STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petitions | : | |
| of | : | |
| **CARL MONTANTE, SR. AND CAROL MONTANTE, ET AL.** | : | DETERMINATION DTA NOS. 827235, 827236, 827237, 827238 AND 827239 |
| for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2009. | : | |

Petitioners, Carl Montante, Sr. and Carol Montante, Timothy Montante, Laura Zaepfel, Michael and Alexendra Montante, and Carl Montante, Jr. and Wendy Montante, filed petitions for redetermination of deficiencies or for refund of personal income tax under article 22 of the Tax Law for the year 2009.

A consolidated hearing was held before Kevin R. Law, Administrative Law Judge, in Rochester, New York, on March 2, 2017, with all briefs due by July 7, 2017, which date began the six-month period for issuance of this determination. Petitioners appeared by Hodgson Russ, LLP (Christopher L. Doyle, Esq., and Andrew W. Wright, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Tobias Lake, Esq., of counsel).

## *ISSUES*

I. Whether the Division of Taxation properly disallowed the qualified empire zone enterprise credits claimed by each of the petitioners on their respective personal income tax returns for the year 2009 based upon the Department of Economic Development's order decertifying petitioners' businesses' empire zone enterprise certifications in June 2009.

II. Assuming the Division of Taxation improperly disallowed said credits, whether the amount of credits should be modified to disallow sanitary district charges and fire district charges on the basis that those charges are not eligible real property taxes pursuant to Tax Law former § 15 (e).

## *FINDINGS OF FACT*

On February 27, 2017, the parties executed a stipulation of facts in connection with this matter. Such stipulated facts have been included in the findings of fact set forth herein. In addition, petitioners submitted 25 proposed findings of fact. Petitioners' proposed findings of fact 1, 2, 3 and 5 through 21 are accepted and substantially included in the findings of fact set forth herein. Petitioners' proposed findings of fact 4 and 22 through 25 are rejected as argumentative and not supported by the record. The Division of Taxation (Division) submitted 7 proposed findings of fact. The Division's proposed findings of fact 1, 2 and 6 are rejected as they are not factual statements but are summaries of petitioners' arguments. The Division's proposed findings of fact 3, 4, 5 and 7 are rejected as they are not factual statements but are arguments as to what is not contained in the hearing record.

1. Petitioner Carl Montane, Sr. (Montante Sr.) founded the Uniland Development Company in the 1970s and has served as its managing director ever since.

2. Uniland Development Company is the doing business name for the Uniland Partnership of Delaware, L.P. (Uniland).

3. Uniland is a full-service real estate development company based in Amherst, New York, that owns properties primarily located in the Buffalo and Rochester areas of New York State.

4. During the 2009 tax year, Montante Sr. and Carol Montante, Timothy Montante, Laura Zaepfel, Michael and Alexendra Montante, and Carl Montane, Jr. and Wendy Montante (collectively petitioners) owned direct or indirect equity interests in Uniland.

5. During the 2009 tax year, petitioners Montante Sr. and Carl Montante, Jr., owned direct or indirect equity interests in Univest Il Corporation and/or its subsidiaries, including BTC Block 1/21, Inc., and ICC South, Inc. (collectively Univest).

6. During the relevant tax year, Uniland and Univest were related through petitioners' ownership.

7. For purposes of the present proceeding, from 2001 to 2008 Uniland and Univest were certified as Qualified Empire Zone Enterprises (QEZE) (collectively the Uniland QEZEs).

8. By virtue of their ownership interests in the Uniland QEZEs, petitioners were entitled to claim certain tax deductions and credits that flowed through to them so long as the Uniland QEZEs continued to be certified as QEZEs and meet the eligibility requirements for receiving such tax deductions and credits under the Tax Law.

9. For tax purposes, Montante Sr. owned 82.99% of Uniland and 99.67% of the Univest Il Corporation.

10. The remaining petitioners are Montante Sr.'s children, who own, for income tax purposes, various minority percentages of Uniland and Univest Il Corporation.

11. In his role as managing director, Montante Sr. was responsible for making all executive-level decisions - including development strategies, construction decisions, property management decisions, and leasing decisions - and establishing and approving general policies, practices, and procedures on behalf of the company, including the Uniland QEZEs.

12. In the early 2000s, the Uniland QEZEs learned about New York's Empire Zone program and its tax benefits.

13. After determining that it owned properties within the geographic limits of certain Empire Zones, the Uniland QEZEs applied for certification under the program.

14. After being certified under the program, the Uniland QEZEs made several significant changes to its policies and procedures in relation to properties located in Empire Zones, including establishing distinct payrolls for each of the Uniland QEZEs, whereas the Uniland QEZEs had traditionally had one payroll for all employees for all of the entities operating under the Uniland umbrella; hiring additional employees to work for the Uniland QEZEs in the Empire Zones and training and supervising those employees; and lowering base rents the Uniland QEZEs charged to tenants at the properties located in the Empire Zones such that much of the benefit of the QEZE credits was passed on to the tenants in the form of lower rents.

15. Uniland would not have taken any of these steps but for its participation in the Empire Zones program.

16. Subsequent to the certification of the Uniland QEZEs in the early 2000s, the Uniland QEZEs began making decisions with respect to long-term leases on properties located in the Empire Zones.

17. The Uniland QEZEs generally entered into leases with its tenants that spanned between 5 and 15 years in length.

18. As a result, the Uniland QEZEs made decisions with respect to pricing the leases that covered the 2009 tax year well in advance of the 2009 tax year.

19. The Uniland QEZEs made these decisions regarding lease pricing in anticipation of receiving the Empire Zone benefits promised to them for the full 15-year period.

20. Each of the Uniland QEZEs met the pre-April 2009 qualifications for claiming the real property tax credit under the Tax Law during the 2009 tax year.

21. On April 7, 2009, Governor Paterson signed the revenue portion of the 2009 Budget which introduced two new criteria that businesses were required to meet to retain their Empire Zone certifications - the shirt-changing test and the 1:1 benefit-cost test (2009 Laws of NY Ch. 57, Part S-10) (the 2009 Amendments).

22. The new certification retention criteria enacted as part of the 2009 Budget Bill did not contain a retroactivity provision, but were effective immediately when signed by the Governor.

23. In August 2010, the Legislature amended the General Municipal Law to state that decertifications pursuant to the 2009 Amendments were retroactively effective as of January 1, 2008 (2010 Laws of NY Ch. 57, Part R).

24. The 2009 Amendments also required the Commissioner of Economic Development to review all certified businesses during 2009 to determine if they should be decertified under the new criteria.

25. For the 2009 tax year, the Uniland QEZEs claimed the QEZE real property tax credit.

26. In June of 2009, the Uniland QEZEs were notified that their QEZE certifications were revoked by Order of the New York State Department of Economic Development (DED) in accordance with the 2009 Amendments.

27. The Uniland QEZEs appealed the revocation of their QEZE certifications by the DED.

28. Upon learning that the Uniland QEZEs were being decertified in 2009, petitioners could not have amended the terms of long-term lease agreements it entered into with its tenants in anticipation of its continued receipt of Empire Zone benefits.

29. In the event that petitioners prevail on the issue of retroactivity, the Division agrees that petitioners are entitled to receive certain QEZE credits from the Uniland QEZEs. The Division and petitioners disagree, however, regarding the exact amount of such credits to which petitioners would be entitled.

30. The entire difference between the eligible real property taxes reported by the Uniland QEZEs for the 2009 tax year, $990,295.80, and the credit that, but for the 2009 Amendments, would be allowed by the Division, $949,380.60, is made up of either garbage district charges ($5,274.73 in total) or fire district charges ($35,640.47 in total). The Division and petitioners disagree as to whether these charges constitute eligible real property taxes as defined by Tax Law § 15 (e).

31. During the 2009 tax year, petitioners Montante Sr. and Carol Montante, Michael and Alexendra Montante, and Timothy Montante (collectively the Refund petitioners) claimed a credit on their 2009 personal income tax returns for their share of the QEZE real property tax credit claimed by the Uniland QEZEs for that year.

32. Upon review of the Refund petitioners' amended 2009 tax returns, the Division disallowed each of the claims for the QEZE real property tax credit, and, in or around July of 2014, issued notices of disallowance for tax year 2009 to each of the Refund petitioners for the QEZE credits claimed as follows:

| Petitioner | Claimed QEZE Credits Disallowed |
|---|---|
| Montante Sr. and Carol Montante | $890,555.00 |
| Michael and Alexandra Montante | $12,312.00 |
| Timothy Montante | $12,293.00 |

33. Each of the Refund petitioners timely appealed the notices of disallowance to the Division's Bureau of Conciliation and Mediation Services (BCMS) and timely appealed the conciliation orders sustaining the notices of disallowance to the Division of Tax Appeals.

34. During the 2009 tax year, petitioners Montante Jr. and Wendy Montante, and Laura Zaepfel (collectively the Deficiency petitioners) first claimed their share of the credits for the Uniland QEZEs on amended personal income tax returns, which were initially granted by the Division.

35. Subsequently, on or about July 30, 2014, the Division issued the following notices of deficiency:

| Petitioner | Notice Number | QEZE Credits Disallowed |
|---|---|---|
| Carl Jr. and Wendy Montante | L-041748546 | $15,167.00 |
| Laura Zaepfel | L-041748552 | $13,887.00 |

36. Each of the Deficiency petitioners timely appealed the notices of deficiency to the BCMS and timely appealed the conciliation orders sustaining the notices of deficiency to Division of Tax Appeals.

37. In or around May of 2015, each of the Deficiency petitioners tendered full payment of the proposed deficiencies as shown on the notices of deficiency.

## *SUMMARY OF THE PARTIES' POSITIONS*

38. For purposes of the present proceeding, the Division and petitioners agree that the Uniland QEZEs were certified from the date of their certification until December 31, 2008. The Division and petitioners agree that the Uniland QEZEs were decertified as QEZEs. The Division and petitioners disagree about whether the statutory amendments were retroactively applied to January 1, 2009 and, if they were, whether that retroactive application violated the law.

39. Petitioners and the Division stipulated that, absent the issue of retroactive application of the 2009 Amendments, petitioners were entitled to receive certain QEZE credits from the Uniland QEZEs, but disagreed over the exact amount of such credit to which petitioners would be entitled, namely with regards to certain district charges included in the eligible real property tax amounts claimed by Uniland and ICC South, Inc.

40. Petitioners contend that the Division's application of the statutory amendments to periods that pre-date both the passage of the statutory amendments and the 2010 passage of the law making the statutory amendments retroactive violates the explicit prohibition against retroactive application of the law requiring recertification of Empire Zone Enterprises pursuant to the Court of Appeals decision in ***James Square Assocs. LP v Mullen***, 21 NY3d 233 (2013), and therefore, petitioners are entitled to QEZE credits for 2009 by virtue of their ownership interests in the QEZEs.

41. 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 the Uniland QEZEs ceased to be QEZEs on January 1, 2009. The Division further contends that the 2010 legislation is irrelevant to this matter because that legislation made the statutory amendments retroactive to 2008 and the present matters involve the 2009 tax year only.

42. Petitioners and the Division disagree on the applicability of the ***James Square*** decision to these matters. Petitioners and the Division also disagree on whether the garbage district and fire district charges are eligible real property taxes pursuant to Tax Law former § 15 (e).

## *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 New York State 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. Uniland was notified in June, 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. Here, although 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, it is recognized that much of their conduct was tailored years earlier when the Empire Zones program came into existence. Montante Sr. testified credibly that rental rates were set factoring in QEZE benefits. Nonetheless, 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 the Uniland QEZEs were decertified by the DED in June, 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***). The application of an amendment passed midway through a taxable year to events or transactions occurring prior to the amendment does not result

in a due process violation (***see United States v Darusmont***, 449 US 292 [1981]). Here, the amendments did not pass a new tax but provided for stricter standards to remain certified as a QEZE and continue receiving tax credits. The Uniland QEZEs did not meet these new standards. Petitioners do not have a "vested right to continue receiving tax credits" for which there is no entitlement (***Matter of Greece Town Mall, LP v New York State***, 105 AD3d 1298, 1300 [3rd Dept 2013]). The Legislature is under no obligation to extend tax credits indefinitely, and may modify, reduce or eliminate tax credits at any time (***see*** NY Constit. Art XVI, § 1; ***United States v Carlton***, 512 US 26 [1994]).

H. Although the question of whether garbage district and fire district charges are eligible real property taxes pursuant to Tax Law former §15 (e) has been rendered moot, it will nonetheless be addressed for sake of a complete record (***see Matter of Riehm v Tax Appeals Tribunal***, 179 AD2d 970 [3d Dept 1992] ***lv denied*** 79 NY2d 759 [1992] ***reargument denied*** 80 NY2d 893 [1992]). In the present matter, the Division asserts that should the respective notices of disallowance and notices of deficiency be canceled, petitioners are not entitled to QEZE real property tax credits for amounts claimed representing garbage district and fire district charges, as such charges do not meet the definition of eligible real property taxes under Tax Law former § 15 (e). The Division is correct in its assertion for it is well settled that "the term 'eligible real property taxes' in Tax Law former § 15 (e) does not include special ad valorem levies and special assessments" (***Matter of Stevenson v Tax Appeals Trib.***, 106 AD3d 1146 [3rd Dept 2013 ]) ***citing Matter of Piccolo v Tax Appeals Trib.***, 108 AD3d 107 [3rd Dept 2013]). Garbage district and fire district charges fall within the definition of special assessments (***see*** Real Property Tax Law § 102 [15], [16]) and do not constitute property taxes.

I. The petitions of Carl Montane, Sr. and Carol Montante, Timothy Montante, Laura Zaepfel, Michael and Alexendra Montante, and Carl Montante, Jr. and Wendy Montante are denied; the notices of deficiency dated July 30, 2014 are sustained; and the notices of disallowance dated July 24, 2014 are sustained.

DATED: Albany, New York
January 4, 2018

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE