STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARK S. AND MARIA F. PURCELL	:	DETERMINATION DTA NO. 825436
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2008, 2009 and 2010.	:	

Petitioners, Mark S. and Maria F. Purcell, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 2008, 2009, and 2010.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, in Rochester, New York, on February 4, 2014 at 9:30 A.M., with all briefs due by November 21, 2014, which date began the six-month period for the issuance of this determination. Petitioners appeared by Bousquet Holstein, PLLC (Paul M. Predmore, Esq., Philip S. Bousquet, Esq. and Cecelia R.S. Cannon, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly reduced the payroll component of the zone allocation factor for purposes of computing the tax reduction credit under Tax Law § 16, specifically by excluding a portion of the claimed in-zone wages of certain employees of Purcell

Construction Corporation, upon the position that such employees were not sufficiently connected with the empire zone so as to be considered empire zone employees.

II. Whether the Division of Taxation properly reduced the tax factor component for purposes of computing the tax reduction credit under Tax Law § 16, specifically by reducing the amount of qualified empire zone enterprise income allocated to New York State on the basis of applying the business allocation percentage of Purcell Construction Corporation, a sub-chapter S corporation, to determine such allocated income amount.

FINDINGS OF FACT[1]

1. Purcell Construction Corporation (PCC) is a New York business corporation, formed in 1972, whose sole shareholder is petitioner Mark S. Purcell. PCC's sole New York business office has always been located at 566 Coffeen Street, Watertown, New York (Coffeen Street premises).

2. At all times relevant, PCC elected to be taxed as a subchapter S corporation pursuant to the Internal Revenue Code (IRC) and Tax Law § 660. PCC filed a Form CT-3-S (New York S Corporation Franchise Tax Return) for each of the years 2008, 2009 and 2010 (the years in issue). On page 1, line E, of each of such returns, PCC reported its business allocation percentage (BAP) as follows:

2008 – 44.5624%
2009 – 51.5741%
2010 – 34.3787%

[1] The parties to this matter entered into a stipulation of facts, and those facts have been incorporated herein.

3. Petitioners, Mark S. and Maria F. Purcell, jointly filed a Form IT-201 (New York State Resident Income Tax Return) for each of the years 2008, 2009 and 2010. As the sole shareholder of PCC, petitioner Mark S. Purcell reported on such returns all income that flowed through to him from PCC.

4. On December 2, 2003, PCC was certified under Article 18-B of the General Municipal Law as an empire zone enterprise in the City of Watertown Empire Zone (Watertown Empire Zone). The Certificate of Eligibility states that the corporation:

> "is eligible to access the benefits referred to in Section Nine Hundred Sixty Six of the General Municipal Law in connection with the facility(ies) located at 566 Coffeen St., Watertown NY-designated as zone property 10/3/2003 [and] 22643 Fisher Circle, 22686 and 22419 Fisher Road, Watertown, New York-designated as zone property 7/27/1994."

PCC's business office is, as noted above, located at the Coffeen Street premises. Its separate, and only, manufacturing plant is situated in the Jefferson County Industrial Park at the Fisher Circle/Fisher Road premises. PCC does not own or operate any other offices or facilities, either in or out of any empire zone, in New York State.

5. PCC utilizes a vertically integrated structure to conduct (a) general construction activities, (b) construction management activities and (c) design/build construction activities. In design/build construction, PCC provides both the building design and building construction functions, so as to provide its customers with "turnkey" delivery of a given structure ready for occupancy and use. The largest segment of PCC's construction activities are large structure, design/build projects, such as dormitories, barracks, and college residence halls, built using pre-fabricated wall, floor/ceiling and roof panels designed (at PPC's Coffeen Street premises) and manufactured (at PCC's Fisher Circle/Fisher Road premises) in the Watertown Empire Zone. PCC's business model relies on integrating its prefabricated panel system into its design/build

construction operations. Its use of the prefabricated panel system for construction, coupled with its ability to self-manufacture the panels for delivery and installation at its job sites, allows for faster construction. This distinguishes PCC from many other design/build construction companies, and results in a competitive advantage for PCC.

6. PCC's manufacturing and construction process begins with a building design using PCC's prefabricated panels. All of the shop drawings are created at the Coffeen Street premises, and serve as the blueprints for the panel manufacturing process that occurs at PCC's Fisher Circle/Fisher Road premises. The panels are manufactured indoors, under a controlled environment, and in a precise order that is determined by the overall design plan. PCC uses its own large vehicles to transport the panels to its job sites in the precise order in which they will be installed on-site by the its specially trained employees, in accordance with installation schedules set forth in its design plan.

7. The start-to-finish process, or plan, by which PCC designs and constructs a building, may be described, generally, as consisting of six phases, as follows:

> a) Design Phase–after a contract is awarded to PCC, the project manager, quality control staff, safety staff, project superintendent and others work with PCC's designers to create, coordinate and review the plans for constructing the building.[2] This process insures that the plans meet the requirements of the contract, and that the details of construction align with the manner in which the building is to actually be built in an orderly and precise manner. Considerations include the construction aspects of the physical component parts of the building (panels), as well as soil conditions, elevations, drainage, site accessibility and the like. The design phase occurs primarily at PCC's Coffeen Street premises, with job site visits as necessary.
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> b) Pre-Construction Phase–the project manager, project superintendent, and safety and quality control managers and staff work out quality control plans, safety plans, and address the ordering and acquisition of necessary materials, tools

[2] Certain projects involving the federal government specifically require on-site quality control managers to perform job quality inspections and testing and prepare quality control reports.

and equipment, and the hiring of subcontractors. This phase occurs primarily at the Coffeen Street premises, again with job site visits as necessary.

c) Site Work Phase–site preparation involves the major earthwork (clearing and "grubbing") to ready the site for subsequent construction. While most of this heavy excavation type of work is subcontracted out, PCC's project superintendent and quality control staff are on site overseeing the work. In addition, carpenters and laborers may be on site setting up safety and other signage, safety fencing, mobilizing the construction site, commencing construction of footing and foundation formwork, and getting the site ready to put foundations in place once the building panels are ready to be delivered and installed at the job site.

d) Envelope Phase–this phase covers the start of the building's foundations through the construction of the building to the point where the structure is completely enclosed (wall, floors, roofing, windows and doors are in place), such that interior work can be undertaken in a largely controlled atmosphere. In this phase, the prefabricated panel system is installed, with work performed by PCC's carpenters, installers, laborers, and brick, block and stone masons, as supervised and coordinated by the project foremen, superintendent and manager. The actual installation process of the panels is undertaken in a very precise order, as dictated by the design plans for each particular structure. Under this manner of installation, each panel, with its different length, component parts or materials and openings, as fabricated in the Fisher Circle/Fisher Road premises, is delivered to the job site, taken off the trucks and installed in place in sequence. The panels are labeled in detail so as to specify their proper location, orientation, studs, track, screws to be used, and the like. By delivering the panels to the site in order and directly unloading them from the trucks and installing them in their final location, PCC avoids stacking the panels on the ground and "weeding" through stacks to find and install the proper panels as needed.[3]

e) Interior Finish Phase–with the building closed in, PCC's employees, including drywall and other interior finish crews, as well as various subcontracted trades crews, fit and finish the interior of the building.

f) Closeout Phase–although not described in any detail in the record, this phase presumably includes finishing any outstanding contractual items (landscaping and irrigation, final paving, "punch list" items and the like) so as to deliver the premises to the owner ready for occupancy and use.

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[3] Petitioners' witness explained, as an example, that certain panels are designed to take specific forces (e.g., shear walls) and must be placed in a particular location and affixed to the building foundation or stacked thereafter in a specific manner.

8. As described above, each of the foregoing phases requires supervision and the engagement of different personnel, including PCC's employees as well as subcontracted (non-employee) trades people, to accomplish the various steps in completing a building project. All supervision and staffing requirements are initially planned at the Coffeen Street premises in a process that involves PCC's vice-president of pre-construction services, project manager for a given project, assistant project manager (if any), project superintendent, quality control and safety managers and staff, and human resources manager. This process results in determinations as to the appropriate staffing levels needed to complete the project, both from PCC's employee pool and through subcontracted trades people. PCC's employee staffing includes employees who work at the PCC's manufacturing facility, as well as its employees who work at the various job sites, including carpenters, employees to install the panels, employees for masonry (brick, stone and concrete) and drywall work, and general laborers, as well as necessary supervisory and quality control employees.

9. The general chain of command and supervision and control on a given project runs from the project manager, to the project superintendent, to the foremen and on to the various employees and subcontracted trades people. Typically, the project manager on a given project works from PCC's Coffeen Street premises. Once the site work and subsequent phases of a project commence, the project superintendent and the quality control employees primarily work out of temporary office trailers located at the job sites, and coordinate on-site activities in accordance with the project plans and in response to any ongoing changes. In turn, the project foremen, under the general direction of the project superintendent, direct the employees and

coordinate trades people on-site as to their areas of work and duties on a daily basis.[4] There is an ongoing job site to main office contact, between the on-site project superintendent and quality control manager, and the project manager and others at the Coffeen Street premises, concerning project updates, staffing needs, and receiving direction or assistance in resolving problems, as needed.

10. Large equipment needed for a given project is either rented from outside vendors or, if owned by PCC, is delivered by PCC's mechanic from PCC's equipment storage location at the Coffeen Street premises to the job sites. Power tools needed for a given project, and thereafter replaced when broken or worn out (as was frequently the case), are obtained from their storage location at the Coffeen Street premises or are sometimes delivered to the construction site by the vendor from whom they are purchased.

11. PCC is typically engaged in multiple ongoing projects, at various stages of completion, at any given time. The initial planning for each project as described above (***see*** Findings of Fact 7 and 8) results in the creation of very detailed schedules for each project, showing staffing and equipment needs and assignments, in general and on a weekly basis. The initial assignment of employees to each job is directed and controlled by the supervisory personnel, including project managers and the human resources manager, at the Coffeen Street premises. Thereafter, employee assignments are routinely adjusted based on ongoing input from the project superintendents and others at the various project sites. Typically, each Friday afternoon a manpower schedule is created for each project for the following week, and is circulated to PCC's management staff to ensure that, on a daily basis, the appropriate workforce

[4] PCC, through its supervisory employees, does not direct the subcontracted trades people in the actual performance of their particular type or method of work, but rather directs and coordinates where and when such subcontracted trades people will be performing work during the course of a project.

is available and on the proper job site for each of the projects. These schedules are adjusted thereafter at least weekly (i.e., each Friday), and sometimes more frequently, based upon the rate of progress on the various projects in which PCC is involved. Such adjustments result from numerous factors, including materials delays, weather delays, faster (or slower) completion of given aspects of a project, and the like. In fact, job site employees may be moved from job site to job site as frequently as daily, depending upon project needs, changes and progress in comparison with PCC's other ongoing projects, as coordinated and directed from the Coffeen Street offices based upon ongoing input from the various job sites.

12. PCC's president (petitioner Mark S. Purcell), its chief financial officer, its other general officers, including its vice president for construction, and its project managers, human resources manager, mechanic, and its accounting, payroll, estimating, design and project management staff employees, are typically physically present and perform the majority of their services at the Coffeen Street offices. Accordingly, the Division of Taxation (Division) concedes that the portion of PCC's payroll pertaining to such employees is properly included in the in-zone payroll component of the zone allocation factor under Tax Law § 16(e)(2).[5]

13. In contrast, PCC's project superintendents, foremen, quality control managers, carpenters, masons, installers and laborers, do not generally clock or punch in or out at PCC's business office in the zone at the beginning or ending of their work days. Once the site work phase of a project commences the project superintendent and quality control manager spend the majority of their time at the job site. As the project progresses through to completion, these employees, as well as the balance of PCC's employees assigned to the project, typically go

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[5] Under Tax Law § 16(e)(2), payroll pertaining to general executive officers is specifically excepted from inclusion for purposes of the tax reduction credit (***see*** Finding of Fact 33).

directly to the particular job site. Though such employees may, on occasion, go to and from a work site and PCC's location in the zone to retrieve, replace or return tools, or for some other purposes, including training or human resource purposes, as necessary, they perform the majority of their job duties at such job sites. The project superintendents and quality control managers spend more time at the in-zone Coffeen Street offices than the balance of the job site employees, especially during the initial phases of a given project (***see*** Findings of Fact 7 - 9). However, the Division contests the inclusion of the portion of PCC's payroll pertaining to the all of the foregoing employees, including the project superintendents and quality control managers, as part of the in-zone payroll component of the zone allocation factor under Tax Law § 16(e)(2). The Division views these individuals as not regularly connected with or working out of PCC's premises inside of the Watertown Empire Zone because they spend the majority of their working time at PCC's various job sites outside of the zone.

14. Layoffs and call-backs of employees based upon labor needs at differing times are very common within the construction industry, in general, and occurred with respect to PCC's projects. PCC strives to maintain a steady crew size by shifting employees with the requisite skills to and from various projects as needed. However, this is not always entirely achievable, and PCC maintains a list of laid-off employees who may be called back to work when there is need for additional personnel. These layoff and call back circumstances, as well as the shifting of employees from job site to job site, may occur as frequently as on a weekly (or even daily) basis. PCC's employees, including its laid-off and called-back employees, as well as subcontracted trades people, are thus commonly shifted or reassigned among projects, and these staffing adjustments are determined from the Coffeen Street premises, based on the on-site information provided by the project superintendents and foremen.

15. Hiring of employees occurs through the process of application and interview, filed and conducted at the Coffeen Street premises. All human resources functions, from hiring to payroll to benefits administration, are handled at the Coffeen Street premises. New employee orientation and initial training, well as subsequent training or retraining in numerous areas including general safety training, elevation specific (scaffolding, ladder and roof) safety training, company and workplace rules and expectations, time and attendance rules, company benefits and the like, occur either at the Coffeen Street premises or, sometimes when large group sessions are undertaken, at rented conference rooms in a local Watertown area hotel.

16. None of PCC's design/build construction projects during the years at issue involved job site locations that were within the specifically defined geographic boundaries of the Watertown Empire Zone. At the same time, however, nearly all of PCC's projects in New York State involved job site locations that were within approximately ten miles of the Watertown Empire Zone, including the Fort Drum U.S. Army base located approximately nine miles from the Coffeen Street premises. PCC also performed construction projects outside of New York State during the years at issue including, mainly, projects in the State of Virginia.

17. At the time of its initial certification in 2003, PCC had approximately 50 employees and $50 million in gross sales. By its peak year, 2009, PCC had approximately 200 employees and approximately $100 million in gross sales. During the years at issue, PCC paid approximately $26 million in wages to its New York employees. The vast majority of its employees, as well as its subcontractors (such as plumbers, electricians and painters), lived in the greater Watertown area. PCC purchased approximately 60 to 80 percent of its materials from local Watertown area vendors and suppliers.

18. PCC, as well as petitioners engaged in significant charitable works in and around the greater Watertown area, including the creation of PCC's charitable foundation to which over $6 million was donated. An additional $1.3 million (approximately) was spent on supporting over 150 local charitable and civic causes, including rehabilitating the Watertown Tween Center, and supporting the Samaritan Medical Center, the YMCA, the Children's Home of Jefferson County and the Watertown Urban Mission Food Pantry.

19. During the years at issue, PCC was a qualified empire zone enterprise (QEZE), as such term is defined in Tax Law § 14. Petitioners claimed the QEZE tax reduction credit under Tax Law § 16 via Form IT-604 (Claim for QEZE Tax Reduction Credit) that accompanied their tax returns for each of the years in issue. On line 21 of the Form IT-604 that accompanied petitioners' personal income tax returns for each of the years 2008, 2009 and 2010, petitioners reported the following amounts as "income from the QEZE allocated within NYS" (QEZE Income):

2008 – $18,049,295.00
2009 – $22,371,001.00
2010 – $14,662,343.00

20. These amounts were reviewed on audit and modified. By the time of the hearing the parties agreed that the QEZE Income amounts for purposes of the tax factor calculation under Tax Law § 16(f)(2)(c) were as follows:

2008 – $18,358,292.00
2009 – $22,748,381.00
2010 – $14,809,862.00

However, on audit the Division (over petitioners' objection) applied PCC's BAP (***see*** Finding of Fact 2) to such amounts in calculating the tax factor for purposes of the QEZE tax reduction credit under Tax Law § 16.

21. The Division selected petitioners' tax return for the year 2009 for audit, and by a letter dated April 11, 2011, requested information concerning PCC's operations so as to verify petitioners' claim for the QEZE tax reduction credit for that year.

22. On November 4, 2011, petitioners supplied such information including (with reservation of all rights) a "hypothetical recalculation of employment numbers" for PCC for 2009. Thereafter, the Division requested additional information and petitioners furnished the same on December 8, 2011.

23. By a letter dated February 1, 2012, the Division provided petitioners with a recalculation reducing the QEZE tax reduction credit claimed by petitioners for 2009, and also requested documentation with respect to petitioners' claimed QEZE tax reduction credit for the years 2008 and 2010.

24. On February 10, 2012, the Division issued to petitioners a Statement of Proposed Audit Changes (Form DTF-960) for 2009, indicating tax due in the amount of $1,108,178.17 plus interest (to date), for a then-balance due in the amount of $1,270,680.52.

25. On March 1, 2012, petitioners submitted to the Division a letter of disagreement concerning the Division's conclusion for the year 2009, accompanied by a payment check in the amount of $1,270,680.52 and a claim for refund of such amount (plus interest).

26. On March 23, 2012, petitioners supplied the requested information for the years 2008 and 2010, including (again with reservation of all rights) a "hypothetical recalculation of employment numbers" for PCC for 2008 and 2010 with supporting documentation.

27. By a letter dated April 23, 2012, the Division provided petitioners with a recalculation reducing the QEZE tax reduction credit claimed by petitioners for the years 2008 and 2010.

28. On May 1, 2012, the Division issued to petitioners a Statement of Proposed Audit Changes (Form DTF-960) for 2008, indicating tax due in the amount of $594,219.00, plus interest (to date), for a then-balance due in the amount of $744,205.73.

29. On May 1, 2012, the Division issued to petitioners a Statement of Proposed Audit Changes (Form DTF-960) for 2010, indicating tax due in the amount of $825,251.39, plus interest (to date), for a then-balance due in the amount of $888,286.03.

30. On May 14, 2012, petitioners submitted to the Division separate letters of disagreement concerning the Division's conclusions for the years 2008 and 2010, accompanied by separate payment checks in the respective amounts of $744,205.73 and $888,286.03, and separate claims for refund of such amounts (plus interest).

31. By a letter dated July 30, 2012, the Division denied petitioners' claims for refund for the years 2008, 2009 and 2010. Petitioners timely challenged such denials by filing a petition with the Division of Tax Appeals, seeking to overturn the Division's disallowance of certain of PCC's employees as in-zone employees for purposes of the zone allocation factor, and the Division's application of the PCC's BAP in calculating petitioner Mark S. Purcell's QEZE income for purposes of computing the tax factor.

32. The Division's initial audit conclusion and result concerning the number of in-zone versus out-of-zone employees for purposes of the payroll component of the zone allocation factor was as follows:

Year	In-Zone	Out-of-Zone
2008	26.75	121.25

2009	37.00	127.00
2010	36.25	80.00

33. At hearing, the parties introduced Exhibits 31, 32 and 33, listing the names, job titles and wages of PCC's employees whose payroll amounts were not included, on audit, as in-zone payroll for purposes of the payroll component of the zone allocation factor. The Division thereafter agreed that the payroll amounts pertaining to PCC's employees (excluding its general officers) who regularly perform their services at the Coffeen Street premises were properly considered in-zone payroll for purposes of the payroll component (***see*** Finding of Fact 12).

34. Further post-hearing discussions between the parties resulted in additional revisions to Exhibits 31, 32 and 33. These revisions were summarized in a letter dated March 10, 2014, specifying that a) the wages of PCC's general executive officers were removed from the listing of payroll amounts for purposes of calculating the tax reduction credit; b) the job classification (title) of one employee was changed to general officer, and that individual's wages were likewise removed; and, c) the listed job classification of one additional employee was changed (without impact as to wage inclusion). Exhibits 31, 32 and 33 were revised to reflect these changes and, as so revised, have been admitted and included as part of the record as amended Exhibits 31, 32 and 33.

35. In addition, the Division has agreed that the payroll amounts pertaining to PCC's employees who typically perform their services at the Fisher Road/Fisher Circle premises (shop employees) are also properly considered in-zone payroll for purposes of the tax reduction credit. The names of these shop employees, together with the names of the office employees described in Finding of Fact 12, and the total wages for all of these employees, are set forth in Appendix A to petitioner's post hearing reply brief.

36. In summary, the contested employees and payroll amounts remaining in issue are those set forth on amended Exhibits 31, 32 and 33, after elimination of the employees (general executive officers, office and shop employees), and their payroll amounts described above. The contested employees thus consist of PCC's project superintendents, quality control and safety personnel, foremen and trades people including carpenters, masons, installers, laborers and the like.

CONCLUSIONS OF LAW

A. In this matter, petitioners are seeking a tax credit. A tax credit is a particularized species of exemption from tax (***Matter of New York Fuel Terminal Corp.***, Tax Appeals Tribunal, August 27, 1998; ***Matter of Marriott Family Rests. v Tax Appeals Trib.***, 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]; ***Matter of Grace v New York State Tax Commn.***, 37 NY2d 193 [1975], ***rearg denied*** 37 NY2d 816 [1975]). In seeking a tax exemption, taxpayers bear the burden of establishing their entitlement thereto (***see e.g. Matter of Golub Serv. Sta. v Tax Appeals Trib.***, 181 AD2d 216 [1992]). In order to meet their burden, the taxpayers must demonstrate through clear and convincing evidence that the exemption applies and that they are entitled to it (***see Matter of Lake Grove Entertainment, LLC v Megna***, 81 AD3d 1191 [2011]; ***Matter of Blue Spruce Farms v New York State Tax Commn.***, 99 AD2d 867 [1984], ***affd*** 64 NY2d 682 [1984]).

B. Where, as in this case, the issues turn on statutory interpretation, the cardinal function is to effectuate the intent of the Legislature (***see Matter of Yellow Book of N.Y., Inc. v***

Commissioner of Taxation & Fin., 75 AD3d 931 [2010], ***lv denied*** 16 NY3d 704 [2011]). The statutory language is the clearest indicator of legislative intent (***Matter of Lewis Family Farm, Inc. v New York State Adirondack Park Agency***, 64 AD3d 1009 [2009] [internal quotation marks and citations omitted]). Statutory rules of construction provide that "[t]he legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction" (McKinney's Cons Laws of NY, Book 1, Statutes § 94). Where a statute is clear, the courts must follow the plain meaning of its words, and "there is no occasion for examination into extrinsic evidence to discover legislative intent . . ." (McKinney's Cons Laws of NY, Book 1, Statutes § 120; ***see Matter of Raritan Dev. Corp. v Silva***, 91 NY2d 98 [1997]; ***Matter of Schein***, Tax Appeals Tribunal, November 6, 2003). Where words of a statute have a definite and precise meaning, it is not necessary to look elsewhere in search of conjecture so as to restrict or extend that meaning (***Matter of Erie County Agricultural Society v Cluchey***, 40 NY2d 194 [1976]), and it is appropriate to interpret such statutory phrases in their ordinary, everyday sense (***Matter of Automatique v Bouchard***, 97 AD2d 183 [1983]).

C. The Division correctly states the general rule that the interpretation of a statute by an agency charged with its enforcement is entitled to great weight and deference to the extent that its interpretation relies on its special competence. (***see e.g. Matter of Jennings v Commissioner of Social Services***, 71 AD3d 98 [2010].) Moreover, the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld. (***Matter of Garofolo v Rosa***, 26 Misc3d 969 [Sup Ct, Kings County 2009].) In contrast, however, a pure legal interpretation of clear and unambiguous statutory terms requires no

deference to interpretation of an agency charged with the statute's enforcement, inasmuch as there is little or no need to rely on any special expertise on the agency's part. (***Matter of Lewis Family Farm, Inc. v New York State Adirondack Park Agency***). In fact, "[a]n administrative practice contrary to or inconsistent with the statute is without legal effect and will be disregarded by the courts" (***In re Billings' Estate***, 70 NYS2d 191, 194 [1947]).

D. Turning to the matter at issue herein, Article 18-B of the General Municipal Law sets forth the New York State empire zones act, and provides, at Section 956 thereof, as follows:

> "Statement of legislative findings and declaration
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> It is hereby 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 require 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. It 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. It is 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" (emphasis added).

E. Consistent with the foregoing, various economic development assistance and incentive programs have been undertaken, including the enactment of a number of tax benefits in the form of credits (***see e.g.*** Tax Law §§ 15, 606[j], [k], [l], [bb]). As relevant to this matter, chapter 63 of the Laws of 2000, effective May 15, 2000 and applicable to taxable years beginning on or after January 1, 2001, amended the Tax Law to provide tax benefits in addition to those already available under the empire zones act, specifically by amending articles 9-A, 22, 32 and 33 of the Tax Law to provide new tax credits. Included in this legislation was Tax Law § 16, which

provided for the QEZE tax reduction credit against corporate taxes of a QEZE and personal income taxes of shareholders of New York S corporations that are QEZEs.

F. Tax Law § 16(b) provides currently, as well as at the time of its enactment, that the amount of the QEZE tax reduction credit "shall be the product of (i) the benefit period factor, (ii) the employment increase factor, (iii) the zone allocation factor and (iv) the tax factor." Neither party disputes petitioners' calculations of the first two factors for the years in issue, and thus it is only the zone allocation factor, and specifically the payroll component therein, and the tax factor, that are at issue herein.[6] Each will be addressed separately.

The Zone Allocation Factor

G. As enacted (***see*** L 2000, ch 63 [A.B. 11006], pt. GG, § 2, eff May 15, 2000), Tax Law former § 16(e) provided as follows:

> "Zone allocation factor. The zone allocation factor shall be the percentage representing the *taxpayer's economic presence in economic development zones* with respect to which the taxpayer is certified under article eighteen-B of the general municipal law. This percentage shall be computed pursuant to the method prescribed in subdivision two of section two hundred nine-B of this chapter (without regard to paragraph (b) of such subdivision), except that references therein to the metropolitan commuter transportation district shall be deemed to be references to the areas of this state constituting such economic development zones. For purposes of article twenty-two of this chapter, references in section two hundred nine-B of this chapter to property, wages, salaries and other personal service compensation shall be deemed to be references to such items connected with the conduct of a business" (emphasis added).

H. Thus, as enacted, the zone allocation factor specifically directed that a taxpayer's economic presence in an economic development zone was to be determined using the same method of computation by which a corporation's business activities were (and are) allocated by

[6] For purposes of the "payroll component" of the zone allocation factor, the phrase "wages, salaries and other personal service compensation" will at times be referred to simply as "wages," or as "payroll" or "payroll amounts."

formula within and without the Metropolitan Commuter Transportation District (MCTD) for purposes of the MCTD Surcharge imposed pursuant to Tax Law § 209-B. The prescribed allocation formula set forth at Tax Law § 209-B(2) was the same for both the MCTD Surcharge tax and the QEZE tax reduction credit, save only for the distinction that the in-zone computation under the QEZE tax reduction credit utilized only two allocation factors (property and payroll), whereas the MCTD surcharge allocation computation under Tax Law § 209-B(2) utilized three factors (property, payroll and receipts).[7]

I. Included in the bill jacket accompanying the enactment of Tax Law § 16(e) was the Division's Technical Analysis stating, in relevant part:

> "The zone allocation factor is a factor representing the *business enterprise's economic presence in the zone*. It is determined using the allocation formula prescribed in Tax Law § 209-B (with respect to MTA surcharges), except that the receipts factor is omitted. Thus, it is based solely on property and payroll *in the zone* compared with property and payroll in the entire State" (***see*** N.Y. Dept of Tax and Fin. Office of Counsel, A. 11006 Technical Analysis, May 8, 2000, section 2 at p. 31, emphasis added).

J. In 2002, Tax Law § 16(e) was amended (***see*** L 2002, ch 85 [A.B. 9762-B], pt. CC, § 14, eff May 29, 2002). As in effect during the years at issue herein (as well as currently), Tax Law § 16(e) provides as follows:

> "Zone allocation factor. The zone allocation factor shall be the percentage representing *the QEZE's economic presence in empire zones* with respect to which the QEZE is certified under article eighteen-B of the general municipal law. This percentage shall be computed by:

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[7] The Metropolitan Commuter Transportation District Business Allocation Percentage (MCTDBAP) under Tax Law § 209-B(2) represents the average of the three separate ratios of the corporate taxpayer's receipts, payroll and property values within the MCTD to those of the corporate taxpayer within New York State. This calculation essentially mirrored the formula calculation by which a corporation's business income was allocated to New York State via its Business Allocation Percentage (BAP) under Tax Law former § 210(3), formerly consisting of the average of the three ratios of the corporate taxpayer's receipts, payroll and property values within New York State to those of the corporate taxpayer as a whole (and subsequently revised by amendment to consist only of the ratio of the value of the corporate taxpayer's business receipts within New York State to its business receipts as a whole).

> (1) ascertaining the percentage which the average value of the QEZE's real and tangible personal property, whether owned or rented to it, *in empire zones* with respect to which the QEZE is certified under article eighteen-B of the general municipal law during the period covered by the taxpayer's report or return bears to the average value of the QEZE's real and tangible property, whether owned or rented to it within the state during such period; provided that the term 'value of the QEZE's real and tangible personal property' shall have the same meaning as such term has in subparagraph one of paragraph (a) of subdivision three of section two hundred ten of this chapter; and
>
> (2) ascertaining the percentage of the total wages, salaries and other personal service compensation, similarly computed, during such period of *employees*, except general executive officers, of the QEZE *in empire zones* with respect to which the QEZE is certified under article eighteen-B of the general municipal law, to the total wages, salaries and other personal service compensation, similarly computed, during such period, of all the QEZE's *employees* within the state, except general executive officers; and
>
> (3) adding together the percentages so determined and dividing the result by the number of percentages.
>
> For purposes of article twenty-two of this chapter, references in this subdivision to property, wages, salaries and other personal service compensation shall be deemed to be references to such items connected with the conduct of a business" (emphasis added).[8]

K. The foregoing amendment did not change the method used to compute a QEZE's zone allocation factor. Rather, it simply replaced the initially enacted language, directing computation by reference to Tax Law § 209-B(2), with specific language directly spelling out such method of computation. In fact, the language of the amendment mirrors that found in the property and payroll portions of the allocation percentage computation methods applicable for MCTDBAP purposes and for BAP purposes, as set forth under Tax Law § 209-B(2)(a)-(c) and former § 210(3)(a)(1)-(3), respectively. With specific regard to payroll (the only allocation item at issue herein), each of the three statutory provisions is designed to identify the portion of an

[8] The Legislative Bill Drafting Commission was directed to change the term "economic development zone," wherever appearing, to "empire zone." Likewise, the term "taxpayer" was changed to "qualified empire zone enterprise" or "QEZE"." (***see*** L. 2000, c.63, pt. GG, § 15, eff. May 15, 2000)

entity's payroll allocable to a specified geographic area, and each uses the same method to do so. The three provisions differ only as to the particular geographic area involved, i.e., payroll within New York State versus total payroll (for purposes of the franchise tax on entire net income under Tax Law § 209), payroll within the MCTD versus total payroll within New York State (for purposes of the MTA Surcharge franchise tax under Tax Law § 209-B), and payroll within an empire zone with respect to which a QEZE is certified versus total payroll of the QEZE within New York State (for purposes of the payroll component of the zone allocation factor at issue herein under Tax Law § 16[e][2]).

L. The parties raise no dispute that the foregoing payroll allocation provisions (Tax Law §§ 16[e][2], 209-B[2] [c], former 210[3][a][3]), are *in pari materia* and that, consequently, their terms should be read and construed in the same manner and as having the same meaning (***see*** McKinney's Cons Laws of NY, Book 1 Statues, § 221[c]; ***Matter of Albany Law School v State Office of Mental Retardation and Developmental Disabilities***, 19 NY3d 106, 121 [2012]; ***Matter of Siemens Corp. v Tax Appeals Trib.***, 217 AD2d 247 [1996], ***lv granted*** 88 NY2d 811 [1996], ***revd*** 89 NY2d 1020 [1997], ***rearg denied*** 90 NY2d 845 [1997]; ***Matter of Royal Indemnity Company v Tax Appeals Tribunal***, 75 NY2d 75 [1989]).[9] In turn, there is no dispute that the controlling regulation for purposes of computing the allocation of payroll is that set forth at 20 NYCRR 4-5.1, entitled "computation of payroll factor." Paragraph (d) of the regulation states, in relevant part, that:

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[9] Further support for this reading is seen by the explicit reference in Tax Law § 16(e)(1) to Tax Law § 210 (3), for direction in how to compute the property component of the zone allocation factor for purposes of the tax reduction credit: "the term 'value of the QEZE's real and tangible personal property' *shall have the same meaning as such term has in subparagraph one of paragraph (a) of subdivision three of section two hundred ten of this chapter*" (***see*** Conclusion of Law J, emphasis added).

> "Employees within New York State include all employees *regularly connected with or working out of an office or place of business of the taxpayer within New York State, irrespective of where the services of such employees were performed*" (emphasis added).

Thus, the portion of an employer's payroll that is allocable within New York State, i.e., the numerator of the payroll allocation fraction, is determined on the basis of the employees' connection with the employer's in-state locations, and not upon an accompanying requirement that the employees must be physically present in state when performing their employment services.

M. The foregoing regulation addressed the allocation of payroll within and without New York State under Tax Law former § 210(3)(a)(3) for purposes of the franchise taxes under Tax Law Article 9-A. This regulation was filed August 31, 1976 and was effective for years beginning on or after January 1, 1976, i.e., before enactment of the QEZE tax reduction credit. However, as noted, there is no dispute that it is applicable in computing payroll allocation for purposes of the QEZE tax reduction credit. Therefore, in applying the regulation to the matter at hand, the phrase "employees regularly connected with or working out of an office or place of business *of the taxpayer within New York State*, irrespective of where the services of such employees were performed," as set forth in the regulation must, simply and consistently, be read as "employees regularly connected with or working out of an office or place of business *of the QEZE with respect to which the QEZE is certified*, irrespective of where the services of such employees were performed."

N. By eliminating the place of performance of the employee's services from consideration, the controlling regulation sets forth a simple and broad rule whereunder allocation is based on whether employees are regularly connected with or work out of a QEZE's in-zone office or place

of business, as opposed to the more limiting rule where an employee's actual physical presence within the empire zone adds an additional requirement for in-zone allocation. This conclusion is supported by the regulation's subsequent language allowing for an alternative allocation of payroll, in instances where employees are attached to an office in the state, but perform a substantial part of their services outside of the state (20 NYCRR 4-5.1[d][1 -3]). Such alternative allocation provides an *employer* with the opportunity to establish that the particular circumstances concerning its employees require alternative allocation to more properly reflect the amount of business done in a geographic area, as opposed to allocation in the first instance under the governing regulation based only upon the fact that an employee is regularly connected with or works out of an office or place of business in that geographic area.[10]

O. The Division's position effectively requires an employee's in-zone physical presence, for at least some (unspecified) period of time, in order that such employee's payroll amount may be in-zone allocable. However, the relevant statue does not impose any such physical presence standard and, as explained above, the applicable regulation specifically eliminates the same as a requirement for in-zone allocation. Since the location where an employee's services are

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[10] Alternative allocation under the regulation is based on the nature of an employee's services and compensation, i.e., upon the volume of business secured in-area versus out-of area (in the case of compensation of commission salespersons); upon the value services performed in-area versus out-of-area (in the case of compensation based on results achieved); or upon the amount of working time in-area versus out-of-area (in the case of compensation based on time worked). Alternative allocation is permissive, the request is to be made by the employer, and the propriety of alternative allocation must to be established by the employer (20 NYCRR 4-5.1[d] [1-3]). An alternative allocation might be justified (and sought by an employer) in the context of its impact on the amount of business *income* ultimately being allocated and subjected to tax under Article 9-A. The employment circumstances here fall factually within the situation where an employer might request alternative allocation in the ultimate context of income allocation (i.e., employees connected with a specific area but performing a substantial part of their services outside of such area). However, in cases involving payroll allocation in the context of calculating a tax *credit*, as here, the consequence of an alternative allocation would only serve to *decrease* PCC's payroll component in-zone allocation fraction for purposes of its zone allocation factor, and hence *decrease* the amount of its tax reduction credit. Not surprisingly, PCC followed the general rule governing allocation under 20 NYCRR 4-5.1(d), and has not requested an alternative allocation in lieu thereof.

performed is not determinative in allocating payroll, the question presented devolves to whether any of the corporation's disallowed employees are *regularly connected with or work out of* PCC's in-zone locations. It is true that many of the disputed employees spent little time at PCC's in-zone locations, and instead reported to and worked mainly at the various job sites that were, admittedly, located outside of the zone. In fact, most of the employees in question do not typically, if ever, clock or punch in and out at, or report to, PCC's in-zone locations. Likewise, with the possible exception of the project superintendents and quality control managers, the employees in question do not appear to have offices or other dedicated work space at such in-zone locations. Notwithstanding the foregoing, however, examination of the nature of PCC's employees' actual and ongoing activities in the course of performing their employment duties supports the conclusion that all of such employees were directed and controlled by, and thus were regularly connected with, PCC and its locations in the Watertown Empire Zone, such that their payroll amounts are properly allocable as in-zone payroll.

P. Initially, it is undisputed that all of such personnel are, in fact, employees as opposed to independent contractors. A hallmark of employee status is that an employer, such as PCC, holds the right to direct and control its employees as to the place and manner of performance of their employment duties and activities (***see*** 20 NYCRR 171.1[b]; Treas Reg § 31.3401[c]-1[b], [d]); ***Matter of Liberman v Gallman***, 41 NY2d 774 [1977]; ***United States v Silk***, 331 US 704 [1947]). Here, PCC's field management and supervisory personnel (project superintendents, and safety and quality control managers) do spend considerable time at PCC's in-zone locations during the earlier project design and planning phases (***see*** Findings of Fact 7 through 9). Thereafter, during the latter project phases when they are in the field at job sites, there is frequent and ongoing

direct communication between such field management personnel and the corporation's in-zone management personnel concerning project progress, changes, staffing needs, manpower adjustments, and the like. Based on this ongoing communication, implementation of the master construction plan developed during the project planning phase is adjusted as necessary. In this regard, detailed manpower schedules determining the job sites to which PCC's employees (foremen, tradesmen and other employees such as laborers) will be assigned are created each week, and are adjusted on an ongoing basis in line with what actually transpires as the projects are being constructed. The detailed initial construction plans, as well as the weekly plans and the subsequent adjustments thereto, by which the initial deployment and subsequent movement (or redeployment) of such employees is determined and controlled, are developed, changed and communicated to and from the job sites by PCC's in-zone headquarters.

As to the disputed nonsupervisory employees, while PCC may not control the specific physical manner in which a skilled carpenter constructs a foundation form, or a skilled mason may apply mortar to a brick or a block, it does directly control the times and the places to which its job site employees are assigned, as well as the overall manner in which such employees carry out their assigned employment duties and obligations, consistent with PCC's directions and its employment policies and practices. Further, and in addition to this day-to-day coordination and overall supervision of its employees at the various job sites, all of PCC's administrative functions (hiring, firing, training, payroll and benefits matters) are overseen, directed and executed at its in-zone headquarters. In sum, PCC's employees are subject to ongoing regular control by the corporation from its in-zone headquarters, and thus are properly considered to be regularly

connected with PCC for purposes of payroll allocation under Tax Law § 16(e)(2) and 20 NYCRR 4-5.1(d).

Finally, and as petitioners point out, PCC's only locations, i.e., its headquarters at Coffeen Street and its Fisher Road/Fisher Circle manufacturing plant, are within the Watertown Empire Zone. Since PCC's only New York State locations are situated within the same empire zone, there is no other business location or office to or with which any of PCC's employees could have been regularly connected. In view of all of the foregoing, PCC correctly included the payroll of all of its employees in the numerator of the payroll component of the zone allocation factor under Tax Law § 16(e)(2) for the years in issue.

The Tax Factor

Q. The tax reduction credit under Tax Law § 16 serves to abate a taxpayer's income tax on QEZE income originating in an Empire Zone. To calculate this abatement, the tax imposed on the taxpayer, as based upon the QEZE's income, must be measured. Such measurement represents the tax factor, and it is determined under Tax Law § 16(f).

R. Tax Law § 16(f)(2)(c) provides, with respect to the determination of the tax factor for shareholders of an S corporation, such as petitioner Mark S. Purcell:

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

The companion provision, Tax Law § 16(f)(1), states that:

> "[T]he tax factor shall be, in the case of article nine-A of this chapter, the larger of the amounts of tax determined for the taxable year under paragraphs (a) and (c) of subdivision one of section two hundred ten of such article. *The tax factor shall be, in the case of article twenty-two of this chapter, the tax determined for the taxable year under subsections (a) through (d) of section six hundred one of such article*" (emphasis added).

Under the foregoing, the tax factor is thus determined by multiplying the shareholder's total New York State income tax by a fraction, the numerator of which is the shareholder's New York income from the QEZE and the denominator of which is the shareholder's New York adjusted gross income (AGI).

S. Petitioner Mark S. Purcell was the sole shareholder of PCC, a New York subchapter S corporation and certified QEZE corporation. PCC was a disregarded entity for federal and state tax purposes, and its tax attributes flowed through to petitioner Mark S. Purcell, who with his wife, petitioner Maria F. Purcell, filed joint personal income tax returns as New York State residents under Article 22 of the Tax Law during each of the years at issue (***see*** Tax Law §§ 617, 660). As such, petitioners' New York State tax on income attributable to PCC was computed pursuant to Article 22, not Article 9-A.

T. Tax Law § 16 clearly requires use of the shareholder's portion of income from the QEZE that is allocated to New York State in calculating the tax factor. As a New York State resident, all of petitioner Mark S. Purcell's income from PCC was allocated to New York State, all of such nonexcluded income entered into petitioners' AGI as reported on their jointly filed New York State resident income tax returns and petitioners' New York State tax liability was, accordingly, determined under Tax Law § 601. Consequently, consistent with the statute, petitioners' tax factor was the amount of their tax that was attributable to the income from PCC,

which was as they reported for the years in issue (as such total income amount was reviewed, modified and agreed to on audit [***see*** Finding of Fact 20]). However, on audit, the Division applied PCC's BAP to the QEZE income from PCC reported by petitioners, thereby reducing petitioners' income allocated to New York State and, in turn, their tax factor under Tax Law § 16(b)(iv).

U. Neither statute nor regulation provides for the application of the BAP when, as here, the tax reduction credit is claimed by a resident shareholder of a subchapter S corporation under Article 22. Tax Law § 16(f)(2) plainly states that when the taxpayer seeking the tax reduction credit is a shareholder of an S corporation, the *shareholder's* tax factor is the portion of his tax as determined under Tax Law § 16(f)(1), which in this case was pursuant to Article 22. It is petitioners', and not PCC's, tax factor that must be determined. Therefore, the Division's BAP calculation of the tax factor under Article 9-A, by which only a portion of PCC's income was allocated to New York State rather than the entire income to which petitioners' tax liability was attributable, was incorrect. The Division's invocation of Tax Law § 210(3) was based on a misreading of the plain language of Tax Law § 16(f)(1) and (2). It is irrelevant that S corporations are taxed under Article 9-A, because Tax Law § 16(f)(2) clearly shifts the focus to the shareholder and his liability.

It is also of no import that the instructions to form IT-604 define income allocable to New York State as the QEZE S corporation's income from New York sources. To the extent that this language could be interpreted to support the Division's position and arguably adds the requirement of applying a BAP, it differs from and expands the plain language of the statute. The Tribunal has strongly cautioned that such additions must be created by the legislative or

regulatory processes, and not simply through memoranda or instructions (***see Matter of Stuckless***, Tax Appeals Tribunal, August 17, 2006).

V. The use of a BAP as discussed in the Division's Technical Services Bureau Memorandum is on point (***see*** TSB-M-06[1]C and TSB-M-06[2]I). Its application is raised, however, in the context of instructions for calculating the tax factor for *corporate* partners. That situation is not present here. Such language is conspicuously missing from the instructions for calculating the tax factor for personal income tax taxpayers, including shareholders of S corporations. In addition, the case law in this area does not bar petitioners' calculations pursuant to Tax Law § 16, which fairly and constitutionally limits the benefit of the tax reduction credit to New York State tax liability attributable to a QEZE's activities within an Empire Zone (***see Matter of Lunding v New York Tax Appeals Tribunal***, 522 US 287, 286 [1998]; ***Shaffer v Carter***, 252 US 37 [1920]; ***Travis v Yale & Towne Mfg. Co.***, 252 US 60 [1920]). Both residents and nonresidents benefit from the credit in a proportionate manner. Indeed, under petitioners' interpretation of Tax Law § 16, both resident and nonresident taxpayers calculate the tax factor and, thus, receive the tax reduction credit proportionately based on their income from the QEZE allocated to New York. They both receive the same percentage of tax abatement. Conversely, as petitioners argue, the Division's position actually treats nonresident taxpayers more favorably than resident taxpayers, as nonresident taxpayers could receive a credit for 100 percent of their tax paid on the income from the QEZE while residents in the same situation could receive credit for a smaller percentage of their tax liability.

W. Finally, the Division argues that the availability of both the resident credit and the QEZE tax reduction credit could be used to reduce petitioners' tax liability in such a way that they would be "double dipping," or getting multiple credits on the same income. There is

nothing in the Tax Law, in authorizing the two credits, that bars the application of both of such authorized credits. In this respect, Tax Law § 16(f)(2)(c) provides that the calculation of the QEZE tax reduction credit is based upon the total amount of New York State tax owed, and not the total amount of New York State tax owed net of any credits (including the resident credit). Moreover, the Tax Law provides a safeguard for such behavior, effectively prohibiting a taxpayer from availing himself of both credits and paying less tax than is actually owed (***see*** Tax Law § 620[b][2]). In fact, application of both the QEZE tax reduction credit and the resident tax credit is necessary to treat resident shareholders of S corporations with income derived from other jurisdictions in the same manner as resident shareholders of S corporations with income derived only from New York State. Here, petitioners claimed the resident credit based on the income tax they actually paid to Virginia as a result of PCC's operations there. Although the QEZE tax reduction credit reduced their share of New York State tax liability for PCC's operations to zero in each year, petitioners were entitled to claim the resident credit to the extent they actually paid income taxes to Virginia. In such manner, their total net tax liability was the same in each year as it would have been had they derived all of their income from New York sources, rather than partially from Virginia. This is the intended effect of the resident credit, without which petitioners would owe more tax as a result of PCC's activity in other states (Virginia) than the owners of a comparable business that derived income only from New York State sources.

X. In sum, it is determined that the clear language contained in Tax Law § 16 supports petitioners' calculation of the tax reduction credit as reported on their 2008, 2009, and 2010 returns. As petitioners' application of Tax Law § 16 is deemed correct, their alternative argument that the Division's application of the statute violates the Equal Protection Clauses of

the United States and New York State constitutions, and the Commerce Clause of the United States constitution, is moot.

Y. The petition of Mark S. Purcell and Maria F. Purcell is hereby granted.

DATED: Albany, New York
May 21, 2015

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE