STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WAGNER FOREST MANAGEMENT, LTD.	:	DETERMINATION DTA NO. 826509
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the period January 1, 2011 through December 31, 2011.	:	

Petitioner, Wagner Forest Management, LTD, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the period January 1, 2011 through December 31, 2011.

On June 11 and 15, 2015, respectively, petitioner, appearing by Berry Dunn (Michel Caouette, CPA), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Bruce D. Lennard, Esq., of counsel), waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by October 19, 2015, which date commenced the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner was a "new business," as defined by Tax Law former § 210(12)(j), and therefore entitled to a refund of an investment tax credit under Tax Law former § 210(12)(e)

for the year at issue.[1]

FINDINGS OF FACT

1. Petitioner, Wagner Forest Management, LTD., is a corporation located in Lyme, New Hampshire. Petitioner's taxable activities in New York State during all relevant periods were limited to the management of timber properties.

2. Petitioner began doing business in New York in 1979, and was subject to the franchise tax under Article 9-A of the Tax Law for the five years preceding 2007 and for 2011.

3. Beginning in 2007, and during the period at issue, petitioner had an 8% investment as a corporate partner in New England Wood Pellet, LLC (New England), a limited liability company engaged in the manufacturing of wood pellets, and petitioner received its proportionate share of credits based on that investment. During 2011, New England was treated as a partnership for tax purposes. Petitioner is not substantially similar in operation or in ownership to the business of New England, either directly or as an investor.

4. Petitioner itself has never been involved in the manufacturing of wood pellets or any other wood product.

5. Petitioner filed a form CT-3, New York General Business Corporation Franchise Tax Return, for the year ending December 31, 2011 (2011 franchise tax return). Along with its 2011 franchise tax return, petitioner also filed a form CT-603, Claim for Empire Zone Investment Tax Credit and Empire Zone Employment Incentive Credit, on which petitioner claimed an Empire Zone (EZ) investment tax credit (ITC) in the amount of $152,878.00 to be available for carry-

[1]Tax Law former § 210(12), in effect for the period at issue, was repealed effective January 1, 2015 (***see*** L 2014, ch 59, pt A, § 15).

forward.[2] The ITC flowed through to petitioner from New England as a result of petitioner's 8% investment in the latter company.

6. For the year ending December 31, 2011, petitioner also filed claims for an EZ wage tax credit, employment tax credit, and a Qualified Empire Zone Enterprise (QEZE) credit for real property taxes.

7. On petitioner's 2011franchise tax return, it used the QEZE credit for real property taxes and the EZ employment incentive credit to reduce its tax to the fixed dollar minimum.

8. On its 2011 franchise tax return, petitioner claimed a refund of $76,439.00, which was 50% of its computed ITC carry-forward amount of $152,878.00.

9. In 2013, the Division of Taxation (Division) performed an audit of petitioner's 2011 franchise tax return, including its claims for credits and refund. At the conclusion of the audit, the Division made the following determinations that are not disputed by petitioner:

a. petitioner's tax on its entire net income (ENI), before credits and prior payments, was $2,410.00;

b. pursuant to Tax Law former § 210(26), an EZ Wage Tax Credit of $1,205.00 and an EZ employment incentive credit of $705.00 should be applied against petitioner's tax on ENI, resulting in petitioner's tax due after credits amounting to $500.00;

c. petitioner had an additional EZ wage tax credit amount of $6,593.00 available as a carry-forward;

d. petitioner had a refundable QEZE credit for real property taxes of $16,665.00; and

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[2] The empire zone was in Herkimer County.

e. petitioner's correct ITC attributable to its investment in New England, was $133,429.00 and not petitioner's computed amount of $152,878.00.

10. For 2011, petitioner's ITC of $133,429.00 was not deducted from, or applied against, the tax on petitioner's ENI and, therefore, was available to be carried forward to subsequent years.

11. Upon completion of its audit, on December 2, 2013, the Division issued a letter denying petitioner's claim for refund of 50% of its available ITC for 2011. The Division's denial was based on the conclusion that petitioner did not qualify as a "new business" under Tax Law former § 210(12)(j) and, thus, was not entitled to the ITC refund.

12. As part of its rationale for its decision, the Division pointed to an advisory opinion that addressed the eligibility for ITC refunds of a new business (***Eagan, Norris, McLaughlin & Marcus***, Advisory Opinion, April 29, 1987, TSB-A-87[9]C). The advisory opinion stated the following in interpreting Tax Law former § 210(12)(j):

> "[i]f the taxpayer is a corporate partner in a partnership, the corporation must qualify as a new business regardless of the status of the partnership, because it is the corporation, not the partnership, that is claiming the investment tax credit."

13. Previously, in 2011, the Division performed an audit of petitioner's New York franchise tax return for the period January 1, 2008 to December 31, 2009 (prior audit). The prior audit resulted in the determination by the Division that petitioner earned an ITC of $4,155.00 for 2009 as a flow-through from its interest in New England and that 50% of that ITC ($2,078.00) was refundable. The Division's conclusion in the prior audit was never the subject of an action before the Tax Appeals Tribunal or the courts.

SUMMARY OF THE PARTIES' POSITIONS

14. Petitioner maintains that it is entitled to claim a refund of 50% of its ITC for 2011 as it qualifies as a "new business" under Tax Law former § 210(12)(j) as a pass through from its 8% interest in New England. It asserts that the Division's reliance on an advisory opinion in denying its claim is incorrect and not supported by statute. Moreover, petitioner claims that the Division's position causes a limitation of ITC availability on corporate investors that was unintended by the legislature. Petitioner also argues that it is entitled to the ITC refund because the Division allowed it for an earlier period in the prior audit. Petitioner concedes, however, that if it does not qualify as a "new business" under Tax Law former § 210(12)(j), it is not entitled to a refund of its ITC.

15. The Division asserts that petitioner itself is not a "new business" under the statute and, thus, cannot receive a refund of 50% of the ITC. The Division adds that its interpretation is consistent with the legislative intent of the law. Finally, the Division points out that case law permits it to correct its erroneous determination in the prior audit.

16. The parties submitted a joint stipulation of facts into the record. Additionally, the Division submitted 25 proposed findings of fact. In accordance with State Administrative Procedure Act § 307(1), the Division's proposed findings of fact and the joint stipulation of facts have been substantially adopted and incorporated herein, except for proposed findings of fact 20 through 22, which simply recite the parties' positions in this case.

CONCLUSIONS OF LAW

A. Tax Law former § 210(12)(e) allowed an investment tax credit to be applied against the corporation franchise tax and a carryover of credit to the following year or years of any

amount of credit not deductible in the taxable year. That section also provided that:

> "[i]n lieu of such carryover, any such taxpayer which qualifies as a *new business* under paragraph (j) of this subdivision may elect to treat the amount of such carryover as an overpayment of tax to be credited or refunded . . ." (emphasis added).

B. Tax Law former § 210(12)(j) provided that:

> "For purposes of paragraph (e) of this subdivision, a new business shall include any corporation, except a corporation which:
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> (1) over fifty percent of the number of shares of stock entitling the holders thereof to vote for the election of directors or trustees is owned or controlled, either directly or indirectly, by a taxpayer subject to tax under this article; section one hundred eighty-three, one hundred eighty-four or one hundred eighty-five of article nine; article thirty-two or thirty-three of this chapter; or
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> (2) is substantially similar in operation and in ownership to a business entity (or entities) taxable, or previously taxable, under this article; section one hundred eighty-three, one hundred eighty-four, one hundred eighty-five or one hundred eight-six of article nine; article thirty-two or thirty-three of this chapter; article twenty-three of this chapter or which would have been subject to tax under such article twenty-three (as such article was in effect on January first, nineteen hundred eighty) or the income (or losses) of which is (or was) includable under article twenty-two of this chapter whereby the intent and purpose of this paragraph and paragraph (e) of this subdivision with respect to refunding of credit to new business would be evaded; or
>
> (3) has been subject to tax under this article for more than five taxable years (excluding short taxable years)."

C. The parties agree that petitioner is not excluded from the definition of a new business under subparagraphs (1) or (2) of Tax Law former § 210(12)(j). Therefore, the crux of this matter is whether petitioner, which is the corporation that filed the 2011 franchise tax return, received the ITC, and claimed the refund, has been subject to tax under Article 9-A for more than five taxable years prior to 2011, thereby excluding it from the definition of "new business" under subparagraph (3).

It is well settled that in matters of statutory interpretation, our 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, 932 [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, 1013 [2009]). 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).

Recently, the Tax Appeals Tribunal revisited the rules of statutory construction regarding the QEZE tax reduction credits, and refunds of EZ wage tax credits (***see Matter of Ayoub***, Tax Appeals Tribunal, April 16, 2014) and emphasized the following:

> "Statutes providing for tax credits are similar to, and should be construed in the same manner as, statutes creating tax exemptions (***Matter of Piccolo v New York State Tax Appeals Trib.***, 108 AD3d 107 [2013]). Such statutes are to be strictly and narrowly construed (***Matter of Mobil Oil Corp. v Finance Adm'r of City of N. Y.,*** 58 NY2d 95 [1983]; ***Matter of Grace v New York State Tax Commn.***, 37 NY2d 193, 195 [1975], ***lv denied*** 37 NY2d 708 [1975]), and the burden of proving entitlement to a tax exemption rests with the taxpayer (***Matter of Blue Spruce Farms v New York State Tax Commn.***, 99 AD2d 867 [1984], ***affd*** 64 NY2d 682 [1984]; ***Matter of Young v Bragalini***, 3 NY2d 602 [1958]). Furthermore, to prevail over the construction by the administrative agency charged with its enforcement, the taxpayer must establish not only that its interpretation of the law is a plausible one, but, also, that its interpretation is the only reasonable construction (***Blue Spruce Farms***)."

Given the standard described above, a review of Tax Law former § 210(12)(e) and (j), in conjunction with the facts presented here, compels the conclusion that petitioner does not qualify as a "new business" for the period at issue.

D. Petitioner maintains that it is not disqualified as a new business under subparagraph (3) of the statute for various reasons. First, petitioner argues that since its ITC is passed through from its 8% investment in New England, it is entitled to claim its refund as New England has not been subject to tax under Article 9-A for more than five taxable years prior to 2011. This argument, though, ignores the plain language of the statute, which permits a *taxpayer* that qualifies as a new business under Tax Law former § 210(12)(j) to treat the carryover as a refund (***see*** Tax Law former § 210[12][e]). Petitioner, not New England, is the taxpayer under Article 9-A in the present case and, admittedly, has been subject to tax under Article 9-A for more than five years prior to 2011. Additionally, Tax Law former § 210(12)(j) requires that a new business be a corporation. Indeed, the Tax Appeals Tribunal has concluded that when ascertaining whether a taxpayer qualifies as a new business for purposes of Article 9-A, the focus must be on the corporation filing the applicable return (***see Matter of International Imaging Materials, Inc.***, Tax Appeals Tribunal, June 8, 1995). New England is not a corporation or a taxpayer under Article 9-A, and did not file the franchise tax return at issue. Therefore, it does not meet the statutory definition of "new business" under Tax Law former § 210(12)(j). Meanwhile, petitioner was a corporation subject to tax under Article 9-A for more than five years prior to 2011, and therefore, the Division correctly determined that it was not a new business as defined by Tax Law former § 210(12)(j) (***see Matter of Campagna***, Tax Appeals Tribunal, January 8, 2004).

E. In denying petitioner's refund claim, the Division points to an advisory opinion, TSB-A-87(9)C, which stated the following in interpreting Tax Law former § 210(12)(j):

> "[i]f the taxpayer is a corporate partner in a partnership, the corporation must qualify as a new business regardless of the status of the partnership, because it is

> the corporation, not the partnership, that is claiming the investment tax credit" (***Eagan, Norris, McLaughlin & Marcus***).

Petitioner argues that the Division erroneously relies on the advisory opinion, emphasizing that petitioner was not the requestor and the opinion's conclusion is not supported by statute. While it is true, as petitioner maintains, that advisory opinions are not precedential and are not in any way binding herein (***see*** Tax Law § 171[24]; 20 NYCRR 2376.4), they can be instructive. In the instant case, the Division correctly notes that the cited advisory opinion is essentially a restatement of the law. New England, which is admittedly an LLC, cannot be a "new business" for purposes of Tax Law former § 210(12)(j) because it is not a corporation subject to taxation under Article 9-A. Likewise, petitioner does not qualify as a new business for the reasons discussed in Conclusion of Law D, which are consistent with the cited advisory opinion.

F. Petitioner further suggests that the Division's interpretation leads to an unintended limitation of available ITC refunds for corporate investors. In support of this argument, petitioner points to Tax Law former § 606(a)(10),[3] which reads, in pertinent part, as follows:

> "For purposes of paragraph five of this subsection, an individual who is either a sole proprietor or a member of a partnership shall qualify as an owner of a new business unless:
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> (A) . . . the business of which the individual is an owner is substantially similar in operation and in ownership to a business entity taxable, or previously taxable, under section one hundred eighty-three, one hundred eighty-four, one hundred eighty-five or one hundred eighty-six of article nine; article nine-A, thirty-two or thirty-three of this chapter; article twenty-three of this chapter or which would have been subject to tax under such article twenty-three (as such article was in effect on January first, nineteen hundred eighty) or the income (or losses) of which is (or was) includable under article twenty-two of this chapter whereby the intent and purpose of this paragraph and paragraph five of this subsection with

[3] The provision cited by petitioner was effective during the period at issue, but repealed effective January 1, 2015.

> respect to refunding of credit to new business would be evaded; or
>
> (B) the individual has operated such new business entity in this state for more than five taxable years (excluding short years of the business)."

Petitioner maintains that as an investor (and, thus, an owner) in a partnership, it should be afforded the same access to an ITC refund as noncorporate investors in a partnership under the above section. For instance, as petitioner points out, under the Article 22 provision, individual members of a partnership are able to qualify as owners of a new business, provided that the business has not operated in New York for more than five years and is not substantially similar in operation or ownership to a previously taxable entity (***see*** Tax Law former § 606[a][10]). As a result, individual taxpayers enjoy the benefit of an ITC refund as owners of a new business, including partnerships, and petitioner insists that a consistent result must apply to corporate owners.

Petitioner's argument fails, however, because a close reading of Tax Law former §§ 606(a)(10) and 210(12) confirms the opposite. Tax Law former § 606(a)(10) specifically limits its application "[f]or purposes of paragraph five of this subsection." By its plain language, it does not extend to Article 9-A. The referenced paragraph, Tax Law former § 606(a)(5), directs whether an individual taxpayer under Article 22 can either carry over its ITC or claim a refund if it is the owner of a new business. For purposes of Article 22, the owner (and taxpayer) itself does not have to be the new business. Additionally, the new business can be a partnership or S corporation. On the other hand, Tax Law former § 210(12)(j) is limited in application to Article 9-A and defines whether a taxpayer corporation itself is a new business. Crucially, the fundamental requirement in Tax Law former § 210(12)(j) that a new business be a corporation is missing from the Article 22 provision. The difference exists because Article 22 contemplates the

individual owner of the new business as the taxpayer, while the Article 9-A provision expressly requires the corporation, which is the taxpayer, to meet the definition of a new business to be entitled to the refund (***see Matter of International Imaging Materials, Inc.***). Although the focus under both sections is on the taxpayer benefitting from the ITC and seeking a refund on that benefit, contrary to petitioner's argument, the legislature created a clear distinction between Articles 9-A and 22 on this issue.

G. Additionally, petitioner maintains that the Division's interpretation of Tax Law former § 210(12) is inconsistent with the overall intent of the law. Petitioner states that the Division's interpretation creates a "significant disincentive for corporate investment within New York." In the Governor's Memorandum approving chapter 103 of the Laws of 1981, which added the refund provision in Tax Law former § 210(12)(e) and the definition of a "new business" in Tax Law former § 210(12)(j), the stated purpose of these amendments to Article 9-A was to expand and enrich various investment incentives "to assure continued economic growth in the State by providing . . . an expansion of the [investment tax] credit to certain retail investments, with provision for a refund of the credit to new firms" (1981 McKinney's Session Laws of NY, at 2571). As the Division correctly argues, however, the section at issue was not intended as a limitation of ITC refunds to all corporate taxpayers, just those beyond their formative years. By requiring that the corporate taxpayer itself qualify as a new business, the clear language of the statute evidences the legislative intent to prevent a corporation subject to tax under Article 9-A for more than five taxable years from continually generating refundable ITCs by repeatedly forming new partnerships or LLCs. Contrary to petitioner's position, the Division's interpretation still permits businesses to carry over the ITC, but reserves the added

benefit of the refund in lieu of carryover to new corporations that have not been previously taxed under Article 9-A for more than five years (***see Matter of International Imaging Materials, Inc.***).

H. Lastly, petitioner suggests that the refund denial must be canceled based on the Division's prior determination on the same issue for the period January 1, 2008 through December 31, 2009. Petitioner emphasizes that after the prior audit, the Division permitted it to claim the refund of its ITC as a flow-through from its interest in New England for that period and, therefore, the denial for 2011 under similar circumstances is impermissibly inconsistent treatment. As the Division properly asserts, though, its conclusion for the prior audit was in error and the Division may correct a prior erroneous interpretation of law (***see Matter of Nathel v Commissioner of Taxation and Fin.***, 232 AD2d 836 [1996]). "[A]n agency has the power and obligation to rectify what it deems to be an erroneous interpretation of the law or an injudicious policy. A shift in agency position to ensure affecting the statute's purpose serves to indicate heightened agency conscientiousness, not arbitrariness" (***Matter of Delese v Tax Appeals Tribunal of the State of New York***, 3 AD3d 612, 613 [2004], ***lv dismissed*** 2 NY3d 793 [2004]). Finally, it must be emphasized that the Division's determination in the prior audit was never reviewed by the Tax Appeals Tribunal or the courts and, thus, has not been ensconced by judicial interpretation.

I. The petition of Wagner Forest Management, LTD, is denied, and the refund denial dated December 2, 2013, is sustained.

DATED: Albany, New York
March 17, 2016

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE