STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **ROBERT J. AND TAMMY L. LAUGHLIN** for Redetermination of Deficiencies or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2015 and 2016.	DECISION DTA NOS. 828788 AND 828789
In the Matter of the Petition of **KIRK C. AND NICOLE L. DORN** 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 2015 and 2016.	

Petitioners, Robert J. and Tammy L. Laughlin, Kirk C. and Nicole L. Dorn, and the Division of Taxation, each filed an exception to the determination of the Administrative Law Judge issued on February 10, 2022. Petitioners appeared by Barclay and Damon LLP (David G. Burch, Esq.). The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in support of its exception and in opposition to petitioners' exception. Petitioners filed a brief in opposition to the Division of Taxation's exception and in reply to the Division of Taxation's brief in opposition. The Division of Taxation filed a reply brief to petitioners' brief

in opposition. Oral argument was heard on March 23, 2023 in Albany, New York, which date began the six-month period for issuance for this decision.

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

ISSUES

I. Whether the Division of Taxation properly determined the tax benefit period for the Qualified Empire Zone Enterprise credits claimed by TMP Acquisitions Inc., the parent of two qualified S corporations that are qualified empire zone enterprises.

II. Whether the Division of Taxation correctly calculated the Qualified Empire Zone Enterprise tax reduction credit pursuant to Tax Law § 16.

FINDINGS OF FACT

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

1. Time Release Sciences, Inc. (TRS), located at 205 Dingens Street, Buffalo, New York, was first organized as a New York corporation on April 29, 2004. On the same date, TRS elected to be taxed as a subchapter S corporation for federal and state tax purposes. TRS manufactures and packages consumer cleaning products for a Fortune 100 company.

2. TRS was certified at 205 Dingens Street in the Buffalo Empire Zone under article 18-B of the General Municipal Law with an effective date of October 20, 2004. TRS is a qualified empire zone enterprise (QEZE).

3. TMP Technologies, Inc. (TMP Technologies) located at 1200 Northland Avenue, Buffalo, New York, was first organized as a New York corporation on September 10, 1993. TMP Technologies elected to be taxed as a subchapter S corporation for federal and state tax

purposes, effective November 1, 1995. TMP Technologies develops custom liquid applicator and dispensing applicator products.

4. TMP Technologies was certified at 1200 Northland Avenue in the Buffalo Empire Zone under article 18-B of the General Municipal Law with an effective date of December 27, 2000. TMP Technologies is a QEZE.

5. TMP Acquisitions Inc. (TMP Acquisitions) is a New York corporation, first organized on September 26, 2014. It was formed to acquire corporations, including TRS and TMP Technologies. TMP Acquisitions elected to be taxed as a subchapter S corporation for federal and state tax purposes on September 26, 2014.

6. On April 30, 2015, TMP Acquisitions purchased 100% of the stock of both TRS and TMP Technologies. TRS and TMP Technologies elected to treat the purchase transaction between the shareholders of the corporations and TMP Acquisitions under section 338 (h) (10) of the Internal Revenue Code (IRC).

7. TMP Acquisitions, as the parent S corporation, elected to treat TRS as a qualified subchapter S subsidiary (QSSS) and filed the form 8869, qualified subchapter S subsidiary election (form 8869), with the Internal Revenue Service (IRS). Subsequently, the IRS accepted TRS' QSSS election, filed by TMP Acquisitions, effective May 1, 2015. TMP Acquisitions, as the parent S corporation, elected to treat TMP Technologies as a QSSS and filed form 8869 with the IRS. Subsequently, the IRS accepted TMP Technologies' QSSS election, filed by TMP Acquisitions, effective May 1, 2015. The IRS also accepted TMP Acquisitions' election to be treated as a parent S corporation, effective May 1, 2015.

8. As of May 1, 2015, both TRS and TMP Technologies are disregarded for tax purposes only, and all income, losses, and tax credits are reported on the corporate tax filings of TMP

Acquisitions. Both TRS and TMP Technologies continue to operate as separate business enterprises, with separate locations of operations, payroll, and payroll filings.

9. TRS was required to file a short period form 1120S, U.S. income tax return for an S corporation (form 1120S), and form CT-3-S, New York S corporation franchise tax return (CT-3-S NY S corporation franchise tax return), for the period November 1, 2014 through April 30, 2015. On its CT-3-S NY S corporation franchise tax return, TRS reported its business allocation percentage (BAP) as 0.0117%, i.e., sales of New York State tangible personal property of $2,415.00 divided by all sales of tangible personal property of $20,707,357.00, and an investment allocation of 100.0000%. As part of its CT-3-S NY S corporation franchise tax filing, TRS also claimed, among other credits, a QEZE tax reduction credit (QEZE TRC) on form CT-604, and a QEZE credit for real property taxes (QEZE RPTC) on form CT-606. As part of its claim for the QEZE TRC, TRS reported, on form CT-604, an employment increase factor of 1.0000, a zone allocation factor of 1.0000, tax year 11 of the business tax benefit period, and a benefit period factor of 0.8. On its form CT-606, TRS reported tax year 11 of the business tax benefit period, a benefit period factor of 0.8, eligible real property taxes in the amount of $13,002.00, and a QEZE credit for real property taxes allowed in the amount of $10,402.00. On its form CT-34-SH, New York S corporation shareholders' information schedule (form CT-34-SH), TRS reported five shareholders including petitioner Robert Laughlin, who was a 15% shareholder. TRS provided each shareholder with a federal schedule K-1 and a New York schedule K-1 equivalent.

10. TMP Technologies was required to file a short period form 1120S and CT-3-S NY S corporation franchise tax return for the period November 1, 2014 through April 30, 2015. On its CT-3-S NY S corporation franchise tax return, TMP Technologies reported its business

allocation percentage as 8.7825%, i.e., sales of New York State tangible personal property of $463,102.00 divided by all sales of tangible personal property of $5,273,012.00, and an investment allocation of 100.0000%. TMP Technologies did not claim a QEZE TRC or a QEZE RPTC on this CT-3-S NY S corporation franchise tax filing. On its form CT-34-SH, TMP Technologies reported five shareholders including Mr. Laughlin, who was a 15% shareholder. TMP Technologies provided each shareholder with a federal schedule K-1 and a New York schedule K-1 equivalent.

11. TMP Acquisitions filed a form 1120S and a CT-3-S NY S corporation franchise tax return for the period November 1, 2014 through October 31, 2015. On its CT-3-S NY S corporation franchise tax return, TMP Acquisitions reported, among other things, ordinary business income of $3,020,501.00, a business allocation percentage of 2.2516%, i.e., sales of New York State tangible personal property of $566,232.00 divided by all sales of tangible personal property of $25,148,335.00, and an investment allocation percentage of 100.0000%. As part of its CT-3-S NY S corporation franchise tax filing, TMP Acquisitions also claimed, among other credits, a QEZE TRC on form CT-604, and a QEZE RPTC on form CT-606. On its form CT-604, TMP Acquisitions reported an employment increase factor of 1.0000, a zone allocation factor of 1.0000, tax year 12 of the business tax benefit period, and a benefit period factor of 0.6. On its form CT-606, TMP Acquisitions reported tax year 12 of the business tax benefit period, a benefit period factor of 0.6, eligible real property taxes in the amount of $32,658.00,[1] and a QEZE credit for real property taxes allowed in the amount of $19,595.00. Included with its claims for the QEZE tax credits were copies of the QEZE retention certificate issued to TRS and

[1] The amount of $32,658.00 represents the first half of the 2015–2016 City of Buffalo real property tax due on 195 Dingens Street, Buffalo, New York, due and paid by July 31, 2015.

the City of Buffalo 2015 –2016 real property tax and sewer rent bill for the property located at 195 Dingens Street, Buffalo, New York, assessed to TRS.

12. TMP Acquisitions filed a form 1120S and a CT-3-S NY S corporation franchise tax return for the period November 1, 2015, through October 31, 2016. On its CT-3-S NY S corporation franchise tax return, TMP Acquisitions reported, among other things, ordinary business income of $9,281,022.00, a business allocation percentage of 1.2855%, i.e., sales of New York State tangible personal property of $688,881.00 divided by all sales of tangible personal property of $53,590,645.00, and an investment allocation percentage of 100.0000%. As part of its CT-3-S NY S corporation franchise tax filing, TMP Acquisitions also claimed, among other credits, a QEZE TRC on form CT-604, and a QEZE RPTC on form CT-606. On its form CT-604, TMP Acquisitions reported an employment increase factor of 1.0000, a zone allocation factor of 1.0000, tax year 13 of the business tax benefit period, and a benefit period factor of 0.4. On its form CT-606, TMP Acquisitions reported tax year 13 of the business tax benefit period, a benefit period factor of 0.4, eligible real property taxes in the amount of $88,774.00,[2] and a QEZE credit for real property taxes allowed in the amount of $35,510.00. Included with its claims for the QEZE tax credits were copies of the QEZE retention certificate issued to TRS; the City of Buffalo 2015-2016 and 2016-2017 real property tax and sewer rent bills for the property located at 195 Dingens Street, assessed to TRS, and proof of payment of the same; the County of Erie Tax, tax year 2016 bill for 195 Dingens Street, and proof of payment of the same; proof of payment of City of Buffalo – Tax in the amount of $3,508.73 by TMP Technologies on December 4, 2015; a City of Buffalo 2016-2017 real property tax and sewer rent bill for 1208

[2] The amount of $88,774.00 consists of a total of $80,207.66 paid by TRS to the City of Buffalo and the County of Erie for taxes due on the property located at 195 Dingens Street, and a total of $8,566.34 paid by TMP Technologies to the City of Buffalo and the County of Erie for taxes due on 1208 Northland Avenue.

Northland Avenue, assessed to TMP Technologies, and proof of payment of the first half payment of the real property tax due on said property; and the County of Erie, tax year 2016 bill for 1208 Northland Avenue, and proof of payment of the same.

13. TMP Acquisitions' two shareholders are Mr. Laughlin, who owns 66.6667%, and petitioner Kirk C. Dorn, who owns 33.3333%. For its tax years ended October 31, 2015, and October 31, 2016, TMP Acquisitions allocated to each shareholder his proportionate share of the QEZE credits to be claimed on his 2015 and 2016 personal income tax returns.

14. As a shareholder of both TRS and TMP Acquisitions, Mr. Laughlin claimed QEZE TRCs for the years 2015 and 2016. As a shareholder of TMP Acquisitions, Mr. Dorn claimed QEZE TRCs for the years 2015 and 2016. Pursuant to Tax Law § 16 (b), the TRC is the product of multiplying four factors: (i) the benefit period factor; (ii) the employment increase factor; (iii) the zone factor; and (iv) the tax factor. The fourth factor, the tax factor, is computed by shareholders on form IT-604, claim for QEZE tax reduction credit (form IT-604), which is filed with their personal income tax returns. The tax factor is the product of (i) the ratio of the shareholder's income from the QEZE from New York State sources to the shareholder's New York State adjusted gross income; and (ii) the shareholder's New York State income tax. The tax factor produces the portion of the shareholder's New York State income resulting from income from the QEZE that is allocated to New York.

15. The instructions to form IT-604 do not mention application of the BAP in describing the procedure for calculating the tax factor as part of the TRC on returns prepared for shareholders of New York S corporations that are QEZEs. Line 21 of the form IT-604 states "Enter the amount of your income from the QEZE allocated within NYS (see instructions)." The

instructions for Line 21 specific to shareholders of New York S corporations that are QEZEs as set forth on the IT-604-I state as follows:

> "This is the income from the New York S corporation that is a QEZE, allocable to New York State and included in New York adjusted gross income. Do not include any wages paid to you by the New York S corporation. The income allocable to New York State is the QEZE S corporation's income from New York State sources. This amount should be provided to you by the New York S corporation. For a nonresident of New York State, this is the New York S corporation's income from the QEZE included in the *New York State amount* column of your Form IT-203."

Robert J. and Tammy L. Laughlin, DTA No. 828788

16. On or about September 19, 2016, petitioners, Robert J. and Tammy L. Laughlin, jointly filed a form IT-201, New York State resident income tax return (form IT-201), for tax year 2015 (Laughlin 2015 income tax return). On that income tax return, Mr. and Mrs. Laughlin claimed, among other credits, a QEZE TRC in the amount of $220,201.00, and a QEZE RPTC in the amount of $14,623.00. Among the numerous forms attached to the Laughlin 2015 income tax return were form IT-604, and form IT-606, claim for QEZE credit for real property taxes (form IT-606). On the form IT-604, Mr. and Mrs. Laughlin reported the qualified QEZE business as TRS, and in Schedule F – QEZE tax reduction credit, reported a tax year 11 of the business benefit period, a benefit period factor of 0.8, an employment increase factor of 1.0000, a zone allocation factor of 1.0000, a tax factor of $336,902.00,[3] and a QEZE tax reduction credit available for use of $220,201.00. On form IT-604, Schedule G – Beneficiary's and fiduciary's share of QEZE income, Mr. and Mrs. Laughlin reported a total share of QEZE income in the amount of $3,833,390.00, consisting of TRS' QEZE income of $1,027,530.00 and TMP

[3] To compute the tax factor, Mr. and Mrs. Laughlin first divided the income from the QEZE allocated within New York State of $3,833,390.00 by their New York adjusted gross income of $5,007,079.00, the result of which was 0.7656. Then, they multiplied 0.7656 by their tax of $440,050.00 and determined their tax factor to be $336,902.00.

Acquisitions' QEZE income of $2,805,860.00. On the form IT-606, Mr. and Mrs. Laughlin reported a total QEZE credit for real property taxes in the amount of $14,623.00, consisting of Mr. Laughlin's share of TRS' QEZE RPTC of $1,560.00 and TMP Acquisitions' QEZE RPTC of $13,063.00. After applying all claimed credits, including the QEZE TRC and the QEZE RPTC, and New York State tax withheld against the tax determined to be due, Mr. and Mrs. Laughlin claimed an overpayment of $122,242.00 to be applied to their 2016 New York State estimated tax.

17. The Division conducted an audit of the flow-through QEZE credits, i.e., the QEZE RPTC and the QEZE TRC, claimed on the Laughlin 2015 income tax return. As part of its review of the QEZE RPTC claimed in the total amount of $14,623.00 (***see*** finding of fact 16), the Division reviewed the computation of TRS' QEZE RPTC, and determined that adjustments to the amount of eligible real property taxes allowed, and the benefit period factor were necessary. Specifically, the Division prorated the taxes paid to April 30, 2015, allowing $4,333.95, as TRS' QEZE eligible real property taxes paid, and changing the benefit period factor to 0.6, the tax year 12 benefit period factor. After multiplying $4,333.95 by 0.6, the Division allowed TRS' QEZE RPTC in the amount of $2,600.37. Because Mr. Laughlin was a 15% shareholder of TRS, his share of TRS' QEZE RPTC was redetermined to be $390.00. The Division disallowed the pass-through of the TMP Acquisitions' QEZE RPTC credit claimed by Mr. Laughlin. The reason for the disallowance was at the time the QSSS election was made on May 1, 2015, there were two QEZEs that became part of the QSSS with TMP Acquisitions as the parent company. The Division concluded that the earliest of the two eligibility dates would determine the benefit period factor used by the parent when it claimed QEZE benefits. Because TMP Technologies

had an eligibility date of December 27, 2000, the year 2015 would be year 15, with no eligibility for QEZE benefits remaining.

After the Division reviewed the claimed QEZE TRC, it disallowed it in full. In recomputing the QEZE TRC, the Division applied TRS' BAP of 0.0117% to Mr. Laughlin's reported TRS QEZE income of $1,027,530.00, reducing the amount of QEZE income allocated within New York State to $120.00. It did not allow any income from TMP Acquisitions in the calculation of the amount of QEZE income allocated within New York State. The Division recomputed the QEZE RPTC as follows.

Form IT-604, Schedule E – Tax Factor

20.) Tax Liability	$438,348.00
21.) Amount of QEZE income allocated within New York State	$120.00
22.) New York Adjusted Gross Income	$4,987,778.00
23.) Divide line 21 by line 22	-
24.) Multiply line 20 by line 23 – Tax Factor	-

Form IT-604, Schedule F – QEZE Tax Reduction Credit

25.) Benefit Period Factor – year 12	0.6
26.) Employment Increase Factor	1.0000
27.) Zone Allocation Factor	1.0000
28.) Tax Factor	-
29.) QEZE Tax Reduction Credit available for use (line 25 X 26 X 27 x 28)	-
30.) Tax Due before Credits	$438,348.00
31.) Credits applied against tax before this credit	-
32.) Net Tax Due	$438,348.00
33.) QEZE Tax Reduction Credit used for the current tax year	-

18. Based upon the above adjustments to the QEZE RPTC and the QEZE TRC claimed on the Laughlin 2015 income tax return, the Division determined additional tax due in the amount of $132,275.00. In its computation of additional tax due, the Division allowed a nonrefundable investment tax credit of $221,633.00, a refundable college tuition credit of $800.00, and a refundable QEZE RPTC of $390.00, and applied estimated payments of

$68,582.00 and withholdings of $175,308.00. The Division also denied Mr. and Mrs. Laughlin's request that $122,242.00 be applied to their 2016 estimated tax.

19. On April 13, 2017, the Division issued to Mr. and Mrs. Laughlin a notice of deficiency, assessment ID L-046241062, asserting additional tax due in the amount of $132,275.00, plus interest, for the year 2015. The "Explanation" section of the notice provided, in pertinent part, as follows:

> "This assessment is the result of adjustments made to your 2015 QEZE Real Property Tax Credit and QEZE Tax Reduction Credit. Your request that $122,242 be applied to 2016 estimated tax is denied and you are being assessed $132,275 of increased tax liability.
>
> Your QEZE Real Property Tax Credit from Time Release Sciences, Inc. was reduced to $390. Claimed eligible taxes from Time Release Sciences, Inc. were prorated to 4/30/2015 which is the last day of the entities [sic] final short period filing period prior to making the QSSS election. The benefit period factor was adjusted to year 12 with a 0.6 factor. Time Release Sciences, Inc. has an eligibility date of 10/20/2004 making the period ended 10/31/2004 year one and period ended 4/30/2015 year 12. The entity level credit allowed is $2,600.
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> Reference Tax Law Section 208 1-B. 'The term 'QSSS' means a corporation which is a qualified subchapter S subsidiary as defined in subparagraph (B) of paragraph three of subsection (b) of section thirteen hundred sixty-one of the internal revenue code. The term 'exempt QSSS' means a QSSS exempt from tax under this article as provided in paragraph (k) of subdivision nine of this section, or a QSSS described in subclause (i) of clause (B) of subparagraph two of paragraph (k) of subdivision nine of this section, wherein the parent corporation of the QSSS is subject to tax under this article, and the assets, liabilities, income and deductions of the QSSS are treated as the assets, liabilities, income and deductions of the parent corporation.
>
> Where a QSSS is an exempt QSSS, then for all purposes under this article: (a) the assets, liabilities, income, deductions, property, payroll, receipts, capital, credits, and all other tax attributes and elements of economic activity of the QSSS shall be deemed to be those of the parent corporation. Also reference TSB-M-97 (6) C.
>
> Based upon the above your QEZE Real Property Tax Credit from TMP Acquisitions, Inc. has been disallowed. When the QSSS election was made on 5/1/2015 there were two QEZEs which became part of the QSSS with TMP Acquisitions, Inc. as the parent company. The earliest of the two eligibility dates will determine the benefit period factor used by the parent when claiming QEZE

benefits. TMP Technologies, Inc. has an eligibility date of 12/27/200 making 2015 year 15 with no eligibility for QEZE benefits remaining.

Your QEZE Tax Reduction Credit was disallowed in full. Time Release Sciences, Inc. has a Business Allocation Percentage (BAP) of 0.0117%. This was applied to your QEZE income from Time Release Sciences, Inc. reducing the QEZE income to $120. Reference Tax Appeals Tribunal Decision, DTA Number 825436, which outlines that the BAP should be used to accurately allocate the QEZE's income from the business entity in the calculation of the tax factor.

In addition, reference Tax Law Section 208 1-B. 'The term 'QSSS' means a corporation which is a qualified subchapter S subsidiary as defined in subparagraph (B) of paragraph three of subsection (b) of section thirteen hundred sixty-one of the internal revenue code. The term 'exempt QSSS' means a QSSS exempt from tax under this article as provided in paragraph (k) of subdivision nine of this section, or a QSSS described in subclause (i) of clause (B) of subparagraph two of paragraph (k) of subdivision nine of this section, wherein the parent corporation of the QSSS is subject to tax under this article, and the assets, liabilities, income and deductions of the QSSS are treated as the assets, liabilities, income and deductions of the parent corporation.

Where a QSSS is an exempt QSSS, then for all purposes under this article: (a) the assets, liabilities, income, deductions, property, payroll, receipts, capital, credits, and all other tax attributes and elements of economic activity of the QSSS shall be deemed to be those of the parent corporation.' Also reference TSB-M-97 (6) C.

Based on the above no QEZE income is allowable in the calculation of the tax factor from TMP Acquisitions, Inc. When the QSSS election was made 5/1/2015 there were two QEZEs which became part of the QSSS with TMP Acquisitions, Inc. as the parent company. The earliest of the two eligibility dates will determine the benefit period factor used by the parent when claiming QEZE benefits. TMP Technologies, Inc. has an eligibility date of 12/27/2000 making 2015 year 15 with no eligibility for QEZE benefits remaining."

20. On or about July 17, 2017, Mr. and Mrs. Laughlin jointly filed a form IT-201 for tax year 2016 (Laughlin 2016 income tax return). On that income tax return, Mr. and Mrs. Laughlin claimed, among other credits, an investment tax credit in the amount of $136,059.00, a QEZE TRC in the amount of $247,276.00, and a QEZE RPTC in the amount of $23,673.00. Among the numerous forms attached to the Laughlin 2016 income tax return were form IT-604 and form IT-606. On the form IT-604, Mr. and Mrs. Laughlin reported the qualified QEZE business as

TMP Acquisitions, and in Schedule F – QEZE tax reduction credit, reported a tax year 13 of the business benefit period, a benefit period factor of 0.4, an employment increase factor of 1.0000, a zone allocation factor of 1.0000, a tax factor of $618,191.00,[4] and a QEZE tax reduction credit available for use of $247,276.00. On form IT-604, schedule G – Beneficiary's and fiduciary's share of QEZE income, Mr. and Mrs. Laughlin reported a total share of QEZE income in the amount of $7,066,424.00, consisting of TMP Acquisitions' QEZE income of $7,066,424.00. On the form IT-606, Mr. and Laughlin reported a total QEZE credit for real property taxes in the amount of $23,673.00, consisting of TMP Acquisitions' share of QEZE RPTC of $23,673.00. After applying all claimed credits, including the QEZE TRC and the QEZE RPTC, and New York State tax withheld against the tax determined to be due, Mr. and Mrs. Laughlin claimed an overpayment of $5,265.00 to be applied to their 2017 New York State estimated tax.

21. On or about September 12, 2017, the Division began a review of Mr. and Mrs. Laughlin's claim for "the QEZE tax reduction credit and investment tax credit for the period ending December 31, 2016." In order to verify the credits claimed, the Division, in a letter dated September 12, 2017, requested the following additional information:

> "**QEZE Tax Reduction Credit**
>
> · A detailed calculation of QEZE income allocated to New York State. Please break the calculation down by income from each entity.
>
> **Investment Tax Credit**
>
> · An itemized list of property claimed for investment tax credit. Please include a description of the property and explain how it is used in the manufacturing process. In addition, please indicate where (on which line) the property is depreciated on federal form 4562."

[4] To compute the tax factor, Mr. and Mrs. Laughlin first divided the income from the QEZE allocated within New York State of $7,066,424.00 by their New York adjusted gross income of $7,315,159.00, the result of which was 0.9660. Then, they multiplied 0.9660 by their tax of $639,949.00 and determined their tax factor to be $618,191.00.

22. On October 23, 2017, Mr. and Mrs. Laughlin's representative, Robert E. Pollock, CPA, responded to the Division's request for information and provided documentation consisting of, among other things, a detailed breakdown of TMP Acquisitions' QEZE TRC calculation for Mr. Laughlin. The record includes a detailed breakdown of TMP Acquisitions' QEZE TRC calculation for Mr. Laughlin.

23. On or about December 21, 2017, Mr. and Mrs. Laughlin jointly filed a form-IT-201-X, amended resident income tax return for the year 2016 (Laughlin 2016 amended income tax return). The reason given for amending the return was "Credit claim." On their amended income tax return, Mr. and Mrs. Laughlin claimed, among other credits, a QEZE TRC in the amount of $113,320.00, and a QEZE RPTC in the amount of $11,837.00. Among the numerous forms attached to the Laughlin 2016 amended income tax return were form IT-604 and form IT-606. On the form IT-604, Mr. and Mrs. Laughlin reported the qualified QEZE business as TMP Acquisitions, and in Schedule F – QEZE tax reduction credit, reported a tax year 14 of the business benefit period, a benefit period factor of 0.2, an employment increase factor of 1.0000, a zone allocation factor of 1.0000, a tax factor of $566,602.00,[5] and a QEZE tax reduction credit available for use of $113,320.00. On form IT-604, Schedule G – Beneficiary's and fiduciary's share of QEZE income, Mr. and Mrs. Laughlin reported a total share of QEZE income in the amount of $6,477,446.00, consisting of TMP Acquisitions' share of QEZE income of $6,477,446.00. On the form IT-606, Mr. and Mrs. Laughlin reported a total QEZE credit for real property taxes in the amount of $11,837.00, consisting of TMP Acquisitions' share of QEZE

[5] To compute the tax factor, Mr. and Mrs. Laughlin first divided the income from the QEZE allocated within New York State of $6,477,446.00 by their New York adjusted gross income of $7,292,922.00, the result of which was 0.8882. Then, they multiplied 0.8882 by their tax of $637,922.00 and determined their tax factor to be $566,602.00.

RPTC of $11,837.00. After applying all claimed credits, including the QEZE TRC and the QEZE RPTC, New York State tax withheld in the amount of $103,137.00, total estimated payments in the amount of $132,242.00, against the tax determined to be due, and then adding back the overpayment shown on the original return in the amount of $5,265.00, Mr. and Mrs. Laughlin reported an amended tax due in the amount of $145,792.00.

24. On or about April 6, 2018, the Division completed its review of the Laughlin 2016 income tax return and the Laughlin 2016 amended income tax return. Based upon its audit review, the Division allowed the investment tax credit in the amount of $136,059.00 as claimed, but disallowed the claimed QEZE credits, i.e., the QEZE RPTC and the QEZE TRC, in full. The Division determined that the QEZE credits should be denied because TMP Acquisitions "is the parent company of a QSSS which has two certified QEZE's as members." Since TRS "has an eligibility date in 2004" and TMP Technologies "has an eligibility date in 2000," the Division concluded that the earlier eligibility date should be used for the benefit period. Therefore, no QEZE benefits remained. The Division's audit conclusions resulted in additional tax due in the amount of $242,134.00. In its calculation of additional tax due, the Division allowed a nonrefundable college tuition credit in the amount of $800.00, a nonrefundable investment tax credit in the amount of $136,059.00, and applied estimated payments in the amount of $10,000.000, withholdings in the amount of $103,137.00 and a payment with the amended return in the amount of $145,792.00.

25. On April 12, 2018, the Division issued to Mr. and Mrs. Laughlin a notice of deficiency, assessment ID L-047907374, asserting additional tax due in the amount of $387,926.00,[6] plus interest, on the 2016 amended income tax return that they filed on December

[6] The additional tax amount asserted as due on this notice of deficiency does not reflect the $145,792.00 payment that Mr. and Mrs. Laughlin made with the amended return.

28, 2017. The "Explanation" section of the notice of deficiency provided, in relevant part, as follows:

> "This assessment is the result of the denial in full of your QEZE Tax Reduction Credit and QEZE Real Property Tax Credit. You also had a $122,242 discrepancy in the amount of estimated payments claimed on line 75 of your IT-201. The result is tax due in the amount of $387,926.
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> Reference Tax Law Section 208 1-B. 'The term 'QSSS' means a corporation which is a qualified subchapter S subsidiary as defined in subparagraph (B) of paragraph three of subsection (b) of section thirteen hundred sixty-one of the internal revenue code. The term 'exempt QSSS' means a QSSS exempt from tax under this article as provided in paragraph (k) of subdivision nine of this section, or a QSSS described in subclause (i) of clause (B) of subparagraph two of paragraph (k) of subdivision nine of this section, wherein the parent corporation of the QSSS is subject to tax under this article, and the assets, liabilities, income and deductions of the QSSS are treated as the assets, liabilities, income and deductions of the parent corporation.
>
> Where a QSSS is an exempt QSSS, then for all purposes under this article: (a) the assets, liabilities, income, deductions, property, payroll, receipts, capital, credits, and all other tax attributes and elements of economic activity of the QSSS shall be deemed to be those of the parent corporation.' Also reference TSB-M-97 (6) C.
>
> When the QSSS election was made 5/1/2015 there were two QEZEs which became part of the QSSS with TMP Acquisitions, Inc. as the parent company. The earliest of the two eligibility dates will determine the benefit period factor used by the parent when claiming QEZE benefits. TMP Technologies, Inc. has an eligibility date of 12/27/2000 as a result no eligibility for QEZE benefits remain in 2016."

26. Subsequently, on April 17, 2018, the Division issued to Mr. and Mrs. Laughlin a notice of adjusted assessment, assessment ID L-047907374, that adjusted the assessment sent to them on April 12, 2018. The notice of adjusted assessment asserted additional tax due in the amount of $242,134.00, plus interest, on the Laughlin amended income tax return filed on December 28, 2017.[7]

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[7] This notice of adjusted assessment reflects Mr. and Mrs. Laughlin's payment in the amount of $145,792.00 made with the amended income.

Kirk C. and Nicole L. Dorn, DTA No. 828789

27. On or about April 12, 2016, petitioners, Kirk C. and Nicole L. Dorn, jointly filed a form IT-201 for the year 2015 (Dorn 2015 income tax return).[8] On that return, Mr. and Mrs. Dorn reported an investment tax credit (ITC) of $110,334.00, a QEZE TRC of $54,317.00, and a QEZE RPTC of $6,532.00. Mr. and Mrs. Dorn reported a New York State tax liability in the amount of $110,334.00, applied nonrefundable credits of $110,334.00, consisting of a QEZE TRC of $54,317.00 and an ITC of $56,017.00, and reported a net tax liability of zero. They also reported total payments and refundable credits in the amount of $21,906.00, consisting of a QEZE RPTC of $6,532.00 and withholdings in the amount of $15,374.00. They also requested that the overpayment in the amount of $21,906.00 be refunded to them.

28. The Division conducted an audit of the flow-through credits claimed on the Dorn 2015 income tax return. Based upon its audit review, the Division reduced Mr. and Mrs. Dorn's claimed refund from $21,906.00 to $15,374.00. On April 4, 2017, the Division issued to Mr. and Mrs. Dorn a notice of disallowance for "audit period: 2015." This notice of disallowance provided, in relevant part, as follows:

> "After a review of your flow-through tax credits for the above referenced audit period adjustments have been made. The result is that your requested refund of $21,906 is reduced to $15,374.
>
> **QEZE Real Property Tax Credit/QEZE Tax Reduction Credit**
>
> Reference Tax Law Section 208 1-B. 'The term 'QSSS' means a corporation which is a qualified subchapter S subsidiary as defined in subparagraph (B) of paragraph three of subsection (b) of section thirteen hundred sixty-one of the internal revenue code. The term 'exempt QSSS' means a QSSS exempt from tax under this article as provided in paragraph (k) of subdivision nine of this section,

[8] The record does not include a copy of the Dorn 2015 income tax return. However, the record does include copies of the form IT-201-X filed by Mr. and Mrs. Dorn for the year 2015 (Dorn 2015 amended income tax return). On or about March 26, 2018, the Dorn 2015 amended income tax return was filed "under protest due to unresolved QEZE credit issues. This protective claim is to preserve the statute of limitations to claim the refund due upon resolution."

> or a QSSS described in subclause (i) of clause (B) of subparagraph two of paragraph (k) of subdivision nine of this section, wherein the parent corporation of the QSSS is subject to tax under this article, and the assets, liabilities, income and deductions of the QSSS are treated as the assets, liabilities, income and deductions of the parent corporation. Where a QSSS is an exempt QSSS, then for all purposes under this article: **(a) the assets, liabilities, income, deductions, property, payroll, receipts, capital, credits, and all other tax attributes and elements of economic activity of the QSSS shall be deemed to be those of the parent corporation.'** Also reference TSB-M-97 (6) C.
>
> Based upon the above both QEZE credits from TMP Acquisitions, Inc. have been disallowed in full. When the QSSS election was made 5/1/2015 there were two QEZE's which became part of the QSSS group with TMP Acquisitions, Inc. as the parent company. The earliest of the two eligibility dates will determine the benefit period factor used by the parent when claiming QEZE benefits. TMP Technologies, Inc. has an eligibility date of 12/27/2000 making 2015 year 15 with no eligibility for QEZE benefits remaining.
>
> **Investment Tax Credit (ITC)**
>
> Due to the disallowed QEZE Tax Reduction Credit your non-refundable ITC was increased by $54,317 to $110,334 to fully offset the disallowed credit. Your carry-forward on non-refundable ITC to 2016 is reduced to $483. Please update your records accordingly."

29. On April 21, 2017, the Division issued to Mr. and Mrs. Dorn an account adjustment notice – personal income tax (refund ID number: 0064370978) that adjusted the refund requested in the amount of $21,906.00 and allowed a refund in the amount of $15,805.17 for the year 2015. The reason for the adjustment was "[w]e adjusted your total NY State, NY City and Yonkers refundable credits based on the information reported on Form 201/3-ATT, *Other Tax Credits and Taxes*."

30. On or about December 27, 2017, Mr. and Mrs. Dorn filed a form IT-201-X for tax year 2016 (Dorn's 2016 amended income tax return).[9] The reason given for amending the return was:

[9] The form IT-201 that Mr. and Mrs. Dorn filed for the year 2016 is not part of the record.

> "to change the benefit period on NYS form IT-604 from 13 years to 14 years and to claim a reduced QEZE real estate tax credit on form IT-606 due to the same benefit period change."

On the Dorns' 2016 amended income tax return, they claimed an ITC in the amount of $68,513.00, a QEZE TRC in the amount of $61,412.00, and a QEZE RPTC in the amount of $5,919.00. Among the numerous forms attached to the Dorns' 2016 amended income tax return were form IT-604 and form IT-606. On the form IT-604, in schedule F – QEZE tax reduction credit, Mr. and Mrs. Dorn reported a tax year 14 of the business benefit period, a benefit period factor of 0.2, an employment increase factor of 1.0000, a zone allocation factor of 1.0000, a tax factor of $307,061.00,[10] and a QEZE tax reduction credit available for use of $61,412.00. On their form IT-606, Mr. and Mrs. Dorn reported a QEZE credit for real property taxes in the amount of $5,919.00. After applying all claimed credits, including the QEZE TRC and the QEZE RPTC, New York State tax withheld in the amount of $14,851.00, and total estimated payments in the amount of $34,934.00, Mr. and Mrs. Dorn reported an amended tax due in the amount of $121,647.00.

31. The Division conducted an audit review of the pass-through credits claimed on the Dorns' 2016 amended income tax return. As a result of its audit review, the Division allowed an investment tax credit in the amount of $68,513.00,[11] but disallowed the claimed QEZE credits, i.e., the QEZE RPTC and the QEZE TRC in full. The Division determined that the QEZE credits should be denied because TMP Acquisitions "is the parent company of a QSSS which has

[10] To compute the tax factor, Mr. and Mrs. Dorn first divided the income from the QEZE allocated within New York State of $3,499,425.00 by their New York adjusted gross income of $3,501,802.00, the result of which was 0.9923. Then, they multiplied 0.9923 by their tax of $307,276.00 and determined their tax factor to be $307,061.00.

[11] The audit notes indicate that "Carry-forward reduced in prior audit to $483. Current year CT-46 ITC claim allowed as claimed."

two certified QEZE's as members." Since TRS "has an eligibility date in 2004" and TMP Technologies "has an eligibility date in 2000," the Division concluded that the earlier eligibility date should be used for the benefit period. Therefore, no QEZE benefits remained. The Division's audit conclusions resulted in additional tax due in the amount of $67,331.00. In its calculation of additional tax due, the Division allowed a nonrefundable investment tax credit in the amount of $68,513.00, and applied estimated payments in the amount of $34,934.000, withholdings in the amount of $14,851.00 and a payment with the amended return in the amount of $121,647.00.

32. On April 12, 2018, the Division issued to Mr. and Mrs. Dorn a notice of deficiency, assessment ID L-047907246, asserting additional tax due in the amount of $67,331.00, plus interest, on the amended income tax return that they filed December 26, 2017. The "Explanation" section of the notice of deficiency provided, in relevant part, as follows:

> "This assessment is the result of the denial in full of your QEZE Tax Reduction Credit and QEZE Real Property Tax Credit. The result is tax due in the amount of $67,331.
>
> Reference Tax Law Section 208 1-B. 'The term 'QSSS' means a corporation which is a qualified subchapter S subsidiary as defined in subparagraph (B) of paragraph three of subsection (b) of section thirteen hundred sixty-one of the internal revenue code. The term 'exempt QSSS' means a QSSS exempt from tax under this article as provided in paragraph (k) of subdivision nine of this section, or a QSSS described in subclause (i) of clause (B) of subparagraph two of paragraph (k) of subdivision nine of this section, wherein the parent corporation of the QSSS is subject to tax under this article, and the assets, liabilities, income and deductions of the QSSS are treated as the assets, liabilities, income and deductions of the parent corporation.
>
> Where a QSSS is an exempt QSSS, then for all purposes under this article: (a) the assets, liabilities, income, deductions, property, payroll, receipts, capital, credits, and all other tax attributes and elements of economic activity of the QSSS shall be deemed to be those of the parent corporation.' Also reference TSB-M-97 (6) C.
>
> When the QSSS election was made 5/1/2015 there were two QEZEs which became part of the QSSS with TMP Acquisitions, Inc. as the parent company.

> The earliest of the two eligibility dates will determine the benefit period factor used by the parent when claiming QEZE benefits. TMP Technologies, Inc. has an eligibility date of 12/27/2000 as a result no eligibility for QEZE benefits remain in 2016."

33. Neither Mr. and Mrs. Laughlin nor Mr. and Mrs. Dorn claimed any New York State resident credits on their respective 2015 and 2016 resident income tax returns.

34. In their petition, Mr. and Mrs. Laughlin challenge the Division's reduction or disallowance of the QEZE credits claimed on their income tax returns filed for the years 2015 and 2016, which reduction or disallowance resulted in assessments of additional tax due for both years.

35. In their petition, Mr. and Mrs. Dorn challenge the Division's disallowance of the pass-through QEZE credits claimed on their income tax returns filed for the years 2015 and 2016, which disallowances resulted in an adjustment to their claimed refund for the year 2015 and the assessment of additional tax due for the year 2016.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began her determination with a brief review of the empire zones program and the transactional history of the three S corporations involved in this matter. The Administrative Law Judge next reviewed the QEZE credits claimed by petitioners in tax years 2015 and 2016 and the respective arguments of the Division and petitioners with respect to the notices at issue. The Administrative Law Judge found that the Division erroneously determined the benefit period for the QEZE credits claimed by TMP Acquisitions, as parent of TRS. She also found that the benefit period for credits available under Tax Law §§ 15 and 16 is triggered by the business enterprise's first date of certification under General Municipal Law Article 18-B. She determined that, even though all income, losses and tax credits for TRS and TMP Technologies are reported on the corporate tax filings of TMP Acquisitions, both TRS and

TMP Technologies continue to operate as separate business enterprises, with separate locations of operations, payroll and payroll filings. She determined, therefore, that the proper certification date to be used in connection with TMP Acquisitions' claims for the QEZE RPTC and QEZE TRC was October 20, 2004, the date of TRS' QEZE certification.

The Administrative Law Judge next addressed the calculation of the tax factor portion of petitioners' claim for the QEZE TRC. She reviewed petitioners' arguments and determined that the Division's use of the BAP in determining the tax factor for the QEZE TRC was proper.

The Administrative Law Judge directed the Division to recompute TMP Acquisitions' RPTC for 2015 and 2016 and pass through the appropriate amounts of the recomputed RPTCs to Mr. Laughlin and Mr. Dorn. She also directed the Division to use TRS' benefit period for TMP Acquisitions' QEZE TRC for the years 2015 and 2016.

ARGUMENTS ON EXCEPTION

Petitioners argue that the determination incorrectly upheld the Division's use of the BAP in determining the tax factor of the QEZE TRC for 2015 and 2016. Petitioners assert that the aim of the QEZE TRC under Tax Law § 16 is to provide a complete abatement of tax liability attributable to a QEZE's income arising out of activities within an empire zone. Petitioners contend that they properly calculated their tax factor based on the income of the S corporations that entered in their New York adjusted gross income since all of their income was earned at empire zone locations and taxed as New York income. They claim that the use of the BAP in the calculation of the QEZE TRC as a means of allocating income within New York does not result in providing an apportionment that reasonably reflects a portion of the shareholder's tax attributable to the income of the qualified QEZE.

Petitioners also argue that the material facts in ***Matter of Purcell v New York State Tax Appeals Trib.***, 167 AD3d 1101 (3d Dept 2018), ***appeal dismissed*** 33 NY3d 999 (2019), ***lv denied*** 33 NY3d 913 (2019), upon which the determination relies, are not similar to those in the present matter. They assert that, unlike in ***Purcell***, the QEZEs in this matter have no assets, employees or operations outside of the empire zone locations in New York. Further, petitioners here did not pay income tax in any other state and did not claim a resident tax credit. Petitioners argue that while the application of the BAP might have been appropriate in the case of ***Purcell***, it is not reasonable to apply the BAP in all situations. Petitioners contend that the Division's policy to apply the BAP in this matter is contrary to the Legislature's intention when creating the QEZE TRC.

Petitioners agree with the determination regarding the proper benefit period to be used for the QEZE credits claimed by TMP Acquisitions. They contend that as a QSSS and QEZE, TRS was entitled to tax credits under Tax Law §§ 14, 15 and 16 based on that business enterprise's original certification date. They observe that TRS and TMP Technologies continue to operate as separate business enterprises with separate locations of operations, payroll and payroll filings. They assert that the Division failed to provide any basis for its argument that the parent of two disregarded QEZEs must use the earlier certification date in claiming QEZE credits.

The Division argues that, based upon Tax Law § 16 and the Appellate Division decision in ***Matter of Purcell***, the Administrative Law Judge correctly determined that the Division properly computed the QEZE TRC by applying the BAP to determine the income of the QEZE properly allocated to the state. The Division contends that petitioners incorrectly included the entire amount of their income reported to them by the S corporations without applying the BAP. Contrary to the assertions of petitioners, the Division argues that the court in ***Purcell*** did not

limit the required application of an S corporation's BAP to entities that have operations, assets or employees outside of New York. It also asserts that any argument as to the use of a resident tax credit has no bearing on this matter. The Division asserts that application of the BAP to calculate the QEZE TRC in this matter does not run afoul of the legislative intent of the Empire Zones program. Rather, it contends that the use of the BAP actually supports the purpose of the program by incentivizing economic activity regionally.

The Division takes its own exception to the determination's holding that petitioners used the appropriate certification date to calculate the benefit period for the claimed QEZE credits. The Division claims that TMP Acquisition's purchase of TRS and TMP Technologies shifted the QEZE certification date of TMP Acquisitions, thereby resulting in the proper disallowance of TRS's claimed credits. The Division contends that it properly determined that the earliest of the two eligibility dates for TRS and TMP Technologies would be attributed to the parent TMP Acquisitions. It asserts that, since TMP Technologies had the earlier certification date of December 27, 2000, the parent company must use that certification date, thereby resulting in tax year 2015 being benefit year 15 and ending any eligibility for further benefits.

OPINION

Tax credit statutes are similar to, and should be construed in the same manner as, statutes creating tax exemptions (***see Matter of Purcell v New York State Tax Appeals Trib.*** That is, such statutes must be strictly construed against the taxpayer and, if ambiguity arises, against the exemption (***Matter of 677 New Loudon Corp. v State of N.Y. Tax Appeals Trib.***, 85 AD3d 1341 [3d Dept 2011], ***affd*** 19 NY3d 1058 [2012], ***reargument denied*** 20 NY3d 1024 [2013], ***cert denied*** 571 US 952 [2013]), although such statutes should not be interpreted so narrowly as to defeat their settled purposes (***Matter of Grace v New York State Tax Commn.***, 37 NY2d 193,

196 [1975], ***rearg denied*** 37 NY2d 816 [1975], ***lv denied*** 338 NE2d 330 [1975]). Petitioner must show that its proffered interpretation of the statute is not only plausible, but also that it is the only reasonable construction (***Matter of Forest City Realty Trust, Inc. v Tax Appeals Trib. of State of N.Y.***, 188 AD3d 1317, 1318 [3d Dept 2020]; ***Matter of Piccolo v New York State Tax Appeals Trib.***, 108 AD3d 107, 111-112 [3d Dept 2013]).

In 1986, the Legislature passed the Economic Development Zones Act (EDZ program) to stimulate private investment, private business development, and job creation in targeted geographic areas characterized by persistent poverty, high unemployment, shrinking tax bases and dependence on public assistance (***see*** L 1986, ch 686; General Municipal Law § 956). The EDZ program offered a number of tax incentives and other state assistance to help existing businesses expand and to promote the development of new businesses in the state. In 2000, Economic Development Zones were renamed Empire Zones, and Qualified Empire Zone Enterprise (QEZE) was defined (L 2000, ch 63, part GG). A QEZE is a business enterprise certified under Article 18-B of the General Municipal Law that meets an employment test specified in Tax Law § 14 (b) (Tax Law § 14 [a]).

Among the tax credits available to QEZEs during the years under review were the QEZE RPTC (Tax Law § 15) and the QEZE TRC (Tax Law § 16). A QEZE that qualifies may receive these tax credits for the length of the "business tax benefit period," which is defined in relation to the certification date of the business enterprise under Article 18-B (Tax Law § 14 [a] [1], [e]).[12] A "benefit period factor" that declines fractionally from 1 to 0 over a 15-year benefit period is applied in calculating the QEZE tax credit allowable in any one year (Tax Law § 15 [c]).

[12] Tax Law § 14 [a] [1] defines the business tax benefit period for certain business enterprises in terms of the enterprise's "test date," which is defined in terms of the business enterprise's certification date (***see*** Tax Law § 14 [e]).

As stated above, TMP Technologies was certified in the Buffalo Empire Zone as of December 27, 2000, making 2015 year 15 of its eligibility period (***see*** findings of fact 4 and 19). TRS was certified in the Buffalo Empire Zone as of October 20, 2004, making the period ending April 30, 2015 year 12 of its benefit period (***see*** findings of fact 2 and 19). TMP Acquisitions acquired 100% of the stock of both TRS and TMP Technologies on April 30, 2015. TMP Acquisitions made the appropriate filings with the IRS to be treated as a parent S corporation with TRS and TMP Technologies as qualified subchapter S subsidiaries (QSSS). Those elections were accepted by the IRS effective May 1, 2015. Consequently, as of that date, both TRS and TMP Technologies were disregarded entities for tax purposes and all income, losses and tax credits were reported on the corporate tax filings of TMP Acquisitions (***see*** finding of fact 8).

Division's Exception - Calculation of the QEZE business tax benefit period

Petitioner Robert J. Laughlin owned two-thirds and petitioner Kirk C. Dorn owned one-third of TMP Acquisitions. On their respective tax returns filed for the years 2015 and 2016, Mr. Laughlin and Mr. Dorn each claimed pass-through credits, i.e., the QEZE RPTC and QEZE TRC from TMP Acquisitions based on the QEZE status of TRS. The Division disallowed the claimed QEZE credits asserting that as of May 1, 2015, TRS and TMP Technologies had liquidated into TMP Acquisitions and, consequently, their individual QEZE certification dates became those of TMP Acquisitions. The Division takes the position that TMP Acquisitions can only have one certification date and in a situation where it owns multiple certified businesses, the earliest certification date must be used for the determination of the benefit period.

Accordingly, the Division determined that TMP Technologies' eligibility date of December 27, 2000 must be used to determine the eligibility for petitioners' claimed credits.

TRS' certification date of October 20, 2004 was deemed no longer relevant. In 2015, TMP Technologies had a benefit period factor of 0 since that was tax year 15 for purposes of its business tax benefit period (***see*** Tax Law § 15 [c]). Consequently, the Division determined that TMP Acquisitions was no longer entitled to empire zone benefits in either 2015 or 2016. The Division's treatment of petitioners' tax credit application in this manner resulted in the denial of QEZE RPTC and QEZE TRC credits even though, based on its certification date, TRS had years remaining in its business tax benefit period and was otherwise eligible for the credits.

The Division maintains that this treatment of petitioners' tax credit application is consistent with the definition of qualified subchapter S subsidiary in Tax Law § 208 (1-B), which sets forth, in relevant part:

> "1-B. The term "QSSS" means a corporation which is a qualified subchapter S subsidiary as defined in subparagraph (B) of paragraph three of subsection (b) of section thirteen hundred sixty-one of the internal revenue code. . . . Where a QSSS is an exempt QSSS, then for all purposes under this article:
>
> a. the assets, liabilities, income, deductions, property, payroll, receipts, capital, credits, and all other tax attributes and elements of economic activity of the QSSS shall be deemed to be those of the parent corporation . . . ."

The resolution of this dispute thus narrows to the following questions: Are the empire zone certification and certification date of a QEZE tax attributes or elements of economic activity that become those of a parent S corporation pursuant to Tax Law § 208 (1-B) and IRC (26 USC) § 1361 and, if a parent S corporation owns more than one QEZE subsidiary, are the certification dates of the QSSS's merged into the parent S corporation such that only one Tax Law § 15 (c) benefit period survives the QSSS election? Is the parent S corporation required to disregard the later certification date and use only the date of the earliest certified QSSS QEZE to determine its business tax benefit period?

In addressing this controversy, our aim is to ascertain and give effect to the discernible

intent of the Legislature (***see Matter of 1605 Book Ctr. v Tax Appeals Trib. of State of N.Y.***, 83 NY2d 240, 244-45 [1994], ***cert denied*** 513 US 811 [1994]). The unambiguous language of a statute should be interpreted in accordance with its plain meaning (***New York State Assn. of Counties v Axelrod***, 213 AD2d 18, 24 [3d Dept 1995], ***lv dismissed*** 87 NY2d 918 [1996]). Every word of the statute must, if possible, be given meaning (***Sanders v Winship***, 57 NY2d 391, 396 [1982]). This is because "[t]he statutory text is the clearest indicator of legislative intent" (***Matter of DaimlerChrysler Corp. v Spitzer***, 7 NY3d 653, 660 [2006]).

Under the empire zones program, the commissioner of economic development is authorized to certify "business enterprises" as eligible to receive the various tax benefits available only to such certified enterprises (***see*** General Municipal Law § 959 [a]). The business tax benefit period for the credits available under Tax Law §§ 15 and 16 is defined in relation to the certification date of the *business enterprise* (Tax Law § 14 [a] [e]). Such benefit period is triggered by the *business enterprise's* first date of certification under Article 18-B (Tax Law § 14 [a] [e]). Here, TRS and TMP Technologies are the business enterprises that were certified pursuant to Article 18-B (***see*** findings of fact 2, 4). The cited QEZE statutes make clear that the business tax benefit period must be based on the date of certification of TRS and TMP Technologies.

There is no dispute that as of May 1, 2015, TRS and TMP Technologies are disregarded entities for tax purposes pursuant to Tax Law § 208 (1-B) and (IRC) (26 USC) § 1361, and that application for the QEZE credits must be made through the tax returns filed by their parent, TMP Acquisitions. Contrary to the Division's interpretation of the law, however, we find no statutory or regulatory procedure for a QSSS election to "shift" the QEZE certification date for the parent S corporation, as the Division contends. The Division's interpretation of the law ignores the

statutory language of Article 18-B of the General Municipal Law and Tax Law § 14, which make clear that the commissioner of Empire State Development certified each "business enterprise" under the empire zones program in accordance with separately submitted applications and any claim for QEZE credits must be made based upon the certification and certification date of such certified business enterprise.

The certified business enterprises in the present matter are qualified subchapter S subsidiaries. It is clear that a QSSS continues to be recognized as a separate corporation under Tax Law § 208 (1-B) and IRC (26 USC) § 1361 for various purposes (***see*** Treas Reg [26 CFR] § 301.7701-2 [c] [2] [iii]: "An entity that is disregarded as separate from its owner for any purpose under this section is treated as an entity separate from its owner for purposes of . . . [3] Refunds or credits of Federal tax . . . ."); TSB-M-97[6][C]). We find no language in the either of those statutes to indicate that the QEZE certification of a subchapter S subsidiary is somehow disregarded or no longer relevant after a QSSS election is made. Furthermore, there is no evidence in the record demonstrating that TRS' empire zone certification and its eligibility for QEZE tax benefits did not survive and remain in full force and effect after the QSSS elections were made. We conclude, therefore, that the separate QEZE certification and certification date of TRS should be respected by the Division when reviewing petitioners' claims for QEZE credits.

Furthermore, we see no language in the General Municipal Law or in Tax Law §§ 14-16 suggesting, as the Division does in the present matter, that the later-certified of an S corporation's two subsidiaries must use the certification date, and hence the benefit period, of the earlier-certified entity. As found by the Administrative Law Judge, TRS and TMP Technologies were already under common ownership at the time that they were independently certified as

QEZEs by the commissioner of economic development with two separate benefit periods. They continued to operate as separate business enterprises, with separate locations of operations, separate payroll and separate withholding returns before and after the QSSS elections were made.

This Tribunal addressed a similar controversy in ***Matter of Weber*** (Tax Appeals Tribunal, August 25, 2016). In that case, the Tribunal found that there was no statutory basis for the Division's determination that a taxpayer must use the earlier of two certification dates for determining the applicable business tax benefit period to be used. The Tribunal focused primarily on a reading of the General Municipal Law provisions that establish entitlement to the tax benefits for *business enterprises* rather than the ultimate owner of the pass-through disregarded entities. There, the Tribunal found the Division's interpretation of the statute to be irrational and petitioner's to be the only reasonable construction, thus permitting the taxpayer to use the certification date of the later-established business enterprise to determine its tax benefit period.

The Division argues that ***Matter of Weber*** is not relevant because that matter involved a different tax credit, and here the QEZEs are two qualified subchapter S subsidiaries that, the Division contends, have been "liquidated" into their parent S corporation pursuant to Tax Law § 208 (1-B) and IRC (26 USC) § 1361. Although ***Matter of Weber*** concerned single member limited liability companies treated as distinct sole proprietorships, and a different tax credit (empire zone wage credit under Tax Law § 606 [k] [3]), the Tribunal's decision was based on an in pari materia construction with Tax Law §§ 14, 15, and 16 and is therefore applicable to the case at hand (***see Matter of Piccolo v New York State Tax Appeals Trib.***, 108 AD3d at 110; ***Matter of Guardian Life Ins. Co. of Am. v Chapman***, 302 NY 226, 231 [1951] [statutes that are

in pari materia are properly construed together and applied consistently]. We note further that we find no statutory language suggesting a legislative intent to treat the empire zone wage tax credit differently than the QEZE tax credits.

In the present case, we find that the Division's approach of using only the earliest certification date to prevent an entity from potentially extending its benefit period in perpetuity is unreasonable and leads to the irrational result of improperly cutting short the benefit period of a later certified entity. Furthermore, by following such approach and denying a certified business enterprise access to empire zone benefits simply because another member of the QSSS group is also a certified QEZE, the Division's determination runs afoul of the Legislature's stated economic development goals in connection with the empire zones program (***see*** General Municipal Law § 956.

We conclude, therefore, that petitioners are entitled to claim the QEZE tax benefits based upon TRS' own 2004 empire zone certification date.

Petitioner's Exception – Use of the BAP in the calculation of the QEZE tax factor

This issue has been addressed by the Tribunal in the recent decisions of ***Matter of Sam and Miriam Goldstein***, Tax Appeals Tribunal, April 21, 2022, ***Matter of Herman and Blimie Schreiber***, Tax Appeals Tribunal, April 21, 2022 and ***Matter of Frank and Kristine Giotto***, Tax Appeals Tribunal, March 23, 2023).

As noted above, the QEZE TRC under Tax Law § 16 is one of the tax benefits available under the Empire Zones program. It is a credit against franchise taxes imposed directly on the QEZE or, where the QEZE is a disregarded flow-through entity for tax reporting purposes, personal income taxes imposed on its owners (Tax Law § 16 [a]). Where the QEZE is organized as a New York subchapter S corporation, the shareholders of the S corporation may apply the

QEZE TRC against their personal income taxes imposed by Article 22 (***see*** Tax Law §§ 16 (f) (2) (C) [a], 606 [i] [1] [B] [xvi], [cc]). As noted, TRS and TMP Technologies are certified QEZEs and, as discussed, TRS is eligible to receive the QEZE TRC (***see*** General Municipal Law § 959 [a]).[13] As a shareholder of both TRS and TMP Acquisitions, Mr. Laughlin claimed QEZE TRCs for the years 2015 and 2016. As a shareholder of TMP Acquisitions, Mr. Dorn claimed QEZE TRCs for the years 2015 and 2016 (***see*** finding of fact 14).

The amount of the QEZE TRC is "the product of (i) the benefit period factor, (ii) the employment increase factor, (iii) the zone allocation factor and (iv) the tax factor" (Tax Law § 16 [b]). There is no dispute as to the amounts determined for the benefit period factor, the employment increase factor and the zone allocation factor. Further, there is no dispute that those factors must be determined at the entity level and be based upon the business activity of the QEZEs. The present matter concerns only the proper computation of the tax factor to calculate the QEZE TRC.

The tax factor calculation for shareholders of an S corporation that is a QEZE is specifically described in Tax Law § 16 (f) (2) (C) as follows:

> "Where the taxpayer is a shareholder of a New York S corporation which is a qualified empire zone enterprise, the shareholder's tax factor shall be that portion of the [taxpayer's New York income tax for the taxable year] which is attributable to the income of the S corporation. Such attribution shall be made in accordance with the ratio of *the shareholder's income from the S corporation allocated within the state, entering into New York adjusted gross income*, to the shareholder's New York adjusted gross income, or in accordance with such other methods as the commissioner may prescribe as providing an apportionment which reasonably reflects the portion of the shareholder's tax attributable to the income of the qualified empire zone enterprise. In no event may the ratio so determined exceed 1.0" (emphasis added).

[13] Although the empire zones program expired on July 1, 2010, a business enterprise certified pursuant to Article 18-B of the General Municipal Law as of June 30, 2010 may continue to claim the QEZE TRC for the remainder of its benefit period, so long as it meets the relevant eligibility requirements.

The parties' dispute centers on the meaning of the phrase "the shareholder's income from the S corporation allocated within the state" as used in the cited statute. Petitioners argue that Tax Law § 16 (f) (2) (C) requires that the tax factor be based on the income of the S corporation that entered in their New York adjusted gross income. They assert that, since they are New York residents and all of their income was earned at empire zone locations, it was proper for them to include all of the income from the S corporations in the calculation of the tax factor.

The Division, on the other hand, contends that the eligibility for the QEZE TRC for shareholders of New York S corporations is based on only the income that is sourced to New York by the corporation. The Division argues, therefore, that petitioners were required to use the S corporations' BAP to allocate the QEZE's gross receipts that are attributable to New York State when calculating the tax factor. We agree.

Support for the Division's interpretation of Tax Law § 16 (f) (2) (C) is found in ***Matter of Purcell v New York State Tax Appeals Trib.*** In ***Purcell***, the court determined that it is rational to interpret Tax Law § 16 (f) (2) (C) to require allocation of a New York S corporation's income for resident shareholders based on the BAP reported by the corporation (167 AD3d at 1105).[14] The court in ***Purcell*** found that such an interpretation gives meaning to all the words in Tax Law § 16 (f) (2) (C), consistent with the rules of statutory construction (***id.***; ***see also*** McKinney's Cons Laws of NY, Book 1, Statutes

[14] During the period at issue in ***Purcell*** (2008-2010), the BAP was defined, generally, as the ratio of New York-allocated business receipts to total business receipts (Tax Law former § 210 [3] [a] [10] [A] [ii]). For BAP purposes, receipts from sales of tangible personal property were generally allocated based on the location of the purchaser and receipts from sales of services were generally allocated based on the place of performance (***see*** Tax Law former § 210 [3] [a] [2] [A], [B]). Corporate tax reform legislation in 2014 continued this receipts-based taxing scheme in a new Tax Law § 210-A that was effective in 2015 and 2016, the years at issue here [***see*** Tax Law former § 210-A (2)].

§ 231). The taxpayer in ***Purcell*** was a resident shareholder of a QEZE S corporation engaged in the business of constructing commercial buildings, primarily in New York and Virginia, using prefabricated systems that it manufactured in the empire zone in which it was certified (167 AD3d at 1105). The court in ***Purcell*** expressly rejected the interpretation of Tax Law § 16 (f) (2) (C) advanced by petitioners in the present matter, i.e., that all of a resident shareholder's income from an S corporation is properly included in the numerator of the tax factor fraction. This proposed interpretation was deemed "facially implausible and unreasonable" because it "impermissibly render[s]" the phrase "allocated within the state" as used in Tax Law § 16 (f) (2) (C) superfluous or meaningless (***id.*** at 1104). Petitioners in ***Matter of Purcell*** had offered no alternative interpretation of this phrase and neither do petitioners in this matter.

Petitioners here seek to distinguish ***Purcell*** on the facts, contrasting the Virginia business activity of the S corporation in that case with the lack of any out-of-state operations for the corporations here. As we noted in ***Matter of Frank and Kristine Giotto***, this line of argument is unavailing as ***Purcell*** rejects petitioners' argument that the operations of the corporations in this matter should determine any allocation for purposes of the QEZE TRC. ***Purcell*** holds that the language of Tax Law § 16 (f) (2) (C) requires allocation of an S corporation's income based on the corporation's BAP when computing the tax factor for a resident shareholder. In the ***Matter of Frank and Kristine Giotto***, the certified QEZEs were New York corporations located in the Oneida/Herkimer empire zone. The corporations in that matter were taxed under Subchapter S of the IRC like the corporations here. Petitioner Frank Giotto owned directly and through several trusts 100% of the shares of stock of three corporations. Petitioners in that matter had represented that all of the corporations' business activity took place within the New York empire

zone, and all of its employees and assets were situated there, as well. Like the corporations in the present matter, the S corporations in ***Matter of Frank and Kristine Giotto*** had out-of-state sales and shipped goods to out-of-state purchasers. Based upon the facts of that proceeding, we agreed that ***Purcell*** was controlling and decided in favor of the Division. We see no reason not to apply the reasoning used in that case to the present one. As noted, the BAP in that case, as in the present one, was based solely on business receipts during the period at issue. Hence, ***Purcell*** is not distinguishable based on the location of the S corporations' business activity, assets or employees.

Petitioners further argue that the taxpayer in ***Purcell*** claimed resident credits for income taxes paid to Virginia attributable to corporate income derived from construction projects in that state. Petitioners contend that this fact created issues of fairness and misuse of tax credits in that case that are not present here and thus justify a different result. We disagree. As noted, ***Purcell*** analyzes Tax Law § 16 (f) in accordance with principles of statutory construction and does not rely on the fact of the resident tax credits in reaching its holding.

Finally, ***Purcell*** addresses petitioners' public policy argument and refutes it by noting that the interpretation proffered by the Division gives meaning to the disputed phrase and ensures that eligibility for QEZE TRC for shareholders of New York S corporations is based on only New York-sourced income.

Accordingly, it is ORDERED, ADJUDGED AND DECREED that:

1. The exception of the Division of Taxation is denied;

2. The exception of Robert J. and Tammy L. Laughlin and Kirk C. and Nicole L. Dorn is denied;

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

4. The petition of Robert J. and Tammy L. Laughlin is granted in accordance with conclusions of law E, F, and O of the determination, and in all other respects is denied; and the Division's notices of deficiency issued to petitioners, Robert J. and Tammy L. Laughlin, dated April 13, 2017 and April 12, 2018, and the notice of adjusted assessment, dated April 17, 2018, as modified in accordance with said conclusions of law E, F, and O, are sustained; and

5. The petition of Kirk C. and Nicole L. Dorn is granted in accordance with conclusions of law E, F, and O of the determination, and in all other respects is denied; and the Division's account adjustment notice, dated April 21, 2017, and the notice of deficiency, dated April 12, 2018, as modified in accordance with said conclusions of law E, F, and O, are sustained.

DATED: Albany, New York
September 21, 2023

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner