STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

FRANKLIN C. LEWIS

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 2009, 2010 and 2011.

DECISION
DTA NO. 827791

Petitioner, Franklin C. Lewis, filed an exception to the determination of the Administrative Law Judge issued on June 20, 2019. Petitioner appeared by Bond, Schoeneck & King (Jennifer M. Boll, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard on November 21, 2019 in Albany, New York, which date began the six-month period for the issuance of this decision.

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

ISSUES

I. Whether the retroactive application of amendments to Tax Law § 632 (a) (2) as applied to petitioner was unconstitutional under the Due Process Clauses of the United States and New York State Constitutions.

II. If so, whether petitioner has nonetheless established that the proper New York business allocation percentage of the S corporation was zero in the year of sale (2009), such that none of the income in question is allocable to, or taxable by, New York.

III. Whether petitioner has established grounds warranting abatement of the penalties asserted pursuant to Tax Law § 685 (a) (1) for failing to have filed tax returns for the years 2010 and 2011.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. Petitioner, Franklin C. Lewis, was a nonresident of New York during the years 2009, 2010 and 2011. Prior to July 31, 2009, petitioner owned 50% of the shares of Energy Service Providers, Inc. (ESPI), a New York domestic corporation, incorporated on October 21, 2002, that had in place a valid election to be taxed under subchapter S of the Internal Revenue Code (IRC) (26 USC) for federal and New York state income tax purposes. Generally, an S corporation does not pay income tax at the corporate level but passes its income and deductions through to its shareholders, who report the same on their personal tax returns.

2. ESPI entered into a Securities Purchase Agreement (Purchase Agreement) with U.S. Gas & Electric, Inc. (USGI), dated July 31, 2009, pursuant to which each ESPI shareholder, including petitioner, and USGI "wishe[d] to sell the Purchased Shares to Buyer, and Buyer wishe[d] to purchase the Purchased Shares from the Sellers, on the terms and subject to the conditions of this Agreement."[1] Under the terms of the Purchase Agreement, the sellers,

[1] Article I, section 2.2 (b) of the Purchase Agreement specifies that, while the actual closing date was July 31, 2009, the parties intend that for financial and tax reporting purposes, the closing will be deemed to have occurred on

including petitioner, and the buyer, negotiated and agreed to make an IRC (26 USC) § 338 (h) (10) election. Accordingly, though the transaction was a sale of stock, the effect of the jointly made IRC (26 USC) § 338 (h) (10) election was that ESPI, as seller, was deemed to have sold all of its assets in a taxable transaction, and USGI, as buyer, was treated as having purchased the assets, so as to receive a step-up in the basis of the assets. Generally speaking, such an election at the federal level may be advantageous to the purchaser due to the stepped-up basis of the assets deemed to have been purchased (for future depreciation and/or amortization purposes). The purchaser, in short, gets the convenience of a stock purchase with the tax benefits of an asset purchase. At the same time, such an election may be disadvantageous to the seller, due to possible higher federal tax liability as the result of being taxed at a higher rate on gain from the sale of assets than would be the case on gain from the sale of stock. Since New York's income tax is a federal "conformity based" system, such an election can carry with it New York state tax implications for both residents and nonresidents.

3. Prior to closing on the ESPI sale to USGI, as described above, and prior to agreeing to make the IRC (26 USC) § 338 (h) (10) election, petitioner consulted with his tax accountant, Alan Eckstein, CPA, and others, regarding the tax consequences of the transaction, including specifically whether the IRC (26 USC) § 338 (h) (10) deemed asset sale election would subject petitioner's sale proceeds to New York income tax. In response, petitioner was advised that at the time of the sale (i.e., in 2009), a stock sale that was a deemed sale of assets pursuant to an IRC (26 USC) § 338 (h) (10) election did not change the nature of the transaction for New York income tax purposes. Specifically, petitioner was advised that under a then recently-issued Tax

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June 30, 2009.

Appeals Tribunal (Tribunal) decision (***Matter of Baum***, Tax Appeals Tribunal, February 12, 2009), a transaction such as the proposed ESPI to USGI sale would be treated, for New York purposes, as the sale of an intangible, i.e., stock, notwithstanding the deemed asset sale treatment for federal tax purposes under the IRC (26 USC) § 338 (h) (10) election, leaving a nonresident such as petitioner not subject to New York tax thereon. This advice was specifically conveyed via an email from Mr. Eckstein to petitioner, in which Mr. Eckstein referenced the Tribunal's decision in ***Baum***.

4. After many months of negotiating with the buyer (USGI), and upon the foregoing advice that he would not be subject to New York tax on the gain from the transaction, petitioner agreed to forego continued negotiations seeking an increased purchase price, or an indemnity (hold harmless) provision, from the purchaser for any additional taxes arising as the result of the IRC (26 USC) § 338 (h) (10) election.[2]

5. At no time in 2009 did ESPI liquidate or distribute assets to petitioner. Among other consideration for the sale transaction, petitioner received an installment obligation and a cash payment. Petitioner's installment obligation qualified for treatment under IRC (26 USC) § 453 (h) (1), permitting recognition of gain periodically upon (future) receipt of payments on the installment obligation.

6. ESPI filed a U.S. income tax return for an S corporation (federal form 1120-S), and a corresponding New York S corporation franchise tax return (form CT-3-S), for the short period spanning January 1, 2009 through June 30, 2009, reporting a capital gain, on an installment basis, in the amount of $6,148,266.00. On its form CT-3-S for the foregoing short period, filed

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[2] An election under IRC (26 USC) § 338 (h) (10) is a joint election that must be made by both the purchaser and the seller.

on April 14, 2010, ESPI reported a 100% New York state business allocation percentage (BAP). ESPI did not include a BAP schedule with the filing of this return. Since its incorporation in New York on October 21, 2002, 100% of ESPI's receipts had been apportioned to New York state in its franchise tax filings.

7. Page one of form CT-3–S asks, at line G thereof, "Did the S Corporation make an IRS section 338 or 453 election?" On the form CT-3-S filed by ESPI for the short period during which the sale in question occurred, ESPI checked the "No" box at line G in response to the foregoing question. ESPI's form CT-3-S for this period, as well as petitioner's form IT-203 for the year 2009 (***see*** finding of fact 10), were prepared by the firm by whom Mr. Eckstein was then employed, and he reviewed such returns before they were signed and filed.

8. On August 11, 2010, Tax Law § 632 (a) (2) was amended to specifically state that a non-resident S corporation shareholder must treat the sale of stock subject to an election under IRC (26 USC) § 338 (h) (10) as the sale of assets and apportion the proceeds thereof to New York in accordance with the S corporation's BAP, without consideration of any deemed liquidation (2010 Amendments).

9. On August 31, 2010, the Division issued a memorandum providing public notice and guidance with respect to the 2010 Amendments (***see*** TSB-M-10 [10]I). This memorandum noted that the amendments were retroactive, and specifically were effective for tax years beginning on or after January 1, 2007 and any other taxable year in which the period of limitations on assessment remained open.

10. On October 14, 2010, petitioner filed his 2009 New York State nonresident and part-year resident income tax return (form IT-203), reporting thereon his share of the foregoing capital gain at line seven in both the federal and New York columns, thus indicating that the gain

was reportable to New York. By virtue of ESPI's 100% BAP, petitioner reported 100% of his share of the gain arising from the Purchase Agreement as New York source income. However, on the same return, petitioner reported a New York subtraction modification removing 100% of the foregoing allocated capital gain resulting from the deemed asset sale of ESPI from his New York adjusted gross income (AGI).

11. For the years 2010 and 2011, petitioner received income from the installment payment obligation arising from the Purchase Agreement, and governed under IRC (26 USC) § 453 (h) (1) (A). Petitioner did not file a form IT-203 for either of these years and did not allocate any of the income received under the installment payment obligation to New York, per Tax Law § 632 (a) (2).

12. Both petitioner and Mr. Eckstein testified at hearing that they did not recall receiving any communications from the Division of Taxation (Division) regarding whether or not taxpayers should rely on the Tribunal's decision in ***Baum***. Mr. Eckstein testified that he could not recall, but did not think he was aware of the Division's issuance of any public guidance or notice, including TSB-M-10 (10) I, prior to the October 14, 2010 filing of petitioner's 2009 return.

13. Petitioner did not file an amended return for the year 2009, and did not file any New York State return for either 2010 or 2011. Ultimately, and as a consequence of his reporting position, petitioner did not pay any New York personal income tax on the proceeds arising from the ESPI to USGI sale transaction.

14. The Division conducted a field audit of the final return form CT-3-S filed for ESPI for the short period spanning January 1, 2009 through June 30, 2009, and the corresponding reporting of that S corporation's income by its shareholders, including petitioner. The

Division's review of returns filed by ESPI, and by petitioner, together with the documentation provided on audit, resulted in a determination that the transaction was properly a deemed asset sale, per IRC (26 USC) § 338 (h) (10), with the proceeds from such transaction properly treated as resulting from an asset sale, and thus constituting New York source income to the extent of ESPI's BAP. For 2009, the Division disallowed petitioner's claimed subtraction modification removing the capital gain income from the deemed asset sale from his return since Tax Law § 612 (c) does not include or provide a subtraction modification for such income. In turn, such entire gain was treated as New York source income, allocable as based on ESPI's reported BAP of 100%, and was subjected to New York tax. For 2010 and 2011, the Division determined that petitioner was obligated to file and report the installment payments arising from the deemed asset sale as New York source income, per Tax Law § 601 (e), with the same allocable to New York based on ESPI's reported BAP of 100%, pursuant to Tax Law § 632 (a) (2), and properly subject to New York tax.

15. On May 30, 2013, the Division issued to petitioner a notice of deficiency (assessment ID L-039487251), asserting additional New York state personal income tax due for the years 2009, 2010 and 2011, in the aggregate amount of $810,815.00, plus interest, and penalty under Tax Law § 685 (a) (1) for failure to have filed a return for either of the years 2010 and 2011.

16. At the hearing, petitioner introduced the testimony of James Cahill, a professional engineer with many years of direct experience in the field of public utilities, energy provision and energy efficiency. Mr. Cahill served as ESPI's vice president for the three year period prior to the sale of ESPI that is at issue in this matter. Mr. Cahill explained that in the late 1990s, the energy industry, which had previously been a public utility-based monopoly including generation, transmission, delivery and sale of energy to end-user customers, was deregulated and

restructured such that consumers could select who would supply their energy.[3] Under deregulation and restructuring, the public utilities would continue to transmit and deliver electricity to end-users, via their transmission network (towers, poles, wires, meters, etc.), maintain such distribution network (grid), and be paid for doing so. However, in order to promote energy price competition, reliability, and efficiency, to the benefit of both end-users and the energy industry in general, entities known as energy services companies (ESCOs) were created as new competitive suppliers in the marketplace. At the same time, and in conjunction with the conversion to deregulation, various price-reduction and other incentives became available to end-users who switched to competitive suppliers.[4]

17. Initially, most ESCOs were large, utility-owned (second tier) companies, with power generation capabilities, who owned the electricity, had significant finance availability, and could advise their large customers to undertake large scale energy efficiency upgrades at their facilities, and pay for such upgrades through their bills. Mr. Cahill noted, however, that in connection with deregulation, and the accompanying changes in the manner in which public utilities were to do business, there was a need for smaller companies who could "facilitate the educational knowledge to the customer so that the customer would be able to benefit from the various programs that were now being offered." Mr. Cahill distinguished smaller ESCOs, such as ESPI, from the larger ESCOs described above, as follows:

> "Well, they would call us 'suppliers,' but we facilitated the transaction; we would inform a customer, do you know that your utility says if you switch to

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[3] Deregulation impacted both gas and electric energy. Since ESPI was involved only with electrical energy, this determination confines itself only to that type of energy.

[4] Among the incentives referenced by Mr. Cahill that became available in conjunction with deregulation, were the reduction or elimination of (state and/or local) sales taxes and gross receipts taxes, certain per kilowatt hour reductions in the cost of electricity, and additional rebates based on efficiency upgrades.

> a competitive supplier, you're going to get a benefit of a reduction in sales tax – well, actually, it was a waiver, a complete waiver of sales tax, and a waiver of the gross receipt[s] taxes, and they gave the customers an incentive of 4 mils; I believe it was .004 cent discount off of their usage in the electricity bill. So they encouraged, one, customers to switch to outside or different ways to get their electricity, and then they encouraged the energy service providers, and they created an incentive[s] for us to come in; one was that offset in the taxes, because we weren't – like any company, we would have passed it through if the customer had to pay sales tax on the goods. And if the customers had to pay gross receipts taxes, then the prices would have probably changed to the customers, as well.
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> So that alleviation of taxes created this giant profit center for new companies, as well as it created an opportunity of savings for the customers."

18. Mr. Cahill further distinguished ESPI from the larger ESCOs, including those who had been divested (or "unbundled") from utility companies as second tier companies, by noting that the latter, larger ESCOs could "wield" power, by virtue of their size and financial wherewithal, so as to negotiate with power generators to purchase blocks of power in advance at a more favorable "day-ahead" price, from which a fixed price product could then be offered to customers. By contrast, ESPI and other smaller ESCOs without the clout to do so, obtained electricity for their customers directly through the New York Independent System Operator (NYISO) energy "pool," and "passed through the charges."

19. Mr. Cahill described ESPI as a service provider that facilitated transactions between customers and public utility companies by assisting customers, most of whom were located in New York, in taking advantage of governmental incentives that had become available in connection with deregulation of the utility industry. He stated that EPSI employees would, with the "blessing" or approval of the utilities, contact potential customers in "optimal areas," meaning customers who were receiving their electricity from such public utilities (i.e., captive customers) in areas where various benefits and incentives associated with deregulation were

offered. In turn, and using ESPI's proprietary software, ESPI's employees would input and analyze, or "scrape," utility data regarding such utility companies' customers' electricity usage, in connection with the potential impact of applying the various incentives stemming from deregulation, so as to determine how, and to what extent, such customers could reduce their electrical bills.

20. ESPI's employees contacted potential customers via telephone from a call center located in Pittsfield, Massachusetts, advised that the potential customers' public utility had given its approval for ESPI to contact them, and explained that ESPI could help save money on the potential customers' energy bills. The potential customers would provide their account numbers to ESPI's employees, who in turn would analyze the potential customers' bills, as above, and advise over the phone as to the potential savings. ESPI's aim was to sign up such public utility customers as its own customers, based on the reduced energy price it could offer. ESPI's price for electricity was described as a "blended" per kilowatt hour price, calculated based on ESPI's cost to purchase electricity from NYISO, in combination with utilizing certain of the available price reduction incentives described above, to arrive at a price that was less than the "captive" price charged by the public utility, but which still allowed ESPI to make a profit.

21. To assure it could provide power for its customers, ESPI would advise NYISO of the estimated amount of electricity ESPI's customers would use, so that the same would be "set aside" as available. Electricity was delivered to ESPI's customers by the public utility for the particular customer's area through the power transmission and distribution grid. The public utilities were obligated to maintain the transmission and distribution grid (e.g., repair downed power lines, broken meters, etc.) so as to assure reliable delivery of power. Each ESPI customer

was billed for the amount of electricity used, as metered, and at the price determined under ESPI's contract with each customer.

22. ESPI's customers did not pay ESPI directly. Instead, under the "one-bill" system, the delivering public utility would bill each customer based on their metered consumption of electricity, and would remit the amount due ESPI after collecting payment from the customer on behalf of ESPI. ESPI would, in turn, pay NYISO based on the metered ("trued-up") amount of power consumed by its customers, with the differential (less ESPI's operating costs) representing ESPI's profit.[5] In consequence, whereas consumers who elected to purchase their electricity directly from the public utilities would pay the public utility's captive customer price, consumers who purchased from ESCOs, such as ESPI, could receive a lower price per kilowatt hour for their electricity based upon the particular blend of the tax benefits, rebates, discounts, and other incentives available from the various competing ESCOs. Mr. Cahill described the foregoing as follows:

> "[ESPI] took [the state and local sales tax] reductions, as well as the .004 reduction. And then, because we were facilitating the transaction, we then offered back to the customer the ability to reduce the rate based on those – so their bill, based on the inclusion of taxes and what they were paying before was X. But because they said, please go with Energy Service Providers, we're going to eliminate the [sales taxes] for you and we're going to reduce your bill by .004, then we were allowed to go in there and we – you know, we'd have transactional fees in there, but we gave back a blended reduced price for the customer. So it was definitely lower than they were paying prior to the relationship [with ESPI]."

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[5] In his testimony, Mr. Cahill stopped short of affirmatively stating that ESPI was responsible to pay for the electricity used by a customer in the event that customer did not pay their bill. Rather, he noted the obligation of the delivery utility to bill and collect from the customer under the one-bill system, and the authority of the utility, as opposed to ESPI, to suspend or terminate power delivery in the event of customer non-payment. Nonetheless, the tenor of the testimony, together with contract documents in the record concerning electricity purchases by ESPI from NYISO, support the finding that if a customer didn't pay for their electricity, ESPI was still required to pay NYISO.

23. Mr. Cahill stated in his testimony that ESPI's employees carried out the foregoing activities via telephone and computer contact from ESPI's call center in Pittsfield, Massachusetts. He also stated his opinion that ESPI did not take physical possession of a tangible asset, per se, but rather that "it's all done through via meters and electronic transfer of data."

24. "ESPI's Business" is defined in Article VIII of its Purchase Agreement with USGI as having "the meaning set forth in the Recitals." Item C of the Purchase Agreement Recitals states that ESPI is "in the business of providing energy to commercial and residential customers in certain states in which the energy market has been deregulated (the 'ESPI Business')." The Purchase Agreement provides, at section 2.11 (c), that ESPI holds New York Retail Licenses allowing ESPI to "sell or market electric energy at retail in the State of New York." Section 2.22 (b) of the Purchase Agreement states that there are no matters outstanding that would materially impact ESPI's "ability to transact business as an electric supplier in any jurisdiction." On its federal forms 1120-S, ESPI reported its "business activity code number" as "221100," corresponding generally to "Utilities," and code-specifically to "power generation, transmission and distribution." On its federal and New York corporation tax returns, ESPI consistently reported its "principal business activity" as "energy provider," and its "product or service" as "energy."

25. As noted, since its incorporation in 2002, 100% of ESPI's receipts have been apportioned to New York State for purposes of computing and reporting its BAP on its New York State S corporation franchise tax filings. In fact, ESPI reported a 100% BAP on such filings for all of the years spanning 2002 through its sale in July 2009, with the exception only of the year 2006, when (as an apparent consequence of "BAP factor weighting") it reported a 60%

BAP.[6] By contrast, none of ESPI's receipts were apportioned to the Commonwealth of Massachusetts during any of the years 2006 through 2009.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first addressed petitioner's argument that the retroactive imposition of the tax liability based upon the 2010 Amendments violates the Due Process Clauses of the US and NY Constitutions. The Administrative Law Judge noted that petitioner was aware that past legal challenges had upheld the retroactive application of the 2010 Amendments but maintained that his challenge should prevail because the sale and the IRC (26 USC) § 338 (h) (10) deemed asset sale election herein (the transactions at issue) occurred after the Tribunal's decision in ***Baum***. The Administrative Law Judge then briefly reviewed those past legal challenges: ***Caprio v New York State Dept. of Taxation & Fin.*** (25 NY3d 744 [2015], ***rearg denied*** 26 NY3d 955 [2015], ***Matter of Luizza*** (Tax Appeals Tribunal, March 29, 2016) and ***Matter of Baum***.[7]

The Administrative Law Judge continued by discussing the legislative history of the issue of New York's treatment of sales of stock of New York related S corporations by nonresidents where the gains from the sales were treated for federal purposes as deemed asset sales under IRC

[6] Beginning in 2007, New York State required the allocation of corporate income on the basis of a BAP consisting of a single, receipts only, apportionment factor, as opposed to the inclusion of additional property and payroll BAP apportionment factors, as had been the case in earlier years.

[7] The Administrative Law Judge also referenced by citation ***Matter of Mintz*** (Division of Tax Appeals, June 4, 2009). The Administrative Law Judge noted that while determinations issued by administrative law judges "shall not be cited" and "shall not be considered as precedent" (***see*** Tax Law § 2010; ***compare*** Tax Law § 2016), ***Matter of Mintz*** was referenced by citation in his determination since that determination was specifically referenced in the legislature's findings accompanying the 2010 Amendments and was identified by citation in the Court of Appeals' decision in ***Caprio***. We agree with this statement, but disagree that ***Matter of Mintz*** is relevant to the current matter as it dealt with an IRC (26 USC) § 453 (h) (1) (a) transaction and not, as in the present matter, an IRC (26 USC) § 338 (h) (10) transaction.

(26 USC) § 338 (h) (10) or installment sales under IRC (26 USC) § 453 (h) (10). The Administrative Law Judge noted that at the time of the transactions at issue in this matter, the controlling statute, Tax Law former § 632 (a) (2), did not address this issue. The Administrative Law Judge explained that in response to ***Baum*** and an Administrative Law Judge determination, the Legislature amended the statute effective August 11, 2010, to provide that any gains resulting from elections made under IRC (26 USC) §§ 338 (h) (10) or 453 (h) (1) (A) were to be recognized as New York source income. The 2010 Amendments were made retroactive to taxable years beginning on or after January 1, 2007. The Administrative Law Judge noted that the Division issued a memorandum providing guidance to the public that reiterated the retroactive nature of the 2010 Amendments. The Administrative Law Judge explained that, thereafter, ***Caprio*** and ***Luizza*** were issued upholding the retroactive application of the 2010 Amendments to the transactions at issue in those cases.

The Administrative Law Judge began his analysis of the circumstances of this case by noting that it was controlled by the balancing test set forth in ***Matter of Replan Dev. v Department of Hous. Preserv. & Dev. of City of N.Y.*** (70 NY2d 451, 455 [1987], ***appeal dismissed***, 485 US 950 [1988], which looks to three factors: (1) "the taxpayer's forewarning of a change in the legislation and the reasonableness of [the taxpayer's] 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.***, 70 NY2d at 456; ***see James Sq. Assoc. LP v Mullen***, 21 NY3d 233, 246 [2013]).

In reviewing whether petitioner had forewarning of the 2010 Amendments and whether petitioner's reliance on the law prior to the 2010 Amendments was reasonable, the Administrative Law Judge noted that the only fact distinguishing this case from ***Caprio*** and

Luizza was the fact that the transactions at issue occurred after the Tribunal's decision in ***Baum***. The Administrative Law Judge explained that the Legislature intended the 2010 Amendments to be retroactive to all open years and did not limit this direction in any manner by reference to the decision in ***Baum***. The Administrative Law Judge found that in evaluating this factor, petitioner's course of conduct needed to be evaluated not only at the time of the transactions at issue, but also during the time of his subsequent return positions, which were taken after the 2010 Amendments and the issuance of the Division's memorandum providing guidance on the 2010 Amendments.

The Administrative Law Judge explained that the Legislature was aware of ***Baum*** when it adopted the 2010 Amendments and did not carve out any exception to application of retroactivity for transactions that postdated ***Baum*** and noted that ***Caprio*** approved of such full retroactivity. The Administrative Law Judge further explained that this Tribunal in ***Luizza*** found that ***Caprio*** required a conclusion that the legislative findings regarding the 2010 Amendments alone defeated any argument that the 2010 Amendments could not have been foreseen.

Finally, in his analysis of this factor, the Administrative Law Judge pointed to this Tribunal's discussion in ***Luizza*** regarding the public purpose for the retroactivity of the statute, and found that this Tribunal concluded that there was no indication in ***Caprio*** "that the deemed sale amendments adopted by the Legislature in response to this Tribunal's decision in ***Matter of Baum***, were meant to be excluded from" the conclusion that the complete retroactive application of the 2010 Amendments should be upheld.

The Administrative Law Judge next addressed the remaining factors set forth in ***Replan***, the length of the retroactive period and the public purpose for the retroactive application, and found that such factors also weighed in favor of the Division's position. The Administrative

Law Judge emphasized that the Court of Appeals in ***Caprio*** accepted the Legislature's stated aim of preventing the consequences of an incorrect Tribunal decision, such as avoiding confusion in filing, unintended refunds and protracted litigation, as a public purpose that passed constitutional muster. Accordingly, the Administrative Law Judge determined that the imposition of the tax at issue was not an unconstitutional retroactive application of law.

Having determined that the retroactive application of the 2010 Amendments was constitutional, the Administrative Law Judge addressed petitioner's New York business allocation percentage argument. The Administrative Law Judge found that petitioner had not established his claim that the business allocation percentage of ESPI was zero and that, therefore, none of its income was allocable to, or taxable by, New York.

With regard to the penalties under Tax Law § 685 (a) (1) for failing to file tax returns for 2010 and 2011, the Administrative Law Judge noted that these returns were due after the adoption of the 2010 Amendments and the issuance of the Division's memorandum providing guidance on the retroactivity of the 2010 Amendments. The Administrative Law Judge pointed to the fact that petitioner's 2009 return affirmatively indicated that no IRC (26 USC) § 338 (h) (10) election was made by petitioner as a fact that cast doubt on the credibility of witness testimony that he completely and reasonably relied on ***Baum*** and that he was unaware of the changes in the law that occurred after this Tribunal's decision in ***Baum***. Accordingly, the Administrative Law Judge sustained the penalties.

ARGUMENTS ON EXCEPTION

Petitioner agrees with the Administrative Law Judge that the three-factor balancing test set forth in ***Replan*** controls the outcome of this issue and acknowledges that ***Caprio*** and ***Luizza*** upheld the Legislature's retroactive application of the 2010 Amendments as constitutional.

Petitioner asserts, however, that the facts in this matter are distinguishable because petitioner reasonably relied upon a decision of this Tribunal, not a non-precedential determination of an Administrative Law Judge.

While petitioner acknowledges that the transactions at issue here and in ***Caprio*** and ***Luizza*** are similar in structure, petitioner asserts that such similarities do not control the outcome of this issue. Petitioner notes that after the transactions that were the subject of the ***Caprio*** and ***Luizza*** decisions occurred, the Tribunal issued its decision in ***Baum*** holding that, notwithstanding an IRC (26 USC) § 338 (h) (10) election at the federal level, the sale at issue remained a sale of stock for New York purposes, the gain from which is not taxed to a nonresident. Petitioner's accountant assured him that, based upon ***Baum***, it was clear that the transactions at issue would be considered a sale of stock for New York purposes notwithstanding the IRC (26 USC) § 338 (h) (10) election. Petitioner argues that as the ***Baum*** decision was binding precedent under New York law, it was entirely reasonable for him to rely upon it in determining any New York tax liability. Furthermore, petitioner notes Tax Law § 632 (a) (2) did not specifically address how a nonresident's gain from the sale of stock in a New York S corporation should be treated when a federal deemed sale election was made under IRC (26 USC) § 338 (h) (10), and that it was not until more than a year after the transactions at issue that the 2010 Amendments were adopted.

Petitioner also disagrees with the premise of the Administrative Law Judge's analysis that petitioner's reliance must be measured at the respective tax filing deadlines. Rather, petitioner argues that whether his reliance was reasonable must be evaluated at the time of the sale, when the critical decisions surrounding the IRC (26 USC) § 338 (h) (10) election were made.

Petitioner argues that the remaining two factors of the ***Replan*** analysis are met when applied to the circumstances of this case. With regard to the public purpose of the retroactive

application of the 2010 Amendments, petitioner argues that the state's loss of revenue is mitigated by the fact that few taxpayers are in the position of petitioner, i.e., having relied upon the Tribunal's decision in ***Baum*** and then having preserved their rights to appeal the Division's subsequent treatment of their IRC (26 USC) § 338 (h) (10) election in contradiction of that decision. Petitioner emphasizes that public policy requires that taxpayers be allowed to rely upon Tribunal decisions.

Alternatively, petitioner asserts that ESPI did not sell electricity, but merely facilitated virtual transactions between suppliers, deliverers and consumers of electricity and that therefore its New York business allocation percentage was zero.

With regard to the penalties under Tax Law § 685 (a) (1) for failing to file tax returns for 2010 and 2011, petitioner asserts that any failure to file was due to reasonable cause and not due to willful neglect.

The Division agrees that the three-factor balancing test set forth in ***Replan*** controls the outcome of this issue, but asserts that ***Caprio*** and ***Luizza*** upheld the Legislature's retroactive application of the 2010 Amendments as constitutional and require the same conclusion here. The Division asserts that the Administrative Law Judge correctly determined that the 2010 Amendments were made retroactive to tax years beginning on or after January 1, 2007 and any other year for which the applicable statute of limitations remained open in order to correct ***Baum*** and a determination of an Administrative Law Judge that had erroneously overturned the longstanding policies of the Division.

The Division implies that petitioner's reliance on his accountant was not reasonable because the accountant understood the effects of an IRC (26 USC) § 338 (h) (10) election to be that the seller continued to treat the sale as the sale of stock rather than an asset sale which is

contradictory to the true effects of the election and was not aware of the 2010 Amendments or the public guidance offered by the Division prior to petitioner's 2009 income tax filing. However, the Division then argues that the Tribunal opined on this very issue in ***Luizza***, where petitioners argued that they reasonably relied on advice of counsel and had no forewarning of the 2010 Amendments, and that this Tribunal held such arguments were insufficient to distinguish the case from ***Caprio***.

The Division points to ***United States v Carlton*** (512 US 26 [1994]) as standing for the proposition that even the retroactive amendment of a congressionally enacted statute relied upon by a taxpayer did not violate the taxpayer's due process rights. The Division notes that in ***Carlton***, the United States Supreme Court upheld the 14-month retroactive application of a statute correcting a legislative mistake that created significant and unanticipated revenue losses (***Carlton*** 512 US at 32-33). The Division argues that the 2010 Amendments were also intended as a corrective measure and that the retroactive application of the 2010 Amendments was upheld in ***Caprio***.

The Division asserts that petitioner's arguments that this matter is distinguishable from ***Caprio*** fail as such arguments are the same as those espoused unsuccessfully by the petitioners in ***Luizza***. The Division also asserts that petitioner's argument that the structure of the sale was based upon ***Baum*** was the same argument dismissed by the Tribunal in ***Luizza***. Furthermore, the Division asserts that the Administrative Law Judge correctly concluded that the legislative findings and ***Caprio*** and ***Luizza*** controlled and that the petitioner's reliance on ***Baum*** was unreasonable, whether looked at in 2009 at the time of the sale or at the times that petitioner's 2009, 2010 and 2011 personal income tax returns were due.

The Division asserts that the Administrative Law Judge also correctly found that the remaining ***Replan*** factors did not weigh in petitioner's favor. Regarding the length of the retroactive period, the Division argues that the court in ***Caprio*** held that the retroactive period of all open tax years was rationally related to the legislative goals of correcting an administrative error and preventing an unintended loss of revenue and controls in this case. Indeed, the Division asserts that petitioner did not even challenge the length of the retroactive period. Regarding the public purpose factor, the Division asserts that the Administrative Law Judge correctly relied on ***Caprio*** and ***Luizza*** in determining that the curative nature of the 2010 Amendments as set forth by the Legislature was a valid public purpose allowing for the retroactive application of the legislation.

In response to petitioner's alternative argument, the Division asserts that petitioner failed to demonstrate by clear and convincing evidence that ESPI's New York business allocation percentage was anything other than 100%.

With regard to the penalties under Tax Law § 685 (a) (1) for failing to file tax returns for 2010 and 2011, the Division asserts that petitioner had an obligation to file tax returns for those years and failed to establish that any failure to file was due to reasonable cause and not due to willful neglect.

OPINION

History of Issue

In July of 2009, when the subject transaction occurred, Tax Law former § 632 (a) (2) provided as follows:

> "In determining New York source income of a nonresident shareholder of an S corporation where the election provided for in subsection (a) of section six hundred sixty of the article is in effect, there shall be included only the

> portion derived from or connected with New York sources of such shareholder's pro rata share of items of S corporation income, loss and deduction entering into his federal adjusted gross income, . . . , as such portion shall be determined under regulations of the commissioner consistent with the applicable methods and rules for allocation under article nine-A or thirty-two of this chapter."

As such, Tax Law former § 632 (a) (2) did not specifically address how a New York nonresident's gain from the sale of stock in a New York S corporation would be impacted where such sale transaction was treated, pursuant to a valid IRC (26 USC) § 338 (h) (10) election, as a deemed sale of the assets of the S corporation to the buyer, followed by a deemed liquidation of the S corporation in exchange for its stock, notwithstanding that the transaction was carried out (in fact) via the sale of the S corporation's stock.

As discussed above, in February of 2009, prior to the transactions at issue, the Tribunal issued its decision in ***Baum***, which held that, notwithstanding an election under the provisions of IRC (26 USC) § 338 (h) (10) where the sale of stock is deemed the sale of assets, the substance of such a transaction remained a sale of stock for New York income tax purposes. Thus, the Tribunal concluded that as gains from the sale of stock are not New York source income to a nonresident, such gains were not required to be included in the New York entire net income of the subchapter S corporation, or to be passed through to the shareholders thereof.

In response, the Legislature amended Tax Law § 632 (a) (2) in 2010 to address the issue of nonresident S corporation shareholders' treatment of income related to IRC (26 USC) § 338 (h) (10), the federal provision that was the subject of ***Baum***, to provide as follows:

> "In determining New York source income of a nonresident shareholder of an S corporation where the election provided for in subsection (a) of section six hundred sixty of this article is in effect, there shall be included only the portion derived from or connected with New York sources of such shareholder's pro rata share of items of S corporation income, loss and deduction entering into his federal adjusted gross income, increased by reductions for taxes described in

> paragraph two and three of subsection (f) of section thirteen hundred sixty-six of the internal revenue code, as such portion shall be determined under regulations of the commissioner consistent with the applicable methods and rules for allocation under article nine-A or thirty-two of this chapter, *regardless of whether or not such item or reduction is included in entire net income under article nine-A or thirty-two for the tax year. . . . In addition, if the shareholders of the S corporation have made an election under section 338(h)(10) of the Internal Revenue Code, then any gain recognized on the deemed asset sale for federal income tax purposes will be treated as New York source income allocated in a manner consistent with the applicable methods and rules for allocation under article nine-A or thirty-two of this chapter in the year that the shareholder made the section 338(h)(10) election. For purposes of a section 338(h)(10) election, when a nonresident shareholder exchanges his or her S corporation stock as part of the deemed liquidation, any gain or loss recognized shall be treated as the disposition of an intangible asset and will not increase or offset any gain recognized on the deemed asset sale as a result of the section 338(h)(10) election"* (***see*** L 2010 ch 57 pt B, § 2 [language added by the amendment in 2010 is italicized]).

The legislative findings accompanying the adoption of those amendments provided

> "Legislative findings. The Legislature finds that it is necessary to correct a decision of the tax appeals tribunal and a determination of the division of tax appeals that erroneously overturned the longstanding policies of the department of taxation and finance that nonresident subchapter S shareholders who sell their interest in an S corporation pursuant to an election under section 338(h)(10) or section 453(h)(1)(A) of the Internal Revenue Code, respectively, are taxed in accordance with that election and the transaction is treated as an asset sale producing New York source income. Section two of this act is intended to clarify the concept of federal conformity in the personal income tax and is necessary to prevent confusion in the preparation of returns, unintended refunds, and protracted litigation of issues that have been properly administered up to now" (L 2010 ch 57 pt C, § 1).

The foregoing amendments to Tax Law § 632 (a) (2) were made applicable "to taxable years beginning on or after January 1, 2007" (L 2010 ch 57 pt C, § 4, amending L 2010 ch 312 pt B, § 1).

As noted previously, the Court of Appeals decision in ***Caprio*** was issued in July of 2015. In ***Caprio***, plaintiffs, nonresidents of New York, together sold all the shares in an S corporation that earned nearly 50% of its income in New York. The parties to this March 1, 2007 sale

jointly elected IRC (26 USC) § 338 (h) (10) deemed asset sale treatment, and the sale was structured such that the purchase price was to be paid in installments under promissory notes, whereby the seller would report income from the sale in future years when such income was received, per IRC (26 USC) § 453 (h) (1) (A), rather than in the year in which the notes representing the installment obligations were received by the plaintiffs. Plaintiffs reported no income or gain from the sale for New York purposes, based on their position that the gain should be treated as proceeds of the sale of an intangible, i.e., stock, as opposed to the sale of assets. In particular, the plaintiffs relied on the federal installment payment provision IRC (26 USC) § 453 (h) (1) (A), which provides that: "the receipt of the payments under such obligation (but not the receipt of such obligation) by the shareholder shall be treated as the receipt of payment for the stock." Plaintiff's position in ***Caprio*** was taken at the time of the sale in 2007, prior to this Tribunal's decision in ***Baum***.

The ***Caprio*** court found the retroactive application of the 2010 Amendments valid under the Due Process Clauses of the US and NY Constitutions. As relevant to the analysis of this case, the Court of Appeals in ***Caprio*** pointed out that the plaintiffs specifically limited their challenge to the retroactive application of the installment payment provisions of IRC (26 USC) § 453 (h) (1) (A). Thus, initially it appeared that the issue of the retroactive application of the deemed asset sale amendments was not before the court in Caprio (***see Caprio***, 25 NY3d at 748). Indeed, the court noted "that in their submissions before Supreme Court, plaintiffs limited their challenge to the retroactive application of the amendments pertaining to the tax treatment of installment obligations" and "expressly acknowledged that they 'did not challenge those portions of the 2010 Amendments related to' deemed asset sales, 'which have no bearing on [plaintiffs'] claims and [were] not even identified in the Verified Complaint'" (***id.***). The court then explained

that this acknowledgment, and the fact that plaintiffs conceded the constitutionality of the prospective application of the statute "distinguishes this case from ***Burton v New York State Dept. of Taxation & Fin.***, [decided herewith], in which the plaintiffs challenge the prospective application of the amendments to transactions in which an election has been made under section 338 (h) (10)" (***id.***, citations omitted).

While this language appeared to limit the application of ***Caprio*** to the issue of the retroactive application of the installment obligation amendments, the court explained that the plaintiffs in ***Caprio*** utilized both IRC (26 USC) § 338 (h) (10) and IRC (26 USC) § 453 (h) (1) (A) in reporting their sale of all the shares of their company (***Caprio***, 25 NY3d at 747-48). Furthermore, the court, throughout its decision, continually referred to: (1) both the deemed asset sale and the installment obligation when discussing the plaintiffs' treatment of the sale at issue; (2) the 2010 Amendments to the statute, including the Legislative findings accompanying the statute, rather than only the installment sale amendments; and (3) this Tribunal's decision in ***Baum*** dealing with a deemed asset sale election, as well as a determination of an Administrative Law Judge dealing with an installment sale (***Caprio***). The final judgment of the court, "that the retroactive application as to plaintiffs of the 2010 amendment to Tax Law § 632 (a) (2) is valid under the Due Process Clauses of the United States and New York Constitutions," did not differentiate between the deemed asset sale amendments and the installment obligation amendments. Finally, in ***Burton***, the case decided with ***Caprio***, the court noted that "[D]uring the pendency of the matter before the Supreme Court plaintiffs abandoned their challenge to the retroactive application of Tax Law § 632 (a) (2). [W]e reject just such a challenge and uphold the retroactivity of the statute in ***Caprio v New York State Dept. of Taxation & Fin.***, [decided herewith]" (***Burton v New York State Dept. of Taxation & Fin***., 25 NY3d 732, 743, footnote 1

[2015] [citation omitted]). Thus, the Court of Appeals made clear its intention to uphold the retroactivity of the entirety of the 2010 Amendments, the deemed asset sale amendments as well as the installment obligation amendments.

Luizza was issued by this Tribunal in March of 2016. In that case, Jeffrey Luizza, a nonresident of New York, sold all his shares of an S corporation that did business partially in New York. The sale was initially structured to be a sale of stock. However, in subsequent negotiations, the buyer requested Mr. Luizza to join in an election to treat the transaction as a deemed asset sale under IRC (26 USC) § 338 (h) (10). Mr. Luizza, concerned about potential negative New York tax implications, proposed the inclusion of a "hold-harmless" indemnification clause reading, "Buyer shall reimburse seller for all costs and negative tax consequences of the 338 (h) (10) election." In response, the buyers preferred to address the tax cost of the § 338 (h) (10) election, if any, "up front." To determine the potential for additional taxes, Mr. Luizza and his long-time accountants researched the tax implications of the election, and concluded, based on their view of the law applicable at the time of the sale, that there would be no additional New York tax consequences to Mr. Luizza resulting from the § 338 (h) (10) election. As a result of this advice, Mr. Luizza, like petitioner herein, did not require the buyer to increase the purchase price or to provide indemnity for any additional taxes resulting from the election. As in ***Caprio***, no income or gain from the sale was reported for New York purposes, based upon the position that the same should be treated as proceeds of the sale of an intangible, i.e., stock, as opposed to the sale of assets, notwithstanding the deemed asset sale result afforded under the federal § 338 (h) (10) election. Again, this position was taken in March of 2016, prior to this Tribunal's decision in ***Baum***.

In ***Luizza***, the Tribunal addressed whether the retroactive application of the 2010 Amendments as applied to petitioner was constitutional based on the Court of Appeals decision in ***Caprio***, or whether petitioner sufficiently distinguished the facts and circumstances of ***Luizza*** so as to support a finding that the retroactive application of the 2010 Amendments as applied to petitioner constituted a violation of the Due Process Clauses of the US and NY Constitutions. The distinguishing fact between ***Caprio*** and ***Luizza*** was that ***Caprio*** dealt with the issue of the retroactive application of the 2010 Amendments to the installment sale provisions of IRC (26 USC) § 453 (h) (1) (A), while at issue in ***Luizza*** was the retroactive application of the deemed sale provisions of IRC (26 USC) § 338 (h) (10). Based on the above discussion of ***Caprio***, this Tribunal determined that the fact that ***Luizza*** dealt with the federal deemed asset provisions and not the federal installment sale provisions was a distinction without a difference, as the Court of Appeals decision in ***Caprio*** indicates that the retroactive application of the 2010 Amendments with respect to either of these provisions did not violate the Due Process Clauses of the US and NY Constitutions.

Thus, the decision of this Tribunal in ***Luizza*** was focused on the issue of whether ***Caprio*** applied on its face to the federal deemed sale election provisions of IRC (26 USC) § 338 (h) (10) as well as federal installment sale provisions of IRC (26 USC) § 453 (h) (1) (A).

Balancing of Equities Test

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 US and NY 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.***, 70 NY2d at 456). We now turn to such an analysis in the present case.

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

The question relevant to this factor is whether we agree with petitioner's assertion that this case is distinguishable from ***Caprio*** and ***Luizza*** because at the time petitioner made his decision to agree to the federal deemed asset sale election pursuant to IRC (26 USC) § 338 (h) (10), and forgo any accommodation from the seller in return for agreeing to the election, this Tribunal had issued its decision in ***Baum***. Petitioner argues that as a decision of the Tribunal is final pursuant to law, it would be nonsensical to find that his reliance on the decision in agreeing to the IRC (26 USC) § 338 (h) (10) election was anything other than reasonable. The Division counters that because the Legislature specifically set forth that the purpose of the 2010 Amendments was to retroactively correct the Tribunal decision in ***Baum***, which decision contradicted a longstanding policy of the Division, it was not reasonable for petitioner to rely on ***Baum***. The Division asserts that the Legislature's intended retroactivity was validated by the Court of Appeals in ***Caprio*** and that any holding finding that the retroactive application of the 2010 Amendments in this case violates the Due Process Clauses of the US and NY Constitutions would require that ***Caprio*** be disregarded.

The Tribunal's decision in ***Baum*** "finally and irrevocably" decided all the issues in that case (Tax Law § 2016). Hence, the law at the time the transactions at issue were negotiated and concluded was that the deemed sale of assets pursuant to an IRC (26 USC) § 338 (h) (10) election did not change the nature of the transaction from that of a stock sale (***Matter of Baum*** ["S corporations must compute their income for New York tax purposes as if the section 338 (h) (10) election had not been made"]). However, petitioners are required to show not just what the

law was, but also that petitioner had no forewarning that changes might be made in the relevant law and that petitioner's reliance on the then-existing law was reasonable.

We must first consider the time frame in which we are to review the reasonableness of petitioner's actions. Although the Administrative Law Judge concurred with petitioner that his reliance on the law is to be evaluated as of the time of the sale, he also found that the positions taken by petitioner at the time his personal income tax returns were due for 2009, 2010 and 2011 are relevant to the analysis. The Administrative Law Judge provided no basis for this conclusion. Petitioner again asserts on exception that whether his reliance was reasonable must be evaluated at the time of the transactions at issue. The Division responds that petitioner's reliance was unreasonable; whether evaluated at the time of the transactions in issue or at the time petitioner's personal income tax returns were required to be filed. We find that in determining whether petitioner reasonably relied on the law and whether he had forewarning of any changes to the law, the only relevant time period is the period of the negotiation and completion of the transactions at issue (***see James Sq.***, 21 NY3d 248 [looked to the time period when altering behavior could have had an effect]).

Petitioner sought out and relied upon professional advice regarding the New York tax implications of a deemed asset sale election under IRC (26 USC) § 338 (h) (10) and would not have forgone the ability to obtain accommodations for any increased New York tax liability based upon the election had there been a forewarning of the change in the law that took place a year after the transactions at issue (***see*** findings of fact 3 and 4). Such facts show that petitioner was reasonable in his reliance by having consulted a professional for advice, and that he relied upon the advice to his detriment.

However, in ***Luizza***, we found that despite similar facts, ***Caprio*** still required us to conclude that petitioner's reliance on the law could not be held to be reasonable because, according to ***Caprio***, petitioner should have been aware, at the time he negotiated and concluded the transactions at issue, of the long-standing policies of the Division. In particular, the Court of Appeals in ***Caprio*** found that: "[A]cceptance of plaintiffs' interpretation of the pre-amendment law would require that we discredit the legislative findings articulated in the amended statute that long-standing policies of DTF required taxpayers to pay proportionate state income taxes on deemed asset sale gains" (***Caprio***, 25 NY3d at 754). The Division asserts that the circumstances of this case do not differ from ***Luizza*** and, therefore, the legislative findings alone require a conclusion that the Division's long-standing policy differed from petitioner's interpretation of the law, making petitioner's reliance on his interpretation unreasonable and defeating petitioner's argument that petitioner had no way of foreseeing the change made by the 2010 amendments.[8] We disagree.

What is different in this case is that petitioner was not relying upon his interpretation of the law, but rather this Tribunal's decision in ***Baum***, a different distinction than that presented in ***Luizza***. We agree with petitioner that this fact requires a different conclusion than that in ***Caprio*** or ***Luizza***, where there was no Tribunal decision at the time of the transactions at issue.

A decision of this Tribunal is a final, irrevocable and precedential decision, unless the taxpayer petitions for judicial review (Tax Law § 2016; ***see also Matter of TransCanada Facility USA***, Tax Appeals Tribunal, May 1, 2020). Petitioner herein relied upon a final decision of this Tribunal in making his decision to forgo any accommodation from USGI, the

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[8] We are also unpersuaded by the Division's reliance on ***United States v Carlton***. That case upheld the retroactive application of legislation "meant to cure an unintended error by the legislature" (***James Sq.***, 21 NY3d at 248). That is not the present case.

seller, in return for his agreeing to a deemed sale election under IRC (26 USC) § 338 (h) (10). Accordingly, we find that petitioner's reliance on ***Baum*** was reasonable.

In ***Luizza,*** we stated that the legislative findings accompanying the 2010 Amendment alone required us to find that it had been unreasonable for petitioners therein to rely on their interpretation of the current status of the law. Where, as here, petitioners rely upon a final decision of this Tribunal, as opposed to their interpretation of the law, the conclusion must change. We believe that to hold otherwise would lead to a "harsh and oppressive" result that would "transgress the constitutional limitation" of due process (***Matter of Replan Dev.***, 70 NY2d at 455 [citations omitted]).

Accordingly, this factor weighs against the constitutionality of the retroactive application of the statute.

Length of retroactive period

There is no bright line delineating when a period of retroactivity of a taxing statute becomes unconstitutional; it is an issue to be reviewed based upon the facts and circumstances of each case. In this case, the retroactive period was approximately one year from the time of the execution of the Purchase Agreement.[9] As noted by the Division, petitioner has not presented an argument in support of the proposition that the length of the retroactive period is unreasonable to the extent to be considered unconstitutional. Indeed, it is a rare case that would find such a short period to be unreasonable (***see Caprio***, 25 NY3d at 757-58). Accordingly, this factor weighs in favor of the constitutionality of the retroactive application of the statute.

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[9] We do not know from the record when the negotiations surrounding the sale began so we cannot calculate a retroactive period to that date.

Public purpose for retroactive application

The public purpose in the present case remains as it was in ***Caprio*** and ***Luizza***: a corrective measure to prevent the consequences of an incorrect Tribunal decision, such as avoiding confusion in filing, unintended refunds and protracted litigation. In both ***Caprio*** and ***Luizza***, it was found that that "the curative, rational public purposes set forth in the legislative findings are compelling and, thus, this factor also supports upholding the retroactive application of the statute" (***Caprio***, 25 NY3d at 758 [citations omitted]).

As we noted in ***Luizza***, we do not know whether any arguments regarding the finality of Tribunal decisions were before the Court of Appeals in ***Caprio***. However, we do know that the issue of petitioner's reliance on ***Baum*** was not at issue in ***Caprio***, as ***Baum*** had not been decided prior to the negotiation and completion of the transactions at issue therein. That is not the case here where petitioner relied to his detriment on a final Tribunal decision. The detrimental reliance relevant to the initial ***Replan*** factor is also relevant to the public purpose ***Replan*** factor in this instance. That is because the finality of Tribunal decisions as a public policy must be weighed against the Legislature's acceptable public purpose of correcting what it considers to be a mistake of the Tribunal. Under the specific facts of this case, we find that the integrity of the finality of Tribunal decisions expressed by Tax Law § 2016 as a public policy prevails over the Legislature's public purpose in correcting a mistake of this Tribunal. Accordingly, this factor weighs against the constitutionality of the retroactive application of the statute.

Conclusion

Considering that petitioner's reliance on ***Baum*** was reasonable and that public policy considerations against retroactivity in the present matter (finality of Tribunal decisions) outweigh public policy considerations in favor of retroactivity (correction of erroneous decisions), we find

that the ***Replan*** balancing of equities test favors petitioner, the relatively short period of retroactivity notwithstanding. Accordingly, under the circumstances of this case, we hold that the retroactive application of the 2010 Amendments 2010 Amendments violates petitioner's rights under the Due Process Clauses of the US and NY Constitutions.

In view of this decision, it is not necessary to address the allocation or penalty issues.

Accordingly, it ORDERED, ADJUDGED and DECREED that:

1. The exception Franklin C. Lewis is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Franklin C. Lewis is granted; and
4. The notice of deficiency dated May 30, 2013 is canceled.

DATED: Albany, New York
May 21, 2020

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner