STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GUS PAXOS	:	DETERMINATION DTA NO. 824349
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 2005.	:	

Petitioner, Gus Paxos, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 2005.

On October 10, 2012 and October 16, 2012, respectively, petitioner, appearing by Robert J. Ryan, Esq., and the Division of Taxation, by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), waived a hearing and agreed to submit this matter for a determination based on documents and briefs submitted by April 25, 2013, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Timothy Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioner's claims for QEZE credit for real property taxes and QEZE tax reduction credit.

FINDINGS OF FACT

1. Petitioner, Konstantinos "Gus" Paxos, is the 100 percent shareholder of Nikolaos Realty Corp. (Nikolaos) and Eleni Operating Corp. (Eleni), both flow-through subchapter S corporations.

2. Nikolaos was incorporated on November 3, 1992 to acquire and hold title to property located at 165 Tuckahoe Road, Yonkers, New York (the premises).

3. In 1994, Nikolaos acquired the premises and converted it into hotel space.

4. Eleni was incorporated on October 13, 1994 as an operating entity to lease the premises from Nikolaos and operate a hotel, known as the Royal Regency Hotel.

5. Nikolaos was certified under Article 18-B of the General Municipal Law as a Qualified Empire Zone Enterprise (QEZE) in connection with the premises pursuant to a Certificate of Eligibility effective May 9, 2001.

6. In 1999, Jean Moise was hired to perform maintenance work at the premises. Moise continued as a full-time maintenance worker through the year at issue.

7. Moise was on Eleni's payroll in 1999 and 2000. He was listed as an employee of Eleni on that corporation's quarterly combined withholding, wage reporting and unemployment insurance returns (Form NYS-45) filed with respect to that period.

8. In 2001, at the time of the QEZE certification, Moise was removed from Eleni's payroll and placed on Nikolaos's payroll. He remained on Nikolaos's payroll through the year at issue. Moise was listed as an employee of Nikolaos on that corporation's NYS-45's filed with respect to that period. Following his transfer to the Nikolaos payroll, Moise was not on Eleni's payroll and was no longer listed as an employee of Eleni on that corporation's NYS-45's.

9. According to petitioner's affidavit submitted in evidence in this matter, Moise was transferred from Eleni's payroll to Nikolaos's payroll in 2001 because petitioner believed that "payroll for at least one individual was required for each separate legal entity under the Tax Law in order to receive Empire Zone benefits."

10. Nikolaos did not maintain a payroll before Moise was placed on that S corporation's payroll in 2001.

11. Mohammed Adamu and Rabiou Atariwa were also employed as maintenance workers at the premises. Adamu started in 2003 and worked at the premises until 2009. Atariwa worked at the premises in 2004 and 2005. Both were, at all times, on Eleni's payroll and were, at all times, listed as employees of Eleni on that corporation's NYS-45's.

12. A letter submitted in evidence by petitioner dated February 19, 2009, by Erez Yacar, General Manager of the Royal Regency Hotel, states, in relevant part:

> This is to acknowledge that Mohammed Adamu was working full time as the Maintenance worker for the Royal Regency Hotel. His employment started on August 19, 2003 until [sic] January 31, 2009.

13. Petitioner and his spouse, Phyllis Paxos, timely filed their joint 2005 New York resident income tax return on September 6, 2006. The return claims a refundable QEZE real property tax credit of $190,482.00 attributable to Nikolaos on Form IT-606 (Claim for QEZE Credit for Real Property Taxes). The return also claims a QEZE tax reduction credit of $5,099.07 attributable to Nikolaos on Form IT-604 (Claim for QEZE Tax Reduction Credit).

14. The Division of Taxation (Division) subsequently reviewed petitioner's 2005 return, and on May 15, 2009, issued to petitioner and Phyllis Paxos a Statement of Proposed Audit Changes asserting a tax deficiency of $195,580.92 and explaining its position, in relevant part:

> Based on our review, we have disallowed the QEZE credit for Real Property Taxes from Nikolaos Realty. The credit for real property taxes is based on a benefit period factor, an employment increase factor and eligible real property taxes paid or incurred by the QEZE during the taxable year. The employee claimed (Jean Moise) does not meet the employment increase factor. Any individual employed within New York state in the immediately preceding 60 months by a related person to the QEZE (related person is defined in Internal Revenue code (IRC) section 465(b)(3)(c)) can not be included in the computation.

Jean Moise was employed by Eleni Operating Corp. Since all three tests must be met, the QEZE credit for Nikolaos Realty is disallowed. The amount claimed was $190,482.00.

In addition, the Tax Reduction credit claimed for Nikolaos Realty Corp is disallowed. The employment increase factor has not been met for the credit. The amount claimed was $5,099.00.

15. The Division issued a Notice of Deficiency dated July 9, 2009 asserting additional tax due of $195,580.92, plus interest, for the year 2005. Consistent with the Statement of Proposed Audit Changes, the asserted tax liability in the Notice of Deficiency reflects the disallowance of the QEZE real property tax credit and QEZE tax reduction credit attributable to Nikolaos.

SUMMARY OF THE PARTIES' POSITIONS

16. Petitioner contends that Moise was employed by both Eleni and Nikolaos from the time he was first hired in 1999 through 2005 pursuant to a common paymaster relationship whereby payroll for Moise was maintained by Eleni until 2001, when his payroll was moved to Nikolaos.

17. Petitioner further contends that Adamu and Atariwa were employed by both Eleni and Nikolaos in 2005 pursuant to a common paymaster relationship whereby Eleni maintained the payroll for Adamu and Atariwa.

18. Petitioner asserts that, in 2005, Moise, Adamu and Atariwa performed the following job duties for Nikolaos: repair and maintenance of the building structure, maintenance of the boiler room and machinery providing heat and hot water to the building, repair and maintenance of the roof, maintenance and repair outside of the structure (landscaping, parking lot), repair and maintenance of the piping system of the structure, and maintenance of the lighting system.

19. Petitioner further asserts that, also in 2005, Moise, Adamu and Atariwa performed repair and maintenance duties for Eleni consisting of interior painting and wallpaper hanging,

hanging and maintaining signage, moving furniture and equipment, and repairing and maintaining hotel equipment.

20. Petitioner also alleges that, during 2005, approximately 90 percent of the time of Moise, Adamu and Atariwa was allocated to work performed for Nikolaos.

21. It is petitioner's position that (i) the exclusion of employees that worked for a related person within the immediately preceding 60 months as provided in the statutory definition of employment number in Tax Law § 14(g) does not apply to concurrent employment situations such as a common paymaster and (ii) Moise, Adamu and Atariwa were concurrently employed by both Eleni and Nikolaos during all of 2005 and at certain times during the immediately preceding 60 months pursuant to a common paymaster situation.

22. As a consequence of the foregoing factual and legal contentions, it is petitioner's position that Nikolaos had an employment number of .9 during the 2000 test year based on Moise's employment at 90 percent, an employment number of 1.8 during 2005 based on Moise at 90 percent (.9) plus part-time employees Adamu and Azariwa at 90 percent (.9), resulting in an employment increase factor for 2005 of 1 (1.8 [tax year] minus .9 [test year] equals .9 divided by .9 [test year] equals 1).

23. The Division contends that Moise was employed by Eleni in 1999 and 2000, began employment in 2001 for Nikolaos and remained employed by Nikolaos in 2005.

24. The Division further contends that Adamu and Atariwa were employed by Eleni in 2004 and 2005.

25. It is the Division's position that petitioner "failed to meet the employment increase factor" and therefore failed to qualify for the subject credits. The Division asserts that there was

neither a concurrent employment situation nor a common paymaster situation with respect to the employment of Moise, Adamu or Atariwa.

CONCLUSIONS OF LAW

A. Petitioner claims the QEZE credit for real property taxes pursuant to Tax Law §§ 15 and 606(bb) and QEZE tax reduction credit pursuant to Tax Law §§ 16 and 606(cc). Such credits are available to New York S corporation shareholders through Tax Law § 606(i). In accordance with that section, as the sole shareholder of Nikolaos, petitioner was entitled to claim 100 percent of that S corporation's credit base.

B. Preliminarily, it is observed that "a tax credit is 'a particularized species of exemption from taxation' (***Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193, 197 [1975], ***lv denied*** 37 NY2d 708 [1975]) and, therefore, petitioner[s] bore the burden of showing 'a clear cut entitlement' to the statutory benefit[s] (***Matter of Luther Forest Corp. v. McGuiness***, 164 AD2d 629, 632 [3d Dept 1991])" (***Matter of Golub Service Station v. Tax Appeals Tribunal***, 181 AD2d 216 [3d Dept 1992]; ***see also*** Tax Law § 689[e]).

C. Subject to certain limitations not at issue, the amount of the refundable QEZE credit for real property taxes in a given tax year is the product of three factors, one of which is the employment increase factor (***see*** Tax Law § 15[b]).

D. The amount of QEZE tax reduction credit in a given tax year is the product of four factors, one of which is also the employment increase factor (***see*** Tax Law § 16[b]).

E. The above-referenced employment increase factor, applicable to both the QEZE real property tax credit and the QEZE tax reduction credit, is defined as follows:

> The employment increase factor is the amount, not to exceed 1.0, which is the greater of:

> (1) the excess of the QEZE's employment number in the empire zones with respect to which the QEZE is certified pursuant to article 18-B of the general municipal law for the taxable year, over the QEZE's test year employment number in such zones, divided by such test year employment number in such zones; or
>
> (2) the excess of the QEZE's employment number in such zones for the taxable year over the QEZE's test year employment number in such zones, divided by 100.
>
> (3) For purposes of paragraph one of this subdivision, where there is an excess as described in such paragraph, and where the test year employment number is zero, then the employment increase factor shall be 1.0. (Tax Law § 15[d]).

F. As used in Tax Law § 15(d), employment number means:

> [T]he average number of individuals, excluding general executive officers (in the case of a corporation), employed full-time by the enterprise for at least one-half of the taxable year. . . . Such number shall not include individuals employed within the state within the immediately preceding sixty months by a related person to the QEZE, as such term "related person" is defined in [Internal Revenue Code § 465(b)(3)(c)] (Tax Law § 14[g]).

Full time employment for QEZE purposes includes two or more jobs that together constitute the equivalent of a job of at least 35 hours per week (***see*** 2005 Instructions for Form IT-604 [IT-604-I] and 2005 Instructions for Form IT-606 [Form IT-606-I]).

G. As used in Tax Law § 15(d), the test year is the last taxable year of the business enterprise ending before the test date, or if the enterprise does not have such a taxable year, then it shall be deemed to have a test year consisting of either the last calendar year or the last fiscal year ending on or before the test date (Tax Law § 14[d]). The test date is, generally, the date the business enterprise was first certified under Article 18-B of the General Municipal Law (Tax Law § 14[e]). Accordingly, Nikolaos's test date was May 9, 2001 and its test year was 2000.

H. Eleni and Nikolaos were related persons as defined in Internal Revenue Code § 465(b)(3)(c) and therefore related persons for purposes of Tax Law § 15(d) because petitioner owned 100 percent of each corporation.

I. As indicated in the Statement of Proposed Audit Changes, the deficiency in the present matter is premised on the Division's determination that Moise is not properly includable in Nikolaos's employment number for the tax year at issue because he was employed by Eleni, a related person, within the immediately preceding 60 months.[1] This disallowance of Moise reduced Nikolaos's reported employment number for the 2005 tax year to zero, thereby reducing Nikolaos's employment increase factor for the 2005 tax year to zero. Given the prescribed methods for computing the credits at issue (***see*** Conclusions of Law C and D), a zero employment increase factor necessarily results in zero credits.

J. The Division's disallowance of the QEZE credit claims is supported by the payroll records of Eleni and Nikolaos. Specifically, such records indicate that Moise was paid by Eleni and not Nikolaos in 2000 and was listed as an Eleni employee in 2000 for withholding, wage reporting and unemployment insurance reporting purposes (***see*** Finding of Fact 7). Based on such documentation it is reasonable to conclude that Moise was employed by Eleni and not Nikolaos in 2000. Payroll records thus indicate an employment number of zero for Nikolaos for the 2000 test year. With respect to 2005, Moise was paid by Nikolaos and was listed as an employee on Nikolaos's NYS-45's (***see*** Finding of Fact 8). Based on such documentation it is reasonable to conclude that Moise was employed by Nikolaos and not Eleni in 2005. Additionally, the payroll records indicate that Adamu and Azariwa were paid by Eleni in 2005 and were listed as employees on Eleni's NYS-45's for that year (***see*** Finding of Fact 11). Based on such documentation it is reasonable to conclude that Adamu and Azariwa were employed by Eleni and not Nikolaos in 2005. The payroll records thus indicate one employee for Nikolaos for

[1] The Statement of Proposed Audit Changes did not address the issue of whether Adamu and Azariwa were properly includable in Nikolaos's employment number for 2005 because petitioner apparently had not yet raised this issue.

2005, but an employment number of zero because the one employee (Moise) was employed by Eleni within the preceding 60 months (***see*** Tax Law § 14[g]). The payroll records thus indicate an employment increase factor of zero (***see*** Tax Law § 15[d]) and thereby support the disallowance of the claimed QEZE credits.

K. Petitioner discounts the significance of the payroll records and the absence of any contemporaneous evidence of concurrent employment or the use of a common paymaster by noting that there are no requirements for approval or registration of a common paymaster or any requirement that an employer reimburse a common paymaster. Even so, the absence of any such corroborating evidence means that petitioner's claim of concurrent employment and common paymasters rests on the weight to be accorded the affidavits of petitioner and Moise, each dated January 3, 2013, that were received in evidence. Pursuant to the following discussion, however, the affidavits are insufficient to establish entitlement to the subject credits.

Clearly, the fundamental weakness in petitioner's position is the lack of any contemporaneous documentation to corroborate his factual claims. This weakness is magnified by petitioner's use of affidavits to make these claims. Absent an opportunity to observe and thereby evaluate the credibility of the affiants (i.e., petitioner and Moise), and to have their factual assertions tested by cross examination, I am unable to find such claims credible in the face of the contrary payroll evidence.

Furthermore, petitioner's ultimate (and uncorroborated) claim of concurrent employment is itself premised on unsubstantiated factual assertions. Specifically, through the affidavits, petitioner contends that a concurrent employer-employee relationship existed between the three employees and Nikolaos and Eleni based on the assertion that the three took direction from petitioner in performing certain tasks for Nikolaos and certain tasks for Eleni (***see*** paragraphs 18

and 19). The record, however, lacks sufficient evidence to establish that Nikolaos was responsible for the various maintenance tasks attributed to it in the affidavits. Petitioner did not offer in evidence a copy of the lease between Nikolaos and Eleni or any other contemporaneous documentation delineating each party's duties and responsibilities with respect to the maintenance of the premises. The fact that Nikolaos was the landlord of the premises is not dispositive that it was responsible for certain specific maintenance tasks as claimed by petitioner. Accordingly, petitioner's contention that concurrent employment is established by reference to the specific tasks performed is rejected.

Even if petitioner had established a concurrent employment situation for Moise, Adamu and Azariwa, the affidavits fail to establish his claim that these employees spent 90 percent of their time performing maintenance work for Nikolaos. As there is no indication that this percentage was based on a review of contemporaneous employment or business records, this assertion is pure conjecture and is therefore properly rejected.

Additionally, the credibility of the assertion in petitioner's affidavit that Adamu was concurrently employed by Nikolaos and Eleni is compromised by the February 19, 2009 letter from Erez Yacar (***see*** Finding of Fact 12) that states that Adamu worked "full time as the Maintenance worker for the Royal Regency Hotel." The Royal Regency Hotel was operated by Eleni (***see*** Finding of Fact 4). Logically, if Adamu worked for the Royal Regency Hotel, he worked for Eleni, and if he worked "full time" for Eleni as stated in the letter, then he did not work for Nikolaos.

In sum, while petitioner's claim of concurrent employment is certainly conceivable, his uncorroborated factual claims made by affidavit are plainly insufficient to overcome the contrary

payroll evidence and thus fail to establish a "clear cut entitlement" to the credit as required (***see Matter of Luther Forest Corp. v. McGuiness***).

L. The petition of Gus Paxos is denied, and the Notice of Deficiency dated July 9, 2009, is sustained.

DATED: Albany, New York
October 17, 2013

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE