STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
CLAYTON H. HALE, JR.	:	DETERMINATION
AND	:	DTA NOS. 827149, 827150, 827151, 827152, 827153, 827155, 827156, 827157,
PATRICIA H. HALE,	:	827158, 827159, 827160, 827161, 827162, 827163,
ET AL.	:	827164, 827165, 827166, 827167, 827168
for Redetermination of Deficiencies or for Refunds of Personal Income Tax under Article 22 of the Tax Law for the Year 2009.[1]	:	

Petitioners Clayton H. Hale, Jr., and Patricia H. Hale, et al, filed petitions for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law for the year 2009.

[1] These matters include some 19 separate petitions, each of which has been assigned a separate Division of Tax Appeals (DTA) number. Each such individual petition results from the disallowance of qualified empire zone enterprise (QEZE) refundable tax credits claimed by Mackenzie Hughes, LLP, as passed through to and claimed (proportionally) by each of the petitioners on their respective personal income tax returns. Since the issue presented in each case is identical, these matters were heard together as one case, as a means of proceeding in an expedient and efficient manner, without prejudice to the appeal rights of any individual party. The individual parties, and assigned DTA numbers are: Clayton H. Hale, Jr., & Patricia H. Hale (827149), William Bradley Hunt & Bridget McManus (827150), Edward J & Elana G. Moses (827151), Mitchell R. Lebowitz & Anne B. Ruffer (827152), Carter H & Nan H. Strickland (827153), Nancy Caple Johnston (827155), David M. & Joyce Garber (827156), Edward J. Spencer, III (827157), Gay and Frances Pomeroy (827158), Ami S. Longstreet (827159), Stephen Theobald and Jacqueline Jones (827160), Alfred W. & Lucy C. Popkess (827161), Ramon E Rivera & Elise R. Rivera (827162), Stephen T. Helmer and Susan A. Helmer (827163), Jeffrey & Gina Brown (827164), Joseph & Maureen McGlynn (827165), Richard P. James and Molly Stuttler-James (827166), Stephen S. & Sharon A. Davie (827167), and Arthur W. & Margaret A. Wentlandt (827168). In some cases, notices of deficiency were issue jointly to spouses based on jointly filed tax returns. Unless noted otherwise, or required by context, petitioners shall refer collectively to all of the foregoing named petitioners.

A consolidated hearing was held before Dennis M. Galliher, Administrative Law Judge, in Albany, New York, on October 6, 2016 at 10:30 A.M. All briefs were due by February 17, 2017, which date began the six-month period for the issuance of this determination. Petitioners appeared by Mackenzie Hughes, LLP (William Bradley Hunt, Esq., and Clayton H. Hale, Jr., Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Tobias A. Lake, Esq., of counsel).

ISSUE

Whether the Division of Taxation (Division) properly disallowed the qualified empire zone enterprise refundable tax reduction credit claimed by MacKenzie Hughes, LLP, thus eliminating the proportionate amount of such credit claimed by each of the petitioners on their respective personal income tax returns for the year 2009.

FINDINGS OF FACT[2]

BACKGROUND FACTS

1. Petitioners were all partners, or spouses of partners, of Mackenzie Hughes, LLP (MH), a New York limited liability partnership, during the year 2009. MH, a law firm, was created out of a predecessor law firm called Mackenzie, Smith, Lewis, Michell & Hughes, LLP (MSLMH).

2. MSLMH operated as a general practice of law, with the exception that it did not offer criminal defense legal services. A bank, as well as several insurance companies, constituted a large portion of MSLMH's client base. However, this client base began to erode in the mid-to-

[2] On September 26, 2016, petitioners and the Division, by their duly authorized representatives, executed a Stipulation of Facts (Stipulation), setting forth 23 stipulated facts in this matter, including therewith seven attached exhibits. Such stipulated facts are included herein as Findings of Fact (references in the stipulation to the exhibits attached thereto have been omitted). The Division also included, with its post-hearing brief, 31 proposed findings of fact. The proposed findings of fact are supported by the record, and in accordance with State Administrative Procedure Act (SAPA) § 307(a), have been incorporated into the Findings of Fact herein.

later 1990s, due to the acquisition of the firm's bank client by another (larger) bank, and to cost constrictions in the insurance industry. As described hereafter, MH, as the successor entity to MSLMH, continued to operate as a general practice of law, although it offered certain additional areas of legal practice beyond those that MSLMH had previously offered (***see*** Finding of Fact 9).

3. Prior to March 1, 2001, MSLMH leased real property located at 101 South Salina Street, Syracuse, New York (the Property), where its offices were, and had been, located for at least 50 years.

4. For many years, the owner of the Property, who was also the lessor in which MSLMH's offices were located, was OnBank and Trust Co. (OnBank). OnBank had been a significant, long-term legal client of MSLMH. However, in the late 1990s, OnBank was acquired by M&T Bancorp. M&T Bancorp had its own, in-house, legal representatives who performed legal services for M&T Bancorp and, post-acquisition, for OnBank. As a consequence, MSLMH was no longer performing legal services for its former bank client, OnBank, and it had no particularly strong connection with, or allegiance to, M&T Bancorp.

5. MSLMH's lease at the Property was set to expire in 2001. In the later 1990s, MSLMH began the process of determining whether to execute a new lease at the same premises, or lease new premises in a different location. Representatives of the City of Syracuse encouraged MSLMH to remain in downtown Syracuse, noting that if MSLMH located in an Economic Development Zone (Empire Zone), and became certified as a Qualified Empire Zone Enterprise (QEZE), it could be entitled to receive significant resulting tax benefits.[3]

---

[3] In 2000, the Legislative Bill Drafting Commission was directed to change the previously used 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).

6. In considering whether to enter into a new lease agreement for the Property, as opposed to relocating its offices, MSLMH engaged the services of William T. Bell & Associates as a real estate broker (broker). A comparison of potential rental properties was prepared for MSLMH by the broker in or about 2000. Among other matters, the comparison showed that the Property was not the least expensive rental property that MSLMH could have selected. The comparison also revealed that several other available rental properties were located within Empire Zones, and could potentially entitle MSLMH to Empire Zone tax credits. The comparison considered the potential economic benefits of leasing property located in an Empire Zone, specifically noting the rehabilitation tax credit and the wage tax credit, though not the tax reduction credit that is at issue herein. At the same time, and in contrast, the broker's comparison does not specifically indicate that the Property was located in an Empire Zone, and did not consider in its analysis a $20,000.00 cleaning credit that MSLMH had at its existing office location at the Property.

7. In 2001, the members of MSLMH also received a letter or memorandum from Green Seifter Consulting, LLC, for consideration in determining where to locate MSLMH's offices. This letter states, in part, that "[b]ased on the information provided, [MSLMH] will not be eligible for any of the new benefits available under the Empire Zones program, which include the QEZE tax reduction credit and the sales tax exemption." Testimony at hearing confirmed that petitioners were aware, at the time they were considering various lease options, that MSLMH, as then constituted, would not meet the "employment test," and hence would not be entitled to, inter alia, the tax reduction credit.[4] The tax reduction credit is the only QEZE credit in dispute in this

[4] The "employment test" requires (generally) that the number of employees in a given year for which the QEZE tax reduction credit is claimed must equal or exceed the number of employees in the "test period," with such test period being the average number of employees during a "base period." The base period is, generally, comprised of the five year period immediately preceding the test period (***see*** Tax Law § 14[a], [b]).

proceeding.

8. On May 18, 2001, MSLMH entered into a 15 year lease for real property located at the Property. The 15 year duration of this new lease was described as a "longer that usual" lease.[5] As part of the lease terms, the lessor (M&T Bancorp) financed the purchase of new office equipment and furnishings, with the cost thereof (approximately $850,000.00) included in, and to be amortized over, the term of the lease by increased monthly rent payments. At the time of entering into the foregoing lease, MSLMH was not a QEZE, and in fact, MSLMH never was a QEZE.

9. MSLMH's legal work for its former bank client (OnBank) was described as "high volume/low profit but steady" (e.g., real estate closings). However, with the loss of this client, as well as reductions in income from its insurance company clients (***see*** Finding of Fact 4), MSLMH was experiencing a significant ongoing decline in its revenues. Some members of MSLMH wanted to expand the firm's practice into additional areas of legal representation, including securities law and immigration matters. Other members, however, were concerned that doing so created substantial potential risk to the firm's then uncollected, long-term receivables, valued at approximately 4.7 million dollars. One way of addressing this concern was to establish a new partnership (MH) going forward, while keeping the existing partnership (MSLMH) "alive" for purposes of segregating the existing booked receivables from new business matters. In addition, taking this step in fact would (and did) result in the newly formed entity meeting the QEZE employment test, going forward.

---

[5] It is noted that the 15 year lease term coincides with the 15 year QEZE benefit period provided under Tax Law § 14(a)(1)(B).

10. On or about May 20, 2002, MH was formed as an entity by filing the appropriate documentation with the New York Department of State.

11. MH did not exist as a business entity when MSLMH entered into the lease agreement for the Property in March 2001.

12. On March 10, 2003, MH was certified as a QEZE in the Syracuse Empire Zone, with a business address of 101 South Salina Street, Syracuse, New York. Such certification was deemed to be in effect as of June 14, 2002.

13. By virtue of their partnership interests in MH, petitioners were entitled to claim certain QEZE-based tax credits that flowed through to them vis-a-vis MH.

14. MH remained a QEZE from June 14, 2002 until December 31, 2008. The Division and petitioners dispute whether MH remained a QEZE for any part of 2009.

15. On or about May 18, 2009, MH was notified by the New York State Department of Economic Development (DED) that MH's QEZE certification would potentially be revoked based upon then-recently enacted statutory amendments.

16. On or about June 29, 2009, DED issued a letter to MH providing official notice that MH's certification as a QEZE was revoked.

17. MH's QEZE certification was revoked based upon statutory amendments to the Empire Zones Program (Part S-1 of Chapter 57 of the Laws of 2009), that were introduced as legislative bills on January 7, 2009, and were signed into law on April 7, 2009 (the 2009 Amendments). The foregoing June 29, 2009 letter from DED provided that MH's certification was being revoked on the basis that it was first certified prior to August 1, 2002, and that it had either: a) caused individuals to transfer from existing employment with another business

enterprise with similar ownership that was located in New York State to similar employment with MH, or b) had transferred to it real property previously owned by an entity with similar ownership.[6] The effective date of the revocation was set at January 1, 2008.

18. MH timely appealed the revocation of its QEZE certification to DED and the Empire Zone Designation Board (EZDB).

19. On October 15, 2010, the EZDB passed Resolution # 18 of 2010, upholding the revocation of MH's QEZE certification. DED notified MH of the EZDB resolution by letter dated October 25, 2010.

20. MH timely appealed the decision to uphold the revocation of MH's QEZE certification to DED and the EZDB.

21. On May 4, 2012, the EZDB passed Resolution # 29A of 2012, granting MH's request for a de novo review of EZBD's Resolution # 18 of 2010, and upholding the decertification of MH as a QEZE.

THE PRESENT DISPUTE

22. The present dispute is not about whether MH was, or was not, correctly or properly decertified as a QEZE by DED, as upheld on appeal by the EZDB. Rather, the present dispute is about whether it is legally permissible for MH's decertification to be effective beginning January 1, 2009.[7]

23. Except for petitioners Alfred and Lucy Popkess, none of the petitioners claimed

---

[6] This basis for revocation has been commonly referred to as "shirt changing."

[7] As detailed hereinafter, making QEZE decertifications in 2009 effective as of January 1, 2008 was overturned on appeal by the Court of Appeals as impermissibly retroactive (***James Sq. Assoc., LP v. Mullen***, 21 NY3d 233 [2013]). The issue of making such 2009 decertifications effective as of January 1, 2009 (i.e., in the same year) was not specifically addressed by the Court.

entitlement to QEZE tax credits on their original 2009 tax returns. They did, however, claim entitlement to QEZE tax credits via amended 2009 returns, which were timely filed in April of 2013, or thereafter in the case of two of the petitioners.[8]

24. Petitioners claimed QEZE tax credits on their amended 2009 returns by virtue of their partnership interests in MH.

25. Based upon petitioners' original (in the case of petitioners Alfred and Lucy Popkess), or amended (in the case of the remaining petitioners), 2009 tax returns, petitioners were issued refunds of the QEZE Tax Reduction Credit, as follows:

PETITIONER	TOTAL AMOUNT REFUNDED
Clayton and Patricia Hale	$5,517.19
Bradley Hunt & Bridget McManus	$5,130.81
Edward and Elana Moses	$8,338.70
Mitchell Lebowitz & Anne Ruffer	$5,117.16
Carter & Nan Strickland	$9,115.44
Nancy Johnston	$1,302.87
Stephen Theobald & Jacqueline Jones	$4,652.10
Ami Longstreet	$2,919.65
Ramon & Elise Rivera	$6,949.00
Edward Spencer	$4,485.29
Gay & Frances Pomeroy	$10,691.76
Richard and Molly James	$9,629.10

[8] Petitioners Alfred and Lucy Popkess are the only petitioners who did claim QEZE tax credits on their original 2009 tax return. Consequently, they did not file an amended return. All other petitioners filed amended returns in April of 2013, except for petitioners Ramon & Elise Rivera, who filed in August of 2013, and petitioners Stephen Theobald & Jacqueline Jones, who filed in October of 2013.

Stephen and Susan Helmer	$13,870.53
David and Joyce Garber	$10,763.03
Stephen and Sharon Davie	$12,895.00
Arthur and Margaret Wentlandt	$9,667.05
Jeffrey and Gina Brown	$8,806.41
Alfred and Lucy Popkess	$0.00
Joseph and Maureen McGlynn	$3,087.62

26. The Division subsequently disallowed each of the petitioners' claims for QEZE tax credits, and in August of 2014 issued a Notice of Deficiency for tax year 2009 to each of the petitioners for the amounts previously refunded.[9]

27. The following chart lists the assessment numbers and dates of each of the notices of deficiency:[10]

PETITIONER	ASSESSMENT ID NO.	DATE OF NOTICE
Clayton and Patricia Hale	L-041761799-9	08/06/14
Bradley Hunt & Bridget McManus	L-041761985-6	08/06/14
Edward and Elana Moses	L-041762025-8	08/06/14
Mitchell Lebowitz & Anne Ruffer	L-041762242-4	08/06/14

[9] Petitioners Alfred and Lucy Popkess were not previously issued a refund, and therefore were not issued a notice of deficiency. Their petition herein is a challenge to the Division's denial of their claim for refund in the amount of $9,888.25, as is consistent with the manner in which their 2009 tax return was filed.

[10] Stipulated Fact 20 lists each petitioner, their accompanying assessment ID number, and the "total amount of deficiency" (i.e., the amount of tax asserted as due, plus interest as calculated to the date of the notice of deficiency). Since the listing of dollar amounts refunded, per Stipulated Fact 18 and per Finding of Fact 25 herein, matches the listed dollar amounts of tax plus interest asserted as due, per Stipulated Fact 20, that dollar amount columnar listing has been eliminated from Finding of Fact 27 herein, as repetitive and unnecessary. It has been replaced by a columnar listing of the dates of each of the notices of deficiency, and in the case of Alfred and Lucy Popkess, the date of the Division's refund denial letter (***see*** Finding of Fact 26 n 9). In each instance, interest continues to accrue.

Carter & Nan Strickland	L-041762154-1	08/06/14
Nancy Johnston	L-041761905-6	08/06/14
Stephen Theobald & Jacqueline Jones	L-041762184-1	08/06/14
Ami Longstreet	L-041770843-8	08/12/14
Ramon & Elise Rivera	L-041762213-3	08/06/14
Edward Spencer	L-041762153-2	08/06/14
Gay & Frances Pomeroy	L-041761868-2	08/06/14
Richard and Molly James	L-041761771-8	08/06/14
Stephen and Susan Helmer	L-041762158-6	08/06/14
David and Joyce Garber	L-041762063-1	08/06/14
Stephen and Sharon Davie	L-041071350-7	04/25/14
Arthur and Margaret Wentlandt	L-041761765-4	08/06/14
Jeffrey and Gina Brown	L-041761971-1	08/06/14
Alfred and Lucy Popkess	N/A (refund denial letter)	08/06/14
Joseph and Maureen McGlynn	L-041764335-6	08/07/14

SUMMARY OF THE PARTIES' POSITIONS[11]

28. The parties disagree as to the applicability of the Court of Appeals decision in ***James Sq. Assoc., LP v. Mullen*** (21 NY3d 233 [2013]) to this matter. Petitioners contend that under ***James Square***, the Division's application of the 2009 Amendments to the entire year 2009 is unconstitutionally retroactive, in violation of due process standards, and that petitioners are entitled to the QEZE tax reduction credits they claimed for the year 2009. Petitioners object to the Division's reliance on Tax Law § 14(i)(1) as the basis for making the decertification of MH effective as of January 1, 2009, thereby eliminating petitioners' entitlement to QEZE tax benefits

[11] Although set forth as stipulated facts numbered 21, 22 and 23 in the parties' Stipulation, the same represent a short summary of the parties' respective legal positions, and are appropriately set forth as such.

for the entire year 2009. On this point, petitioners claim that MH's decertification by the DED was based upon substantively new QEZE eligibility criteria that only became effective during 2009, rather than on QEZE eligibility criteria in effect when MH initially became QEZE certified, as of June 14, 2002. In sum, petitioners challenge the constitutionally of the Division's application of Tax Law § 14(i)(1), to a mid-year decertification based upon newly established eligibility criteria, so as to render MH's ineligibility to receive QEZE benefits retroactively effective as of January 1, 2009.[12]

29. In contrast, the Division points out 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. Therefore, the Division specifically contends that petitioners are not eligible to receive QEZE credits for 2009 because, effective January 1, 2009, per Tax Law § 14(i)(1), MH ceased to be a QEZE. The Division argues that it simply applied the existing statutory provision, and had no leeway or discretion not to do so.

30. The Division further maintains that the decision in ***James Square*** is not applicable herein, since that decision only addressed the clearly retroactive application of the 2009 Amendments to the year 2008, as driven by legislation subsequently enacted in 2010 (***see*** Conclusion of Law D). In this regard, the Division asserts that the 2009 Amendments were effective on April 7, 2009, and therefore, their application to the same taxable year, i.e., 2009, is not properly considered a retroactive application. The Division further argues, assuming such application is considered a retroactive application, that retroactivity has been permitted with

---

[12] Since the nature of the challenge pertains to the constitutionality of the Division's application of a statute (Tax Law § 14[i][1]), rather than to the statute's facial constitutionality, the issue may be resolved in this forum (***see Matter of Brussel***, Tax Appeals Tribunal, June 25, 1992; ***Matter of Fourth Day Enters.***, Tax Appeals Tribunal, October 27, 1988).

respect to tax statutes, unless the nature of the tax and its period of retroactive application renders the impact thereof unduly harsh and oppressive (***see Matter of Replan Dev. v. Department of Hous. Preserv. & Dev. of City of New York***, 70 NY2d 451 [1987], ***appeal dismissed*** 485 US 950 [1988]). The Division states that even if its application of MH's June 29, 2009 QEZE decertification to the full year 2009 is considered retroactive, it nonetheless is not "unduly harsh and oppressive," and does not cause undue harm to petitioners under the ***Replan*** test. Therefore, the Division requests that its denial of the tax credits sought by petitioners for 2009, and the resulting notices of deficiency (and the notice of refund denial as to petitioners Alfred and Lucy Popkess), be sustained.

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. MH received its Certificate of Eligibility on March 10, 2003, deemed effective as of June 14, 2002. At that time, the primary eligibility requirement to participate in the program related to employment, and MH was required to report its employee number each year. MH's participation in the program made it eligible to apply for certain credits against its New York State taxes, including the tax reduction credit that is at issue in this proceeding.

C. Chapter 57 of the Laws of 2009, carrying the 2009 Amendments, was signed into law by Governor David Paterson on April 7, 2009, and amended the General Municipal Law and the Tax Law to enact reforms to the Empire Zones Program (***see*** Finding of Fact 17). As relevant

here, the 2009 Amendments set forth new criteria that served to restrict continued Empire Zones Program eligibility, including a required review to determine whether existing certified business enterprises (such as MH) 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, including MH, as directed by the foregoing legislation (***see*** General Municipal Law § 959[w]), to determine whether such businesses should remain eligible to participate in the program pursuant to the new criteria established by the 2009 Amendments. Pursuant to this review, MH was, in fact, decertified as a QEZE, and was so notified on June 29, 2009. The Decertification Notice provided that the revocation of MH's certification was effective January 1, 2008.[13]

D. In 2010, the Legislature enacted additional "clarifying" provisions, effective August 10, 2010 (the 2010 Amendments). This legislation was specifically intended to clarify that: a) decertifications resulting from the 2009 Amendments were effective for the same year in which such decertifications occurred, and for all subsequent years, and b) that decertifications occurring

---

[13] MH challenged the decertification, arguing that its formation as an entity resulted from valid business considerations and was undertaken for valid business purposes (***see*** Findings of Fact 9 through 12), such that its certification as a QEZE was valid, and should have remained in place under the new criteria established by the 2009 Amendments. MH's challenge was unsuccessful. Its decertification as a QEZE is not at issue herein (***see*** Finding of Fact 22).

in 2009 were 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).

E. Several challenges to the 2010 Amendments followed, specifically targeting the retroactive application of 2009 decertifications, 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 decertifications, resulting from the 2009 Amendments, to the year *2008* violated constitutional due process standards. In turn, and relying principally upon the decision in ***James Square***, petitioners argue that the Division's application of Tax Law § 14(i)(1) to MH's mid-2009 decertification under the 2009 Amendments, so as to deny petitioners their QEZE benefits (i.e., each petitioner's proportionate share of MH's tax reduction credit) for the entire year 2009, likewise constitutes an impermissible retroactive application of the law, in violation of constitutional due process standards. As concluded hereafter, although the amendments were enacted on April 7, 2009, their application to the entire year 2009 does not constitute a retroactive application of the law. Moreover, even if such application were to be considered retroactive, the same did not violate due process standards.

F. Tax Law § 14(i)(1) specifically 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*" (italics added). The tax year in this case spans January 1, 2009 through December 31, 2009. MH received notice on June 29, 2009, from the DED, that

it did not meet the newly restricted criteria for continued certification as a QEZE under the 2009 Amendments, that it was decertified as a QEZE, and that it was therefore no longer eligible to receive the credits available under the program. Pursuant to Tax Law § 14(i)(1), the effective date for MH's decertification was specifically statutorily required to be January 1, 2009. For its part, the Division was not at liberty to ignore the effective date imposed by Tax Law § 14(i)(1), and simply followed the existing and applicable law. Thus, the Division properly denied the tax reduction credit to petitioners for the entire 2009 taxable year.

G. Imposing ineligibility for the entire year 2009, where such ineligibility resulted from statutory changes enacted in, and effective for, that same year (2009), was simply not a retroactive application of the law.[14] In fact, the specific language used in the 2010 Amendments does not support petitioners' claim that applying the impact of decertification for the entire year 2009 is either erroneous, or impermissible as retroactive. Rather, the language of the 2010 Amendments only affirms such full-year impact as one driven by existing law. Tax Law § 14(i)(1) has been in effect since the inception of the Empire Zones Program in 2000 (***see*** L 2000,

---

[14] The initial versions of what became the 2009 Amendments in fact included a ***2008*** effective date provision, reading as follows:

> "With respect to any business enterprise decertified pursuant to subparagraph six of paragraph (ii) of this subdivision, that decertification (1) will be effective for a taxable year beginning on or after January first, two thousand eight and before January first two thousand nine and for subsequent taxable years for a business enterprise for which a review is required to be conducted pursuant to subdivision (w) of this section in calendar year two thousand nine" (2009 NY Senate-Assembly Bill S60-A, A160-A).

However, the foregoing provision concerning decertifications made pursuant to the required review under the tightened criteria for continued Empire Zones Program participation did not become part of the 2009 Amendments as enacted (***compare*** 2009 NY Senate -Assembly Bill S60-A, A160-A to Chapter 57 of the Laws of 2009; ***see James Square*** at 241, 242). Nonetheless, this difference between the initial proposed amendments, and the 2009 Amendments as enacted, may account for the initial determinations by both DED and the Division making 2009 decertifications applicable as of January 1, ***2008*** (***see*** Finding of Fact 17), as well support the Legislature's subsequent passage of the 2010 Amendments specifying that such 2009 revocations were deemed to be retroactively effective as of January 1, ***2008***.

ch 63, Part GG). As set forth above, Tax Law § 14(i)(1) provides, unequivocally, that when an entity is decertified, that decertification will be effective on the first day of the taxable year during which the revocation of certification occurs. It does not specify any bases for avoiding that "first day of the taxable year" effective date of decertification, premised upon the underlying reason or reasons for such decertification. In enacting the 2009 Amendments, the Legislature is presumed to have been aware of the rule it had imposed under Tax Law § 14(i)(1), and the result such rule would have upon application of the 2009 Amendments to the tax year 2009, yet it made no change to section 14(i)(1) when enacting the 2009 Amendments.

Indeed, not only did the Legislature make no change to Tax Law § 14(i)(1) when it enacted the 2009 Amendments, but in fact it simply reiterated (or ratified) the impact of that provision when it subsequently enacted the 2010 Amendments. Carefully parsing the 2010 Amendments reveals that the same carried two specific directives. The first directive simply ratified the rule and result under Tax Law § 14(i)(1), by stating that "[the 2009 Amendments] *are intended to be effective for the taxable year in which the revocation of certification occurs and for all subsequent taxable years.*" The second directive affirmatively expanded the reach of such decertifications under the 2009 Amendments, making them retroactively applicable to 2008 by stating that *" . . . 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*" (***see*** Conclusion of Law D). The Legislature thus used language that specifically distinguishes between the two directives of the 2010 Amendments: i.e., the first directly addresses the *existing and intended* full-year impact for the taxable year during which decertification occurs (a clear and simple ratification of existing law), while the second addresses the affirmative expansion of

such effective date by the *deemed* inclusion of a prior, otherwise excluded, year (2008) not covered by the existing law (Tax Law § 14[i][1])(emphasis added). Carefully reading the foregoing italicized portions of the 2010 Amendments clearly reveals that the Legislature's aim, with regard to decertifications occurring during 2009, pursuant to the 2009 Amendments, was to confirm the already statutorily included full current year (2009) of ineligibility, and to affirmatively add another full prior year of ineligibility (2008) thereto. It is this latter "affirmative expansion by deemed inclusion" directive that the Court of Appeals addressed and rejected in ***James Square*** as impermissibly retroactive.

H. In addition to the foregoing, it is well established that tax credits are a "particularized species of exemption from taxation" (***Golub Service Station, Inc., v. Tax Appeals Tribunal***, 181 AD2d 219 [3d Dept 1992]), resulting as a matter of legislative grace, and are not promises carrying with them a vested right thereto in perpetuity. As such, the Legislature is under no obligation to extend the same indefinitely, and may modify, reduce or eliminate tax credits at any time (***see*** NY Constit. Art XVI, § 1; ***US v Carlton***, 512 U.S. 26 [1994]). MH's QEZE certification merely made it (and, by flow-through, its members) eligible to receive the benefits referred to in General Municipal Law § 966, including the tax reduction credit at issue herein. Entitlement to such tax benefits does not override the Legislature's prerogative to modify the requirements for participants obtaining those benefits to continue to do so. In this respect, it is significant that while petitioners view the 2009 Amendments as imposing substantively new QEZE eligibility criteria, such amendments in fact served only to restrict the existing QEZE eligibility criteria for purposes of retaining existing QEZE eligibility, i.e., the 2009 Amendments enacted reforms to the Empire Zones Program in an effort to curtail or reign in what had been

long-identified weaknesses or abuses under the existing criteria. The fact that the 2009 Amendments were applicable to eligibility-entitlement actions taken by petitioners long before the 2009 Amendments were in effect, does not render the 2009 Amendments themselves, or their application to the year 2009, retroactive. In addressing the question of the revocation of a taxpayer's QEZE certification resulting from application of the 2009 Amendments, the Appellate Division stated:

> "[w]e reject petitioner's contention that its due process rights were violated in that the revocation of its certificate was based upon actions that were not a basis for decertification when they were taken. The fact that the 2009 statutory standards for the prospective retention of empire zone certification are applicable to actions taken before the statute took effect 'does not render that statute "retroactive" in any true sense of that term' and does not implicate petitioner's due process rights [citations omitted]" (***Matter of Dermody, Burke & Brown, CPAs, LLC v. Department of Economic Dev.***, 14AD3d 1275[2016]).

Nothing in the ***James Square*** decision prevents application of the tightened criteria for continued QEZE certification and participation, under the 2009 Amendments, to the 2009 tax year, or in consequence, the application of Tax Law § 14(i)(1) to establish the effective and applicable date of decertification as the first day of the tax year (here 2009) in which a QEZE is decertified under such tightened criteria.

I. Even if imposing a January 1, 2009 effective date with respect to either: a) the 2009 Amendments (enacted on April 7, 2009), or b) the decertification of MH (effective as of June 29, 2009), were to be considered a retroactive application of the law, the same is not barred by the result in ***James Square***, nor is it an impermissibly retroactive impact under due process standards. First, the Court in ***James Square*** made no ruling concerning the validity of a decertification in 2009 being applicable in the same year, either pursuant to Tax Law § 14(i)(1) or pursuant to the 2010 amendments. In fact, and as noted earlier, the 2010 amendments do not

speak exclusively or specifically to making 2009 revocations effective for 2009, but rather ratify the existing general rule of Tax Law § 14(i)(1) that any decertifications (including those made pursuant to the 2009 Amendments) in any given year, will be effective for that entire given year (***see*** Conclusion of Law D). This result is fully consistent with the mandate of the long-existing QEZE decertification effective date provision (Tax Law § 14[i][1]). In turn, and *specifically and only* for revocations that occur in *2009*, the Legislature added a separate one-year retroactive directive impacting only *2008*. Thus, a decertification in 2009 was to be effective for that same year, as driven by Tax Law § 14(i)(1), and was also to be effective for *2008*. In effect, then, the Legislature attempted to expand, by the 2010 Amendments, the directive of Tax Law § 14(i)(1) to a prior year. Again, it was the impact of this specific one additional year directive, found in the latter portion of the 2010 Amendments, that the Court of Appeals struck down in ***James Square***, on the dispositive basis that without a valid public purpose, the retroactivity imposed thereby upon a closed tax year (2008) was impermissible.

J. As a general proposition, the retroactive application of tax statutes is disfavored (***see James Square***; ***Caprio v. New York State Dept of Taxation and Fin.***, 25 NY3d 744 [2015], ***rearg denied***, 26 NY3d 955 [2015]; ***Majewski v. Broadalbin-Perth Central School Dist.***, 91 NY2d 577, 584 [1988]). However, short periods of retroactivity of a tax statute or regulation, with adequate justification, are commonly permitted (***see Matter of Replan; Matter of Varrington Corp. v. City of New York Dept. of Finance***, 85 NY2d 28, 33 [1995]). Again, assuming that applying the 2009 decertification to the entire year 2009, as opposed to limiting the impact of decertification only to the part-year period after the April 7, 2009 effective date of the 2009 Amendments, or to the part-year period after the June 29, 2009 notice of decertification was

issued to MH, was in fact a retroactive application, the question of whether a tax statute or tax regulation may be validly applied retroactively depends on a consideration of the following three principal factors:

> (1) the "taxpayer's forewarning of a change in the legislation and the reasonableness of [the taxpayer's] reliance on the old law,"
>
> (2) "the length of the retroactive period," and
>
> (3) "the public purpose for the retroactive application." (***Matter of Replan; Matter of James Square*** at 246).

K. Analysis under the foregoing three factors strongly militates against petitioners' position. In this respect, it was: (1) clearly foreseeable that the applicable law, as in effect on January 1, 2009, would not remain so at the conclusion of the year; (2) the period of retroactivity (some 97 days as clarified hereafter) is well within an acceptable range; and (3) the application of the 2009 Amendments to the year 2009 was fully consistent with the stated budgetary purposes supporting the 2009 Amendments, and also served the public purposes of limiting perceived abuses in the Empire Zones Program.

L. First, there is no dispute that taxpayers, such as petitioners, were aware of the likely changes to the Empire Zones Program. The proposed 2009 Amendments were introduced on January 7, 2009 and were enacted and became effective on April 7, 2009. In ***James Square***, the taxpayers "had no warning and opportunity at any time *in 2008* to alter their behavior in anticipation of the impact of the 2009 Amendments" (***James Sq. Assoc., LP*** at 248)(italics added). Here, in clear contrast, petitioners had the opportunity to know 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 (e.g., at a minimum, increase the amounts

of their respective withholdings, or make [or increase] their prepayments of estimated tax liabilities to account for and mitigate the impact of the highly likely and foreseeable potential result of losing the benefit of the credit at issue). Under these circumstances, petitioners cannot claim either a lack of forewarning or any basis supporting reasonable reliance on their status under existing law, or any sense of "secure repose" therein (***Replan*** at 456; ***see Matter of Luizza***, Tax Appeals Tribunal, March 29, 2016).

M. Clarified next is the actual period of alleged retroactivity. Petitioners claim a period (with respect to 2009) of one year and eight months, calculated from the August 10, 2010 effective date of the 2010 amendments back to the beginning of 2009. The Division, by contrast (and while not agreeing that there is any retroactive application for 2009), would calculate a period of three months and seven days, i.e., from the April 7, 2009 effective date of the 2009 Amendments to the beginning of 2009. As noted above, the retroactivity imposed by the 2010 Amendments concerned adding one additional prior year, i.e., 2008, but did not drive the effective date of the decertification itself as to the year during which decertification occurred (i.e., 2009). It follows, then, that the 2010 amendments simply had no impact with regard to the year 2009 in this case, and it is unnecessary and improper to calculate the period of retroactivity upon the basis of such 2010 Amendments. Accordingly, to the extent there is any period of retroactive application, it spans, as the Division would argue, at most the very short 97-day period from April 7, 2009 back to January 1, 2009. As noted above, significantly longer periods of time have been upheld as permissible.

N. Finally, while making the decertification retroactive to an earlier, closed year (2008), pursuant to the 2010 amendments, failed under ***James Square*** for lack of any supporting

valid public purpose, it remains that the period at issue here (2009) is not driven by the 2010 amendments, but rather by the 2009 Amendments. The impetus for the 2009 Amendments to the Empire Zones Program commenced with the Governor's 2009-2010 budget plan whereunder, in December of 2008, it was announced that the Program would be reformed to "ensure that participants are providing a clear benefit to the State" (2009 NY Executive Budget, December 16, 2008, p. 48; ***see James Square*** at 241). The stated purposes for the 2009 Amendments included curtailing perceived abuses in the Empire Zones Program, reining in the scope of the Program, and thereby lessening the fiscal impact of the Program as a savings measure for the then-upcoming 2009-2010 budget year (and going forward). In turn, on January 7, 2009, the proposed legislation that would become the 2009 Amendments (Assembly Bill A157 and Senate Bill S57) was introduced as part of the Governor's budget legislation (***see*** 2009 Assembly Bills A150 through 163, Senate Bills S50 through 63). Applying the 2009 amendments in the year of their enactment is fully consistent with the valid public policy purposes of reigning in or curtailing perceived ongoing abuses of the Empire Zones program and of achieving budget savings for such year. This is clearly different from the impact of the 2010 amendments on the year 2008, which simply added one year of ineligibility to a prior, otherwise closed year, without adequate justification for doing so (***Matter of James Sq. Assoc., LP***).

O. Finally, petitioners' request for partial allowance of the amounts at issue, specifically up to the point in time when petitioners were notified of decertification, is denied. The tax year in this instance covers the entirety of 2009, and there is no basis to allow a truncated period of eligibility for the credit at issue. Moreover, petitioners' request is fully at odds with Tax Law § 14(i)(1) and its full year impact.

P. The petitions of Clayton H. Hale, Jr., and Patricia Hale, et al., are denied, and the notices of deficiency and the notice of refund denial (as to petitioners Alfred and Lucy Popkess), as specified in Finding of Fact 27, are sustained.

DATED: Albany, New York
August 10, 2017

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE