STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
RICHARD J. AND ALICIA S. CALAGIOVANNI,	:	DETERMINATION DTA NOS. 827081, 827082, 827098, 827099, 827100,
ET AL.	:	827101 AND 827102
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2009.	:	

Petitioners Richard J. and Alicia S. Calagiovanni, Maureen Fatcheric Martin and Clark Martin, Christian Jones and Nicole Marlow, Robert and Jacquelyn Connolly, Donald and Shelly DiBenedetto, John R. and Rosemary B. Langey, and Paul G. and Beth Ferrara, filed petitions for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2009.

On November 8, 2016 petitioners, appearing by Costello, Cooney and Fearon, PLLC (Maureen Fatcheric, Esq. and Donald DiBenedetto, Esq., of counsel) and the Division of Taxation, by Amanda Hiller, Esq. (Tobias A. Lake, Esq.), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by March 24, 2017, which date commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation (Division) properly disallowed the qualified empire zone enterprise refundable tax reduction credit claimed by each of the petitioners as members of Costello, Cooney and Fearon, PLLC, on their respective personal income tax returns for the year 2009.

FINDINGS OF FACT

1. Petitioners were all members, or spouses of members, of Costello, Cooney & Fearon, PLLC (CCF), a New York Professional Limited Liability Company, during 2009.

2. On or around June 14, 2002, CCF was certified as a Qualified Empire Zone Enterprise (QEZE) in the Syracuse Empire Zone, with a business address of 205 South Salina Street, Syracuse, New York.

3. By virtue of their membership in CCF, petitioners were entitled to claim certain tax deductions and credits that flowed through to them.

4. CCF remained a QEZE from its date of certification at least until December 31, 2008.

5. On June 29, 2009, the State notified CCF that its QEZE certification was revoked by Order of the New York State Department of Economic Development (DED).

6. CCF's QEZE certification was revoked based upon the DED's application of statutory amendments to the QEZE program (the statutory amendments), Part S-1 of Chapter 57 of the Laws of 2009, that were signed into law on April 7, 2009 (the 2009 Amendments).

7. Petitioners did not claim QEZE tax credits on their original 2009 tax returns, but did claim entitlement to QEZE credits on timely filed amended returns.

8. Petitioners claimed QEZE tax credits on their amended 2009 returns by virtue of their membership interests in CCF.

9. Based upon petitioners' amended 2009 tax returns, in September of 2013, petitioners were issued refunds of the QEZE Tax Reduction Credit as follows:

Petitioner	Total Amount Refunded
Richard J. and Alicia S. Calagiovanni	$7,120.79
Maureen Fatcheric Martin and Clark Martin	$9,761.47
Christian Jones and Nicole Marlow	$6,266.78
Robert and Jacquelyn Connolly	$6,252.05
Donald and Shelly DiBenedetto	$8,213.04
John R. and Rosemary B. Langey	$8,978.95
Paul G. and Beth Ferrara	$11,114.93

10. The Division subsequently disallowed each of the Petitioners' claims for the QEZE Tax Reduction Credit, and in July 2014, issued notices of deficiency for tax year 2009 to each of the petitioners for the amounts previously refunded.

11. The following chart illustrates the amounts assessed by the notices of deficiency, inclusive of tax and interest calculated up to the notice date, as well as the relevant assessment identification numbers:

Petitioner	Assessment ID NO.	Notice Date	Amount Assessed
Richard J. and Alicia S. Calagiovanni	L-041632560-9	7/1/14	$7,120.79
Maureen Fatcheric and Clark Martin	L-041632556-8	7/1/14	$9,761.47
Christian Jones and Nicole Marlow	L-041690204-3	7/9/14	$6,266.78
Robert and Jacquelyn Connolly	L-041638453-4	7/2/14	$6,252.05
Donald and Shelly DiBenedetto	L-041632564-1	7/1/14	$8,213.04
John R. and Rosemary B. Langey	L-041632631-5	7/1/14	$8,978.95
Paul G. and Beth Ferrara	L-041632601-5	7/1/14	$11,114.93

12. The affidavit of petitioner Paul Ferrara avers that following the June 29, 2009 decertification letter from DED, petitioners' personal decisions about what money was available for spending, college savings, investment and/or how much money was needed for allocation as tax payments became chaotic because each petitioner had factored into their spending QEZE tax credits which were subsequently taken away.

SUMMARY OF THE PARTIES' POSITIONS

13. The Division contends that, pursuant to Tax Law 14(i)(1), a business ceases to be a QEZE on the first day of the taxable year during which its QEZE certification is revoked and, therefore, petitioners are not eligible to receive QEZE credits for 2009 because CCF ceased to be a QEZE on January 1, 2009.

14. Petitioners contend that, pursuant to the Court of Appeals decision in ***James Square Associates LP v. Mullen*** (21 NY3d 233 [2013]), the statutory amendments have been illegally applied retroactively to January 2009 and, therefore, petitioners are entitled to QEZE credits for 2009 by virtue of their membership interests in CCF.

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]).

B. Chapter 57 of the Laws of 2009, which included the 2009 Amendments, was signed into law on April 7, 2009, and amended the General Municipal Law and the Tax Law to enact reforms to the Empire Zones Program. The 2009 Amendments set forth new criteria that restricted continued Empire Zones Program eligibility, including a required review to determine

whether existing certified business enterprises had engaged in a process known as "shirt-changing," i.e., reincorporating or transferring employees or assets among related entities, so as to appear to have created new jobs or made new investments in order to have qualified for, or maximized, Empire Zone benefits (***see*** General Municipal Law § 959[a]). In addition, certified business enterprises were required to show that they had provided economic returns to the state (wages and benefits to employees, and investments in facilities) that were greater in value than the tax benefits they had received (***see*** General Municipal Law § 959[a][6]). In 2009, the DED reviewed all Empire Zone certified businesses to determine whether such businesses should remain eligible to participate in the program pursuant to the new criteria established by the 2009 Amendments (***see*** General Municipal Law § 959[w]).

C. In 2010, the Legislature enacted additional "clarifying" provisions, effective August 10, 2010 (the 2010 Amendments). This legislation was specifically intended to clarify that: a) decertification resulting from the 2009 Amendments was effective for the same year in which such decertification occurred, and for all subsequent years, and b) decertification occurring in 2009 was also to be deemed effective for the year 2008, as follows:

> "It is the intent of the legislature to clarify and confirm that the amendments made to the general municipal law by chapter 57 of the laws of 2009 that require the revocation of certification of certain business entities previously certified under the empire zones program *are intended to be effective for the taxable year in which the revocation of certification occurs and for all subsequent taxable years*, . . . , *and that such revocations of certification that occur in 2009 are deemed to be in effect for the taxable year commencing on or after January 1, 2008 and before January 1, 2009*." (L 2010, ch 57, part R, § 1; italics and underscoring added).

D. Several challenges to the 2010 Amendments followed, specifically targeting the retroactive application of 2009 decertification, per the 2009 Amendments, to the year 2008. On June 4, 2013, the Court of Appeals issued its decision in ***James Square***, holding that the 2010

Amendments' retroactive application of 2009 decertification, resulting from the 2009 Amendments, to the year *2008* violated constitutional due process standards.

E. This matter, however, deals with application of the 2009 Amendments to the tax year 2009. CCF was notified on June 29, 2009 that its certification was revoked. Pursuant to Tax Law § 14(i)(1) "[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." Thus, by operation of the law, the effective date of decertification was January 1, 2009. ***James Square*** does not compel the relief petitioners are seeking, as this matter does not involve a retroactive application of the law. As noted by the Division, Tax Law § 14(i)(1) has been in effect since the inception of the Empire Zones Program in 2000 (***see*** L 2000, ch 63, Part GG).

F. Nonetheless, even if it could be viewed as a retroactive application of the law, the question of whether a statute may be validly applied retroactively depends on a consideration of the following factors: (1) "the taxpayer's forewarning of a change in the legislation and the reasonableness of . . . reliance on the old law," (2) "the length of the retroactive period," and (3) "the public purpose for retroactive application" (***James Square****, at 246;* ***Matter of Replan Dev. v. Department of Hous. Preserv. & Dev. of City of New York***, 70 NY2d 451, 456 [1987], ***appeal dismissed*** 485 US 950 [1988]).

G. Applying these factors to the present matter leads to the conclusion that the petitioners' loss of QEZE benefits as of January 1, 2009 is permissible. First, the 2009 Amendments were first introduced on January 7, 2009, and were enacted and became effective on April 7, 2009. Unlike the situation presented in ***James Square,*** where the taxpayers therein "had no warning and opportunity at any time *in 2008* to alter their behavior in anticipation of the impact of the 2009 Amendments" (***James Square*** at 248), the tax year herein involves 2009. Thus, petitioners had the opportunity to know early in the tax year that changes in the law were highly likely, to

know what the law would be after the enactment of the changes, and had the opportunity to conform their conduct accordingly. Second, the length of the retroactive period is relatively short, as the changes to the QEZE program imposed by the 2009 Amendments were signed into law on April 7, 2009 and CCF was decertified by the DED on June 29, 2009. Finally, the stated purpose for the 2009 Amendments included curtailing perceived abuses in the Empire Zones Program, reining in the scope thereof, and thereby lessening the fiscal impact as a savings measure for the then-upcoming 2009-2010 budget year. This stated purpose serves a legitimate public interest that is not overridden by petitioners' continuing expectation of tax credits. Accordingly, to the extent it is concluded that the 2009 Amendments were applied to petitioner on a retroactive basis, the retroactivity is entirely permissible (***see Matter of Replan***).

H. The petitions of Richard J. and Alicia S. Calagiovanni, Maureen Fatcheric Martin and Clark Martin, Christian Jones and Nicole Marlow, Robert and Jacquelyn Connolly, Donald and Shelly DiBenedetto, John R. and Rosemary B. Langey, and Paul G. and Beth Ferrara are denied; and the notices of deficiency dated July 1, 2014, July 2, 2014, and July 9, 2014 are sustained.

DATED: Albany, New York
September 21, 2017

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE