STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	DECISION
CLAYTON H. HALE, JR. AND PATRICIA H. HALE, ET AL.	:	DTA NOS. 827149, 827150, 827151, 827152, 827153, 827155, 827156, 827157,
for Redetermination of Deficiencies or for Refunds of Personal Income Tax under Article 22 of the Tax Law for the Year 2009.[1]	:	827158, 827159, 827160, 827161, 827162, 827163, 827164, 827165, 827166, 827167, and 827168

Petitioners Clayton H. Hale, Jr., and Patricia H. Hale, et al, filed an exception to the determination of the Administrative Law Judge issued on August 10, 2017. Petitioners appeared by Mackenzie Hughes, LLP (William Bradley Hunt, Esq., and Clayton H. Hale, Jr., Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Tobias A. Lake, Esq., of counsel).

In lieu of filing briefs on exception, petitioners and the Division of Taxation relied upon their respective briefs filed with the Administrative Law Judge. The six-month period for the

[1] These matters include some 19 separate petitions, each of which has been assigned a separate Division of Tax Appeals (DTA) number. Each such individual petition results from the disallowance of qualified empire zone enterprise (QEZE) refundable tax credits claimed by Mackenzie Hughes, LLP, as passed through to and claimed (proportionally) by each of the petitioners on his or her respective personal income tax return. Since the issue presented in each case is identical, these matters were heard together as one case, as a means of proceeding in an expedient and efficient manner, without prejudice to the appeal rights of any individual party. The individual parties, and assigned DTA numbers are: Clayton H. Hale, Jr., & Patricia H. Hale (827149), William Bradley Hunt & Bridget McManus (827150), Edward J & Elana G. Moses (827151), Mitchell R. Lebowitz & Anne B. Ruffer (827152), Carter H. & Nan H. Strickland (827153), Nancy Caple Johnston (827155), David M. & Joyce Garber (827156), Edward J. Spencer, III (827157), Gay and Frances Pomeroy (827158), Ami S. Longstreet (827159), Stephen Theobald and Jacqueline Jones (827160), Alfred W. & Lucy C. Popkess (827161), Ramon E. Rivera & Elise R. Rivera (827162), Stephen T. Helmer and Susan A. Helmer (827163), Jeffrey & Gina Brown (827164), Joseph & Maureen McGlynn (827165), Richard P. James and Molly Stuttler-James (827166), Stephen S. & Sharon A. Davie (827167), and Arthur W. & Margaret A. Wentlandt (827168). In some cases, notices of deficiency were issued jointly to spouses based on jointly filed tax returns. Unless noted otherwise, or required by context, "petitioners" shall refer collectively to all of the foregoing named petitioners.

issuance of this decision began on December 14, 2017, the date petitioners withdrew their request for oral argument.

ISSUES

I. Whether the application of certain 2009 statutory amendments to the empire zones program was retroactively applied to the beginning of the 2009 tax year.

II. If so, whether the retroactive application of those 2009 statutory amendments violated petitioners' rights under the Due Process Clause of the United States Constitution.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact 10, which has been modified to more fully reflect the record. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

BACKGROUND FACTS

1. Petitioners were all partners, or spouses of partners, of Mackenzie Hughes, LLP (MH), a New York limited liability partnership, during the year 2009. MH, a law firm, was created out of a predecessor law firm called Mackenzie, Smith, Lewis, Michell & Hughes, LLP (MSLMH).

2. MSLMH operated as a general practice of law, with the exception that it did not offer criminal defense legal services. A bank, as well as several insurance companies, constituted a large portion of MSLMH's client base. However, this client base began to erode in the mid-to-later 1990s, due to the acquisition of the firm's bank client by another (larger) bank, and to cost constrictions in the insurance industry. As described hereafter, MH, as the successor entity to MSLMH, continued to operate as a general practice of law, although it offered certain additional areas of legal practice beyond those that MSLMH had previously offered (***see*** finding of fact 9).

3. Prior to March 1, 2001, MSLMH leased real property located at 101 South Salina Street, Syracuse, New York (the Property), where its offices were, and had been, located for at least 50 years.

4. For many years, the owner of the Property, who was also the lessor in which MSLMH's offices were located, was OnBank and Trust Co. (OnBank). OnBank had been a significant, long-term legal client of MSLMH. However, in the late 1990s, OnBank was acquired by M&T Bancorp. M&T Bancorp had its own in-house legal representatives who performed legal services for M&T Bancorp and, post-acquisition, for OnBank. As a consequence, MSLMH was no longer performing legal services for its former bank client, OnBank, and it had no particularly strong connection with, or allegiance to, M&T Bancorp.

5. MSLMH's lease at the Property was set to expire in 2001. In the late 1990s, MSLMH began the process of determining whether to execute a new lease at the same premises, or lease new premises in a different location. Representatives of the City of Syracuse encouraged MSLMH to remain in downtown Syracuse, noting that if MSLMH located in an Economic Development Zone (Empire Zone), and became certified as a Qualified Empire Zone Enterprise (QEZE), it could be entitled to receive significant resulting tax benefits under the empire zones program.[2]

6. In considering whether to enter into a new lease agreement for the Property, as opposed to relocating its offices, MSLMH engaged the services of William T. Bell & Associates as a real estate broker (broker). A comparison of potential rental properties was prepared for

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[2] In 2000, the Legislative Bill Drafting Commission was directed to change the previously used term "economic development zone," wherever appearing, to "empire zone." Likewise, the term "taxpayer" was changed to "qualified empire zone enterprise" or "QEZE" (***see*** L 2000 c 63, pt GG, § 15, eff May 15, 2000).

MSLMH by the broker in or about 2000. Among other matters, the comparison showed that the Property was not the least expensive rental property that MSLMH could have selected. The comparison also revealed that several other available rental properties were located within Empire Zones, and could potentially entitle MSLMH to empire zones program tax credits. The comparison considered the potential economic benefits of leasing property located in an Empire Zone, specifically noting the rehabilitation tax credit and the wage tax credit, though not the tax reduction credit that is at issue herein. At the same time, and in contrast, the broker's comparison does not specifically indicate that the Property was located in an Empire Zone and did not consider in its analysis a $20,000.00 cleaning credit that MSLMH had at its existing office location at the Property.

7. In 2001, the members of MSLMH also received a letter or memorandum from Green Seifter Consulting, LLC, for consideration in determining where to locate MSLMH's offices. This letter states, in part, that "[b]ased on the information provided, [MSLMH] will not be eligible for any of the new benefits available under the empire zones program, which include the QEZE tax reduction credit and the sales tax exemption." Testimony at hearing confirmed that petitioners were aware, at the time they were considering various lease options, that MSLMH, as then constituted, would not meet the "employment test," and hence would not be entitled to, inter alia, the tax reduction credit.[3] The tax reduction credit is the only QEZE credit in dispute in this proceeding.

8. On May 18, 2001, MSLMH entered into a 15-year lease for real property located at the

[3] The "employment test" generally requires that the number of employees in a given year for which the QEZE tax reduction credit is claimed must equal or exceed the number of employees in the "test period," with such test period being the average number of employees during a "base period." The base period is, generally, comprised of the five year period immediately preceding the test period (***see*** Tax Law § 14 [a], [b]).

Property. The 15-year duration of this new lease was described as a "longer than usual" lease.[4] As part of the lease terms, the lessor, M&T Bancorp, financed the purchase of new office equipment and furnishings, with the cost thereof (approximately $850,000.00) included in, and to be amortized over, the term of the lease by increased monthly rent payments. At the time of entering into the foregoing lease, MSLMH was not a QEZE, and in fact, MSLMH never was a QEZE.

9. MSLMH's legal work for its former bank client, OnBank, was described as "high volume/low profit but steady" (e.g., real estate closings). However, with the loss of this client, as well as reductions in income from its insurance company clients (***see*** finding of fact 4), MSLMH was experiencing a significant ongoing decline in its revenues. Some members of MSLMH wanted to expand the firm's practice into additional areas of legal representation, including securities law and immigration matters. Other members, however, were concerned that doing so created substantial potential risk to the firm's then uncollected, long-term receivables, valued at approximately $4.7 million. One way of addressing this concern was to establish a new partnership (MH) going forward, while keeping the existing partnership (MSLMH) "alive" for purposes of segregating the existing booked receivables from new business matters. In addition, taking this step in fact would (and did) result in the newly formed entity meeting the QEZE employment test going forward.

10. On or about May 20, 2002, MH was formed as an entity by filing the appropriate documentation with the New York Department of State. MH assumed the physical operating

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[4] It is noted that the 15-year lease term coincides with the 15-year QEZE benefit period provided under Tax Law § 14 (a) (1) (B).

assets of MSLMH, including the lease. MH also continued the law practice of MSLMH, and added new areas of practice. All receivables in existence at this time and any work in progress remained with MSLMH.

11. MH did not exist as a business entity when MSLMH entered into the lease agreement for the Property in March 2001.

12. On March 10, 2003, MH was certified as a QEZE in the Syracuse Empire Zone, with a business address of 101 South Salina Street, Syracuse, New York. Such certification was deemed to be in effect as of June 14, 2002.

13. By virtue of their partnership interests in MH, petitioners were entitled to claim certain QEZE-based tax credits that flowed through to them vis-a-vis MH.

14. MH remained a QEZE from June 14, 2002 until December 31, 2008. The Division and petitioners dispute whether MH remained a QEZE for any part of 2009.

15. On or about May 18, 2009, MH was notified by the New York State Department of Economic Development (DED) that MH's QEZE certification would potentially be revoked based upon then-recently enacted statutory amendments.

16. On or about June 29, 2009, DED issued a letter to MH providing official notice that MH's certification as a QEZE was revoked.

17. MH's QEZE certification was revoked based upon statutory amendments to the empire zones program (Part S-1 of Chapter 57 of the Laws of 2009), that were introduced as legislative bills on January 7, 2009, and were signed into law on April 7, 2009 (the 2009 Amendments). The foregoing June 29, 2009 letter from DED provided that MH's certification was being revoked on the basis that it was first certified prior to August 1, 2002, and that it had

either: a) caused individuals to transfer from existing employment with another business enterprise with similar ownership that was located in New York State to similar employment with MH, or b) had transferred to it real property previously owned by an entity with similar ownership.[5] The effective date of the revocation was set at January 1, 2008.

18. MH timely appealed the revocation of its QEZE certification to DED and the Empire Zone Designation Board (EZDB).

19. On October 15, 2010, the EZDB passed Resolution # 18 of 2010, upholding the revocation of MH's QEZE certification. DED notified MH of the EZDB resolution by letter dated October 25, 2010.

20. MH timely appealed the decision to uphold the revocation of MH's QEZE certification to DED and the EZDB.

21. On May 4, 2012, the EZDB passed Resolution # 29A of 2012, granting MH's request for a de novo review of EZBD's Resolution # 18 of 2010, and upholding the decertification of MH as a QEZE.

THE PRESENT DISPUTE

22. The present dispute is not about whether MH was, or was not, correctly or properly decertified as a QEZE by DED, as upheld on appeal by the EZDB. Rather, the present dispute is about whether it is legally permissible for MH's decertification to be effective beginning January 1, 2009.[6]

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[5] This basis for revocation has been commonly referred to as "shirt changing."

[6] As detailed hereinafter, making QEZE decertifications in 2009 effective as of January 1, 2008 was overturned on appeal by the Court of Appeals as impermissibly retroactive (***James Sq. Assoc., LP v Mullen***, 21 NY3d 233 [2013]). The issue of making such 2009 decertifications effective as of January 1, 2009 (i.e., in the same year) was not specifically addressed by the Court.

23. Except for petitioners Alfred and Lucy Popkess, none of the petitioners claimed entitlement to QEZE tax credits on their original 2009 tax returns. They did, however, claim entitlement to QEZE tax credits via amended 2009 returns, which were timely filed in April 2013, or thereafter in the case of two of the petitioners.[7]

24. Petitioners claimed QEZE tax credits on their amended 2009 returns by virtue of their partnership interests in MH.

25. Based upon petitioners' original (in the case of petitioners Alfred and Lucy Popkess), or amended (in the case of the remaining petitioners), 2009 tax returns, petitioners were issued refunds of the QEZE tax reduction credit, as follows:

PETITIONER	TOTAL AMOUNT REFUNDED
Clayton and Patricia Hale	$5,517.19
Bradley Hunt & Bridget McManus	$5,130.81
Edward and Elana Moses	$8,338.70
Mitchell Lebowitz & Anne Ruffer	$5,117.16
Carter & Nan Strickland	$9,115.44
Nancy Johnston	$1,302.87
Stephen Theobald & Jacqueline Jones	$4,652.10
Ami Longstreet	$2,919.65
Ramon & Elise Rivera	$6,949.00
Edward Spencer	$4,485.29
Gay & Frances Pomeroy	$10,691.76

[7] Petitioners Alfred and Lucy Popkess are the only petitioners who did claim QEZE tax credits on their original 2009 tax return. Consequently, they did not file an amended return. All other petitioners filed amended returns in April of 2013, except for petitioners Ramon & Elise Rivera, who filed in August of 2013, and petitioners Stephen Theobald & Jacqueline Jones, who filed in October of 2013.

Richard and Molly James	$9,629.10
Stephen and Susan Helmer	$13,870.53
David and Joyce Garber	$10,763.03
Stephen and Sharon Davie	$12,895.00
Arthur and Margaret Wentlandt	$9,667.05
Jeffrey and Gina Brown	$8,806.41
Alfred and Lucy Popkess	$0.00
Joseph and Maureen McGlynn	$3,087.62

26. The Division subsequently disallowed each of the petitioners' claims for QEZE tax credits, and in August of 2014 issued a notice of deficiency for tax year 2009 to each of the petitioners for the amounts previously refunded.[8]

27. The following chart lists the assessment numbers and dates of each of the notices of deficiency:

PETITIONER	ASSESSMENT ID NO.	DATE OF NOTICE
Clayton and Patricia Hale	L-041761799-9	08/06/14
Bradley Hunt & Bridget McManus	L-041761985-6	08/06/14
Edward and Elana Moses	L-041762025-8	08/06/14
Mitchell Lebowitz & Anne Ruffer	L-041762242-4	08/06/14
Carter & Nan Strickland	L-041762154-1	08/06/14
Nancy Johnston	L-041761905-6	08/06/14
Stephen Theobald & Jacqueline Jones	L-041762184-1	08/06/14
Ami Longstreet	L-041770843-8	08/12/14

[8] Petitioners, Alfred and Lucy Popkess were not previously issued a refund, and therefore were not issued a notice of deficiency. Their petition herein is a challenge to the Division's denial of their claim for refund in the amount of $9,888.25, as is consistent with the manner in which their 2009 tax return was filed.

Ramon & Elise Rivera	L-041762213-3	08/06/14
Edward Spencer	L-041762153-2	08/06/14
Gay & Frances Pomeroy	L-041761868-2	08/06/14
Richard and Molly James	L-041761771-8	08/06/14
Stephen and Susan Helmer	L-041762158-6	08/06/14
David and Joyce Garber	L-041762063-1	08/06/14
Stephen and Sharon Davie	L-041071350-7	04/25/14
Arthur and Margaret Wentlandt	L-041761765-4	08/06/14
Jeffrey and Gina Brown	L-041761971-1	08/06/14
Alfred and Lucy Popkess	N/A (refund denial letter)	08/06/14
Joseph and Maureen McGlynn	L-041764335-6	08/07/14

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge explained that the purpose of the empire zones program was to spur economic growth and job creation and that MH had been eligible for participation in the program since 2002, provided it met the criteria of the program each year.

The Administrative Law Judge then noted that in April 2009, the criteria for the program was changed by statutory amendments and that DED undertook a statutorily-required review of all program participants to determine whether they remained eligible under the new criteria. The Administrative Law Judge noted that in June of 2009, DED revoked MH's certificate of eligibility effective January 1, 2008. The Administrative Law Judge explained that the reason provided by DED for revoking MH's certification was that MH did not meet the new criteria contained in the 2009 Amendments in that it had engaged in shirt-changing, a process whereby existing businesses reincorporate or transfer existing employees or assets among related entities so as to appear to have created new jobs or made new investments in order to qualify for, or

maximize, empire zones program benefits. The Administrative Law Judge noted that MH had challenged the revocation of its certification and that such challenge was unsuccessful.

The Administrative Law Judge also noted that the Legislature enacted additional amendments to the empire zones program in 2010 (the 2010 Amendments). The Administrative Law Judge found that the Legislative history accompanying these amendments indicated that the Legislature intended that revocations of certifications for participation in the empire zones program made pursuant to the 2009 Amendments be effective for the entire taxable year in which they occurred, except that revocations made during 2009 would be deemed effective as of January 1, 2008.

The Administrative Law Judge then discussed the case of ***James Sq. Assoc. LP v Mullen***, (21 NY3d 233 [2013]) wherein the Court of Appeals held that the 2009 Amendments should not be applied retroactively as such an application would violate taxpayers' due process rights (***James Sq. Assoc.*** at 250). The Administrative Law Judge found, however, that the Court of Appeals in ***James Sq. Assoc.*** rejected only the deemed inclusion of 2008 as impermissibly retroactive and did not address 2009. Thus, the Administrative Law Judge concluded that there was nothing in ***James Sq. Assoc.*** that would automatically preclude the application of the 2009 Amendments, or Tax Law § 14 (i) (1), to 2009.

The Administrative Law Judge initially determined that because this case involves 2009, the application of the 2009 Amendments to MH's circumstances could not be considered a retroactive application of a statute. The Administrative Law Judge noted that the revocation of MH's certification under the empire zones program was made in June 2009. The Administrative

Law Judge then explained that Tax Law § 14 (i) (1)[9] provides that a business ceases to be qualified to participate in the empire zones program on the first day of the taxable year in which its certification is revoked, in this case January 1, 2009, and concluded that the Division was not at liberty to ignore this statute. As further support for the conclusion that the application of the statute to 2009 was not retroactive, the Administrative Law Judge emphasized that neither the 2009 Amendments nor the 2010 Amendments made any change to Tax Law § 14 (i) (1). Indeed, the Administrative Law Judge found that the 2010 Amendments seemed to ratify the effect of Tax Law § 14 (i) (1), while also adding further reach to it by specifically providing that any revocations of certifications occurring in 2009, would be deemed to include 2008.

The Administrative Law Judge then explained that even if the retroactive application of the 2009 Amendments, or the June 2009 revocation of MH's certification under the empire zones program, were considered to be retroactive applications of statutes, such retroactive applications were not impermissible under due process standards.

The Administrative Law Judge reached this conclusion based upon an application of the three-factor test set forth in ***Matter of Replan Dev. v Department of Hous. Preserv. & Dev. of City of N.Y.*** (70 NY2d 451, 456 [1987] ***appeal dismissed*** 485 US 950 [1988]). The Administrative Law Judge initially determined that taxpayers such as petitioners were aware of the likely changes to the empire zones program and thus had an opportunity to change their behavior, at least to the extent of making provisions to pay for the additional likely tax liability. The Administrative Law Judge then addressed the actual period of retroactivity and determined

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[9] References herein to Tax Law § 14 (i) (1) are former Tax Law § 14 (i) (1), which was effective until January 1, 2018.

that the Division was correct in its position that the period of retroactivity was a very short 97-day period, which ran from the enactment of the 2009 Amendments on April 7, 2009 back to January 1, 2009. The Administrative Law Judge noted that longer periods of retroactivity had been found constitutional. Finally, the Administrative Law Judge concluded that the 2009 Amendments were adopted with the clearly acceptable public purposes of curtailing abuses of the empire zones program and achieving budget savings for 2009.

The Administrative Law Judge also dismissed petitioners' position that they were entitled to a credit pro-rated up to the time that they were notified of the revocation of MH's certification under the empire zones program, because such position not only had no basis in statute, but was completely at odds with Tax Law § 14 (i) (1).

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioners assert that the decision in ***James Sq. Assoc.*** requires a decision in the present matter that the 2009 Amendments and 2010 Amendments, and thus the revocation of MH's certification under the empire zones program, may be applied prospectively only. Petitioners' assertion is based upon numerous factors discussed in ***James Sq. Assoc.***

First, petitioners do not dispute that the application of Tax Law § 14 (i) (1), which provides that all empire zones program revocations of certifications are to be deemed effective on January 1 of the year in which they occur, results in MH's decertification becoming effective as of January 1, 2009. Rather, petitioners contend that the application of Tax Law § 14 (i) (1) in the present case, where MH met all of the program requirements at the beginning of the year and where such requirements changed during the year, is an unconstitutional retroactive application of the statute. Second, petitioners argue that the Court in ***James Sq. Assoc.*** found that: (1) there

was no valid public purpose for the retroactive application of the 2009 Amendments and 2010 Amendments; (2) similarly situated taxpayers had no forewarning of the changes in the statutes; and (3) there was an impermissible length of time between January 1, 2009 and the passage of the legislation. With regard to the last point, petitioners argue that the period of retroactivity must actually be measured from August 2010, when the 2010 Amendments became effective, because that was the first time the Legislature made the additional provisions regarding the revocation of certification under the empire zones program retroactive. Thus, petitioners argue that the retroactive period was 20 months and that this period of retroactivity is impermissible.

Finally, petitioners alternatively argue that they are entitled to the tax reduction credits at issue on a pro rata basis up to the June 29, 2009 date of DED's initial determination to revoke MH's certification under the empire zones program.

The Division contends that the Court of Appeals decision in ***James Sq. Assoc.*** holds only that the 2010 Amendments cannot be retroactively applied to January 1, 2008. Thus, the Division asserts that there is nothing in that decision that prohibits the 2009 Amendments from being applied to January 1, 2009.

The Division argues initially that the application of the 2009 Amendments to the revocation of MH's certification under the empire zones program in 2009 is not a retroactive application of the legislation in that the revocation occurred in the same year as the legislation was passed. Furthermore, the Division argues that it was the application of Tax Law § 14 (i) (1) that required the revocation of MH's certification under the empire zones program in June 2009 to be deemed effective as of January 1, 2009. Therefore, there was no retroactive application of the 2009 Amendments.

The Division then argues that even if it were determined that there was a retroactive application of the 2009 Amendments under these circumstances, such retroactive application was not constitutionally impermissible. In response to petitioners' assertions that it met the ***Matter of Replan Dev.*** test as set forth in ***James Sq. Assoc.***, the Division argues that: (1) petitioners had ample warning of the proposed changes and did not, and indeed could not, have relied upon the previous statutory requirements to their detriment in that petitioners base such reliance on MH's staying in downtown Syracuse and it was MH's predecessor, not MH, that signed the lease, and the lease was signed two years prior to MH being certified to participate in the empire zones program; (2) there was a valid public purpose for the retroactive application of the 2009 Amendments to January 1, 2009 as such would potentially allow for the spurring of investment, creation of jobs and the prevention of future bad behavior; and (3) the relatively short retroactive period of four months is less than many previous cases.

OPINION

The Legislature enacted the empire zones program to spur economic growth and job creation (***see*** General Municipal Law § 956; ***Matter of Purcell***, Tax Appeals Tribunal, November 14, 2016). As relevant here, one of the tax benefits available under the empire zones program, the QEZE tax reduction credit under Tax Law § 16 (tax reduction credit), provides for a credit against franchise taxes imposed directly on the QEZE. Where the QEZE is a disregarded or flow-through entity for tax reporting purposes, a credit is allowed against the personal income taxes imposed on its owners (Tax Law § 16 [a]).

Under the empire zones program, the commissioner of economic development was authorized to certify business enterprises as eligible to receive the various tax benefits available

only to such certified enterprises (***see*** General Municipal Law § 959 [a]).[10] Pursuant to such authority, MH was certified as a QEZE effective June 14, 2002.

As discussed above, the 2009 Amendments changed the requirements of the empire zones program and required that DED undertake a review to determine whether each empire zone participant remained eligible under the new requirements. Pursuant to this review, MH's certificate of eligibility was revoked by a letter issued by DED on or about June 29, 2009. Thus, the crux of the matter is that if MH is considered certified to participate in the empire zones program during 2009, as asserted by petitioners, the tax reduction credit under Tax Law § 16 is available to petitioners in 2009. Alternatively, if it is decided that the revocation of MH's certification to participate in the program was effective as of January 1, 2009, then the tax reduction credit is not available to petitioners for 2009.[11]

Initially, it is noted that tax credit statutes providing for credits such as the tax reduction credit 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 [3d Dept 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*** 571 US 952 [2013]). Petitioners must show an "unambiguous entitlement" to the claimed benefit (***Matter of United Parcel Serv., Inc. v Tax***

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[10] Although the empire zones 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 the QEZE tax reduction credit for the remainder of its benefit period, so long as it meets the relevant eligibility requirements.

[11] With regard to petitioners' assertion that they are entitled to at least a partial allowance because the revocation occurred in June, we agree with the Administrative Law Judge that there is no legal authority for such a position and affirm for the reasons stated in the determination.

Appeals Trib. of the State of N.Y., 98 AD3d 796, 798 [3d Dept 2012], ***lv denied*** 20 NY3d 860 [2013]) and that their interpretation of the statute is the only reasonable construction (***Matter of American Food & Vending Corp. v New York State Tax Appeals Trib.***,144 AD3d 1227 [3d Dept 2016]). 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]). Furthermore, in the case of an asserted retroactive application of a statute, we must also consider the axiom that the application of statutes retroactively is looked upon with disfavor (***James Sq. Assocs.*** at 246).

Relevance of 2010 Amendments

As noted by the Administrative Law Judge, in adopting the 2010 Amendments, the Legislature specifically stated that such amendments were intended to clarify and confirm that: (1) decertifications resulting from the 2009 Amendments were effective for the same year in which such decertifications occurred, and for all subsequent years; and (2) decertifications occurring in 2009 were also to be deemed effective for the year 2008 (***see*** L 2010 ch 57, part R, § 1).

As set forth below, we have concluded that Tax Law § 14 (i) (1) mandated that all revocations of certifications to participate in the empire zones program be deemed effective as of the first day of the taxable year in which the revocation occurred. Thus, revocation of MH's certification in June 2009 was deemed to be effective as of January 1, 2009. Accordingly, the Legislature's intent to clarify that this was the case in the 2010 Amendments was superfluous.

As to the second point, the Court of Appeals in ***James Sq. Assoc.***, declared that the retroactive application of the revocation of certification of an empire zones program participant

to January 1, 2008 under the 2009 Amendments was violative of a taxpayer's rights to due process. There is nothing in the court's decision in ***James Sq. Assoc.*** that would prohibit us from reviewing whether the retroactive application of the 2009 Amendments in this case also violates petitioners' rights to due process.

Accordingly, we agree with the conclusion of the Administrative Law Judge that the 2010 Amendments have little practical effect on this case. Thus, unless noted otherwise, we will limit our discussion in the remainder of this decision to the 2009 Amendments.

Retroactivity of the 2009 Amendments

The initial question to be addressed is whether the application of the 2009 Amendments to MH's circumstances in 2009 constituted the retroactive application of a statute. We recently decided in a similar case that the application of the 2009 Amendments constituted a retroactive application of the statute, and nothing in the present matter leads us to change our mind (***Matter of NRG Energy, Inc.***, Tax Appeals Tribunal, March 14, 2018).

As we discussed in ***NRG Energy***, it is unclear from the various court decisions on this issue whether a statute adopted during an open tax year and made effective as of the first day of that year is considered to be the retroactive application of a statute (Steve R. Johnson, ***Retroactive Tax Legislation***, State Tax Notes, August 15, 2016, p 4 "[C]ourts have been unclear as to whether same-year changes are not retroactive or are retroactive but constitutional"]). And we can understand the common sense analysis of the Administrative Law Judge that leads to the conclusion that a statute changed within a tax year is not retroactive if applied to the beginning of that tax year. However, there is no rule that a statute adopted during an open tax year and made effective as of the first of that year automatically is determined not to have a retroactive effect. Rather, in determining whether the application of a statute is retroactive under a given set of

circumstances, the question that must be addressed is "whether the new provision attaches new legal consequences to events completed before its enactment" (***see Landgraf v USI Film Prod.***, 511 US 244, 290 [1994]).

In this case, petitioners had participated in the empire zones program with regard to the operations of MH since 2002. The requirements of the empire zones program were changed in April 2009 by the 2009 Amendments to make petitioners' behavior in creating MH, and causing MH to continue the law practice of MSLMH, including the assumption of the physical assets of MSLMH, grounds for revocation of MH's certificate of eligibility to participate in the empire zones program. Specifically, MH's certification was revoked because it had caused individuals to transfer from existing employment with another business enterprise with similar ownership that was located within New York State to similar employment with MH, or transferred to it real property previously owned by an entity with similar ownership. The revocation was effective as of January 1, 2009 through the operation of Tax Law § 14 (i) (1). Tax Law § 14 (i) (1) provides that "[A] business enterprise shall cease to be a qualified empire zone enterprise: . . . on the first day of the taxable year during which revocation of its certification under article eighteen-B of the general municipal law occurs."

In general, this means that a business whose certificate of eligibility is revoked during a given taxable year ceases to be qualified to participate in the empire zones program as of the first day of that taxable year. Under normal circumstances, such a revocation would be based upon a business not meeting the requirements of the empire zones program that were in effect on the first day of that taxable year. Thus, no question of retroactivity would arise.

However, we agree with petitioner that the application of the 2009 amendments to the tax year 2009 pursuant to Tax Law § 14 (i) (1) presents a unique situation. In the present case, the

application of Tax Law § 14 (i) (1) renders petitioner unqualified to participate in the empire zones program as of January 1, 2009 based upon program requirements that were not in effect until April of that year. Thus, the application of the 2009 amendments in the present case attached "new legal consequences" to actions of petitioner that occurred prior to the enactment of the 2009 Amendments (***Landgraf v USI Film Prod.***). Accordingly, we find that the application of the 2009 amendments to the entirety of 2009 constituted a retroactive application of the statute.

The Administrative Law Judge cites to a portion of the decision in ***Matter of Dermody, Burke & Brown, CPAs, LLC v Department of Economic Dev.*** (140 AD3d 1275, 1279 [3d Dept 2016] [citations omitted]) that holds that just because the 2009 Amendments "are applicable to actions taken before the statute took effect 'does not render that statute "retroactive" in any true sense of that term' and does not implicate petitioner's due process rights." As previously discussed, the line between whether a statute adopted during an open tax year and made effective as of the first day of that year is considered to be a prospective application of a statute, or a retroactive application that is most likely constitutional, is not a clear line. We interpret the language in ***Matter of Dermody*** that the statute is not "retroactive in any true sense of the term" and "does not implicate petitioner's due process rights" to mean that while the statute is technically being applied retroactively, the court considered it clearly constitutional (***id.***).

We agree with the Division that it was required to follow the statutory framework set forth by reading the 2009 Amendments and Tax Law § 14 (i) (1) together, and that such framework requires that the June 2009 revocation of MH's certificate of eligibility to participate in the empire zones program be considered revoked as of January 1, 2009. Indeed, the Legislature ratified this interpretation in the 2010 Amendments. However, we also agree with petitioners that this necessarily leads to an analysis as to whether this application of the statutory framework passes

constitutional muster or is violative of petitioners' due process rights.

Constitutionality of 2009 Amendments as Applied

Having determined that the application of the 2009 Amendments in this case constituted a retroactive application of a tax statute, the next question that must be addressed is whether the retroactive application of the 2009 Amendments was constitutionally permitted.

It is agreed by the courts, the Administrative Law Judge and the parties, that in determining whether the retroactive application of a taxing statute violates the Due Process Clauses of the United States and New York Constitutions, the courts look to three factors: (1) "the taxpayer's forewarning of a change in the legislation and the reasonableness of . . . reliance on the old law," (2) "the length of the retroactive period," and (3) "the public purpose for the retroactive application" (***Matter of Replan Dev.*** at 456; ***see also James Sq. Assoc.*** at 246; ***Matter of Luizza***, Tax Appeals Tribunal, March 29, 2016). We now turn to such an analysis in the present case.

Forewarning of change in the law and reasonable reliance on the old law

"This inquiry focuses on whether the taxpayer's 'reliance' has been justified under all of the circumstances of the case and whether his 'expectations as to taxation [have been] unreasonably disappointed'" (***Matter of Replan Dev.*** at 456 [citations omitted]).

Petitioners argue that the fact that MH was certified for participation in the empire zones program, and did indeed participate for approximately seven years, proves that they reasonably relied on the law in effect prior to the 2009 Amendments. The Division asserts that the only action taken by petitioners in reliance upon MH being certified as eligible to participate in the empire zones program was entering into the lease including the new equipment and furnishings to be amortized over the period of the lease. The Division argues that such actions cannot be the

basis for petitioners' reasonable reliance on the statute in effect prior to the 2009 Amendments, because MH did not even exist as an entity, much less have empire zones program certification, prior to this action being taken.

We find that under the particular circumstances of this case, the forewarning and reasonable reliance factor of the ***Matter of Replan Dev.*** analysis should not be accorded any weight. This factor protects a taxpayer who reasonably relied on the law in effect at the time an action was taken, but is not afforded the opportunity, due to lack of notice of the possible change in the law, to take any action to avoid the repercussions of the new law (e.g. ***Matter of Replan Dev.*** at 453 [developer could have avoided repercussions of new law by not unreasonably relying on old law in undertaking renovations of two vacant buildings]). Such protection could never have been afforded petitioners under the circumstances of this case.

The circumstances herein are unique in that the revocation of the certification of MH to participate in the empire zones program was based upon actions taken by petitioners in 2001 and 2002, namely: (1) causing MSLMH to execute a 15-year lease, that included new equipment and furnishings to be amortized over the period of the lease, on May 18, 2001; (2) causing the creation of MH on or about May 20, 2002; and (3) causing MH to continue the law practice of MSLMH, including the assumption of the physical assets of MSLMH. As a result of all of these actions, MH was certified as a participant in the empire zones program effective June 14, 2002. The 2009 Amendments made these same actions grounds for the revocation of MH's certification to participate in the empire zones program in 2009.

There does not appear to be, nor do petitioners claim, any action that MH or petitioners could have taken in 2008 or 2009 to alter the result of MH's certification being revoked. Furthermore, given the short period of retroactivity in the present matter, we cannot find that

petitioners' expectations to continue to receive QEZE tax credits in 2009 were "unreasonably disappointed" (***Matter of Replan Dev.*** at 456). Accordingly, under these circumstances we do not afford any weight to this factor.

Length of retroactive period

As previously discussed, we disagree with petitioners that the 2010 Amendments have any practical effect on this case as we have concluded that Tax Law § 14 (i) (1) made the revocation of MH's certification retroactive to January 1, 2009. Thus we agree with the Administrative Law Judge that the retroactive period at issue herein was a relatively short period of 97 days, from the April 7, 2009 enactment of the 2009 Amendments back to January 1, 2009. "Retroactive tax legislation may be treated as valid, unless it reaches *so far into the past* . . . as to constitute a deprivation of property without due process" (***Matter of Varrington Corp. v City of N.Y. Dept. of Fin.***, 85 NY2d 28, 32 [1995] [citations omitted] [emphasis added]). The 97-day retroactive period at issue in this case cannot be held to reach "so far into the past" that it would render this retroactive application of a statute a violation of petitioners' due process rights. Accordingly, this factor weighs in favor of the constitutionality of the retroactive application of the 2009 Amendments.

Public purpose for the retroactive application

We find that the public purpose for the retroactivity of the statute is controlled by ***James Sq. Assoc.*** The court in ***James Sq. Assoc.*** found that the legislative purposes in adopting the 2009 Amendments were to "stem abuses in the Empire Zones Program (increasing the benefits to the public relative to the cost of the credits) and to increase tax receipts" (***James Sq. Assoc.*** at 250). As noted by the Court:

> "retroactively denying tax credits to plaintiffs did nothing to spur investment, to create jobs, or to prevent prior shirt-changing. The retroactive application of the 2009

> Amendments simply punished the Program participants more harshly for behavior that already occurred and that they could not alter" (***James Sq. Assoc.*** at 250).

We fail to see any difference when applying the 2009 Amendments to the present circumstances.

The Division argues that the 2009 Amendments have a different purpose as applied to 2009, that of spurring investment, creating jobs and preventing future bad behavior. While we understand that the purpose of the empire zones program in general is to spur investment and create jobs, we fail to see how the 2009 Amendments do either. The 2009 Amendments were meant to curtail abuses of the program and to raise revenue (***James Sq. Assoc.*** at 250). As far as preventing future bad behavior, a prospective application of a statute would accomplish that purpose. Finally, the Division argues that if the legislation were not adopted retroactively, evasive measures could be taken to frustrate the purposes of the legislation. The Division does not attempt to explain what those evasive measures might have been in the present case, and petitioners themselves do not claim there was any such action they could have taken.

Factor analysis

In summation, we have found that: (1) the forewarning and reasonable reliance factor of the ***Matter of Replan Dev.*** analysis is entitled to no weight under the circumstances of this case; (2) the length of the retroactive period factor of the ***Matter of Replan Dev.*** analysis supports a finding that the retroactive application of the 2009 Amendments was constitutional; and (3) the public purpose factor of the ***Matter of Replan Dev.*** analysis supports a finding that the retroactive application of the 2009 Amendments was violative of petitioners' due process rights.

In weighing the two competing factors, we need to consider that the ***Matter of Replan Dev.*** analysis is simply a method of determining whether the retroactive application of the 2009 Amendments is "so harsh and oppressive as to transgress constitutional limitation" (***Welch v***

Henry, 305 US 134, 147 [1938], ***reh denied*** 305 US 675 [1938]). It is also true that courts have been far less likely to invalidate the retroactive imposition of a taxing statute when it involves the changing of a tax rate, or an exemption or credit than they are when the issue is the imposition of a new tax (***see United States v Darusmont***, 449 US 292, 298-300 [1981]; ***Fein v United States***, 730 F2d 1211, 1212-1214 [8th Cir 1984], ***cert denied*** 469 US 858 [1984]; ***Honeywell, Inc. v United States***, 973 F2d 638, 642-643 [8th Cir 1992] [quoting ***Fein v. United States*** at 1213]). In the instant case, we are dealing with the elimination of a tax credit rather than a new tax (***Honeywell, Inc.*** at 642-43 ["This kind of tinkering, though certainly annoying to taxpayers and their advisers, is a regular feature of the tax-law landscape.... The change of which plaintiff complains here is, we think, closer in kind and in effect to a mere increase in the tax rate than to the enactment of a wholly new tax."]).

Furthermore, we note that "tax legislation that is retroactive to the beginning of the year of enactment has routinely been upheld against due process challenges" (Erika K. Lunder, Robert Meltz, and Kenneth R. Thomas, ***Constitutionality of Retroactive Tax Legislation***, Congressional Research Service, Oct. 25, 2012 at 2]; ***see also Welch v Henry*** 305 US at 148 ["it has been the familiar legislative practice of Congress in the enactment of revenue laws to tax retroactively income or profits received during the year of the session in which the taxing statute is enacted."]; ***United States v Darusmont*** 449 US at 298 ["[t]he Court consistently has held that the application of an income tax statute to the entire calendar year in which enactment took place does not per se violate the Due Process Clause . . . .]; ***Matter of Replan Dev.*** at 455 ["retroactivity provisions in tax statutes, if for a short period, are generally valid"] [citations omitted]; ***James Sq. Assoc.*** at 249 [in finding a retroactive period of 16 to 32 months excessive the court noted "one year of

retroactivity is not considered excessive according to ***Replan***. . . ."]). Thus, there is no precedent that we have found for concluding that a tax statute retroactively applied to the beginning of the year in which it was enacted violates a taxpayer's due process rights.

Accordingly, we conclude that the extremely short period of retroactivity outweighs the lack of a public purpose under the circumstances of this case and hereby hold that the application of the 2009 Amendments in this instance does not violate petitioners' due process rights.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Clayton H. Hale, Jr., and Patricia H. Hale, et al., is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petitions of Clayton H. Hale, Jr., and Patricia H. Hale, et al., are denied; and

4. The notices of deficiency and the notice of refund denial (as to petitioners Alfred and Lucy Popkess), as specified in finding of fact 27, are sustained.

DATED: Albany, New York
June 14, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner