

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
PAUL SOLIS-COHEN : DETERMINATION
for Redetermination of a Deficiency or for Refund : DTA NO. 825097
of New York State Personal Income Tax under :
Article 22 of the Tax Law for the Year 2010. :

Petitioner, Paul Solis-Cohen, 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 2010.

A hearing was held before Arthur S. Bray, Administrative Law Judge, in Albany, New York, on August 1, 2013 at 10:00 A.M., with all briefs due by December 17, 2013 which date began the six-month period for the issuance of this determination. Petitioner appeared by Berardi, Gottstine & Miller, CPAs, P.C. (William F. Berardi, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly disallowed petitioner's deduction for the qualified empire zone enterprise real property tax credit for the year 2010 on the ground that his company did not meet the employment increase factor.

FINDINGS OF FACT

1. Petitioner, Paul Solis-Cohen, and his wife filed a joint New York State Resident Income Tax Return for the year 2010. The return included a form IT-606 Claim for QEZE¹ Credit for Real Property Taxes. The QEZE business named on the form was Level Realty LLC (Level Realty). In order to compute the QEZE credit, there must be, among other things, an increase in employment and this, in turn, is determined by comparing the current year's employment with the base year employment level. To the extent at issue in this proceeding, petitioner reported that the current year employment number within the Empire Zone in which he was certified was 1.00. The next step is to calculate the employment increase factor. Petitioner had one full-time employee for the current year and since he had no employees during the test year, he reported an employment increase factor of one.

2. Petitioner owned 100 percent of Level Realty, which was organized as a single-member limited liability corporation. Level Realty operated as a real estate holding and management company. He also owned 100 percent of another firm known as Catskill Art and Office Supply (Catskill Art).

3. The Division of Taxation (Division) conducted an audit of the QEZE credit reported on petitioner's income tax return and also examined Level Realty. In the course of the audit, the Division ascertained that the one employee reported on the tax form was Ms. Rebekah Waterman. It also learned that, within the previous 60 months, Ms. Waterman worked for Catskill Art.

¹ The term QEZE refers to a qualified empire zone enterprise.

4. The Division reasoned that in order to calculate the amount of the QEZE credit, one is required to multiply three factors, the employment factor, the benefit period factor and the amount of real property taxes that were actually paid. Since the Tax Law excluded individuals employed by a related entity within the past 60 months from the calculation of the employment factor, the Division concluded that employment factor was zero. It followed that since one of the factors was zero, when the three factors were multiplied together, the product, which was the amount of the allowable credit, was also zero.

5. On the basis of the forgoing audit, the Division issued an Account Adjustment Notice, dated June 5, 2011, which explained that the amount of the refund requested in petitioner's New York State income tax return had been reduced from \$67,135.00 to \$1,801.77.

6. In or about 1978, petitioner started Catskill Art in Woodstock, New York. Thereafter, he opened stores in Kingston and Poughkeepsie, New York.

7. Level Realty was formed to enable petitioner to acquire and develop distressed properties in order for the properties to become productive assets of the community. Petitioner hoped to accomplish this goal through a process wherein he would not suffer a significant financial loss.

8. Petitioner became interested in a distressed property that was located on Main Street in the Town of Poughkeepsie. The building, which consisted of approximately 7,500 square feet, was in disrepair and a blight upon the community. Petitioner and his wife, who is an architect, felt that with the assistance of a QEZE credit, they could accomplish their goal of restoring the building and creating jobs.

9. Petitioner spent close to two million dollars renovating the building, which included installation of a photovoltaic solar energy system on the roof. The impetus for installing the

photovoltaic solar energy system was to be responsive to the community and set an example by creating a renewable energy resource.

10. The QEZE credit was an important part of the financial planning for the renovation of the building because petitioner needed the tax credit in order to meet the substantial mortgage obligation that he incurred.

11. On March 20, 2003, Level Realty entered into a lease of the renovated property on Main Street in Poughkeepsie with Advance Stores Company, Incorporated. This firm, which operated a national chain of stores, ultimately created 20 jobs. Paragraph 14(b) of the lease directed the landlord to maintain all common areas in good repair and keep the common areas reasonably free of snow, ice and debris.

12. The leased property is located in an urban environment and the common areas require constant upkeep. Among other things, there are gardens to maintain, occasional snow removal, periodic cleaning of scattered debris and vagrancy issues. In order to comply with his obligations under the lease, petitioner hired a property manager. The position required the hiring and supervision of outside contractors to keep the property safe and compliant with the lease at all times.

13. In November 2009, the employee who performed the property management service for Level Realty left without notice. Petitioner viewed the vacancy of this position as an emergency because the tenant required that the property be managed. In order to solve this problem, petitioner contacted Rebekah Waterman, who had worked as a clerk for Catskill Art from May 14, 2007 until February 21, 2009 when she resigned to take a position with another employer. Ms. Waterman's prior position with Catskill Art led her to become familiar with the property. Petitioner offered Ms. Waterman the job and she accepted.

14. Ms. Waterman fulfilled her duties for a period of time and, when she was no longer needed, she accepted other employment. Thereafter, petitioner hired another individual.

CONCLUSIONS OF LAW

A. The Empire Zone program was created in order to promote economic growth and encourage job creation (*see* General Municipal Law § 956). A QEZE may receive a tax benefit through a statutory formula that multiplies three factors: the benefit period factor, the employment increase factor and the eligible real taxes paid during the taxable year (Tax Law § 15[b][1]).

B. The only factor in issue in this matter is the employment increase factor. The Division maintains that the employment increase factor is “0” because Ms. Waterman is disqualified by the exclusionary provision of Tax Law § 14(g). The disqualification arises because she was employed by Catskill Art, which was undisputedly a “related person” within the prior 60-month period. In response, petitioner argued at the hearing that he faced a situation where he needed to fill the position of property manager as quickly as possible in order to maintain a good relationship with his tenant. Petitioner also explained that he mistakenly thought that the exclusionary provision in Tax Law § 14(g) was for a six-month period. In his brief, petitioner contends that he should prevail because the answer of the Division misstated the name of the related company. Petitioner also asks that the economic substance doctrine be considered resulting in a conclusion that events beyond one’s control should not have a major tax impact because of a finely worded definition.

C. The resolution of the issue presented depends on the meaning of the term “employment number.” The term “employment number” is defined by Tax Law 14(g)(1) 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.

In the next sentence, Tax Law § 14(g)(1) limits the types of individuals who may be included within the “employment number”:

“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” (emphasis added).

The interpretation of this provision is the only issue raised by the parties. The question is whether Ms. Waterman may be included in the employment number despite the fact that she was employed by a related person to the QEZE within the preceding 60 months.

D. Since petitioner is seeking a tax credit, he bears the burden of proof of establishing through clear and convincing evidence that the exemption applies and that he is entitled to the statutory benefit (*see e.g. Matter of Golub Serv. Sta. v. Tax Appeals Trib.*, 181 AD2d 216 [1992]; *Matter of The Golub Corporation*, Tax Appeals Tribunal, May 31, 2012, *confirmed* 116 AD3d 1261 [2014]). In *Matter of Hucko Trust* (Tax Appeals Tribunal, September 19, 2013), a case that also involved an interpretation of the employment number, the Tribunal noted that:

[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]).

E. In this instance, the statutory language at issue is unambiguous and it is clear that Ms. Waterman’s employment at Catskill Art excludes her from being included in the employment number. The statutory language simply does not lend itself to the flexibility sought by petitioner. Similarly, while petitioner’s goal of diminishing urban blight is commendable, the Division of Tax Appeals is not at liberty to extend the coverage of statutory language to situations not covered by the statute (*Matter of Bloomingdale Bros. v Chu*, 70 NY2d 218, 223 [1987]).

F. It is noted that there has been no showing that the error in the answer caused any prejudice to petitioner. Therefore, the error may be ignored (*see* Siegel, NY Prac § 6 at 7).

G. The petition of Paul Solis-Cohen is denied and the Account Adjustment Notice, dated July 5, 2011, is sustained.

DATED: Albany, New York
June 5, 2014

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE