

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
CARL MONTANTE, SR.	:	DECISION
AND CAROL MONTANTE,	:	DTA NOS. 827235, 827236,
ET AL.	:	827237, 827238 AND
	:	827239
for Redetermination of Deficiencies or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 2009.	:	

Petitioners, Carl Montante, Sr. and Carol Montante, Timothy Montante, Laura Zaepfel, Michael and Alexendra Montante, and Carl Montante, Jr. and Wendy Montante filed an exception to the determination of the Administrative Law Judge issued on January 4, 2018. Petitioners appeared by Hodgson Russ, LLP (Christopher L. Doyle, Esq., and Andrew W. Wright, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Tobias Lake, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument was heard on September 27, 2018, in Albany, New York. At the Tribunal's request, the parties also filed simultaneous supplemental letter briefs. The six-month period for the issuance of this decision began on November 2, 2018, the date that both parties' letter responses were received.

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

ISSUES

I. Whether the Division of Taxation properly disallowed the qualified empire zone enterprise credits claimed by each of the petitioners on their respective personal income tax returns for the year 2009 based upon the Department of Economic Development's order decertifying petitioners' businesses' empire zone enterprise certifications in June 2009.

II. Assuming that the Division of Taxation improperly disallowed said credits, whether the amount of credits should be modified to disallow sanitary sewer district charges and fire district charges on the basis that those charges are not eligible real property taxes pursuant to Tax Law former § 15 (e).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified finding of fact 21 to include an additional fact from the record. As so modified, the Administrative Law Judge's findings of fact appear below.

1. Petitioner Carl Montane, Sr. (Montante Sr.) founded the Uniland Development Company in the 1970s and has served as its managing director ever since.
2. Uniland Development Company is the doing business name for the Uniland Partnership of Delaware, L.P. (Uniland).
3. Uniland is a full-service real estate development company based in Amherst, New York, that owns properties primarily located in the Buffalo and Rochester areas of New York State.
4. During the 2009 tax year, Montante Sr. and Carol Montante, Timothy Montante, Laura Zaepfel, Michael and Alexendra Montante, and Carl Montane, Jr. and Wendy Montante (collectively petitioners) owned direct or indirect equity interests in Uniland.

5. During the 2009 tax year, petitioners Montante Sr. and Carl Montante, Jr., owned direct or indirect equity interests in Univest II Corporation and/or its subsidiaries, including BTC Block 1/21, Inc., and ICC South, Inc. (collectively Univest).

6. During the relevant tax year, Uniland and Univest were related through petitioners' ownership.

7. For purposes of the present proceeding, from 2001 to 2008 Uniland and Univest were certified as qualified empire zone enterprises (QEZE) (collectively the Uniland QEZEs).

8. By virtue of their ownership interests in the Uniland QEZEs, petitioners were entitled to claim certain tax deductions and credits that flowed through to them so long as the Uniland QEZEs continued to be certified as QEZEs and meet the eligibility requirements for receiving such tax deductions and credits under the Tax Law.

9. For tax purposes, Montante Sr. owned 82.99% of Uniland and 99.67% of the Univest II Corporation.

10. The remaining petitioners are Montante Sr.'s children, who own, for income tax purposes, various minority percentages of Uniland and Univest II Corporation.

11. In his role as managing director, Montante Sr. was responsible for making all executive-level decisions, including development strategies, construction decisions, property management decisions and leasing decisions, and for establishing and approving general policies, practices and procedures on behalf of the company, including the Uniland QEZEs.

12. In the early 2000s, the Uniland QEZEs learned about New York's empire zone program and its tax benefits.

13. After determining that it owned properties within the geographic limits of certain empire zones, the Uniland QEZEs applied for certification under the program.

14. After being certified under the program, the Uniland QEZEs made several significant changes to its policies and procedures in relation to properties located in empire zones, including establishing distinct payrolls for each of the Uniland QEZEs, whereas the Uniland QEZEs had traditionally had one payroll for all employees for all of the entities operating under the Uniland umbrella; hiring additional employees to work for the Uniland QEZEs in the empire zones and training and supervising those employees; and lowering base rents the Uniland QEZEs charged to tenants at the properties located in the empire zones such that much of the benefit of the QEZE credits was passed on to the tenants in the form of lower rents.

15. Uniland would not have taken any of these steps but for its participation in the empire zones program.

16. Subsequent to the certification of the Uniland QEZEs in the early 2000s, the Uniland QEZEs began making decisions with respect to long-term leases on properties located in the empire zones.

17. The Uniland QEZEs generally entered into leases with its tenants that spanned between 5 and 15 years in length.

18. As a result, the Uniland QEZEs made decisions with respect to pricing the leases that covered the 2009 tax year well in advance of the 2009 tax year.

19. The Uniland QEZEs made these decisions regarding lease pricing in anticipation of receiving the empire zone benefits promised to them for the full 15-year period.

20. Each of the Uniland QEZEs met the pre-April 2009 qualifications for claiming the real property tax credit under the Tax Law during the 2009 tax year.

21. On April 7, 2009, Governor Paterson signed the revenue portion of the 2009 New York State budget, which introduced two new criteria that businesses were required to meet to retain their empire zone certifications, the shirt-changing test and the 1:1 benefit-cost test (L 2009, c 57, pt S-10) (the 2009 amendments). The 2009 amendments had been introduced as part of a bill on or around January 7, 2009.

22. The new certification retention criteria enacted as part of the 2009 budget bill did not contain a retroactivity provision, but were effective immediately when signed by the Governor.

23. In August 2010, the Legislature amended the General Municipal Law to state that decertifications pursuant to the 2009 amendments were retroactively effective as of January 1, 2008 (L 2010, c 57, pt R).

24. The 2009 amendments also required the Commissioner of Economic Development to review all certified businesses during 2009 to determine if they should be decertified under the new criteria.

25. For the 2009 tax year, the Uniland QEZEs claimed the QEZE real property tax credit.

26. In June of 2009, the Uniland QEZEs were notified that their QEZE certifications were revoked by order of the New York State Department of Economic Development (DED) in accordance with the 2009 amendments.

27. The Uniland QEZEs appealed the revocation of their QEZE certifications by the DED.

28. Upon learning that the Uniland QEZEs were being decertified in 2009, petitioners could not have amended the terms of long-term lease agreements they entered into with their tenants in anticipation of their continued receipt of empire zone benefits.

29. In the event that petitioners prevail on the issue of retroactivity, the Division agrees

that petitioners are entitled to receive certain QEZE credits from the Uniland QEZEs. The Division and petitioners disagree, however, regarding the exact amount of such credits to which petitioners would be entitled.

30. The entire difference between the eligible real property taxes reported by the Uniland QEZEs for the 2009 tax year, \$990,295.80, and the credit that, but for the 2009 amendments, would be allowed by the Division, \$949,380.60, is made up of either garbage (i.e. sanitary sewer) district charges (\$5,274.73 in total) or fire district charges (\$35,640.47 in total). The Division and petitioners disagree as to whether these charges constitute eligible real property taxes as defined by Tax Law § 15 (e).

31. During the 2009 tax year, petitioners Montante Sr. and Carol Montante, Michael and Alexandra Montante, and Timothy Montante (collectively the refund petitioners) claimed a credit on their 2009 personal income tax returns for their share of the QEZE real property tax credit claimed by the Uniland QEZEs for that year.

32. Upon review of the amended 2009 tax returns of the refund petitioners, the Division disallowed each of the claims for the QEZE real property tax credit, and, in or around July of 2014, issued notices of disallowance for tax year 2009 to each of the refund petitioners for the QEZE credits claimed as follows:

Petitioner	Claimed QEZE Credits Disallowed
Montante Sr. and Carol Montante	\$890,555.00
Michael and Alexandra Montante	\$12,312.00
Timothy Montante	\$12,293.00

33. The refund petitioners timely appealed the notices of disallowance to the Division's Bureau of Conciliation and Mediation Services (BCMS) and timely appealed the conciliation orders sustaining the notices of disallowance to the Division of Tax Appeals.

34. During the 2009 tax year, petitioners Montante Jr. and Wendy Montante, and Laura Zaepfel (collectively the deficiency petitioners) first claimed their share of the credits for the Uniland QEZE on amended personal income tax returns, which were initially granted by the Division.

35. Subsequently, on or about July 30, 2014, the Division issued the following notices of deficiency:

Petitioner	Notice Number	QEZE Credits Disallowed
Carl Jr. and Wendy Montante	L-041748546	\$15,167.00
Laura Zaepfel	L-041748552	\$13,887.00

36. The deficiency petitioners timely appealed the notices of deficiency to BCMS and timely appealed the conciliation orders sustaining the notices of deficiency to the Division of Tax Appeals.

37. In or around May of 2015, each of the deficiency petitioners tendered full payment of the proposed deficiencies as shown on the notices of deficiency.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that the decertification of the Uniland QEZE in June 2009 was effective as of January 1, 2009 by operation of Tax Law § 14 (i) (1). Under that provision, a business ceases to be a QEZE on the first day of the taxable year during which its QEZE certification is revoked. As Tax Law § 14 (i) (1) had been in effect since the inception of the QEZE program, the Administrative Law Judge determined that the present matter does not involve a retroactive application of the law.

The Administrative Law Judge also concluded that, even if the present matter does involve a retroactive application of the law, such retroactive application is permissible. The

Administrative Law Judge applied the three-part balancing 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]), also employed in *James Sq. Assoc. LP v Mullen*, 21 NY3d 233 (2013), to the facts herein to reach this conclusion. Specifically, the Administrative Law Judge noted that, although the Uniland QEZEs had the opportunity to know early in 2009 that changes in the law were likely, they did not have a realistic opportunity to conform their conduct to the changes. According to the Administrative Law Judge, however, this forewarning factor was outweighed by the relatively short retroactive period and the 2009 amendments' public purposes of curtailing abuses in the QEZE program and fiscal savings in the state budget. The Administrative Law Judge thus found that the retroactive application of the 2009 amendments did not result in a due process violation.

Although petitioners did not prevail on the issue of retroactivity, the Administrative Law Judge nonetheless determined that the garbage district and fire district charges were not eligible real property taxes for purposes of the QEZE real property tax credit.

ARGUMENTS ON EXCEPTION

Petitioners take issue with the Administrative Law Judge's conclusion that the present matter does not involve a retroactive application of the law. Petitioners point to this Tribunal's decision in *Matter of NRG Energy, Inc.* (Tax Appeals Tribunal, March 14, 2018), in which we found that the application of the 2009 amendments to tax years beginning on January 1, 2009 was a retroactive application of such amendments. Petitioners note also that the Court of Appeals determined that "the 2009 Amendments should not be applied retroactively," in *James Sq. Assoc.* (21 NY3d at 250), a case addressing the application of the same amendments to the tax year beginning on January 1, 2008. Petitioners assert that the *James Sq. Assoc.* holding also

applies to the 2009 tax year and thus contend that the 2009 amendments may not be applied to the Uniland QEZEs.

Alternatively, petitioners contend that even if the retroactive application of the 2009 amendments to January 1, 2009 is not prohibited by *James Sq. Assoc.*, application of the three-part *Matter of Replan Dev.* balancing test to the facts in the present matter shows that such retroactive application violated petitioners' rights to due process. Petitioners assert that they did not have adequate forewarning of the 2009 amendments and that they reasonably relied on the prior law to their detriment; that there is insufficient public purpose to justify retroactivity; and that, although the period of retroactivity here is relatively short, given the absence of any legitimate public purpose for such retroaction, any such period is excessive.

Petitioners also urge this Tribunal to consider the square corners doctrine as a basis to bar the retroactive application of the 2009 amendments in the present matter. Petitioners assert that, while this Tribunal has not used this doctrine in connection with retroactivity, New Jersey courts have done so persuasively. Petitioners contend that the square corners doctrine precludes the Division from applying the 2009 amendments to the 2009 tax year with respect to petitioners' claims for credit.

Finally, petitioners contend that the garbage and fire district charges paid by the Uniland QEZEs and included in petitioners' claim for credit constitute eligible real property taxes under Tax Law § 15 (e).

The Division concedes that the application of the 2009 amendments to the 2009 tax year is a retroactive application of the law under *Matter of NRG Energy, Inc.* The Division asserts, however, that *NRG* implicitly rejects petitioners' contention that *James Sq. Assoc.* precludes the application of the 2009 amendments to the 2009 tax year. The Division also contends that

application of the *Matter of Replan Dev.* balancing test mandates a conclusion in its favor. Specifically, the Division contends that petitioners had adequate forewarning of the change in the law. The Division notes that the State Comptroller had pointed out weaknesses in the empire zones program for several years prior to enactment, that the bill proposing the 2009 amendments was introduced in January 2009 and signed into law on April 7, 2009. The Division notes also that courts have not considered a retroactive period of less than 100 days, as is the case here, to be excessive. The Division also contends that the third prong of the balancing test, the public purpose of the legislation, weighs in its favor. The Division asserts that the 2009 amendments, which were effective immediately, served the public purpose of curtailing abuses of the empire zones program. The Division notes also that, although not retroactive by themselves, the 2009 amendments had a retroactive impact by operation of Tax Law § 14 (i) (1), which deems a revocation of QEZE status to have occurred on the first day of the taxable year of revocation. Accordingly, the Division asserts that retroactivity here was required by statute, a valid public purpose.

The Division rejects petitioners' square corners argument as meritless, asserting that the New Jersey cases cited by petitioners in support thereof have nothing to do with New York State law.

The Division also contends that petitioners have failed to prove that the garbage and fire district charges paid by the Uniland QEZEs qualify as eligible real property taxes under Tax Law § 15 (e).

At oral argument, this Tribunal provided the parties the opportunity to file supplemental written arguments regarding *Matter of Hale* (Tax Appeals Tribunal, June 14, 2018), a case involving the same question of retroactivity as is at issue here.

In response, petitioners contend that applying the three-prong test to petitioners' facts and circumstances, using the same format as was applied in *Hale*, must result in a finding that the 2009 amendments may not be applied retroactively to petitioners. Petitioners assert that the forewarning and public purpose factors weigh in their favor and offset the length of the retroactive period factor that favors the Division.

The Division contends that there is no major distinction between the facts in *Hale* and the facts herein. Accordingly, the Division asserts that the analysis and conclusions in that case are controlling in the present matter and require denial of the petitions.

OPINION

The now-discontinued empire zones program is an economic development program that provides tax benefits to qualified business enterprises located in areas of the state deemed to be in need of such assistance (*see* General Municipal Law § 956 [statement of legislative findings and declaration regarding the program]). Although the program has been discontinued, a QEZE certified as of June 30, 2010 may continue to claim tax benefits for the remainder of its benefit period, so long as it remains eligible. A business enterprise must be certified by the Commissioner of Economic Development under article 18-B of the General Municipal Law to be eligible to claim benefits under the program (*see* General Municipal Law § 959 [a]).

From the inception of the program, business enterprises have been required to meet certain criteria in order to obtain QEZE certification. The Uniland QEZEs met such criteria when they were first certified in the early 2000s.

The 2009 amendments introduced two new eligibility criteria. Specifically, businesses were prevented from reincorporating or transferring employees or assets among related entities in order to appear to have created new jobs or made new investments to maximize tax benefits

under the empire zones program (i.e., no shirt-changing) (*see* General Municipal Law § 959 [a]). Businesses were also required to provide economic returns to the state in the form of employee wages and benefits and facility investment greater in value than the tax benefits received under the program (the 1:1 cost-benefit test) (*see* General Municipal Law § 959 [a] [v] [6]). These changes became effective immediately upon enactment of the law on April 7, 2009 (*see* L 2009, ch 57, p S-1, § 44).

The Uniland QEZEs did not meet the new eligibility criteria. Accordingly, their certifications were revoked by the Commissioner of Economic Development in June 2009.¹

For personal income and corporate franchise tax purposes, a business is deemed to lose its QEZE status on the first day of the taxable year in which its certification is revoked (Tax Law § 14 [i] [1]). This provision has been in effect since 2000 (*see* L 2000, ch 63, part GG). The Division thus deemed the Uniland QEZEs' June 2009 decertification to be effective on January 1, 2009 and disallowed petitioners' claims for QEZE tax credit for 2009 accordingly.

Petitioners contest this application of Tax Law § 14 (i) (1) and contend that the denial of their claims for QEZE credit is the result of an improper retroactive application of the 2009 amendments contrary to their rights to due process under the United States and New York Constitutions.

As we have previously determined, and as the Division now concedes, the application of the 2009 amendments to January 1, 2009 by operation of Tax Law § 14 (i) (1) is a retroactive application of the law (*Matter of Hale; Matter of NRG Energy, Inc.*).²

¹ As noted, the 2009 amendments contained a provision that required the Commissioner of Economic Development to review all QEZEs during the 2009 calendar year to determine if they should retain their certification under the new rules (*see* General Municipal Law § 959 [w]).

² The determination's conclusion to the contrary on this point is thus erroneous. In fairness, we note that the determination predates our decisions in both *Hale* and *NRG*.

In *Hale* and *NRG*, we noted the different opinions among courts and scholars as to whether a statute adopted during an open tax year and made effective as of the first day of that year, such as the present circumstance, is properly considered a retroactive application of a statute. We concluded that it was and our rationale in *NRG* may be applied to the present matter:

“[T]he 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.*, 511 US 244, 290 [1994]). Accordingly, we find that the application of the 2009 amendments to the 2009 tax year constituted a retroactive application of the statute.”

Although retroactive statutes are generally looked upon with disfavor (*see James Sq. Assoc.*, 21 NY3d at 246), retroactive tax statutes are treated somewhat more favorably:

“Retroactivity provisions in tax statutes, if for a short period, are generally valid (citations omitted), and ordinarily are upheld against due process challenges, unless in light of ‘the nature of the tax and the circumstances in which it is laid,’ the retroactivity of the law is ‘so harsh and oppressive as to transgress the constitutional limitation’” (*Matter of Replan Dev.*, 70 NY2d at 455 quoting *Welch v Henry*, 305 US 134, 147 [1938]).

At oral argument, petitioners suggested that this more favorable rule should not apply in the present matter because the 2009 amendments modified the General Municipal Law, not the Tax Law. We disagree. As the Appellate Division noted in *James Sq. Assoc.*:

“The 2009 amendments at issue are not, strictly speaking, retroactive tax laws, i.e., they do not retroactively impose a new tax or increase an existing tax. The amendments, however, alter plaintiffs’ eligibility for tax credits, and the cases addressing the retroactive application of tax statutes are therefore instructive” (91 AD3d 164, 173 [4th Dept 2011], *affd* 21 NY3d 233 n[2013]).

The Court of Appeals also employed case law dealing with the retroactivity of tax statutes in affirming the Appellate Division’s decision in *James Sq. Assoc.*, as did this Tribunal in *Hale*.

We thus properly apply such case law in the present matter.

Petitioners also contend that the Legislature did not intend for the 2009 amendments to be retroactive to January 1, 2009. In support, petitioners argue that the “effective immediately” language of the 2009 amendments (L 2009, ch 57, p S-1, § 44) should take precedence over the general language in the Tax Law. This contention, however, is contradicted by the 2010 amendments (*see* finding of fact 23), by which the Legislature clearly expressed its intent regarding the retroactive effect of the 2009 amendments:

“It is the intent of the legislature to clarify and confirm that the amendments made to the general municipal law by chapter 57 of the laws of 2009 [i.e. the 2009 amendments] that require the revocation of certification of certain business entities previously certified under the empire zones program are intended to be effective for the taxable year in which the revocation of certification occurs and for all subsequent taxable years” (L 2010, ch 57, part R, § 1).

Even without considering the 2010 amendments, the Legislature’s intent regarding the effective retroactivity of the 2009 amendments to the General Municipal Law for Tax Law purposes is clear. As noted, the 2009 amendments created new QEZE eligibility criteria. The amendments also directed a review of all QEZEs during the 2009 calendar year to determine if they should retain their status under the new rules. The Legislature was aware that if such review resulted in a revocation of QEZE status then, pursuant to Tax Law § 14 (i) (1), such revocation would be effective as of January 1, 2009. The 2009 amendments contain no language restricting the operation of Tax Law § 14 (i) (1) with respect to revocations made as a consequence of the new rules.

We next note our disagreement with petitioners’ contention that *James Sq. Assoc.* prohibits any retroactive application of the 2009 amendments, no matter the duration. The question presented in *James Sq. Assoc.* was whether the 2009 amendments could be retroactively applied to the tax year beginning January 1, 2008, a period of at least 16 months.³

³ The parties in *James Sq. Assoc.* disputed whether the period of retroactivity was 16 months (as measured from the April 2009 enactment of the 2009 amendments) or 32 months (as measured from the August 2010 enactment of the 2010 amendments [*see* finding of fact 23]). The Court found it unnecessary to resolve this dispute (21 NY3d at 249 [“Regardless of whether the period of retroactivity is deemed to span 16 or 32 months . . .”]).

As petitioners correctly observe, *James Sq. Assoc.* held that “the 2009 Amendments should not be applied retroactively” without further express qualification (21 NY3d at 250) and did not specifically state that its holding was limited to the 2008 tax year at issue in that case. In the present matter, however, we must determine whether the 2009 amendments may be applied to January 1, 2009, a 97-day retroactive period. Considering that *James Sq. Assoc.* deferentially observes that “one year of retroactivity is not considered excessive according to *Replan*” (21 NY3d at 249), we think it clear that *James Sq. Assoc.* does not provide for a per se ban on retroactive application of the 2009 amendments, as petitioners suggest. Hence, we conclude on this point, as we did in *Hale*: “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.”

As in *Hale*, we now turn to the multi-factor balancing of equities test set forth in *Matter of Replan Dev.*, to determine whether the retroactive application of the 2009 amendments to January 1, 2009 is “so harsh and oppressive” that it violates petitioners’ rights to due process. The test considers 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.*, 21 NY3d at 246).

As we noted in *Hale*, the forewarning and reasonable reliance factor of the *Matter of Replan Dev.* analysis 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. This inquiry focuses on whether “the taxpayer’s ‘reliance’ has been justified under all the circumstances of the case and

whether his ‘expectations as to taxation [have been] *unreasonably* disappointed’” (*Matter of Neuner v Weyant*, 63 AD2d 290, 300 [2d Dept 1978], *appeal dismissed* 48 NY2d 975 [1979] *quoting Wilgard Realty Co. v Commr.*, 127 F2d 514, 517 [2d Cir 1942], *cert denied* 317 US 655 [1942] [emphasis added]).

Similar to the situation in *Hale*, there is no evidence in the record indicating that either the Uniland QEZEs or petitioners could have taken any action in 2008 or 2009 to alter DED’s decision to revoke the Uniland QEZEs’ certification in June 2009. Indeed, petitioners do not claim that they or the Uniland QEZEs could have avoided revocation under the 2009 amendments, but rather argue that they had no opportunity to correct actions that were taken well before 2009 in reliance on their continuing QEZE status under pre-2009 rules. Specifically, petitioners note the cost of establishing and maintaining separate payrolls for each of the Uniland QEZEs; the cost of hiring additional employees in order to qualify for QEZE tax credits; the cost of training, supervising and managing such employees; and the negotiation of long-term leases whereby some portion of the benefit of the QEZE credits was passed on to tenants in the form of lower rents (*see* findings of fact 14-19).

The enactment of tax legislation retroactive to the beginning of the year of enactment is, historically, a common legislative practice (*United States v Carlton*, 512 US 26, 32-33 [1994]). Moreover, tax exemptions and credits are “freely repealable” by the Legislature (*James Sq. Assoc.*, 21 NY3d at 247; NY Const, art XVI, § 1). Accordingly, while petitioners have shown that they continued to rely on pre-2009 law to their detriment during 2009, we nonetheless conclude, as we did in *Hale*, that “given the short period of retroactivity in the present matter, we cannot find that petitioners’ expectations to continue to receive QEZE credits in 2009 were ‘unreasonably disappointed’ (*Matter of Replan Dev.* at 456).”

The duration of the retroactive period factor weighs in favor of the constitutionality of the retroactive application of the 2009 amendments. “[T]ax 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 United States v Darusmont*, 449 US at 292, 297 [“[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”). Indeed, we have found no precedent concluding that such a tax statute violates a taxpayer’s due process rights. Accordingly, we find that “[t]he 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” (*Hale* citing *Matter of Varrington Corp. v City of N.Y. Dept. of Fin.*, 85 NY2d 28, 32 [1995]).

As in *Hale*, we find that the retroactive application of the 2009 amendments lacked a valid public purpose and we adopt the following reasoning contained in *James Sq. Assoc.* with respect to this factor:

“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).

Petitioners note that *James Sq. Assoc.* found that the lack of a valid public purpose for the retroactive application of the 2009 amendments was “dispositive in this case” (21 NY3d at 249). Petitioners thus contend that, as we have determined that the retroactive application here lacks a valid public purpose, we must conclude that such retroactive application is unconstitutional. We disagree and distinguish *James Sq. Assoc.*, as we did previously in this

decision, based on the significant difference between the 16 to 32-month retroactive period in that case and the 97-day retroactive period here. As we noted previously, considering that such relatively brief periods of retroactivity are routinely deemed constitutional (*Matter of Replan*, 70 NY2d at 455), we believe that *James Sq. Assoc.* would have made clear that its conclusion that the lack of a valid public policy was “dispositive” applied to any period of retroactivity and, indeed, would not have limited its conclusion on this point with the language “in this case.”

Pursuant to the foregoing discussion we conclude, as we did in *Hale*, “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.”

As noted, petitioners also contend, alternatively, that the square corners doctrine precludes the retroactive application of the 2009 amendments to the 2009 tax year with respect to petitioners’ claims for QEZE tax credit. As applied to the present matter, petitioners assert that “the square corners doctrine requires the government to deal fairly with its citizens, eschewing inequitable practices” (*Residuary Trust A v Director, Div of Taxation*, 28 N.J. Tax 541, 546 [Superior Ct of N.J., App Div 2015]). Petitioners cite New Jersey cases that use the square corners doctrine to bar the retroactive application of a tax law under the specific facts of those cases (*see Residuary Trust A v Director, Div of Taxation; Harrington v Director, Div. of Taxation*, 29 N.J. Tax 370 [Tax Court of N.J. 2016]; *Milligan v Director, Div. of Taxation*, 29 N.J. Tax 381 [Tax Court of N.J. 2016]). Petitioners concede that there appear to be no New York cases employing this doctrine in a comparable context and thus no precedential authority for the use of the doctrine in the present matter.

We do not think that the square corners doctrine is properly applicable here. As discussed, the Legislature has made its intent clear regarding the 2009 amendments and we have found that the law as applied does not violate petitioners' rights to due process. Under such circumstances, we are compelled to follow the law (*see Matter of Turner Constr. Co. v State Tax Commn.*, 57 AD2d 201, 203 [3d Dept 1977] ["Public policy favors full and uninhibited enforcement of the Tax Law"]).

Although the resolution of the retroactivity and square corners issues is sufficient to deny petitioners' claims in this matter, for the sake of a complete record, we also address whether the garbage district charges and fire district charges are eligible real property taxes for purposes of the QEZE real property tax credit. We note that petitioners have the burden to prove unambiguous entitlement to the credit and that their interpretation of the relevant statute is the only reasonable one (*Matter of Jones*, Tax Appeals Tribunal, November 21, 2018).

Among the benefits available under the empire zones program, Tax Law § 15 provides a credit against tax for eligible real property taxes to QEZEs or, where, as here, the QEZE is a pass-through entity, owners of QEZEs. During the year at issue, the term eligible real property taxes was defined generally as real property taxes imposed on real property owned by the QEZE, located in the QEZE's empire zone, and paid by the QEZE (Tax Law former § 15 [e]).

Subsequent case law clarified that the term excluded special ad valorem levies and special assessments as those terms are defined in Real Property Tax Law § 102 (14, 15) (*Matter of Stevenson v New York State Tax Appeals Trib.*, 106 AD3d 1146, 1148 [3d Dept 2013]) *citing* *Matter of Piccolo v New York State Tax Appeals Trib.*, 108 AD3d 107 [3d Dept 2013]). The garbage and fire districts here appear to be special districts as defined in Real Property Tax Law § 102 (16) and thus the charges appear to be special ad valorem levies or special assessments

intended to fund the continuing operation and maintenance of those districts. Such charges appear analogous to the sanitary district charges for the operation and maintenance of a sewer system deemed ineligible for the QEZE real property tax credit in *Matter of Stevenson v New York State Tax Appeals Trib.* and petitioners have offered no evidence to the contrary.

Petitioners cite a portion of Tax Law § 15 (e)'s definition of eligible real property taxes, as amended subsequent to 2009, to support their contention that the garbage and fire district charges are eligible for the credit. As such amendment was not part of the statute during the year in question, we do not consider this argument. Even if Tax Law § 15 (e) as amended subsequent to 2009 was relevant to the present matter, we note that petitioners have not addressed whether the charges at issue meet the exclusionary criteria also set forth in the amended provision (i.e., "The term 'tax' does not include . . .").

We conclude, therefore, that petitioners have failed to meet their burden to show that the garbage and fire district charges are eligible real property taxes for purposes of the credit under Tax Law § 15.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Carl Montante, Sr. and Carol Montante, Timothy Montante, Laura Zaepfel, Michael and Alexendra Montante, and Carl Montante, Jr. and Wendy Montante is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Carl Montante, Sr. and Carol Montante, Timothy Montante, Laura Zaepfel, Michael and Alexendra Montante, and Carl Montante, Jr. and Wendy Montante are denied; and

4. The notices of disallowance issued to petitioners Carl Montante, Sr. and Carol Montante, Michael and Alexendra Montante, and Timothy Montante (*see* finding of fact 32) and the notices of deficiency issued to petitioners Laura Zaepfel, Carl Montante, Jr. and Wendy Montante (*see* finding of fact 35) are sustained.

DATED: Albany, New York
May 2, 2019

s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner