STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NRG ENERGY, INC.	:	DETERMINATION DTA NO. 826921
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the period ending December 31, 2009.	:	

Petitioner, NRG Energy, Inc., 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 ending December 31, 2009.

A hearing was held before Donna M. Gardiner, Administrative Law Judge, in Albany, New York, on June 17, 2016 at 9:30 A.M. All briefs were due by October 12, 2016, which date began the six-month period for issuance of this determination. Petitioner appeared by Nixon Peabody LLP (Daniel J. Hurteau, Esq. and Jena R. Rotheim, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (David Markey, Esq., of counsel).

ISSUE

Whether petitioner has demonstrated entitlement to a refund claimed for the tax year 2009.

FINDINGS OF FACT

The parties have entered into a stipulation of facts and the Division of Taxation (Division) has proposed additional findings of fact, all of which have been renumbered and incorporated as set forth below.

1. Petitioner, NRG Energy, Inc., is a power provider that owns and operates power plants that generate power from any number of fuel sources including, coal, natural gas, solar and wind. Petitioner is the sole owner and sole member of Oswego Harbor Power LLC, the entity that owns and operates the Oswego Generating Station in Oswego, Oswego County, New York (the Plant).

2. Petitioner is a Delaware corporation and is authorized to do business in New York.

3. Petitioner originally received its Certificate of Eligibility under the New York State Empire Zones Act, General Municipal Law § 955 et seq., for the Plant effective on or about December 2, 2002. Oswego Harbor Power LLC was originally certified for the Plant on or about August 8, 2002.

4. As an eligible participant in the Empire Zones Program, petitioner was eligible to apply for certain credits against its New York State corporate franchise taxes, including a credit for real property taxes paid during a tax year in connection with its Plant.

5. The credit for real property taxes is a refundable credit.

6. The Department of Economic Development (DED) administers the Empire Zones Program.

7. On April 7, 2009, legislation amending the Empire Zones Act to include new criteria for continued certification under the Empire Zones Program was signed into law (the 2009 amendments).

8. In 2009, the DED reviewed all Empire Zones certified businesses to determine whether they should remain eligible to participate in the Empire Zones Program pursuant to the new criteria established by the 2009 amendments.

9. On or about June 29, 2009, DED notified petitioner and Oswego Harbor Power LLP by separate letters that their respective certifications for eligibility for the Plant were being revoked.

10. The Notice of Revocation of Certification (Decertification Notice) stated that petitioner's certification was revoked for failing to meet the new criteria established by the 2009 amendments.

11. The Decertification Notice states that "[t]he effective date of revocation will be January 1, 2008."

12. Petitioner filed its 2008 tax return on or about November 11, 2009.

13. On or about November 9, 2012, petitioner filed an amended 2008 tax return in which it claimed a refund for the qualified empire zone enterprise (QEZE) credits for its payment of real property taxes relating to the Plant.

14. By letter dated March 14, 2013, the Division advised that, because it had no record of receiving from petitioner a retention certificate for the 2008 tax year (demonstrating petitioner's continued certification to participate in the Empire Zones Program), petitioner could not claim QEZE credits for 2008.

15. On June 4, 2013, the New York State Court of Appeals issued its decision in ***James Sq. Assocs. LP v. Mullen***, 21 NY3d 233.

16. On or about June 14, 2013, the Division advised petitioner that it was preparing to issue refunds of 2008 tax credits based upon the decision in ***James Square***. Thereafter, on or about August 20, 2013, petitioner received a refund of its 2008 claimed QEZE credits.

17. On or about November 3, 2010, petitioner filed its 2009 Form CT-3-A, General Business Corporation Combined Franchise Tax Return (CT-3-A), claiming a refundable QEZE credit in the amount of $24,014,753.00.

18. Petitioner's claim for the QEZE credit on its original 2009 tax return was based on the certification of eligibility for its facility located within the Town of Tonawanda Empire Zone and its facility located with the City of Dunkirk, Towns of Dunkirk and Sheridan Empire Zone, as identified on petitioner's 2009 Form CT-606, Claim for QEZE Credit for Real Property Taxes.

19. Petitioner received a refund for the 2009 tax year based on the refundable QEZE credit in the amount of $24,014,753.00.

20. On or about August 27, 2013, petitioner filed an amended 2009 CT-3-A return, in which it claimed a total QEZE credit in the amount of $29,869,127.00, amending its CT-3-A based on the certification of eligibility for the Plant located at 261 George Washington Boulevard, Oswego, New York, within the Oswego County Empire Zone.

21. Petitioner's claim for the QEZE credit on its amended 2009 CT-3-A represented an increase in the amount of $5,854,374.00 based on the certification of eligibility for the Plant.

22. By letter dated April 16, 2014, petitioner was notified by the Division that, because the certification of eligibility had been revoked, the additional refund amount of $5,854,374.00 claimed on petitioner's amended CT-3-A was disallowed.

23. Petitioner requested a conciliation conference at the Bureau of Conciliation and Mediation Services (BCMS) to challenge its denial of the 2009 refund claim. The conciliation conference was held on October 14, 2014, and a conciliation order dated February 13, 2015 was issued to petitioner. The conciliation order sustained the denial of its 2009 refund claim.

24. On or about April 28, 2015, petitioner timely filed a petition with the Division of Tax Appeals.

SUMMARY OF THE PARTIES' POSITIONS

25. Petitioner argues that the Division's retroactive application of the 2009 amendments to the law is impermissible based upon the Court of Appeals' decision in ***James Sq. Assocs. LP v. Mullen***, 21 NY3d 233 (2013). Moreover, petitioner argues that the Division's admitted selective enforcement of that statute violates its right to equal protection under the laws.

26. The Division states that the decision in ***James Square*** is not applicable herein since the application of the 2009 amendments was not an issue in that case. The Division asserts that the 2009 amendment to the law was effective on April 4, 2009 and, as such, is not considered retroactive if applied to the taxable year of 2009. The Division argues that even if it is considered a retroactive application, retroactivity has been permitted with respect to tax statutes unless the nature of the tax renders the imposition of the law unduly harsh and oppressive (***see Matter of Replan Dev. v. Department of Hous. Preserv. & Dev. of City of New York***, 70 NY2d 451 [1987], ***lv dismissed*** 485 US 950 [1988]). The Division states that a mere three-month retroactive application does not cause an undue harm to petitioner. Therefore, the Division requests that its denial of the tax credit sought by petitioner for 2009 should be upheld.

CONCLUSIONS OF LAW

A. The Legislature enacted the Empire Zones Program to spur economic growth and job creation (***see*** General Municipal Law § 956). Under the program, the commissioner of economic development is authorized to certify "business enterprises" as eligible to receive various tax benefits available only to such certified enterprises (***see*** General Municipal Law § 959[a]).

Petitioner received its Certificate of Eligibility effective as of August 8, 2002. At that time, the primary eligibility requirement to participate in the program related to employment and petitioner was required to report its employee number each year. Petitioner's participation in the program made it eligible to apply for certain credits against its New York State corporate franchise taxes, including a credit for real property taxes paid during each tax year.

B. Chapter 57 of the Laws of 2009 was signed into law by Governor David Paterson on April 7, 2009, which amended the General Municipal Law and the Tax Law to enact reforms to the Empire Zone Programs. In 2009, the DED reviewed all Empire Zones certified businesses to determine whether they should remain eligible to participate in the program pursuant to the new criteria established by the 2009 amendments.

On or about June 29, 2009, petitioner received a Decertification Notice from the DED. This notice stated that petitioner's certification was revoked for failing to meet the new criteria established by the amendments because petitioner failed to provide economic returns to New York State in the form of wages and benefits to its employees and investments in its facility greater in value to the tax benefits petitioner used and had refunded to it. The Decertification Notice said that the revocation of petitioner's certification was effective January 1, 2008.

C. Subsequent to this Decertification Notice, the Court of Appeals in ***James Square*** held that the 2009 amendments were not entitled to retroactive application to the 2008 taxable year. Therefore, the Division allowed the tax credit claimed by petitioner for the 2008 year and denied the claimed credit for the 2009 year. The Division argues that ***James Square*** did not address the taxable year 2009 and, as such, application of the amendments, effective January 1, 2009, is not considered a retroactive application of the law.

In ***James Square***, the taxpayer was subject to decertification as a QEZE based on the retroactive application of a statute that specifically applied to prior tax years. This case involves the tax year 2009 and, as such, it is determined that the 2009 amendments, although enacted on April 7, 2009, is not a retroactive application of the law.

Petitioner was notified in June of 2009, from the DED, that it did not meet the new criteria for certification. The tax year is January 1 through December 31. Petitioner was notified well before the end of the tax year that it was decertified and no longer eligible for the credits under the program. Nothing in the ***James Square*** decision prevents application of the 2009 Amendments to the 2009 tax year.

As the Division points out, Tax Law § 14(i)(1) provides that a business enterprise shall cease to be a qualified empire zone enterprise on the first day of the taxable year during which revocation of its certification takes place. Therefore, since the January 1, 2009 effective date for petitioner's decertification was required by Tax Law § 14, decertification to that date was not due to a retroactive application of the 2009 amendments. Therefore, the Division properly denied the credit for the 2009 taxable year.

D. Petitioner argues that the Division's selective enforcement of the 2009 amendments to deny it the 2009 credit deprived it of its equal protection rights. Petitioner states that "the Division selectively applied Article 1, Section 14(i)(1) of the Tax Law to businesses that were decertified mid-way through the 2009 tax year without justification."

Petitioner's argument regarding a violation of its equal protection rights as a result of selective enforcement of the 2009 amendments is rejected. The Tax Appeals Tribunal in ***Matter of Goetz Energy Corp.*** (Tax Appeals Tribunal, November 18, 1999) stated, in pertinent part, that

"To prove a claim of discriminatory enforcement, petitioner needs to prove selectivity of enforcement and that the selectivity arose from 'an intentional invidious plan of discrimination on the part of the Division'" (quoting ***Matter of Petro Enters.***, Tax Appeals Tribunal, September 19, 1991). Petitioner failed to prove that there was any intentional plan of discrimination on the part of the Division in rejecting petitioner's claim for credit. In fact, as the statute unambiguously states, a business enterprise shall be considered decertified as of the beginning of the tax year in which the business has it certification revoked by the DED (***see*** Tax Law § 14[i][1]).

E. The petition of NRG Energy, Inc., is denied and the denial of the refund claim is sustained.

DATED: Albany, New York
March 30, 2017

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE