the center of the dispute in this matter. Noting that Timeless Frames and Timeless Décor were both disregarded entities for income tax reporting purposes, the Division argues that the certification of Timeless Décor was a "subsequent certification of the taxpayer" (i.e., petitioner) as that phrase is used in Tax Law § 606 (k) (3). The Division thus asserts that petitioner must use Timeless Frames' certification date and therefore must assume Timeless Frames' benefit period in computing EZ wage tax credits attributable to the operation of Timeless Décor. As noted, Timeless Frames was certified under Article 18-A in 1999 (***see*** finding of fact 3) and its 5-year EZ wage tax credit benefit period expired in 2004 (***see*** finding of fact 8). Under the Division's interpretation, although Timeless Décor began operations and was certified in 2008, its EZ wage tax credit benefit period expired four years before it existed.

Petitioner disagrees with the Division and contends that the taxpayer referred to in the disputed provision is the LLC.

Resolution of the present dispute thus narrows to the following question: To whom or what does Tax Law § 606 (k) (3) refer by the phrase "subsequent certifications of the taxpayer." Answering this question is a matter of statutory interpretation, the purpose of which is to ascertain and give effect to the intent of the Legislature (***Patrolmen's Benevolent Assn. of City of N.Y. v City of New York***, 41 NY2d 205 [1976] ***citing Matter of Petterson v Daystrom Corp.***, 17 NY2d 32 [1966]). The language of the statute "is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning" (***Matter of DaimlerChrysler Corp. v Spitzer***, 7 NY3d 653, 660 [2006]). Where the statutory language is ambiguous, however, other methods of determining the Legislature's intent may be employed (***see*** McKinney's Cons Laws of NY, Book 1, Statutes §§ 76, 92; ***Matter of Guardian Life Ins.***

Co. of Am. v. Chapman, 302 NY 226 [1951]; ***Matter of American Communications Tech. v State of N.Y. Tax Appeals Trib.*** 185AD2d 79 [1993], ***lv granted*** 82 NY2d 653 [1993], ***affd*** 83 NY2d 773 [1994]). Such other methods include a review of the statute's legislative history (***see Matter of Blau Par Corp***., Tax Appeals Tribunal, May 21, 1992) and a consideration of statutes that are in pari materia to the statute at issue (***Matter of 73 Warren St., LLC v State of N.Y. Div. of Hous. & Community Renewal***, 96 AD3d 524, 530 [2012] ***citing*** McKinney's Cons. Laws of N.Y., Book 1, Statute § 221 [a], Comment). Ultimately, proper statutory construction focuses on "the precise language of the enactment in an effort to give a correct, fair and practical construction that properly accords with the discernable intention and expression of the Legislature [citation omitted]" (***Matter of 1605 Book Ctr. v Tax Appeals Trib. of State of N.Y.***, 83 NY2d 240, 244, 245 [1994], ***cert denied*** 513 US 811 [1994]).

The Division's proposed construction of the phrase "subsequent certifications of the taxpayer" as used in Tax Law § 606 (k) (3) has the appeal of a literal interpretation. The literal language of a statute will not always be controlling, however, if such a reading would defeat the general purpose or manifest policy intended to be promoted by the statute or would lead to an unreasonable result (***Matter of Beckwith***, 57 AD2d 415, 417, 418 [1977]). In the present matter, as noted, the Division's literal interpretation would result in the expiration of Timeless Décor's EZ wage tax credit benefit period four years before that business even existed. Plainly, this is an unreasonable and irrational result. Furthermore, by denying a certified business enterprise access to empire zone benefits simply because that entity's sole proprietor owned a previously certified business, the Division's statutory interpretation runs contrary to the Legislature's stated economic development goals in connection with the empire zones program (***see*** General Municipal Law § 956).

Having determined that the Division's proposed construction of the provision is irrational, we now turn to an analysis of petitioner's proposed interpretation. In so doing, we consider the disputed provision in context. "Statutory words must be read in their context, and words, phrases, and sentences of a statutory section should be interpreted with reference to the scheme of the entire section" (McKinney's Cons Laws of NY, Book 1, Statutes § 97). In considering the statutory words in this manner, we note that the disputed provision refers to "subsequent certifications of the *taxpayer* pursuant to article eighteen-B of the general municipal law" (emphasis added).[4] As the Legislature was surely aware, *business enterprises* and not *taxpayers* are certified under Article 18-B (***see e.g.*** Gen. Mun. Law § 959 [a] [responsibilities of the commissioner of economic development include the certification of "business enterprises" as eligible for certain benefits]). Here, Timeless Décor and Timeless Frames, and not petitioner, were certified pursuant to Article 18-B (***see*** findings of fact 2 and 3). Accordingly, the term taxpayer as used in Tax Law § 606 (k) (3) logically cannot simply refer to an individual Article 22 filer, but must refer to such an individual as a sole proprietor of a certified business enterprise.

A review of other empire zone credit statutes provides additional support for the foregoing conclusion. Such other statutes deal with the same subject matter, and are therefore in pari materia with Tax Law § 606 (k) (3) (***Matter of Piccolo v New York State Tax Appeals Trib.***, 108 AD3d at 110). Statutes that are in pari materia are properly construed together and applied consistently (***id***.; ***see also Matter of Guardian Life Ins. Co. of Am. v Chapman***, 302 NY at 231).

Among such other empire zone credit provisions, Tax Law §§ 14, 15, and 16 provide tax credits to qualified empire zone enterprises (QEZE). A QEZE is a *business enterprise* that has

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[4] Tax Law § 606 (k) (1) makes a similar reference: "A taxpayer shall be allowed a credit . . . where the *taxpayer* has been certified pursuant to article eighteen-B of the general municipal law (emphasis added)."

been certified under Article 18-B that also meets an employment test (Tax Law § 14 [a]). The business tax benefit period for the credits available under Tax Law §§ 15 and 16 is defined in relation to the certification date of the *business enterprise* (***id***.). Such benefit period is triggered by the *business enterprise's* first date of certification under Article 18-B (***see*** Tax Law § 14 [a] [1], [e]).[5] Tax Law §§ 15 and 16 provide for QEZE real property tax credit and QEZE tax reduction credit. As relevant here, both such credits are allowed to "[a] taxpayer . . . which is a sole proprietor of a QEZE . . . and which is subject to tax under article . . . twenty-two." (Tax Law §§ 15 [a], 16 [a]). Tax Law § 606 (bb) and (cc), respectively provide that the QEZE credit for real property taxes and the QEZE tax reduction credit may be claimed by a taxpayer which is the sole proprietor of a QEZE.

The cited QEZE statutes make clear that the tax benefit period is based on the business enterprise's date of certification. There is no language in any of these statutes suggesting, as the Division does in the present matter, that the later-certified of an individual's two sole proprietorships must use the certification date, and hence the benefit period, of the earlier-certified entity. Although not expressed therein as clearly, Tax Law § 606 (k) (3) may be interpreted similarly. As discussed, the QEZE and EZ wage statutes are in pari materia and are thus properly construed in a like manner (***Matter of Piccolo v New York State Tax Appeals Trib.***). We note further that we find no statutory language suggesting a legislative intent to treat the EZ wage tax credit differently than the QEZE tax credits.

The legislative history also supports our conclusion that the disputed portion of Tax Law

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[5] Tax Law § 14 (a) defines the business tax benefit period for certain business enterprises in terms of the enterprise's "test date," a term that is, itself, defined in terms of the business enterprise's certification date (***see*** Tax Law § 14 [e]).

§ 606 (k) (3) does not refer to the individual Article 22 filer, but rather refers to such individual as a sole proprietor of a certified business enterprise.

The sentence in Tax Law § 606 (k) (3) that is at the center of the dispute in this matter was added by L 2002, c 85. It was part of a package of "technical and clarifying amendments" to the QEZE tax credit and the EZ wage tax credit provisions (***see*** Memorandum in Support, Arthur J. Roth, Commr. of Tax. and Fin. [at p 25], Bill Jacket, L 2002, c 85). The same legislation included amendments to the definition of "business tax benefit period" in Tax Law § 14 (a) (1) and "test date" in Tax Law § 14 (e). These amendments clarify (by inserting the word "first") that the benefit periods for the QEZE real property tax credit and the QEZE tax reduction credit are determined by the date that the QEZE was "first" certified under Article 18-B. The provision in dispute says that "subsequent certifications . . . shall not extend the . . . time limitation" for the credit. The 2002 amendments to both the QEZE statutes and the EZ wage statute thus express the same concept, albeit in a different way. The legislative history thus indicates that the disputed provision was added in 2002 not to indicate that different enterprises must use the same certification date, as the Division urges, but simply to clarify that if, for example, a business was recertified because of a move to a new location, its original certification date would control for EZ wage tax credit purposes.[6]

Finally, we note that, upon review, the Treasury regulation and advisory opinion cited by the Division provide little support for its position.

Accordingly, pursuant to the foregoing discussion, we conclude that petitioner has carried her burden of proof to establish that the Division's proposed interpretation of Tax Law § 606 (k)

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[6] The certificates of eligibility for Timeless Frames and Timeless Décor indicate that eligibility for empire zone benefits is tied to specific facilities (***see*** findings of fact 2 and 3). This implies that recertification is required if a business moves to a new location.

(3) is irrational and that her proposed interpretation is the only reasonable construction (***Matter of Brooklyn Navy Yard Cogeneration Partners, L.P. v Tax Appeals Trib. of State of N.Y.***). We thus conclude that the certification date for Timeless Décor to be used in connection with the subject claims for EZ wage tax credit was October 7, 2008. The Division's audit determination that the benefit period for such credit was expired was therefore improper.

Although we have decided the main issue herein in petitioner's favor, we decline to grant petitioner's exception because the Administrative Law Judge's determination does not address whether petitioner has established entitlement to a refund of a portion of the claimed credits pursuant to Tax Law § 606 (k) (5) as a new business. We note that the Division raised this issue before the Administrative Law Judge (and in its brief herein) by its argument that the operations of Timeless Frames and Timeless Décor were indistinct. At the present, we are deprived of the research and analysis of both the Administrative Law Judge and the parties on exception (***Matter of United States Life Ins. Co.***, Tax Appeals Tribunal, March 24, 1994). Accordingly, we remand this matter to the Administrative Law Judge for a supplemental determination addressing this issue.

The supplemental determination shall be rendered as expeditiously as possible and shall be based upon the factual record already made. However, we recognize that little guidance was provided to the Administrative Law Judge by the parties on this issue. We therefore recommend that, before issuing the supplemental determination, the Administrative Law Judge request supplemental briefs from the parties addressing the issue of whether petitioner has established entitlement to a refund of a portion of the claimed credits pursuant to Tax Law § 606 (k) (5).

We will retain jurisdiction over this matter based on the exception timely filed by petitioner. After the Administrative Law Judge issues the supplemental determination, petitioner

will be allowed to add to her existing exception and briefs provided that she does so within 30 days of the issuance of the supplemental determination or requests an extension of time within the 30-day period. The Division will be given an opportunity to respond to any additional submission by petitioner. If the Division wishes to except to any portion of the Administrative Law Judge's supplemental determination, the Division will be required to submit a timely exception to the supplemental determination.

Finally, we note that petitioner's constitutional argument is rendered moot by our conclusion on the certification date issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this matter is remanded to the Administrative Law Judge for the issuance of a supplemental determination in accordance with the foregoing decision.

DATED: Albany, New York
August 25, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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