STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	DECISION DTA NO. 829184
GLOBALFOUNDRIES U.S. INC.	:	
for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Years 2012 and 2014.	:	
	:	

Petitioner, GlobalFoundries U.S. Inc., filed an exception to the determination of the Administrative Law Judge issued on July 15, 2021. Petitioner appeared by Greenberg Traurig LLP (Glenn Newman, Esq., Howard Iselin, Esq., and Henry Greenberg, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Bruce Lennard, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard on July 28, 2022, in New York, New York, which date began the six-month period for issuance of this decision.

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

ISSUES

I. Whether Tax Law § 210-B (3) (d)[1], which allows any taxpayer that is a new business to elect to receive a refund of 50% of its Empire Zone investment tax credit (EZ-ITC) carryover and any taxpayer that is the owner of a qualified investment project (QUIP) or significant investment project (SCIP) to elect to receive a refund of 50% of its EZ-ITC carryover, permits a

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[1] Tax Law former § 210 (12-B) (d) was renumbered 210-B (3) (d) by the Laws of 2014, chapter 59, part A (effective January 1, 2015). We refer to this provision as Tax Law § 210-B (3) (d) throughout this decision.

taxpayer that is both a new business and an owner of a QUIP or SCIP to elect to receive both such refunds in a single year, effectively resulting in a refund of 100% of the credit carryover for that year.

II. If so, whether petitioner's refund claim for the tax year 2012 was timely filed.

III. If petitioner's formal refund claim for tax year 2012 was untimely, whether petitioner made a timely informal refund claim for that tax year.

FINDINGS OF FACT[2]

We find the facts as determined by the Administrative Law Judge, except for findings of fact 44, 45, 47, 49, 51, 52, 54 and 59, which have been modified to reflect the record more completely. These facts are set forth below.

1. Petitioner, GlobalFoundries U.S. Inc., operates a manufacturing facility within a designated Empire Zone in Malta, New York.

2. Petitioner seeks a refund of Empire Zone investment tax credits (EZ-ITCs) in the amount of $219,684,307.00 for its taxable years 2012 and 2014. Specifically, the refund claimed for taxable year 2012 is $67,332,179.00 and the refund claimed for taxable year 2014 is $152,352,128.00.

3. Petitioner's refund claim for a total of $219,684,307.00 was made by its filing of an amended 2014 form CT-3, general business corporation franchise tax return, signed and dated July 18, 2018 and, in particular, an amended 2014 form CT-603, claim for EZ investment tax credit and EZ employment tax credit. The Division issued a refund denial letter dated August 10, 2018.

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[2] The facts as determined by the Administrative Law Judge and as adopted herein incorporate a stipulation of facts executed by the parties.

4. After audit of its taxable year 2012, petitioner had $138,075,926.00 of EZ-ITC available for carryforward of which 50% was refunded as an overpayment of tax and, in its taxable year 2014, petitioner had $304,704,256.00 of EZ-ITC available for carryforward of which 50% was also refunded as an overpayment of tax.

5. Petitioner's combined refund claim of $219,684,307.00 seeks a refund of the remaining 50% of EZ-ITC available for carryforward for each of petitioner's taxable years 2012 and 2014. Petitioner claims that it is entitled to be refunded 50% of its EZ-ITC amounts from its taxable years 2012 and 2014 as a "new business" in an Empire Zone and, additionally, to be refunded the remaining 50% of its EZ-ITC amount from each of these years as an owner of a qualified investment project (QUIP) or significant capital investment project (SCIP).

6. On August 10, 2018, the Division denied the refund claim. The Division stated that 50% of petitioner's carryover EZ-ITCs for taxable years 2012 and 2014 had been refunded as overpayments of tax and it concluded that petitioner was not entitled to any additional refunds. Additionally, the Division concluded that because petitioner was refunded 50% of its EZ-ITC available to be carried forward, no amount was deferred and the claim for refund for the 2012 tax year was untimely.

7. Subsequently, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services in protest of the refund denial letter. A conciliation order was issued, on February 1, 2019, sustaining the denial of the refund. On February 19, 2019, petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order.

HISTORICAL BACKGROUND OF THE EMPIRE ZONES PROGRAM

8. Article 18-B of the General Municipal Law is known and can be cited as the "New

York State Empire Zones Act" (Act). The Act was added by chapter 686 of the Laws of 1986, at which time the New York State Legislature (Legislature):

> "found and declared that there exist within the state certain areas characterized by persistent and pervasive poverty, high unemployment, limited new job creation, a dependence on public assistance income, dilapidated and abandoned industrial and commercial facilities, and shrinking tax bases. These severe conditions required state government to target for these areas extraordinary economic and human resource development programs in order to stimulate private investment, private business development and job creation" (General Municipal Law § 956).

Therefore, the Legislature found and declared that it was, and is:

> "the public policy of the state to offer special incentives and assistance that will promote the development of new businesses, the expansion of existing businesses and the development of human resources within these economically impoverished areas and to do so without encouraging the relocation of business investment from other areas of the state."

The Legislature "further found and declared that it is the public policy of the state to achieve these goals through the mutual cooperation of all levels of state and local government and the business community."

9. The special incentives and assistance to be offered to stimulate private investment, private business development and job creation within Empire Zones include various tax incentives and benefits, including sales and use tax exemptions, credits for real property taxes, tax reduction credits, and EZ-ITCs.

10. Beginning in the early 1990s, Governor Mario Cuomo had the vision that high technology manufacturing could be brought to upstate New York through a combination of creating educational opportunities in nanotechnology and providing an environment for high technology industries to develop and grow in a region in need of economic revitalization.

11. In an effort to revitalize upstate New York and go beyond the traditional manufacturing base, the state identified leading-edge manufacturing industries that would

transform and drive economic growth. Studies performed identified five key industries as viable targets for next-generation opportunities for upstate New York based upon the existing infrastructure and asset base: advanced materials, clean energy, nanotechnology/semiconductors, information technology and biotechnology/life sciences.

12. Nanotechnology and semi-conductor manufacturing were selected as an initial area of focus based on the historical corporate presence in New York of International Business Machines Corporation and its interest in having a world-class research partner, and New York's existing asset base. The increasing importance of proximity to research for manufacturing was a key factor in the Capital Region's pursuit of a semiconductor fabrication facility.

13. To attract a semiconductor wafer fabrication facility, the region needed to provide a site that was competitive with other locations nationally and globally in terms of construction readiness, incentives, available workforce and proximity to research and development. New York State created a proactive marketing and outreach campaign to communicate that upstate New York could support semiconductor manufacturing and would be an excellent place for business to locate and invest. This marketing effort included collaboration with regional, state and economic development partners.

14. The incentives that New York State created to encourage development of a semiconductor manufacturing facility in Saratoga County included grants, tax exemptions and tax credits, some of which were refundable tax credits, enacted in Tax Law §§ 14, 15, 16 and 210. These incentives were carefully crafted in order to ensure that they were sufficient to induce the major investment required for developing the high technology facilities required to produce semiconductor chips.

15. In chapter 108 of the Laws of 2006, approved on June 23, 2006, the Legislature appropriated the sum of $500 million for costs associated with the development of a semiconductor manufacturing facility including but not limited to the construction, purchase and installation of equipment, or other state costs required pursuant to a letter of intent executed by the chairman of the New York State Urban Development Corporation and Advanced Micro Devices, Inc. (AMD); and the sum of $150 million for research and development activities of AMD.

16. On that same day, Friday, June 23, 2006, Governor George Pataki announced a state financing deal under which AMD would build a computer microchip manufacturing center in a high-technology industrial park in the Town of Malta, Saratoga County, New York.

17. In a July 20, 2006 press release, AMD announced that it had received a non-binding $900 million cash incentive package consisting of grants and tax credits from the State of New York to build its next fabrication facility in Luther Forest, in the Town if Malta, Saratoga County, New York.

18. In its U.S. Securities and Exchange Commission (SEC) form 10-K for the fiscal year ended December 31, 2006, AMD reported that, in anticipation of the potential need for increased manufacturing capacity over the longer term, on December 22, 2006, it had entered into a Grant Disbursement Agreement with the New York State Urban Development Corporation d/b/a Empire State Development Corporation (ESDC), in connection with a potential new 300-millimeter wafer fabrication facility on the Luther Forest Technology Campus in Saratoga County, New York. Under the agreement, AMD would be able to construct a new facility designed to produce 300-millimeter wafers using 32-nanometer process technology between July 2007 and July 2009.

19. In its SEC form 10-K, for the fiscal year ended December 29, 2007, AMD reported its agreement in connection with its potential new 300-millimeter wafer fabrication facility on the Luther Forest Technology Campus in Saratoga County, New York.

20. In its SEC form 10-K, for fiscal year ended December 27, 2008, AMD reported that, on October 6, 2008, it had entered into a Master Transaction Agreement, which was further amended on December 5, 2008, with Advanced Technology Investment Company LLC (ATIC) to form a manufacturing joint venture, The Foundry Company.

21. In its SEC form 10-K, for the fiscal year ended December 26, 2009, AMD reported that on March 2, 2009, together with ATIC and West Coast Hitech L.P. (WCH), acting through its general partner West Coast Hitech G.P., Ltd., AMD had formed GLOBALFOUNDRIES, Inc. (GF), a manufacturing joint venture that manufactures semiconductor products and provides certain foundry services to AMD.

22. Tax Law §§ 14, 15 and 16 address the Empire Zones program and sales and use tax exemptions, credits for real property taxes and tax reduction credits for Qualified Empire Zone Enterprises (QEZEs).

23. QEZEs are business enterprises certified under article 18-B of the General Municipal Law that meet an “employment test” specified in Tax Law § 14 (b).

24. Pursuant to Tax Law § 14 (b) (4), as effective April 12, 2005 to April 27, 2006, in the case of a business enterprise that is first certified under article 18-B of the General Municipal Law, on or after April 1, 2005, the employment test is met with respect to a taxable year if the business enterprise’s employment number in the state and the Empire Zones for such taxable year exceeds its employment number in the state and the Empire Zones, respectively for a “base period.”

25. Section 2 of part AA of chapter 62 of the Laws of 2006, approved on April 28, 2006, amended Tax Law § 14 (j) by adding a new paragraph 5. This newly added paragraph provided that a business enterprise that placed in service property (or a project that includes such property) for which, at the time the property is placed in service by a taxpayer, the basis for federal income tax purposes equals or exceeds $750 million, shall be "deemed to be a new business" so long as such new business shall have received certification by December 31, 2007.

26. By approving this newly added paragraph 5 of Tax Law § 14 (j) on April 28, 2006, the Legislature intended to, and did, extend to business enterprises placing in service property with a basis equal to or exceeding $750 million the sales and use tax exemptions, credits for real property taxes and tax reduction credits for QEZEs provided for by Tax Law §§ 14, 15 and 16 by allowing these business enterprises to be deemed to be new businesses for purposes of Tax Law § 14 (b) (4) when they were not otherwise new businesses.

27. Tax Law § 210 (12-B), as effective April 28, 2006 to June 22, 2006, created an EZ-ITC. Tax Law § 210 (12-B) (d) provided that this credit could not reduce the tax due for any taxable year to less than the higher of the amounts prescribed in Tax Law § 210 (1) (c) and (d). In the event the amount of the credit allowed under section 210 (12-B) for any taxable year reduced the tax to such amount, a credit not deductible in that tax year could be carried over to the following year or years and deducted from the taxpayer's tax for such year or years. In lieu of a carryover, the taxpayer qualifying as a "new business" under Tax Law § 210 (12) (j) could elect, on its report for the taxable year with respect to which the credit was allowed, to treat fifty percent of the amount of such carryover as an overpayment of tax to be credited or refunded in accordance with the provisions of Tax Law § 1086.

28. Section 8 of part N of chapter 61 of the Laws of 2006, approved on April 20, 2006, further amended Tax Law § 14 (j) (5), as added by section 2 of Part AA of chapter 62, to provide that a business enterprise that placed in service property (or a project that includes such property) for which at the time the property is placed in service by a taxpayer, the basis for Federal income tax purposes equals or exceeds $750 million, shall be "deemed to be a new business" under Tax Law §§ 14, 210 (12) and 606 (a) (10).

29. Part V-1 of chapter 109 of the Laws of 2006, approved on June 23, 2006, amended the General Municipal Law and the Tax Law in relation to extending Empire Zone benefits to QUIPs and SCIPs.

30. General Municipal Law § 957 provides definitions for words and terms used in article 18-B of the General Municipal Law, which addresses New York State Empire Zones.

31. Section 1 of part V-1 of chapter 109 of the Laws of 2006 amended General Municipal Law § 957 by adding new subdivisions (s) and (t).

32. Newly added subdivision (s) of General Municipal Law § 957 defines a QUIP to mean a project (i) located within an Empire Zone; (ii) at which 500 or more jobs will be created, provided such jobs are new to the State and are in addition to any other jobs previously created by the owner of such project in the State; and (iii) which will consist of tangible personal property and other tangible property, including buildings and structural components of buildings, described in subparagraphs (i), (ii), (iii), (iv) and clause (A) or (C) of subparagraph (v) of Tax Law § 210-B (3) (b), the basis of which for federal income tax purposes will equal or exceed $750 million. However, the owner of such project must not employ more than 200 persons in the state at the time the project is commenced.

33. Newly added subdivision (t) of General Municipal Law § 957 defines a SCIP to mean a project (i) located within an Empire Zone, (ii) which will be either a newly constructed facility or a newly constructed addition to or expansion of a QUIP, consisting of tangible personal property and other tangible property, including buildings and structural components of buildings, described in subparagraph (i), (ii), (iii), (iv) and clause (A) or (C) of subparagraph (v) of Tax Law § 210-B (3) (b), the basis of which for federal income tax purposes will equal or exceed $750 million, (iii) which is constructed after the basis for Federal income tax purposes of the property comprising such QUIP equals or exceeds $750 million, and (iv) at which 500 or more jobs will be created, provided such jobs are new to the State and are in addition to any other jobs previously created by the owner of such project in the State.

34. By approving sections 1, 2 and 4 of part V-1 of chapter 109 of the Laws of 2006, the Legislature intended to, and did, specifically: (1) newly establish the concepts of, and define, a QUIP and a SCIP; (2) assign to the Commissioner of Economic Development the responsibility to approve applications for qualification of a business enterprise as the owner of a QUIP or a SCIP; and (3) extend to business enterprises approved as the owners of QUIPs or SCIPs the tax benefits provided for in Tax Law §§ 14, 15 and 16.

35. Tax Law § 210 (12-C), effective January 1, 2006 to April 27, 2006, addressed the Empire Zone employment incentive credit (EZ-EIC) and provided that in no event shall the EZ-EIC be allowed in an amount that will reduce the tax payable to less than the amount prescribed in Tax Law § 210 (1) (d). However, if the amount of credit allowable under this subdivision for any taxable year reduces the tax to such amount, any amount of credit not deductible in such taxable year may be carried over to the following year or years and may be deducted from the taxpayer's tax for that year or years.

36. Section 9 of part N of chapter 61 of the Laws of 2006, approved on April 20, 2006, amended Tax Law § 210 (12-C) (c) to add that, in lieu of such carryover, a taxpayer deemed to be a new business under Tax Law § 14 (j) (5) may elect, on its report for its taxable year with respect to which such credit is allowed, to treat fifty percent of the amount of the carryover as an overpayment of tax to be credited or refunded in accordance with the provisions of Tax Law § 1086.

37. Section 7 of part V-1 of chapter 109 of the laws of 2006, approved on June 23, 2006, further amended Tax Law § 210 (12-C) (c) to provide that, in lieu of such carryover, any taxpayer approved as the owner of a QUIP or a SCIP, may elect, on its report for its taxable year with respect to which such credit is allowed, to treat fifty percent of the amount of the carryover as an overpayment of tax to be credited or refunded in accordance with the provisions of Tax Law § 1086.

TAX FILINGS AND REFUND CLAIMS

38. By letter dated July 20, 2018, from petitioner's Vice President for Tax, William C. Barrett, petitioner sought a refund of EZ-ITC from its taxable year 2012 in the amount of $67,332,179.00 and a refund of EZ-ITC from its taxable year 2014 in the amount of $152,352,128.00

39. Petitioner's aggregate refund claim for $219,684,307.00 was made by its filing of an amended 2014 form CT-3, General Business Corporation Franchise Tax return, signed and dated July 18, 2018 and, in particular, an amended 2014 form CT-603, claim for EZ investment tax credit and EZ employment tax credit.

40. Mr. Barrett's July 20, 2018[3] letter and petitioner's amended 2014 form CT-3 and amended 2014 form CT-603, among other forms, were sent to the Division by certified mail in an envelope postmarked July 18, 2018 and delivered to the Division on July 19, 2018. The refund claim was denied by letter dated August 10, 2018.

41. After audit of its taxable year 2012, petitioner had $138,075,926.00 of EZ-ITC available for carryforward of which 50% was refunded as an overpayment of tax and, in its taxable year 2014, petitioner had $304,704,256.00 of EZ-ITC available for carryforward of which 50% was also refunded as an overpayment of tax.

42. Petitioner's combined refund claim of $219,684,307.00 seeks a refund of the remaining 50% of EZ-ITC available for carryforward for each of petitioner's taxable years 2012 and 2014.

43. For its taxable year 2012, petitioner electronically filed with the Division a 2012 form CT-3, a 2012 form CT-603 and a 2012 form CT-500, corporation tax credit deferral form, among other forms. These forms were received by the Division on October 12, 2013.

44. For tax year 2012, petitioner reported available EZ-ITC of $138,145,237.00. Petitioner reported 50% of that amount, or $69,072,618.00, as EZ-ITC "available for refund" and EZ-ITC "to be refunded" (form CT-603 lines 20a and 20b). After applying $4,324.00 against its tax liability for 2012, petitioner reported the balance of $69,068,295.00 as "EZ-ITC available for carryforward after refund" (form CT-603 line 21). A Division audit of petitioner's 2012 return slightly modified these reported amounts. Specifically, the Division determined that petitioner had available EZ-ITC of $138,080,250.00. From this amount, the Division applied $4,324.00 against tax, leaving $138,075,926.00 of EZ-ITC available for carryforward.

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[3] It is noted that the date of the correspondence from Mr. Barrett is two days after the letter and the

45. Consistent with petitioner's return as filed, the Division determined that 50% of the EZ-ITC available for carryforward, or $69,037,963.00, was refundable EZ-ITC. $1,650,007.00 of that amount was refunded to petitioner for its tax year 2012.

46. Refund of the remaining amount of petitioner's refundable EZ-ITC from its taxable year 2012, i.e. $67,387,956.00, was deferred from petitioner's taxable year 2012 but later paid to petitioner during its taxable years 2013, 2014 and 2015, respectively.

47. Also consistent with petitioner's 2012 return as filed, the Division's audit determined that the remaining 50% of available EZ-ITC for tax year 2012, or $69,037,963.00, was available for carryforward after refund.

48. Petitioner did not file an amended 2012 form CT-603 at any time.

49. For its tax year 2013, petitioner electronically filed with the Division a 2013 form CT-603, among other forms. These forms were received by the Division on October 10, 2014. Petitioner's 2013 CT-603 reports $69,037,963.00 as "EZ-ITC available for carryforward" (line 19) and as "EZ-ITC available for carryforward after refund" (line 21). This $69,037,963.00 amount had been carried forward from petitioner's audited 2012 CT-603 (***see*** finding of fact 47).

50. Petitioner did not file an amended 2013 form CT-603 at any time.

51. For its 2014 tax year, petitioner originally electronically filed with the Division a 2014 form CT-603, among other forms, all of which were received by the Division on September 12, 2015. Petitioner's original form CT-603 reports the $69,037,963.00 amount (***see*** finding of fact 49) as "Unused EZ-ITC from preceding period" (line 2). Petitioner's original 2014 CT-603 claims an EZ-ITC for that year of $319,036,187.00 and a refund of 50% of that amount, or

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amended returns were mailed to the Division. It is concluded that this discrepancy is immaterial.

$159,518,093.00. The $69,037,963.00 amount is included in the $226,850,273.00 reported as "EZ-ITC available for carryforward after refund" (line 21).

52. Petitioner's 2014 amended CT-603 reported, after recapture of its line 4 amount, $372,036,434.00 of "net EZ-ITC" (line 5).

53. On line 19 of its amended 2014 form CT-603, petitioner reported this $372,036,434.00 amount as EZ-ITC available for carryforward in its taxable year 2014.

54. On lines 20a and 20b of its amended 2014 form CT-603, petitioner reported that it was claiming a refund of the full $372,036,434.00 of EZ-ITC that it reported as "available for carryforward" on line 19. This amount included a claim for refund of the $69,037,963.00 reported as "Unused EZ-ITC from preceding period" on line 2 of both its original and amended 2014 forms CT-603.

55. On line 20b of its amended 2014 form CT-603, petitioner claimed a refund of the $69,037,963.00 it had as an available non-refundable EZ-ITC carryforward from its taxable year 2012, minus the $1,705,784.00 of EZ-ITCs petitioner took in previous periods leaving $67,332,179.00 of unrefunded credits at issue in this proceeding.

56. Petitioner is an article 9-A taxpayer.

57. The filing of petitioner's amended 2014 form CT-603, in combination with its amended 2014 form CT-3 and the letter from Mr. Barrett, all on or about July 19, 2018, was a claim that petitioner made for refund of the EZ-ITC amount of $67,332,179.00 that petitioner had carried forward from its taxable year 2012 to its taxable year 2013 and to its taxable year 2014.

58. The filing of petitioner's amended 2014 form CT-603, in combination with its amended 2014 form CT-3 and the letter from Mr. Barrett, all on or about July 19, 2018, was a

claim petitioner made for refund of the EZ-ITC amount of $152,352,128.00 that petitioner had carried forward from its taxable year 2014.

59. The Division submitted the affirmation of Deborah R. Liebman, Esq., in support of its case. As of the date of her affirmation, Ms. Liebman was employed by the Division and had been so employed since 1983. In 2006, she served as Deputy Counsel in the Division's Office of Counsel. Her duties and responsibilities as Deputy Counsel included the development and review of drafts of possible legislative proposals on behalf of the Division of Budget and the Governor's Counsel's Office.

60. Ms. Liebman's affirmation is based upon her personal involvement, and the supervision of others in the development, drafting and administration of the Tax Law provisions relating to the qualified empire zone enterprise credit for real property taxes, the Empire Zone program, the EZ-ITC, the empire zone employment incentive credit and the empire zone wage credit. She affirms that she was specifically involved in the development, drafting and administration of the amendments made to Tax Law § 210 (12-B) (d) enacted into law by chapter 109 of the Laws of 2006 on June 23, 2006.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The determination first addressed whether petitioner is due refunds of the remaining 50% of its EZ-ITC carryover for tax years 2012 and 2014 because it is both a new business and an owner of a QUIP or SCIP pursuant to Tax Law § 210-B (3) (d). The Administrative Law Judge reviewed Tax Law § 210-B (3) (d) and the guiding principles set out by the courts for resolving matters of statutory interpretation. She also reviewed the principles for construing tax credit statutes and determined that petitioner has the burden to establish unambiguous entitlement to

the benefit it claims and that its interpretation of the statute must be the only reasonable construction.

The Administrative Law Judge observed that Tax Law § 210-B (3) (d) allows a qualifying new business to elect to treat 50% of its EZ-ITC carryover as an overpayment of tax to be refunded and also allows an owner of a QUIP or SCIP to elect to treat 50% of its EZ-ITC carryover as an overpayment of tax to be refunded. The Administrative Law Judge determined, however, that the Tax Law does not allow a single taxpayer that may be both a new business and the owner of a QUIP or SCIP to take advantage of both of those provisions in order to treat 100% of its EZ-ITC carryover as an overpayment of tax to be refunded in a single tax year. She determined that, if the Legislature had intended that result, it would have explicitly provided for that in the statute and it did not. The Administrative Law Judge thus determined that petitioner failed to demonstrate that its interpretation of Tax Law § 210-B (3) (d) is the only reasonable construction of that statutory provision.

The Administrative Law Judge next addressed the timeliness of petitioner's refund claim for 2012 and the temporary deferral provisions of Tax Law §§ 33 and 34. She found that, in petitioner's tax filing for tax year 2012, petitioner reported 50% of its EZ-ITC carryover as a refundable credit that was deferred pursuant Tax Law § 33 and later paid to petitioner during 2013, 2014 and 2015 pursuant to Tax Law § 34 (2). She found that petitioner reported the remaining balance of its EZ-ITC for 2012 as a non-refundable credit to be carried over and did not include that amount as a refund to be deferred pursuant to Tax Law § 33. Therefore, the Administrative Law Judge determined that the $67,332,179.00 that petitioner now claims as a refundable credit for tax year 2012 was not subject to Tax Law § 34 (2) and was not available to be claimed as a refund in 2013, 2014 or 2015.

Next, the Administrative Law Judge addressed petitioner's claim that it had made a timely, informal refund claim for 2012 prior to the filing of its amended 2014 form CT-3, dated July 18, 2018. The Administrative Law Judge determined that petitioner's alleged informal refund claim fell short of providing notice to the Division that petitioner was seeking a refund claim for tax year 2012. She found that a conversation in 2016 between petitioner and staff in the Division's Office of Tax Policy about whether Tax Law § 210-B (3) (d) would allow a single taxpayer to claim a refund of 100% of its EZ-ITC as both a new business and an owner of a QUIP or SCIP did not meet the requirements of establishing an informal claim. She found that petitioner did not notify the Division during that conversation that it sought a refund nor was its informal claim committed to writing within the statutory limitations period. She also found unavailing petitioner's argument that the Division, through its continuous audits of petitioner, had all of the information necessary to deduce whether a refund was warranted or the amount thereof. The Administrative Law Judge thus determined that petitioner failed to make a timely informal refund claim for the tax year 2012.

ARGUMENTS ON EXCEPTION

Petitioner argues that Tax Law § 210-B (3) (d) unambiguously allows it to receive both a 50% refund of its EZ-ITC carryover for tax years 2012 and 2014 as a new business and a 50% refund its EZ-ITC carryover for tax years 2012 and 2014 as the owner of a QUIP or SCIP. Petitioner focuses on the phrase "in addition" as used in the statute and assets that, given the ordinary and commonly understood meaning of that phrase, any taxpayer who qualifies both as a new business and as an owner of a QUIP or SCIP may claim both refunds in a single tax year, subject to the specific limitations on each. Petitioner claims that the statute contains no language indicating that the two refunds are mutually exclusive. Petitioner further observes that the

Legislature used different language when it sought to limit other Empire Zone tax credits to a single 50% refund.

Petitioner also argues that the legislative history and purpose of the statute confirm its interpretation. Petitioner contends that such history shows that the Legislature extended the refundable tax credit program by making an additional, and not alternative, incentive. Petitioner asserts that its interpretation furthers the statute's economic development purpose, and that the Administrative Law Judge's strict construction standard of review is not warranted here because the present dispute is a matter of law, not fact, and Tax Law § 210-B (3) (d) is not an exemption statute; it allows refunds. Moreover, petitioner asserts that Tax Law § 210-B (3) (d) is a remedial statute that must be construed liberally and in favor of the intended beneficiaries.

With regard to timeliness, petitioner argues that its refund claim for 2012 was timely because Tax Law §§ 33 and 34 deferred recognition of that claim. It asserts that, as a result of such deferral, it had until 2019 to file a timely refund claim for 2012. It further alleges that the statute provided a cap and not a minimum on the amount of refunds it could claim in 2013 and 2014 and that its tax credits were fully refundable through 2015. Alternatively, petitioner contends that it filed a valid informal refund claim for 2012 within the period of limitations. It alleges that the Division had all of the information it needed to determine the amount of petitioner's EZ-ITCs, the carryovers of those credits, and the refunds at issue here. It asserts that the full course of conduct between petitioner and the Division, its 2012 tax return, audit communications, the June 27, 2016 conference and the July 20, 2018 actual refund claim collectively satisfy all of the elements of an informal refund claim.

The Division argues that Tax Law § 210-B (3) (d) does not allow petitioner a 50% refund of its EZ-ITC carryover as a new business and a 50% refund of the remaining amount of its EZ-

ITC carryover as an owner of a QUIP or SCIP in 2012 or 2014. The Division asserts that petitioner itself did not initially interpret the Tax Law to authorize such refunds, as evidenced by its failure to claim those refunds on its original 2012, 2013 and 2014 tax filings. The Division argues that the statute must be strictly construed against petitioner and that, in order to prevail, petitioner must prove that the Division's interpretation is irrational, and that petitioner's interpretation is the only reasonable construction. Additionally, the Division asserts that agency deference is appropriate as, according to the Division, this matter involves a specific application of a broad statutory term.

The Division contends that when the Legislature adopted the subject tax incentives in 2006, the focus of the Legislature was the AMD chip fab project. The Division claims that AMD was not a new business in 2006 and that the Legislature crafted legislation to allow AMD to claim a refund of up to 50% of its EZ-ITC if it qualified as a QUIP or SCIP

The Division asserts that an examination of the legislative history demonstrates that there is no indication that the Legislature intended that AMD would be entitled to elect to claim a refund of 100% of its EZ-ITC carryover in any given year. The Division points out that the qualifications for a new business and approval as a QUIP or SCIP include different conditions and it contends that the Legislature would not allow both benefits with different conditions to be claimed by the same taxpayer. It argues that petitioner, as the owner of a QUIP or SCIP, cannot qualify for a 50% refund as a new business because it is subject to the conditions placed on it as the owner of a QUIP or SCIP by the Legislature.

The Division further argues that petitioner did not make a timely claim for refund of the additional 50% of its EZ-ITC carryover for 2012. It argues that the refund that petitioner now seeks did not accumulate to constitute part of petitioner's temporary deferral refund payout under

Tax Law §§ 33 and 34 because the credit was not reported on the 2012 CT-500 filed by petitioner. The Division contends that petitioner's failure to assert a claim for the alleged refundable credits in 2012, therefore, foreclosed the possibility that the claim could be part of the temporary deferral refundable payout credit. In any event, the Division argues, the payout of that refund claim would have had to have happened in 2013, 2014 and 2015, pursuant to Tax Law § 34 (2). The Division claims that even if petitioner's argument is accepted, the temporary deferral program did not operate to extend the period of limitations in Tax Law § 1087 within which petitioner must have filed its refund claim.

The Division also argues that petitioner did not make an effective informal refund claim of its EZ-ITC carryover for 2012. It asserts that neither petitioner's tax filing for 2012 nor the audit of its 2012 EZ-ITC amount could have provided notice to the Division that petitioner was either entitled to, or was claiming, a refund of EZ-ITC above what it actually claimed. The Division asserts that petitioner's 2012 filing, in which it claimed a refund of only 50% of its EZ-ITC, and its tax filings for years 2013 and 2014 affirmatively put the Division on notice that petitioner was *not* seeking a refund above 50% of its EZ-ITC credit. Further, the Division argues that petitioner failed to submit any informal, written request for a refund within the statutory limitation period and that the June 27, 2016 telephone conference between Division staff and petitioner, without a writing, is insufficient to constitute an informal claim.

OPINION

I. Petitioner's Refund Claim

Background:

In 1986, the Legislature created 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 qualifying businesses located in an empire zone during the years under review were the empire zone employment incentive credit (EZ-EIC) under Tax Law former § 210 (12-C), the empire zone wage tax credit under Tax Law former § 210 (19), and the empire zone investment tax credit (EZ-ITC) under Tax Law former § 210 (12-B) (renumbered as Tax Law § 210-B [3] by L 2014, ch 59, part A [eff January 1, 2015]), which is the specific tax credit that is the subject of this matter. The EZ-ITC, now expired, allowed taxpayers certified pursuant to article 18-B of the General Municipal Law program to claim a credit for a percentage of the cost or other basis of qualifying depreciable property placed in service in a designated empire zone (Tax Law § 210-B [3] [a]).[4] It is undisputed that petitioner here was so certified during the period under review. Petitioner's entitlement to the EZ-ITC in the claimed amounts for 2012 and 2014 is also undisputed, as is petitioner's right to carryover such credit.

Analysis:

An earned EZ-ITC may be carried over to the following year or years and refunded in

[4] Although expired on July 1, 2010, a certified business enterprise may continue to claim the EZ-ITC for the remainder of its benefit period, so long as it meets the relevant eligibility requirements (***see*** Tax Law § 210-B [3] [g, h]).

certain circumstances subject to the limitations set forth in Tax Law § 210-B (3). Specifically, Tax Law § 210-B (3) (d) provides:

> "(d) Carryover. The credit allowed under this subdivision for any taxable year shall not reduce the tax due for such year to less than the fixed dollar minimum amount prescribed in paragraph (d) of subdivision one of section two hundred ten of this article. Provided, however, that if the amount of credit allowed under this subdivision for any taxable year reduces the tax to such amount or if the taxpayer otherwise pays tax based on the fixed dollar minimum amount, any amount of credit not deductible in such taxable year may be carried over to the following year or years and may be deducted from the taxpayer's tax for such year or years. *In lieu of such carryover, any such taxpayer which qualifies as a new business under paragraph (f) of subdivision one of this section may elect, on its report for its taxable year with respect to which such credit is allowed, to treat fifty percent of the amount of such carryover as an overpayment of tax to be credited or refunded in accordance with the provisions of section one thousand eighty-six of this chapter. In addition, any taxpayer which is approved as the owner of a qualified investment project or a significant capital investment project pursuant to subdivision (w) of section nine hundred fifty-nine of the general municipal law, on its report for its taxable year with respect to which such credit is allowed, in lieu of such carryover, may elect to treat fifty percent of the amount of such carryover which is attributable to the credit allowed under this subdivision for property which is part of such project as an overpayment of tax to be credited or refunded in accordance with the provisions of section one thousand eighty-six of this chapter.* Provided, however, such owner shall be allowed such refund for a maximum of ten taxable years with respect to such qualified investment project and each significant capital investment project, starting with the first taxable year in which property comprising such project is placed in service. Provided, further, however, the provisions of subsection (c) of section one thousand eighty-eight of this chapter notwithstanding, no interest shall be paid thereon" (emphasis added) (Tax Law § 210-B [3] [d]).

As noted, the issue here is whether petitioner may receive both a refund of 50% of its EZ-ITC carryover as a new business and a refund of 50% of its EZ-ITC carryover as the owner of a QUIP or SCIP in tax years 2012 and 2014. As also noted, it is undisputed that during those tax years, petitioner qualified as a new business under Tax Law § 210-B (1) (f) and was approved as the owner of a QUIP or SCIP pursuant to General Municipal Law § 957 (s) and (t).

Petitioner asserts that Tax Law § 210-B (3) (d) unambiguously provides two independent bases to claim a 50% refund of the EZ-ITC carryover and that petitioner is eligible to receive the

50% refund under each of them. Accordingly, it urges that any taxpayer who qualifies both as a new business and as an owner of a QUIP or SCIP may claim both refunds in a single tax year, subject to the specific limitations on each.

In opposition, the Division argues that the 2006 amendment to Tax Law § 210-B (3) (d) to allow the owner of a QUIP or SCIP to receive a refund of 50% of its EZ-ITC carryover was approved specifically for AMD and that the Legislature never intended to give AMD (or its successors) the right to claim both that refund and a separate 50% refund as a new business in the same year. The Division contends that the legislative history and other Tax Law changes made by the Legislature in 2006 support that contention.

As the present dispute is a matter of statutory interpretation, the purpose of our review 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 tax 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]).

Generally, 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.***, 167 AD3d 1101, 1103 [3d Dept 2018], ***lv denied*** 33 NY3d 913 [2019]). That is, such statutes must be strictly construed against the taxpayer and, if ambiguity arises, against the exemption, 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 (Tax Law § 1089 [e]; ***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]).

As to the correct standard of construction, petitioner notes correctly that the issue here relates to the refundability of the claimed tax credits and that there is no disagreement about its eligibility for the EZ-ITC or about the amount of the claimed credit. Petitioner contends, therefore, that the strict construction standard is not applicable. Petitioner further argues that Tax Law § 210-B (3) (d) is a remedial statute because it extends a benefit where none existed previously and that it, therefore, should be construed liberally in favor of petitioner.

We disagree. It is a well-settled principle of statutory construction that a statute must be construed as a whole and that its various sections must be considered together and with reference to each other (***see People v Mobil Oil Corp.***, 48 NY2d 192, 199 [1979]; McKinney's Cons Laws of NY, Book 1, Statutes § 97). Considered as a whole, Tax Law § 210-B (3) is a tax credit statute. The carryover and refundability provisions of paragraph (d) center on how an earned EZ-ITC may be used by a taxpayer and, therefore, are integral to and may not be considered apart from the rest of that statute. Even if considered separately, strict construction of the refundability provision in Tax Law § 210-B (3) (d) is appropriate, as a refundable credit is a statutory benefit. As such, petitioner has the burden of proving an unambiguous or clearcut entitlement thereto (***Matter of Luther Forest Corp. v McGuinness***, 164 AD2d 629, 632 [3d Dept 1991]).

We also disagree with the Division's assertion that we should defer to its interpretation of Tax Law § 210-B (3) (d). In general, where the question is one of pure legal interpretation of statutory terms, deference to an administrative agency is not required (***see Matter of Raritan Dev. Corp. v Silva***, 91 NY2d 98 [1997]). The terms of the tax incentive package approved by the Legislature were specific and did not include a delegation of authority to the Division. Further, in our view, a proper analysis of Tax Law § 210-B (3) (d) does not require an understanding of any regulatory process or specialized knowledge of the Division (***see Matter of Kurcsics v Merchants Mutual Ins. Co.***, 49 NY2d 451, 459 [1980]). Thus, the meaning of the words and the context of the statute under review present a question "of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent" and, as such, agency deference with regard to this question is not warranted (***Matter of Level 3 Communications, LLC v Erie County***, 174 AD3d 1497, 1500 [4th Dept 2019], ***rearg denied*** 177 AD3d 1346 [4th Dept 2019], ***lv denied*** 35 NY3d 906 [2020], quoting ***Lorillard Tobacco Co. v Roth***, 99 NY2d 316, 322 [2003] quoting ***Seittelman v Sabol***, 91 NY2d 618, 625 [1998] [internal citations omitted]).

At the core of the Division's argument is its contention that in 2006 the Legislative and Executive branches crafted a tax package to incentivize AMD to build a semiconductor manufacturing facility in Saratoga County. AMD was not a new business in New York and, therefore, could not have availed itself of the tax credits that were already available to new businesses in Tax Law §§ 14 and former 210 (12-B) (d). After several attempts to create the tax incentive package, the Legislature, on June 23, 2006, adopted legislation to define "qualified investment project" (QUIP) and "significant capital investment project" (SCIP) (***see*** Laws of 2006, Ch 109, Part V-1; findings of fact 31 to 34). Section 4 of Chapter 109 amended Tax Law

§ 14 (j) (5) to allow an owner of a QUIP or SCIP to be *deemed* a new business under Tax Law §§ 14, 15 and 16, thereby extending to AMD the right to the tax benefits for purposes of those sections of the law only.

At that time, Tax Law former § 210 (12-B) (d) already allowed a taxpayer that qualified as a new business to receive a 50% refund of its EZ-ITC carryover. The Division argues that since AMD was not a new business, the Legislature amended Tax Law former § 210 (12-B) (d) to specifically allow the owner of a QUIP or SCIP to receive the benefits of a 50% refund of its EZ-ITC carryover by adding the following language, which is the subject of this dispute:

> "In addition, any taxpayer which is approved as the owner of a qualified investment project or a significant capital investment project pursuant to subdivision (w) of section nine hundred fifty-nine of the general municipal law, on its report for its taxable year with respect to which such credit is allowed, in lieu of such carryover, may elect to treat fifty percent of the amount of such carryover which is attributable to the credit allowed under this subdivision for property which is part of such project as an overpayment of tax to be credited or refunded in accordance with the provisions of section one thousand eighty-six of this chapter" (L 2006, ch 109, pt V-1, § 5).

The Division reasons that, by amending Tax Law § 210-B (3) (d) as it did, the Legislature could have, but did not, provide for a QUIP or SCIP to be deemed a new business for purposes of the EZ-ITC and its failure to do so establishes that the Legislature intended to provide AMD with the benefit of a 50% refundable EZ-ITC based only on its status as the owner of a QUIP or SCIP. The Division argues that there is no indication that the Legislature intended to give AMD the ability to also claim a 50% refund of its EZ-ITC carryover as a new business. It also contends that if the Legislature had wanted to make the EZ-ITC carryover one hundred percent refundable for AMD, it could have done so explicitly, but it did not.

The text of Tax Law § 210-B (3) (d) is facially unambiguous. Hence, we must construe such language in accordance with its plain meaning (***New York State Assn. of Counties v***

Axelrod, 213 AD2d at 24). The statute expressly provides that any taxpayer that qualifies as a new business under Tax Law § 210-B (1) (f) may elect to treat 50% of its EZ-ITC carryover as an overpayment of tax to be credited or refunded. It also expressly provides that, *in addition*, any taxpayer that is approved as the owner of a QUIP or SCIP may elect to treat 50% of its EZ-ITC carryover as an overpayment of tax to be credited or refunded. There is no language in the statute to indicate that the two bases for refundability of the carryover credit are mutually exclusive. Additionally, neither the definition of new business in Tax Law § 210-B (1) (f) nor the definitions of QUIP and SCIP in General Municipal Law § 957 (s) and (t) contain any language suggesting that a corporation that qualifies as a new business is disqualified from owning a QUIP or SCIP or vice versa. The words "in addition," of course, mean "also" (Merriam-Webster.com/dictionary/addition [last accessed 12/5/22]). As such, "[t]his is hardly the language we would expect to see" if the Legislature intended the refund provisions to be mutually exclusive (***Matter of Crucible Materials Corp. v New York Power Auth.***, 13 NY3d 223, 230 [2009], ***rearg denied*** 13 NY3d 927 [2010]). The statute as written thus provides two benefits, one "in addition" to the other, each available to "any" taxpayer that qualifies. In our view, a natural reading of that language permits a taxpayer that qualifies for both benefits to receive both benefits.

Contrary to the Division's contention, we find that the statute provides for two separate refunds of EZ-ITC carryovers, one for new businesses and one for QUIPs or SCIPs, each subject to different conditions. Specifically, the new business refund is limited to the taxpayer's first five years as a New York taxpayer (Tax Law § 210-B [1] [f], [3] [d]). The QUIP-SCIP refund is limited to the first ten taxable years of the project. It applies only to the credit allowed with respect to the project and is subject to recapture if the project does not meet the statutory

investment and job creation requirements (Tax Law § 210-B [3] [d], [f]; General Municipal Law § 957 [s], [t]).

We also reject the Division's proposed interpretation of "in addition," which is that these are simply words of transition that do not relate to a combining of different benefits. Under this interpretation, "in addition" lacks substantive meaning, a construction that is properly avoided (McKinney's Cons Laws of NY, Book 1, Statutes § 231 [meaning should be given to all words in a statute]).

The Division asserts that ***Matter of Crucible Materials Corp. v New York Power Auth.*** is distinguishable from the present matter and that the holding in that case is thus narrowly directed at a specific factual situation. We disagree. ***Crucible Materials*** concerned the New York Power Authority's Power for Jobs program by which the Authority sought to stabilize energy costs for New York businesses. The program offered two options for participants. A business could contract with the Authority to purchase energy at a specific price, which was expected to be below market (contract program). Alternatively, a business could purchase energy from a local provider at market prices and, if such prices exceeded a specified threshold, the business would receive a rebate from the Authority for the difference (rebate program). In 2006, the amounts paid by some participants in the contract program exceeded market prices due to decreases in energy prices. As a result, the Legislature created a restitution benefit by which such contracting businesses could recover amounts paid in excess of the market price. As part of the same legislation, contract program participants that were manufacturers were also permitted to terminate their contracts immediately and to prospectively participate in the rebate program. The dispute in ***Crucible Materials*** was whether contract program participants that were

manufacturers could receive both benefits. The Authority took the position that such participants had to choose between benefits.

While the facts in ***Crucible Materials*** obviously differ from the facts here, the cases are similar in that each involves the application of statutory construction principles to determine the meaning of a disputed provision. The statutes in dispute similarly provide two benefits: in ***Crucible Materials***, a restitution benefit for all contract program participants and a rebate benefit for a subset of contract program participants; here, a refund of 50% of EZ-ITC carryover for new businesses and a similar refund for owners of QUIPs or SCIPs. The statutes are also structured similarly in that each benefit is set forth separately in consecutive sentences with the second sentence beginning with the phrase "in addition." Neither statute contains any language indicating that the two benefits are mutually exclusive. Finally, the specific question presented in each case is similar. That is, whether a program participant/taxpayer that qualifies for both benefits can receive both benefits. The court in ***Crucible Materials*** answered this question in the affirmative, in accordance with what it determined to be the plain meaning of the statutory language. ***Crucible Materials*** thus supports our analysis and conclusion herein, in particular our interpretation of the phrase "in addition" and our analysis of that phrase in context.

In reviewing a statute to determine the intention of the Legislature, we are mindful that the absence of facial ambiguity is not necessarily conclusive and that "[s]ound principles of statutory interpretation generally require examination of a statute's legislative history and context to determine its meaning and scope" (***New York State Bankers Assn. v Albright***, 38 NY2d 430, 434 [1975]). "Discerning a statute's purpose and intent begins with its language; nevertheless, the legislative history of an enactment may also be relevant and is not to be ignored" (***Matter of American Rock Salt Co. LLC v Commissioner of Taxation & Fin. of the***

State of N.Y., 104 AD3d 12, 13 [3d Dept 2012] [internal quotation marks, brackets and citations omitted]). Simply put, even if the statute is clear on its face, the legislative history and context may be relevant to ascertain the Legislature's intent. Of course, while extraneous sources may be relevant and therefore should be considered, as a general rule, unambiguous language of a statute is alone determinative (***see Riley v County of Broome***, 95 NY2d 455, 463 [2000]).

The legislative history of Tax Law § 210-B (3) (d) does not lend support to the Division's argument. The title of Chapter 109 of the Laws of 2006 indicates that Part V-1 amends the general municipal law and the tax law in relation to extending empire zone benefits to QUIPs and SCIPs. As noted, at that time, the statute already provided a refund of 50% of the EZ-ITC carryover for new businesses. There is nothing in the legislative history of Chapter 109 to suggest that the Legislature intended something other than what is expressed clearly in the statute, that is, to give the benefit of refundability of the EZ-ITC carryover to the owner of a QUIP or SCIP that was already available to new businesses. The Division has not submitted any legislative materials, such as a sponsor's memorandum or other portions of the legislative bill jacket that would indicate that the amendatory language in Chapter 109 means that only one 50% refund in a taxable year could be taken by a single taxpayer that may be both a new business and the owner of a QUIP or SCIP. Furthermore, the structure of the statute does not support the Division's argument. As discussed, the EZ-ITC refundability was already available to new businesses that qualified when the Legislature simply added the refundability benefit for the owner of a QUIP or SCIP beginning with the words "in addition," which, as also discussed, must be given meaning and read in their natural and most obvious sense (***see Matter of Crucible Materials***; McKinney's Cons Laws of NY, Book 1, Statutes § 94).

Furthermore, the legislative bill introductions, amendments and enactments during the

2006 legislative session that are detailed in the Division's brief and that eventually led to the creation of the final tax incentive package for AMD, if anything, demonstrate that the individual chambers of the Legislature and the Governor were not always in agreement or were undecided as to what specific terms should govern the tax incentive package. As the Division notes, at one point during the legislative session, the Senate, in fact, passed legislation amending Tax Law § former 210 (12-B) (d) to allow AMD to receive a refund for the entire amount of its EZ-ITC carryover whether or not it was a new business (***see*** S.6460-B, Part RRR of 2006). That bill was recalled from the Assembly and amended. The amended version did not address the EZ-ITC.

The Division notes that petitioner GlobalFoundries did not exist in 2006 and asserts that the Legislature could not have foreseen the current situation developing. In 2009, AMD reported in its SEC form 10-K that it had formed petitioner GlobalFoundries as part of a joint venture to manufacture semiconductor products for AMD. If the statutory language resulted in an unintended consequence with the subsequent formation of petitioner GlobalFoundries and its attendant status as a new business, then the Legislature could have amended the statute to preclude a new business that also qualifies as the owner of a QUIP or SCIP from claiming two 50% refunds (***see Matter of Lisa T. v King E.T.***, 30 NY3d 548, 556 [2017] [if the wording of the statute has created an unintended consequence, it is the prerogative of the legislature, not [the courts], to correct it]). The Legislature did not, however, take such an action.

Further weighing against the Division's argument is the fact that the Legislature used different language when it sought to limit other empire zone tax credits to a single 50% refund in the same bill. The EZ-EIC was originally not refundable, but the Legislature amended the language to offer a single 50% refund of the EZ-EIC carryover to "deemed" new business owners (***see*** findings of fact 35 and 36; L 2006, ch 61, part N, § 9). Soon thereafter, the

Legislature further amended the EZ-EIC by deleting the language that extended the refund to deemed new business owners and inserting language offering a single 50% refund to owners of a QUIP or SCIP (***see*** finding of fact 37; L 2006, ch 109, part V-1, § 7). In the same legislation, the Legislature also expanded the refund provision of the Empire Zone wage tax credit by allowing an owner of a QUIP or SCIP to receive a 50% refund of its wage tax credit carryover by adding the following language:

> "In lieu of such carryover, any such taxpayer which qualifies as a new business . . . *or* a taxpayer which is approved as the owner of a qualified investment project or a significant capital investment project . . . may elect . . . to treat fifty percent of the amount of such carryover as an overpayment of tax to be credited or refunded . . ."(***see*** Tax Law former § 210 [19] [e]; L 2006, ch 109, part V-1, § 8) (emphasis added).

The Legislature thus expressly chose to allow a single 50% refund for wage tax credit carryovers whether a taxpayer qualifies as a new business, a QUIP or SCIP owner, or both.

These amendments show that the Legislature could have chosen to offer a single 50% refund of EZ-ITC carryover to owners of QUIPs or SCIPs by simply using the language it had recently employed in the employment incentive credit statute. Alternatively, the Legislature could have chosen to provide a single 50% refund of the EZ-ITC carryover to owners of QUIPs or SCIPs or new businesses by using language it had recently employed in amending the wage tax credit provision. The Legislature, however, chose neither of these provisions as a model for its amendment to the EZ-ITC. Rather, as discussed, the Legislature was deliberate in providing two bases for the refundability of the EZ-ITC carryover credit, but no language indicating that such two bases are mutually exclusive. We agree with petitioner that such differences in language imply differences in meaning (***Suffolk Regional Off-Track Betting Corp. v N.Y. State Racing and Wagering Bd.***, 47 AD3d 133, 138 [3d Dept 2007], ***affd*** 11 NY3d 559 [2008] ["had

the Legislature intended that the calculation be made on a regional track basis, it would have employed the language it used in the very next section of the statute"]).

Finally, allowing petitioner to claim refunds based both on its status as a new business and as the owner of a QUIP or SCIP appears consistent with the economic development goals of the Empire Zone program and cannot be said to lead to an unreasonable or irrational result (***see*** General Municipal Law § 956).

As a general rule of statutory interpretation, application of a statute's clear language should not be ignored in favor of more equivocal evidence of legislative intent (***Desiderio v Ochs***, 100 NY2d 159, 169 [2003]). Thus, even if we accept the Division's interpretation of the legislative underpinnings of the statute in question, there is no manifestation of legislative intent allowing a departure from the literal language of Tax Law § 210-B (3) (d) (***see Bender v Jamaica Hosp.***, 40 NY2d 560, 562 [1976] ["Absent ambiguity the courts may not resort to rules of construction to [alter] the scope and application of a statute" because no such rule "gives the court discretion to declare the intent of the law when the words are unequivocal"]; ***see Kuzmich v 50 Murray St. Acquisition LLC***, 34 NY3d 84, 91-93 [2019], ***rearg denied*** 33 NY3d 1135 [2019]); McKinney's Cons Laws of NY, Book 1, Statutes § 94, Comment ["(t)he Legislature is presumed to mean what it says"]).

Accordingly, pursuant to the foregoing discussion, we find petitioner's proposed construction of Tax Law § 210-B (3) (d) to be reasonable and we reject the Division's proposed construction of that provision as irrational and inconsistent with the statutory language.

II. Timeliness of Petitioner's Refund Claim

Although we have found in petitioner's favor on the issue of whether Tax Law § 210-B (3) (d) permits a taxpayer to claim a refund of carryforward EZ-ITC as both a new business and

as the owner of a QUIP or SCIP in a given tax year, the Division also challenges petitioner's refund claim for tax year 2012 as untimely. We address that issue now.

As discussed, Tax Law § 210-B (3) (d) requires a taxpayer to affirmatively assert a refund of that portion of the EZ-ITC carryforward to which it claims entitlement and subjects such refund claims to the rules set forth in Tax Law § 1086. Specifically, Tax Law § 210-B (3) (d) permits a taxpayer that qualifies as a new business to *elect*, on its report for its taxable year for which the credit is allowed,[5] to treat 50% of such overpayment to be credited or refunded "in accordance with the provisions of [Tax Law § 1086]." The same provision also permits a taxpayer that is approved as an owner of a QUIP or SCIP to *elect*, on its report for its taxable year for which the credit is allowed, to treat 50% of such overpayment to be credited or refunded "in accordance with the provisions of [Tax Law § 1086]." Failure to elect a refund under Tax Law § 210-B (3) (d) thus necessarily results in the treatment of 100% of a taxpayer's EZ-ITC carryforward as nonrefundable.

As referenced in Tax Law § 210-B (3) (d) and as relevant here, Tax Law § 1086 (a) requires the filing of a return and an application for the refund on such return as a condition precedent to the granting of a refund. Tax Law § 1086 (a) also subjects any credit or refund of overpayments to the applicable period of limitations.

Tax Law § 1087 is the applicable statute of limitations for credit or refund claims under article 9-A. As pertinent to the present matter, that section provides that any such credit or refund claim must be filed within three years from the time the return was filed (Tax Law § 1087 [a]). That section further states that no refund shall be allowed unless a claim is filed within the

[5] For purposes of Tax Law § 210-B (3) (d), an EZ-ITC is allowed in the tax year during which the qualified property is placed in service in a designated empire zone (20 NYCRR 5-10.1 [c]).

prescribed period and that "[n]o period of limitations specified in any other law shall apply to the recovery by a taxpayer of moneys paid in respect of taxes under article . . . 9-A" (Tax Law § 1087 [e]).

Application of these provisions to the facts here makes clear that the 2012 EZ-ITC refund claim at issue was untimely. Petitioner's 2012 return was filed on October 12, 2013 (finding of fact 43). That return claimed 50% of petitioner's available EZ-ITC as a refund and reported the remaining 50% of EZ-ITC as available for carryforward after refund (findings of fact 44 and 47). Petitioner continued to report this 50% of EZ-ITC as available for carryforward on its 2013 return and its original 2014 return (findings of fact 49 and 51). Under Tax Law § 210-B (3) (d), if petitioner desired to receive a refund in lieu of carryover as a new business or an owner of a QUIP or a SCIP, petitioner was required to make that election on its 2012 return or on an amended return filed within the limitations period. Petitioner, however, first claimed a refund of the remaining 50% of its 2012 EZ-ITC (i.e., the 2012 refund claim at issue) on its amended 2014 return filed on or about July 18, 2018 (***see*** finding of fact 3), well beyond the expiration of the three-year limitations period, which began with the filing of petitioner's 2012 return on October 12, 2013 (***see*** Tax Law § 1087 [a]).

Petitioner argues, however, that its amended 2014 return was a timely filed refund claim for 2012 by operation of Tax Law §§ 33 and 34. In 2010, in the aftermath of the Great Recession, the Legislature enacted Tax Law §§ 33 and 34 which, together, precluded taxpayers from immediately using earned tax credits that exceeded $2 million in tax years 2010 through 2012 and, instead, deferred the use or refund of those credits to tax years 2013 through 2015 (***see*** Richard Weiss, *States Seek to Manage the Cost of Tax Credits in the Current Economic Environment*, 20-FEB JMTX6, Journal of Multistate Taxation and Incentives, 5 [2011]). The

EZ-ITC was made part of this temporary tax credit deferral program by its inclusion in Tax Law § 33 (3) (a).

Tax Law § 33 (1) (a) specifically provides that:

> "For taxable years beginning on or after January first, two thousand ten and before January first, two thousand thirteen, the excess over two million dollars of the total amount of the tax credits specified in subdivision three of this section that in each of those taxable years would otherwise be used to reduce the taxpayer's tax liability to the amount otherwise specified in this chapter or be refunded or credited as an overpayment will be deferred to and used or refunded in taxable years beginning on or after January first, two thousand thirteen in accordance with the provisions of section thirty-four of this article. Interest shall not be paid on the amount of credit deferred."

To reconcile the deferral of the tax credits codified in Tax Law § 33, a new section 34 was added to allow taxpayers to gradually claim those tax credits and refunds that were deferred over a period of three years. Tax Law § 34 (1) pertains to nonrefundable credits. Tax Law § 34 (2) pertains to refundable credits and provides that the credits that have been deferred in tax years 2010, 2011 and 2012 will constitute the taxpayer's "temporary deferral refundable payout credit" that may be claimed over the ensuing three-year period. Specifically, Tax Law § 34 (2) provides:

> "The amounts of refundable credits that are deferred pursuant to section thirty-three of this article in taxable years beginning on or after January first, two thousand ten and before January first, two thousand thirteen shall be accumulated and constitute the taxpayer's temporary deferral refundable payout credit. In the taxable year beginning on or after January first, two thousand thirteen and before January first, two thousand fourteen, the taxpayer shall be allowed to claim a credit equal to fifty percent of the amount accumulated. In the taxable year beginning on or after January first, two thousand fourteen and before January first, two thousand fifteen, the taxpayer shall be allowed to claim a credit equal to seventy-five percent of the balance of the amount accumulated. In the taxable year beginning on or after January first, two thousand fifteen and before January first, two thousand sixteen, the taxpayer shall be allowed to claim a credit equal to the remaining balance of the amount accumulated. The credit shall be allowed against the taxpayer's tax."

To administer the temporary tax credit deferral program, the Division created new tax forms for corporations that went into use in tax year 2010. The new forms, CT-500 (Corporation Tax Credit Deferral form), CT-501 (Temporary Deferral Nonrefundable Payout Credit form), and CT-502 (Temporary Deferral Refundable Payout Credit form) provided taxpayers with detailed instructions and schedules to report and track the temporary deferral of tax credits.

The Division argues and the Administrative Law Judge concurred that because petitioner failed to report the EZ-ITC carryover as a refundable credit in its 2012 tax filings, the $67,332,179.00 of EZ-ITC carried over after refund was not subject to the temporary deferral payout credit provisions of Tax Law § 34 (2). The Division also argues that even if the remaining 50% of petitioner's 2012 EZ-ITC credit is a refundable carryover, it must have been claimed according to the schedule set forth in Tax Law § 34 (2), i.e., 50% in 2013, 75% in 2014 and the remaining amount in 2015. It contends that the limitations period in Tax Law § 1087 to file a refund claim for tax year 2012 expired before petitioner filed its 2014 amended tax return on July 18, 2018.

Notwithstanding that petitioner had already followed the deferral and payout requirements of Tax Law §§ 33 and 34 to claim and receive 50% of its EZ-ITC carryover refund in taxable year 2012, it now asserts that it was not required to claim the refund for the balance of its EZ-ITC carryover credit in 2012 because Tax Law §§ 33 and 34 "deferred recognition" of that claim. Petitioner asserts that Tax Law § 34 (2) "allowed" petitioner but did not "require" petitioner to claim the temporary deferral payout credit gradually over the three-year period. Petitioner contends that the Legislature's goal was to provide flexibility concerning the deferred payout credit and, therefore, it was appropriate for it to claim the remaining balance of the EZ-ITC carryforward for 2012 as part of its 2014 refund claim. It claims that it had until October

12, 2019, which is three years after the filing of its 2015 tax return to claim a refund of its unused EZ-ITC carryover credit for 2012.

Petitioner contends, in essence, that Tax Law §§ 33 and 34 superseded the three-year limitations period otherwise applicable to claims for refund of EZ-ITC. We disagree. There is nothing in the statutory language supporting petitioner's claim that the temporary deferral payout statutes either deferred recognition of an allowed tax credit or provided flexibility as to when taxpayers must report an EZ-ITC earned in 2010, 2011 or 2012. Nor has petitioner offered any legislative history to support its interpretation. Rather, the clear language of the statute indicates simply a legislative intent to defer the *use* of the credits to later years. As noted, Tax Law § 33 (1) (a) refers to tax credits that "would otherwise be used to reduce the taxpayer's tax liability . . . or be refunded . . . will be deferred to and used or refunded [in subsequent years]" (emphasis added; ***see also Empire Gen. Holdings, Inc. v Governor of the State of N.Y.***, 40 Misc 3d 984, 987 [Sup Ct, Albany County 2013] [tax credit deferral provisions deferred plaintiff's receipt of the balance of the full redevelopment tax credit to future years]). Neither of the deferral provisions contains any language negating the requirement set forth in Tax Law § 210-B (3) (d) to elect a refund of an overpayment of EZ-ITC and tying such an election to the statute of limitations for refunds. Even if we were to accept petitioner's argument that the permissive language of Tax Law § 34 (2) provided flexibility to taxpayers (i.e., "the taxpayer shall be allowed to claim a credit . . . ."), that flexibility was only as to when a taxpayer was allowed to use the tax credits or receive a refund for tax credits that were subject to deferral.

Given the foregoing discussion, we find that petitioner failed to properly file an amended 2012 tax return to claim the additional refund it now seeks and that its refund claim for 2012 made by the filing of an amended 2014 report was untimely (***see*** Tax Law § 1087). We further

find that Tax Law §§ 33 and 34 did not supersede the reporting requirements for the EZ-ITC under Tax Law § 210-B (3) (d) and that petitioner has failed to demonstrate that its interpretation is the only reasonable construction of those statutes (***see Matter of Brooklyn Navy Yard Cogeneration Partners, L.P. v Tax Appeals Trib. of State of N.Y.***, 46 AD3d 1247, 1248 [3d Dept 2007], ***lv denied*** 10 NY3d 706 [2008]).

III. Petitioner's Informal Refund Claim

Even if its formal 2012 refund claim (i.e., its 2014 amended return) is found to be untimely, petitioner contends that it filed an informal refund claim for that year within the limitations period and is, therefore, entitled to its claimed refund. As set forth in ***Matter of Accidental Husband Intermediary, Inc.*** (Tax Appeals Tribunal, April 11, 2019), an informal claim for refund has three elements: (1) it must provide the taxing authority with notice that the taxpayer is asserting a right to a refund; (2) it must describe the legal and factual basis for the requested refund; and (3) it must have a written component (***see New England Elec. Sys. v United States***, 32 Fed Cl 636, 641 [1995], citing ***Am. Radiator & Sanitary Corp. v United States***, 162 Ct Cl 106, 113-114 [1963]). In considering a claim pursuant to the informal refund claim doctrine, "courts have held that under certain circumstances, it is sufficient that the taxpayer submit a so called 'informal claim' within the statutory period, and then, outside of the limitation period, submit a formal claim" (***Donahue v United States***, 33 Fed Cl 600, 608 [1995]). "The determination of whether a taxpayer has satisfied the requirements for an informal claim is made on a case-by-case basis and is based on the totality of the facts [citation omitted]" (***id).***

Petitioner contends that the "full course of conduct" between it and the Division, which it describes as its 2012 tax return, audit communications, a June 27, 2016 discussion between its representatives and representatives of the Division, and its July 18, 2018 refund claim (***see***

finding of fact 57), collectively satisfy all the elements of an informal refund claim for its 2012 tax year.

We disagree. Petitioner's 2012 return, after audit, reports EZ-ITC available for carryforward of $138,075,926.00 (finding of fact 44). Petitioner claimed, and ultimately received, a refund of 50% of that amount (findings of fact 45 and 46). Petitioner reported the remaining 50% of EZ-ITC as available for carryforward after refund (findings of fact 44 and 47). Petitioner's 2012 return thus does not indicate that petitioner was seeking a refund of 100% of its 2012 EZ-ITC. Additionally, petitioner continued to report the same 50% of EZ-ITC as available for carryforward on its 2013 return and its original 2014 return (findings of fact 49 and 51). Hence, those returns also fail to show that petitioner was seeking a refund of 100% of its 2012 EZ-ITC. Moreover, while the Division may have continuously audited petitioner's returns from 2012 forward, there is no evidence in the record that any such audit communications addressed a claim for refund of the remaining 50% of petitioner's 2012 EZ-ITC. The fact that the Division had enough information in its possession to be able to deduce whether a refund is warranted is not enough to put the Division on notice that petitioner was seeking a refund (***see Matter of Mobil Corp. v United States***, 67 Fed Cl 708 [2005] [documents which are merely a normal part of the administrative process and which do not apprise the Internal Revenue Service that the taxpayer is presently seeking a refund do not constitute an informal refund request]). Furthermore, as the Division points out, petitioner's original filing for taxable year 2012 was consistent with the Division's interpretation that petitioner was eligible to elect to treat only 50% of its EZ-ITC carryover as an overpayment to be refunded.

Additionally, the affidavit submitted by petitioner to show that a telephone discussion on June 27, 2016 put the Division on notice that petitioner intended to file a refund claim for the

remaining 50% of its 2012 EZ-ITC is insufficient to establish this contention. We observe that the affidavit, made by Thomas Lane, petitioner's tax manager, and sworn to on November 18, 2020, does not directly assert that petitioner's representatives stated an intent to file a refund claim for the remaining 50% of the 2012 EZ-ITC during the discussion. Rather, the affidavit states that ". . . there was a discussion regarding Petitioner's claim to the refundable tax credits as **both** a new business **and** as an owner of a [QUIP or SCIP]" and that, "[s]pecifically, there was a discussion of the provisions of Tax Law Section 210-B (3) (d), including language providing new businesses an additional refundable tax credit if the entity also qualified as an owner of a [QUIP or SCIP]" (Lane affidavit paragraphs 9 and 10). In any event, we accord these assertions little evidentiary weight, considering that the affidavit was made more than four years after the events described therein and is unaccompanied by any corroboration, such as contemporaneous notes or a written communication to the Division. We note, too, that the fact that petitioner's refund claim for the remaining 50% of its 2012 EZ-ITC was not filed for more than two years after this conversation is consistent with a finding that petitioner's representatives did not, at the time of the telephone call, communicate an intent to file such a refund claim. Finally, we note that the July 18, 2018 refund claim for 2012, i.e., the amended 2014 return, may not be considered as an element of petitioner's asserted informal refund claim. That document was filed after the running of the limitations period. To be effective, the elements of an informal refund claim must be present within the prescribed limitations period (***Donohue v United States***, 33 Fed Cl at 608).

The ultimate question with respect to an informal refund claim is one of notice; that is, whether the taxing authority knew or should have known that a refund claim was being made (***see Krape v Commr.***, TC Memo 2007-125). Here, petitioner's 2012 tax return, the ongoing

audit communications between it and the Division, and the June 27, 2016 telephone discussion, taken together, failed to provide the Division with such notice. Petitioner has thus failed to establish the existence of a timely informal refund claim in the present matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of GlobalFoundries U.S. Inc., is granted with respect to petitioner's claim for a refund of its EZ-ITC carryover for the tax year ended December 31, 2014, but is otherwise denied;

2. The determination of the Administrative Law Judge is reversed with respect to petitioner's claim for a refund of its EZ-ITC carryover for the tax year ended December 31, 2014, but is otherwise affirmed;

3. The petition of GlobalFoundries U.S. Inc., is granted with respect to its claim for a refund of its EZ-ITC carryover for the tax year ended December 31, 2014, but is otherwise denied; and

4. The refund denial letter, dated August 10, 2018, is modified to allow the amount of petitioner's claim for a refund of its EZ-ITC carryover for the tax year ended December 31, 2014 (***see*** findings of fact 2 and 3). The Division is directed to issue such refund accordingly. As so modified, the refund denial letter is sustained.

Dated: Albany, New York
January 19, 2023

/s/ Anthony Giardina
Anthony Giardina
President

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

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