

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :

of :

JOSEPH SPIEZIO, III, JACQUELINE SPIEZIO, :
JOSEPH SPIEZIO, IV, AND LIANNA SPIEZIO :

for Redetermination of Deficiencies or for Refund of
Personal Income Tax under Article 22 of the Tax Law
for the Year 2008. :

DETERMINATION
DTA NOS. 824755, 824756,
824757, 824758 and 824759

In the Matter of the Petition :

of :

LOUISE SPIEZIO AND JOSEPH SPIEZIO, III :

for Redetermination of Deficiencies or for Refund of
Personal Income Tax under Article 22 of the Tax Law
for the Years 2006 and 2007. :

Petitioners Joseph Spiezio, III, Jacqueline Spiezio, Joseph Spiezio, IV, and Lianna Spiezio filed petitions for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the year 2008.

Petitioners Louise Spiezio and Joseph Spiezio, III, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 2006 and 2007.

On May 28, 2013 and June 3, 2013, respectively, petitioners, appearing by Harris Beach PLLC (Pietra G. Lettieri, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), waived a hearing and submitted this matter

for determination based on documents and briefs to be submitted by January 31, 2014, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.¹

ISSUES

I. Whether the Division of Taxation properly disallowed petitioners' Empire Zone wage tax credits and real property tax credits claimed via Joni Property Trust, LLC, for the years 2006, 2007 and 2008, on the basis that Joni Property Trust, LLC, failed to meet the employment increase factor because certain employees of that corporation were not "qualified employees" since they had been employed by a related entity, Joni Management and Realty Services, LLC, within the immediately preceding 60 months.

II. Whether the Division of Taxation properly disallowed petitioners' Empire Zone wage tax credits and real property tax credits claimed via Spiezio Organization, LLC f/k/a Mercantile Lofts, LLC, for the years 2006, 2007 and 2008, upon the basis that such entity failed to maintain a full-time employee for more than half of such years.

FINDINGS OF FACT

1. During the years at issue, 2006 through 2008, and during the year 2005, petitioner Joseph F. Spiezio, III, was the managing member and tax member of certain domestic limited liability companies (Spiezio Companies). These companies, the dates of their creation, and their allocated ownership interests at various points in time are set forth below:

¹ These matters were initially assigned to Thomas C. Sacca, Administrative Law Judge. Judge Sacca retired from State service during the pendency of these matters and the same were transferred and assigned to Dennis M. Galliher, Administrative Law Judge, pursuant to the authority of section 3000.15(f) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

a) Spiezio Family Holdings, LLC (SFH) was created November 9, 1997. For the years 2005, 2006 and 2008, SFH was owned by Joseph Spiezio, III (9%), Louise Spiezio (61%), Jacqueline Spiezio (10%), Joseph Spiezio (10%) and Lianna Spiezio (10%). For the year 2007, SFH was owned by Joseph Spiezio, III (100%).

b) Joni Property Trust LLC (Joni Property) was created August 18, 1998. For the year 2005, Joni Property was owned by SFH (50%) and by one Nicholas Tarsia (50%).² For the year 2006, Joni Property was owned by Joseph Spiezio, III (50%) and Nicholas Tarsia (50%). For 2007, Joni Property was owned by Joseph Spiezio, III, (50%) and Louise Spiezio (50%).³ In 2008, Joni Property was owned by SFH (50%) and Nicholas Tarsia (50%).

c) Joni Management & Realty Services LLC (Joni Management) was created April 6, 1999. For all of the years 2005 through 2008, Joni Management was owned by SFH (50%) and Nicholas Tarsia (50%).⁴

d) Spiezio Organization LLC, f/k/a Mercantile Lofts LLC (Merc) was created May 3, 2001. For all of the years 2005 through 2008, Merc was owned by Joseph Spiezio, III (100%).

2. For the audit years at issue, Joseph Spiezio, III, and/or the other members of SFH, including the other four petitioners herein who are the spouse and children of Joseph Spiezio, III, received the flow-through benefit of Qualified Empire Zone Enterprise (QEZE) tax credits claimed by certain of the Spiezio Companies, with such credits allocated pro-rata to the various petitioners in accordance with their proportional membership interests in the various entities during the particular years in issue.

² For those years during which SFH owned 50% of Joni Property (2005 and 2008), and with respect to the 50% ownership interest SFH held in Joni Management, their 50% ownership interests were in turn held in the same percentages as are set forth with respect to the ownership of SFH during the years 2005, 2006 and 2008 (*see* Finding of Fact 1[a]).

³ The record reflects that for 2007, Joni Property was owned by Joseph Spiezio, III (50%) and Louise Spiezio (50%) (*see* Ex L, 2007 New York Partner's Schedule K-1 [Form IT-204-IP]). This differs from the ownership for such year as set forth in petitioners' brief (Joseph Spiezio, III [50%] and Nicholas Taxzia [50%]). This distinction has no impact on the conclusion that Joni Property and Joni Management were "related persons" per Internal Revenue Code (IRC) § 465(b)(3)(C).

⁴ Joni Management was dissolved October 28, 2009.

3. Until the end of 2005, when it was merged into Joni Property, Joni Management was an operating company that engaged in the overall management of various commercial real estate projects owned and developed by the Spiezio Companies. Joni Management acted as the primary operator and the designated entity to conduct repairs to properties that were purchased by the Spiezio Companies in the City of Yonkers, New York, Empire Zone (the Yonkers Zone). Joni Management also undertook all of the construction and renovation of dilapidated properties purchased by its affiliated entities. Joni Management applied for, and was certified as, a QEZE on December 27, 2000. Joni Management's successes in the revitalization of the urban core of the City of Yonkers led to it being presented with the first "Rising Development" award given in the history of the City of Yonkers.

4. Joni Property initially operated as a real estate holding company, having purchased for redevelopment a run down and abandoned retail shopping center. Joni Property applied for, and was certified as, a QEZE on May 30, 2002 in connection with a facility located at 660 Tuckahoe Road, Yonkers, New York (the Tuckahoe project). The property was completely rehabilitated into a thriving shopping center that currently employs over 100 people in the Yonkers community. As a result of Joni Property's development efforts, the developer was able to hire local contractors. The taxes collected on the property increased from \$60,000.00 to \$160,000.00. In order to attract viable tenants so as to make the shopping center a success, a pass-through of the Yonkers Zone tax credits to all tenants through their leases was offered, such that upon fulfillment of its economic development goals, Joni Property's tenants were not required to reimburse the landlord for property taxes paid.

5. In similar fashion, Merc undertook the development of a vacant and abandoned commercial building, located in Yonkers at 12 - 14 North Broadway, into the first new loft

building in the City of Yonkers (the Merc Project). The Merc Project was developed for both residential and commercial use, including the development of a single unit commercial space for a retail store. Merc applied for, and was certified as, a QEZE on May 30, 2002 in connection with the facility located at 12 - 14 North Broadway, Yonkers, New York. The loft development was commenced and completed in accordance with the goals set out by the local and State Empire Zone program to promote economic development and job creation in an economically distressed area of the State.

6. SFH was created as a holding company for all of the Spiezio family holdings and it continues to operate in the same capacity today. According to the August 29, 2013 affidavit of Joseph Spiezio, III, although Joni Management, Joni Properties, and Merc were separate legal entities for Empire Zone purposes, they were viewed by him as one cohesive operation, with employees working “concurrently.” Mr. Spiezio states that he interpreted “facility” as meaning “location rather than taking into account employment for the separate legal entities.”

7. Mr. Hector Paulino was hired by Joseph Spiezio, III, in 2001 as a property manager and local site manager to perform maintenance functions and handle tenant inquiries for the SFH properties, including the Tuckahoe Project and the Merc Project, located within the Yonkers Zone. Mr. Paulino avers by his affidavit dated August 29, 2013 that he was employed full time during the years 2006 through 2008 and, given the differences in size and scope of the properties he managed, spent approximately 80% of his working time at the Tuckahoe Project and 20% of his working time at the Merc Project. Mr. Paulino states that he was under the direction of Joseph Spiezio, III, in performing services including, but not limited to, site management, oversight of all retail tenants, and common area maintenance of the facilities. Mr. Paulino notes

that his paychecks were issued by Joni Management until 2005, when it ceased operations and was merged into Joni Property, and that his paychecks were thereafter issued by Joni Property.

8. Mr. Scott Fredericks was hired by Joseph Spiezio, III in 2001 as a comptroller for the SFH companies, to perform financial functions including comptroller functions, assisting all managers of the Spiezio companies, meeting with Yonkers Zone officials, filing reports, reviewing and paying contractor invoices and vetting lease qualifications and lease procurement with respect to the above-noted properties located within the Yonkers Zone. Mr. Fredericks avers by his affidavit dated August 29, 2013 that, like Mr. Paulino, he was employed full time during the years 2006 through 2008, and spent approximately 80% of his working time on the Tuckahoe Project and 20% of his working time on the Merc Project. Mr. Fredericks states that he was under the direction of Joseph Spiezio, III in performing his various functions on behalf of the Spiezio Companies. Like Mr. Paulino, Mr. Fredericks notes that his paychecks were issued by Joni Management until 2005, when it ceased operations and was merged into Joni Property, and that his paychecks were thereafter issued by Joni Property.

9. Ms. Mildred Molina was hired by Joseph Spiezio, III, as a property manager at the Merc Project, in charge of advertising and leasing, conducting meetings and showings, and overseeing maintenance of the loft property. Petitioners claim that Ms. Molina was employed full time, as the on-site rental manager for the Merc loft property, and that as such her compensation included the value of an apartment that she was required to live in at the property. Ms. Molina was required to be on call 24 hours per day, 7 days per week, and had larger responsibilities during the construction of the several-phase project. Ms. Molina was employed by Merc commencing with the execution of an Employment Agreement dated August 1, 2005 between Ms. Molina and Merc for a term of employment running from such August 1, 2005 date

through June 30, 2008. Joseph Spiezio, III, states that, like Messrs. Paulino and Fredericks, Ms. Molina worked under his direction in performing her employment responsibilities concerning Merc.

10. Although petitioners' brief describes Ms. Molina as a "leased employee," the Employment Agreement is, by its own terms, a direct agreement between Merc, as employer, and Ms. Molina, as employee, and there is no evidence that Ms. Molina was employed by Joni Management at any time or was an employee leased by that entity to Merc. The Employment Agreement specifies, at Article 2, paragraph 2.01, that it is for a fixed term of employment spanning August 1, 2005 through June 30, 2008 and requires, under Article 7, paragraph 7.03, that any changes to the terms of the agreement must be in writing and signed by the party to be bound. Ms. Molina's compensation was set, per Article 3, paragraph 3.01, at a salary of \$30,500.00 per year, consisting of \$24,000.00 to be deducted therefrom as the value of an on-premises apartment in which she was required to live, leaving \$6,500.00 as the balance of her salary income. The date and method of payment of her compensation, per Article 3, paragraph 3.02, was set as a weekly payment of \$125.00, plus the \$2,000.00 per month amount attributable to the on-premises apartment to be deducted on the last business day of each month.

11. Ms. Molina's final weekly payment of \$125.00 was made on June 27, 2008. Pursuant to the terms of the Employment Agreement, the final deduction for the value of the on-premises apartment would have been made on June 30, 2008. There is no evidence that the Employment Agreement was terminated prior to its June 30, 2008 ending date, nor any evidence that such agreement was extended beyond such date. Similarly, and contrary to petitioners' allegations by brief, there is no evidence that Ms. Molina continued to have the right to remain in the on-premises apartment, or that she in fact remained in that apartment or that she continued in

her employment with Merc beyond the June 30, 2008 termination date of the Employment Agreement.

12. As the result of an audit of petitioners' New York State personal income tax returns for the years 2006, 2007 and 2008, the Division issued the following notices of deficiency:

Petitioner	Date of Notice	Notice Number	Tax Year	Tax Amount ⁵
Joseph Spiezio, III & Louise Spiezio	11/29/2010	L-035069555-4	2006	\$72,621.00
Joseph Spiezio, III & Louise Spiezio	11/29/2010	L-035069557-2	2007	\$145,182.00
Jacqueline Spiezio	02/24/2011	L-035069554-5	2008	\$14,389.00
Joseph Spiezio, IV	02/24/2011	L-035069553-6	2008	\$14,389.00
Lianna Spiezio	02/24/2011	L-035069550-9	2008	\$15,116.00

13. On February 2, 2011, the Division issued to petitioners Joseph Spiezio, III, and Louise Spiezio a Notice of Disallowance, premised upon the foregoing audit and pursuant to which the Division disallowed a portion, \$106,499.00, of Mr. and Mrs. Spiezio's claim for refund for the year 2008.

SUMMARY OF THE PARTIES' POSITIONS

14. The foregoing notices of deficiency and the Notice of Disallowance reflect the Division's position that petitioners were not entitled to receive, as flow-through recipients, the QEZE Credit for Real Property Tax (CRPT) and the QEZE Wage Tax Credit (WTC) claimed through SFH via Joni Property and Merc for the years 2006, 2007 and 2008. Specifically, the Division maintains that:

⁵ The amounts shown reflect tax only and do not include interest due thereon. No penalties were asserted on the deficiencies at issue.

a) Joni Property's claims for CRPT and WTC credits for the years ended 12/31/2006, 12/31/2007 and 12/31/2008 were properly denied on the basis that Joni Property did not meet the QEZE employment increase factor because Mr. Paulino and Mr. Fredericks were not eligible employees of Joni Property since they had been employed by Joni Management within the previous 60 months.

b) Merc's claims for the CRPT and WTC credits for the years ended 12/31/2006, 12/31/2007 and 12/31/2008 were properly denied because Merc's sole employee, Ms. Molina, was not an eligible full-time employee in 2006, 2007 and 2008.⁶

15. It is petitioners' position that the exclusion of employees who worked for a related person within the immediately preceding 60 months, as provided under the statutory definition of employment number in Tax Law § 14(g), does not apply to concurrent employment situations involving a common paymaster. Specifically, petitioners contend that Mr. Paulino and Mr. Fredericks were on Joni Management's payroll, but were employed in a concurrent employment arrangement by SFH from the time they were first hired, and were paid pursuant to a common paymaster relationship. Petitioners assert that the two employees took directions from and were under the control of petitioner Joseph Spiezio, III, as to the performance of their employment duties on behalf of all of the Spiezio entities, including Joni Management, Merc and Joni Property. Petitioners note that these two individuals were paid by both Joni Management and by Joni Property in 2005, "presumably" in connection with the wind down of the former entity. Thus, petitioners argue that this case does not present a situation where a new entity was created to whom employees of a predecessor entity were transferred so as to gain or maximize QEZE

⁶ With regard to the CRPT, the Division's notices also make reference to a lack of proof of payment of the real property taxes underlying such claimed credits. This claim was disputed by petitioners and documents were submitted to substantiate the payment of such taxes. The Division did not address this claim in its answers to the petitions or in its brief herein, and such claim of nonpayment of taxes is deemed abandoned and no longer in issue.

benefits, but rather that these employees simply were changed to the payroll of the entity actually paying them for the work they performed for all of the Spiezio companies.

16. With respect to Ms. Molina, petitioners maintain that while her last weekly \$125.00 salary payment was made on June 27, 2008, her employment with Merc did not terminate on that date. In this regard, petitioners claim that Ms. Molina's employment compensation for 2008 included her living arrangement whereby she was required live in an on-site apartment and be on call around the clock, and that this situation continued through the end of the calendar year 2008. Thus, petitioners maintain that since her status as an employee receiving compensation continued throughout such year, the Division improperly denied the QEZE credits claimed by petitioners through Merc.

17. The Division asserts in contrast, and with respect to the Joni Property based claims, that there was neither a concurrent employment situation nor a common paymaster situation regarding the employment of Mr. Paulino or Mr. Fredericks. With respect to the Merc based claims, the Division maintains that Ms. Molina's employment was terminated as of June 27, 2008, and that she was therefore not an eligible employee for purposes of the subject credits because she was not employed for at least half of the year 2008 and did not receive eligible wages for more than half of such year.⁷

⁷ The Division's initial position was that Ms. Molina was not an eligible full-time employee of Merc for any of the years at issue (2006 - 2008), and thus denied the Merc based credit claims for all of such years on that basis. However, correspondence in the record indicates that the Division recognized that the salary compensation as set forth in Ms. Molina's Employment Agreement, including both the \$125.00 weekly payment and the \$2,000.00 monthly salary deduction for the value of the on-site apartment, was (per 26 CFR 1.119-1[b]) acceptable for purposes of constituting full-time employment for the first two years in question. Thus, the Division did not address the years 2006 or 2007 viz-a-viz Ms. Molina and the Merc based credits in its brief and, in light of the record, it is concluded that the Merc based CRPT and WTC claims for such years are no longer disputed or in issue. However, the Division does continue to challenge the Merc based credit claims for the year 2008, upon the premise that Ms. Molina was not an eligible employee for such year.

CONCLUSIONS OF LAW

A. In this case, the Division determined that petitioners were not entitled to receive, as flow-through recipients, two different Empire Zone Tax Credits, to wit, the Credit for Real Property Tax and the Wage Tax Credit. The Division maintains that the “average number of Individuals” employed, for purposes of computing the “employment number” and the “employment increase factor,” may only include individuals employed full time for at least one-half of the taxable year, and may not include individuals who were employed by a “related person” within the immediately preceding 60 months. In this instance, the Division asserts that Joni Property did not meet the employment increase factor because Messrs. Paulino and Fredericks had been previously employed by a related person (Joni Management) within the preceding 60 months. The Division further asserts that Merc’s sole employee, Ms. Molina, was not a full-time employee for at least half of the taxable years in question, and did not receive eligible wages for more than half of the taxable year.

B. The Legislature passed the Empire Zones legislation in order to incentivize economic growth and new job creation (*see* General Municipal Law § 956; ***Matter of Hucko Trust***, Tax Appeals Tribunal, September 19, 2013). The legislation provides certain tax benefits in the form of credits to QEZEs. In this case, petitioners as flow-through recipients claim the QEZE CRPT pursuant to Tax Law §§ 15 and 606(bb), and the QEZE WTC pursuant to Tax Law § 606(k). Such credits are available to New York S corporation shareholders through Tax Law § 606(i); § 210(27) (CRPT) and § 210(19) (WTC). The credits are based upon a formula that calculates increases in employment. The formula compares a business’s “employment number” in a test year against its “employment number” in the year in which the QEZE tax credits are sought.

Thus, the definition of the “employment number,” and therein the definition of “eligible employee,” form the key components of the calculation.

C. Preliminarily, it is observed that petitioners are seeking a tax credit and thus bear the burden of proof to establish, through clear and convincing evidence, that they have a clear cut entitlement to the statutory benefit (*see e.g. Matter of Golub Service Station v. Tax Appeals Tribunal*, 181 AD2d 216 [3d Dept 1992]; *Matter of The Golub Corporation*, Tax Appeals Tribunal, May 31, 2012, *confirmed* 116 AD3d 1261 [2014]); see *also* Tax Law § 1089[e]). In *Matter of Hucko Trust*, a case that likewise involved an interpretation of the employment number, the Tribunal noted:

[T]ax credits, such as those at issue, are a particularized species of exemption from tax (*Matter of Marriott Family Rests. v. Tax Appeals Trib. of State of N.Y.*, 174 AD2d 805 [1991], *lv denied* 78 NY2d 863 [1991]). “Statutes creating tax exemptions must be construed against the taxpayer” (*Matter of Federal Deposit Ins. Corp. v. Commissioner of Taxation & Fin.*, 83 NY2d 44, 49 [1993] [internal quotation marks and citation omitted]). Herein, petitioners must show clear entitlement to the QEZE real property tax credits at issue (*Matter of Stevenson v New York State Tax Appeals Trib.*, 106 AD3d 1146 [2013]), specifically, proving that under the circumstances, their “interpretation of the statute is not only plausible, but also that it is the only reasonable construction” (*Id.* at 1147, *citing Matter of Moran Towing & Transp. Co. v New York State Tax Commn.*, 72 NY2d 166, 173 [1988]).

D. Dealing first with the Joni Property based credits, the term “employment increase factor” is defined for purposes of the QEZE CRPT pursuant to Tax Law § 15(d) as:

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 eighteen-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.

E. Tax Law § 14(g)(1), in turn, defines the "employment number" as follows:

The term "employment number" shall mean the 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 be computed by determining the number of such individuals employed by the taxpayer on the *thirty-first day of March, the thirtieth day of June, the thirtieth day of September and the thirty-first day of December* during the applicable taxable year, adding together the number of such individuals determined to be so employed on each of such dates and dividing the sum so obtained by the number of such dates occurring within such applicable taxable year.

The next sentence in Tax Law § 14(g)(1) limits the types of individuals who may be included within the "employment number" as follows:

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 subparagraph (c) of paragraph three of subsection (b) of section four hundred sixty-five of the internal revenue code. For this purpose, a "related person" shall include an entity which would have qualified as a "related person" to the QEZE if it had not been dissolved, liquidated, merged with another entity or otherwise ceased to exist or operate (italics added).

Tax Law § 606(k)(4)(iii) and § 210(19)(d)(3) set forth virtually identical limiting language with regard to the type of individuals who may not be included within the employment number for purposes of the QEZE WTC.

F. Section 465(b)(3)(c) of the Internal Revenue Code (IRC) provides, in part, that "a person (hereinafter in this paragraph referred to as the 'related person') is related to any person if (i) the related person bears a relationship to such person specified in section 267(b) or section 707(b)(1)" IRC § 267(b)(11) defines related persons as "[a]n S corporation and another S

corporation if the same persons own more than 50 percent in value of the outstanding stock of each corporation. . . .”

G. It is undisputed that Joni Property and Joni Management are related persons pursuant to the terms of the foregoing provisions. The Division’s position rests on this fact, thus leaving Mr. Paulino and Mr. Fredericks not properly included in Joni Property’s employment number for the years at issue because each was employed by a related person, Joni Management, within the immediately preceding 60 months. The disallowance of these employees reduced Joni Property’s employment number for the subject years to zero, thereby reducing the employment increase factor for such years to zero. Since the employment increase factor is one of the factors multiplied to compute the QEZE credits at issue, a zero employment increase factor necessarily results in zero credit.

H. Petitioners’ position is based on the claim that the individuals involved were actually employed by SFH to perform work for all of the Spiezio entities, that these individuals were thus concurrently employed, and the fact that their payrolls were initially maintained by Joni Management and later by Joni Property reflects only the use of a common paymaster. Petitioners attempted to establish these arrangements through the introduction into the record of the affidavits of Joseph Spiezio, III, Hector Paulino and Scott Fredericks, all dated August 29, 2013.

I. Petitioners’ position is initially frustrated by the lack of any contemporaneous documentation in support of the factual claims. The fact that the noted employees were carried first on Joni Management’s payroll and thereafter on Joni Property’s payroll does not establish that they were employed by all of the SFH companies, since this fact could equally and simply indicate that they were previously employed by Joni Management and later by Joni Property upon the wind-down, merger, liquidation or dissolution of the former entity. This latter situation falls

squarely within the exclusion rule of Tax Law § 14(g)(1) and § 210(19)(d)(3). There are no employment agreements specific to these two individuals included as a part of the record. Petitioners discount the absence of any contemporaneous evidence of concurrent employment or of the use of a common paymaster by noting that there are no QEZE specific 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 petitioners' claim of concurrent employment and common paymasters rests on the weight to be accorded the noted affidavits, each dated August 29, 2013, that were received in evidence. Pursuant to the following discussion, however, the affidavits are insufficient to establish entitlement to the subject credits.

J. There is no question that competent evidence can be submitted by affidavit, as authorized by the Tax Appeal Tribunal's regulations (20 NYCRR 3000.15[d][1]), and findings of fact may be made on the basis of affidavits (*see Matter of Orvis Co. v. Tax Appeals Tribunal*, 86 NY2d 165 [1995], *cert denied* 516 US 989 [1995]). However, the presentation of essential facts through the introduction of affidavits denies the trier of fact the opportunity to observe and evaluate the affiants' credibility and to have their assertions tested by cross examination. It also precludes the opportunity to question the affiants concerning matters not addressed in the affidavits. Clearly, the fundamental weakness in petitioners' position is the lack of any contemporaneous documentation to corroborate their factual claims, and 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, and to have their factual assertions tested by cross examination, I am unable to find such claims credible in the face of the lack of any compelling supportive documentary evidence.

K. Furthermore, petitioners' ultimate (and uncorroborated) claim of concurrent employment is itself premised on unsubstantiated factual assertions. Specifically, through the affidavits, petitioners contend that a concurrent employer-employee relationship existed between the two employees and the Spiezio family of companies, based on the assertion that the employees took direction from petitioner Joseph Spiezio, III, in performing certain tasks for the Joni entities and for Merc. The record, however, lacks sufficient evidence such as any contemporaneous documentation delineating each party's duties and responsibilities with respect to their employment. Unlike the Merc based credits, there are no employment agreements or other documents spelling out the obligations and duties of either of the two employees. Petitioners note that the record includes an Agreement for Services between Joni Management and Merc, dated as of May 3, 2001, pursuant to which Joni Management may lease employees to Merc. This agreement does not specify any particular employees being leased, but instead references "attached" exhibits A and B to identify or specify the particular leased employees. Exhibits A and B were not, however, attached or otherwise included in the record. Moreover, even if petitioners had established a concurrent employment situation, the affidavits fail to establish the claim that these employees spent 80 percent of their time performing work for the Joni entities and 20 percent of their time performing work for Merc. 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. In short, the absence of any steps formalizing the concurrent employment/common paymaster method of operation leaves no clear basis in support of the existence of the same. While petitioners' claim of concurrent employment and the use of a common paymaster is certainly conceivable, the uncorroborated factual claims made by affidavit are plainly insufficient to establish a "clear-cut entitlement" to

the credit as required (*see Matter of Luther Forest Corp. v. McGuiness*, 164 AD2d 629, 632 [1991]). Thus, petitioners' Joni Property based claims for QEZE CRPT and QEZE WTC are denied as barred by the 60-month related person provisions under Tax Law § 14(g)(1) and § 210(19)(d)(3), respectively.

L. With regard to the Merc-based QEZE CRPT and QEZE WTC, the same turn on the issues of "eligible employee" and "eligible wages." With respect to the QEZE CRPT, Tax Law § 14(g)(1) defines eligible employees as those who are employed full time by the QEZE entity for at least half of the taxable year for which the credit is being claimed, measured upon their employment status as existing on four quarterly dates. As relevant here with regard to Ms. Molina and Merc, those dates are March 31 and June 30 of the year 2008 (*see* Conclusion of Law E). The record establishes that Mildred Molina was in fact employed, full time, and was paid pursuant to the terms of her Employment Agreement with Merc, from August 1, 2005 through June 30, 2008 (*see* Findings of Fact 9, 10 and 11). As a consequence, Merc is entitled to the QEZE CRPT claimed for the years 2006, 2007 and 2008, as well as the CRPT and WTC claimed for 2006 and 2007 (*see* footnote 7).

M. While petitioners are entitled to the Merc-based QEZE CRPT for the all of the years and to the Merc-based QEZE WTC for 2006 and 2007, the Merc-based QEZE WTC for 2008 must be denied. On this score, Tax Law § 210(19)(b)(3) defines "employment number" as follows:

"Average number of individuals, excluding general executive officers, *employed full-time*" shall be computed by ascertaining the number of such individuals employed by the taxpayer on the *thirty-first day of March, the thirtieth day of June, the thirtieth day of September and the thirty-first day of December during each taxable year* or other applicable period, by adding together the number of such individuals ascertained on each of such dates and dividing the sum so

obtained by the number of such dates occurring within such applicable taxable year or other applicable period (emphasis added).

N. Ms. Molina was, pursuant to her Employment Agreement, clearly employed full time for at least half the year 2008 (*see* Conclusion of Law L). However, for purposes of calculating the credit, Tax Law § 210(19)(d) states:

The amount of the credit shall equal the sum of (1) the product of three thousand dollars and the average number of individuals . . . employed full-time by the taxpayer, computed pursuant to the provisions of subparagraph three of paragraph (b) of this subdivision who

(A) *received empire zone wages for more than half of the taxable year,*

(B) received, with respect to more than half of the period of employment by the taxpayer during the taxable year, an hourly wage which was at least one hundred thirty-five percent of the minimum wage specified in section six hundred fifty-two of the labor law, and

(c) are targeted employees; and

(2) the product of fifteen hundred dollars and the average number of individuals . . . employed full-time by the taxpayers, computed pursuant to the provisions of subparagraph three of paragraph (b) of this subdivision, *who received empire zone wages for more than half of the taxable year* (italics added).

O. Unfortunately, the record does not establish that Ms. Molina received empire zone wages for *more than* half of the year 2008, as required. Rather, her employment ended, per her Employment Agreement, on June 30, 2008, and there is no evidence in the record to support petitioners' claim that she was entitled to remain in the on-premises apartment for the balance of 2008, or was otherwise employed by Merc *after* June 30, 2008. Thus, whether the half-year point for purposes of Tax Law § 210(19)(d) is measured by months (i.e., six months) or by days (June 30 was the 182nd out of 366 days in 2008, a leap year), Ms. Molina did not receive empire

zone wages for *more than* half of the year as required. Accordingly, petitioners are not entitled to the Merc-based QEZE WTC claimed for the year 2008.

P. The petitions of Joseph Spiezio, III, Louise Spiezio, Jacqueline Spiezio, Joseph Spiezio, IV, and Lianna Spiezio are granted to the extent indicated in Conclusion of Law L (granting the Merc-based QEZE CRPT claimed for 2006, 2007 and 2008 and the Merc-based QEZE WTC claimed for 2006 and 2007), but are otherwise denied, and the Division's notices of deficiency dated November 29, 2010 and February 24, 2011 and its Notice of Disallowance dated February 2, 2011, as recalculated in accordance herewith, are sustained.

DATED: Albany, New York
July 17, 2014

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE