

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**RONALD N. AND KAREN A. LEBLANC** :  
for Redetermination of a Deficiency or for Refund of :  
Personal Income Tax under Articles 22 and 30-A of the :  
Tax Law and the Administrative Code of the City of :  
New York for the Years 2010 and 2012. :

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In the Matter of the Petition :  
of :  
**ROBERT P. AND PATRICIA Z. MCJURY** :  
for Redetermination of a Deficiency or for Refund of :  
Personal Income Tax under Articles 22 and 30-A of the :  
Tax Law and the Administrative Code of the City of New :  
York for the Years 2010 and 2012. :

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DETERMINATION  
DTA NOS. 826547,  
826548 and 826549

In the Matter of the Petition :  
of :  
**DANIEL J. AND CAROLYN WAGNER** :  
for Redetermination of a Deficiency or for Refund of :  
Personal Income Tax under Articles 22 and 30-A of the :  
Tax Law and the Administrative Code of the City of :  
New York for the Years 2010 and 2012. :

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Petitioners, Ronald N. and Karen A. LeBlanc, Robert P. and Patricia Z. McJury, and Daniel  
J. and Carolyn Wagner, each filed a petition for redetermination of a deficiency or for refund of

personal income tax under Articles 22 and 30-A of the Tax Law and the Administrative Code of the City of New York for the years 2010 and 2012.

On June 8, 2015, petitioners, appearing by DeJoy, Knauf & Blood LLP (Michael L. Cooke, CPA), and on June 25, 2015, the Division of Taxation, appearing by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), waived a hearing and submitted the matters for a consolidated determination based on documents and briefs to be submitted by December 5, 2016, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether, in claiming an Investment Tax Credit, the investment credit base properly includes any amount of property that was expensed under Internal Revenue Code § 179(a).

***FINDINGS OF FACT***

1. TLF Graphics, Inc. (TLF), is an S corporation and a pass-through entity. TLF is certified as an Empire Zone (EZ) enterprise for its facilities located in Monroe County. Its certificate of eligibility was issued on July 5, 2005.
2. Each pair of petitioners is a 33.3% shareholder in TLF.
3. Petitioners claimed an investment tax credit (ITC) via the pass-through entity TLF on their New York State Resident Income Tax Return Forms IT-201.
4. The Division of Taxation (Division) conducted an audit of petitioners' personal income tax returns, Forms IT-201, for the tax years 2010 and 2012.

5. TLF claimed Internal Revenue Code (IRC) § 179 expenses as well as ITCs on its New York tax returns for 2010 and 2012.

6. The auditor reviewed the returns and noted that petitioners did not reduce the cost basis of the ITC property by the amount of the property expensed under IRC § 179(a). The auditor concluded that this was in error and an adjustment was made to the cost basis, which in turn resulted in an adjustment to the ITC claimed.

7. The Division issued two notices of deficiency to Ronald N. and Karen A. LeBlanc for additional tax due. Notice of Deficiency, assessment ID #L-040220895, dated November 27, 2013, was issued for the tax year 2010. Notice of Deficiency, assessment ID #L-040992666, dated June 4, 2014, was issued for the tax year 2012.

8. The Division issued two notices of deficiency to Robert P. and Patricia Z. McJury for additional tax due. Notice of Deficiency, assessment ID #L-040219990, dated November 27, 2013, was issued for the tax year 2010. Notice of Deficiency, assessment ID #L-040993695, dated April 18, 2014, was issued for the tax year 2012.

9. The Division issued two notices of deficiency to Daniel J. and Carolyn H. Wagner for additional tax due. Notice of Deficiency, assessment ID #L-040216785, dated November 27, 2013, was issued for the tax year 2010. Notice of Deficiency, assessment ID #L-041770764, dated September 29, 2014, was issued for the tax year 2012.

10. The numbers involved in the adjustments are not at issue in this proceeding.

#### ***CONCLUSIONS OF LAW***

A. This case involves the calculation of TLF's cost basis and its resulting calculation for petitioners' claims of investment tax credits (ITC) for the years at issue. Tax Law § 210.12(b)(i)

states, in pertinent part, that: “A credit shall be allowed under this section with respect to tangible personal property and other tangible property. . . .which are: depreciable pursuant to section one hundred sixty-seven of the internal revenue code . . . .”

The Division’s auditor adjusted the ITC claimed because petitioners elected to expense rather than depreciate the property. The Division argues that if a taxpayer elects to expense the cost of an asset under IRC § 179, that cost is not eligible for the ITC under Tax Law § 210.12(b). The Division argues the ITC is allowed on the federal basis of the property and, if the property has been wholly expensed according to IRC § 179, the basis remaining is zero and there is no amount upon which to calculate the ITC.

On the other hand, petitioners argue that the Division is not relying on the language contained in the Tax Law but, rather, on language contained within instructions for Forms IT-212 Investment Credit and IT-603 Claim for EZ Investment Tax Credit. Petitioners state that there is no statutory language consistent with the proposition that property upon which a federal election to claim an IRC § 179 expense has been made is ineligible for the NYS EZ ITC.

B. IRC § 179 allows an entity to treat the purchase of qualifying property as an expense rather than a capital expenditure. The section 179 election is made on form 4562, Depreciation and Amortization. IRC § 179, regarding the election to expense certain depreciable business assets, states, in pertinent part that: “Basis - A taxpayer who elects to expense under section 179 must reduce the depreciable basis of the section 179 property by the amount of the section 179 expense deduction.”

C. A tax credit is a particularized species of exemption from tax (*Matter of New York Fuel Terminal Corp.*, Tax Appeals Tribunal, August 27, 1998). Statutes creating exemptions

from tax are to be strictly construed (*see Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193 [1975], *lv denied* 37 NY2d 708 [1975]; *Matter of Blue Spruce Farms v. New York State Tax Commn.*, 99 AD2d 867 [3d Dept 1984], *affd* 64 NY2d 682 [1984]). In addition, it is well established that the interpretation given a statute by the agency authorized with its enforcement should generally be given weight and judicial deference if the interpretation is not irrational, unreasonable or inconsistent with the statute (*Matter of Trump-Equitable Fifth Avenue Co. v. Gliedman*, 62 NY2d 539 [1984]).

D. In reviewing Tax Law § 210.12(b), the statutory language is clear. The statute specifically provides for a credit for property which is *depreciable*. In this case, the property was depreciable; however, rather than depreciate it, TLF chose to expense it. Internal Revenue Service Publication 551 states that: “If you take the section 179 deduction for all or part of the cost of the qualifying business property, decrease the basis of the property by the deduction.” Therefore, for federal purposes, TLF has completely recovered the cost incurred in its purchase of the property, leaving a zero basis upon which to compute the ITC. Thus, the ITC claimed for the years in issue were properly denied.

E. The petitions of Ronald N. and Karen A. LeBlanc, Robert P. and Patricia Z. McJury and Daniel J. and Carolyn Wagner are denied and the Notices of Deficiency are sustained.

DATED: Albany, New York  
June 1, 2017

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE