

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :

of :

**RALPH RISIO AND LOUISE RISIO** : DETERMINATION  
DTA NO. 827599

for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the  
Tax Law for the Years 2011 and 2012. :

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Petitioners, Ralph Risio and Louise Risio, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law for the years 2011 and 2012.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, on March 28, 2018 at 10:30 a.m., in Albany, New York, with all briefs to be submitted by July 25, 2018, which date began the six-month period for issuance of this determination. Petitioners appeared by Gitlin & Associates, LLC (Irwin Gitlin, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

***ISSUE***

Whether the Division of Taxation properly disallowed a portion of petitioners' empire zone real property tax credits claimed via Memorare Realty Holding Company, a subchapter S corporation, for the years 2011 and 2012, on the basis that the corporation's first benefit year was the tax year ended December 31, 2001, and not December 31, 2002, as claimed by petitioners.

***FINDINGS OF FACT***

1. Memorare Realty Holding Corp. (Memorare), was incorporated on October 1, 1984, and is a subchapter S corporation. Petitioners, Ralph Risio and Louise Risio, are each 50% shareholders of Memorare.

2. As a subchapter S corporation, Memorare's tax credits (among other things) are passed through, proportionately, to its shareholders.

3. In 2001, Memorare filed an Application for Joint Certification of an Empire Zone Business Enterprise (joint application) under General Municipal Law article 18-B.

4. Empire Zones Program Certificate of Eligibility Number 6000857679 (certificate of eligibility), pertaining to the facility located at Washington St., Newburgh, New York, within the Newburgh-Stewart, Orange County Empire Zone, was issued to Memorare. The certificate was issued on August 19, 2002, and specified the following with respect to Memorare's eligibility for empire zone benefits:

“Such eligibility shall be in effect as of 12/26/01 and continue in effect until terminated by operation of law or by action taken pursuant to such laws, rules and regulations as may be applicable.”

5. Memorare timely filed a New York S Corporation Franchise Tax Return (form CT-3-S) for each of the years 2011 and 2012, including therewith form CT-606 (Claim for QEZE Credit for Real Property Taxes). Section one of form CT-606 is applicable to QEZEs such as Memorare that were first certified prior to April 1, 2005. Section one of Memorare's forms CT-606 for each year at issue reports “12-26-2001” as the “[d]ate of first certification by Empire State Development.”

6. Petitioners timely filed a New York State Resident Income Tax Return (form IT-201) for each of the years 2011 and 2012, including therewith form IT-606 (Claim for QEZE Credit

for Real Property Taxes). Petitioners thereafter timely filed a New York State Amended Resident Income Tax Return (form IT-201-X) for each of the years 2011 and 2012, including therewith form IT-606. Like section one of form CT-606, section one of form IT-606 is applicable to QEZE's such as Memorare that were first certified prior to April 1, 2005.

Consistent with Memorare's forms CT-606, the forms IT-606 included with each of petitioners' foregoing personal filings report "12-26-2001" as the "[d]ate of first certification by Empire State Development." By these filings, petitioners claimed their proportionate shares of Memorare's real property tax credit (RPTC) for each of the years 2011 and 2012, as the shareholders of Memorare.

7. Tax Law § 15 (b) provides that the amount of the RPTC for a given taxable year shall be the product of the "benefit period factor," the "employment increase factor," and the amount of "eligible real property taxes" paid or incurred by the QEZE during the taxable year.

8. The Division of Taxation (Division) conducted a review of petitioners' 2011 and 2012 personal income tax returns. The employment increase factor and the amount of eligible real property taxes that were paid were not at issue. Instead, the portion of the Division's review that is at issue here only addresses the benefit period factor. The benefit period factor is a multiple of the RPTC credit that varies by year, beginning with the first year, known as the "test date," in which the QEZE is eligible to claim the RPTC.

9. The Division determined petitioners had calculated the 2002 tax year as the test date upon which to begin the 15-year RPTC benefit period. However, in reliance upon the certificate, the Division determined instead that Memorare's first benefit year and, hence, its test date, was the 2001 tax year. As a result, the 2011 tax year was the eleventh (as opposed to the tenth) benefit year, and in turn 2012 was the twelfth (as opposed to the eleventh) benefit year.

Consequently, the Division reduced Memorare's benefit period factor from 1.0 to .8, for 2011, and from .8 to .6 for 2012, resulting in adjustments (decreases) to the amount of RPTC to which petitioners were entitled, via Memorare, for each of such respective years.

10. On December 23, 2013, the Division issued to petitioners a notice of deficiency (L-040306745) asserting additional tax due for the year 2011 in the amount of \$5,026.00, plus interest. A statement of proposed audit changes previously issued to petitioners on November 5, 2013, explained that the \$5,026.00 amount due resulted from the test date change described above (*see* finding of fact 9), and reduced the amount of refund previously granted to petitioners, as follows:

\$151,880.00 =	Amount of real property taxes paid by Memorare for 2011.
\$151,880.00 =	Amount of RPTC claimed by petitioners based upon benefit factor of 1.0.
\$151,880.00 =	Amount of total refundable credits claimed by petitioners per form IT-201-ATT.
\$121,504.00 =	Amount of (reduced) RPTC, per Division audit, based on benefit factor of .8.
\$ 30,376.00 =	Reduction to claimed RPTC ( $\$151,880.00 - \$121,504.00 = \$30,376.00$ ).
\$126,530.00 =	Amount of total refund previously (initially) allowed by Division.
\$ 5,026.00 =	Deficiency amount assessed ( $\$126,530.00 - \$121,504.00 = \$5,026.00$ ).

11. By a letter dated March 27, 2015, the Division advised petitioners that the benefit period factor by which their proportionate shares of the QEZE RPTC earned by and derived from Memorare for the years 2011 and 2012 was incorrect and was being adjusted.

12. In addition to the foregoing adjustment for the year 2011, on April 2, 2015, the Division issued to petitioners an account adjustment notice concerning petitioners' return for the year 2012. By this notice, the Division advised petitioners that their claimed refund for the year 2012 was denied, in part, as follows:

\$167,754.00 =	Amount of real property taxes paid by Memorare for 2012.
\$134,203.00 =	Amount of RPTC claimed by petitioners based upon benefit factor of .8.
\$134,203.00 =	Amount of total refundable credits claimed by petitioners per form IT-201-ATT.
\$100,652.00 =	Amount of (reduced) RPTC, per Division audit, based on benefit factor of .6.
\$ 33,551.00 =	Reduction to RPTC ( $\$134,203.00 - \$100,652.00 = \$33,551.00$ ).
\$ 33,551.00 =	Amount of refund denied ( $\$134,203.00 - \$100,652.00 = \$33,551.00$ ).

13. On April 28, 2016, petitioners challenged the Division's actions by filing a petition with the Division of Tax Appeals, seeking a refund of the \$63,927.00 amount by which their claimed RPTC had been reduced for the years in question, as follows:

For 2011, the petition seeks allowance of the full amount of RPTC claimed by petitioners based on a benefit factor of 1.0 (\$151,880.00), in turn leading to allowance of the full amount of refundable credit claimed and full amount of refund initially allowed by the Division for 2011 (\$126,530.00), so as to result in cancellation of the notice of deficiency issued for the year 2011 in the amount of \$5,026.00.

For 2012, the petition seeks allowance of the full amount of RPTC claimed by petitioners based on a benefit factor of .8 (\$134,203.00), as opposed to the amount of RPTC allowed by the Division based on a benefit factor of .6 (\$100,652.00), so as to result in a reversal of the Division's disallowance (refund denial) of the \$33,551.00 portion of petitioners' claimed refundable credit.

14. The record does not include a complete copy of Memorare's joint application, but rather only one, unsigned and undated page from Memorare's application. That page reflects zero employees "as of Jan 1 of current year," "01/02" as the "date to begin hiring," and "03/02" as the "projected date for full-scale operations." It is petitioners' contention that the foregoing information set forth on this page indicates Memorare sought certification for benefits beginning with the year 2002, and not for 2001 as appears on its certificate of eligibility. Petitioners argue that the certificate was issued in error with respect to the effective date of Memorare's certification and, in turn, the effective date of its initial year of eligibility for the RPTC.

15. As noted, all of the tax returns in the record list "12-26-2001" as the date of Memorare's certification. The record also includes a copy of Memorare's Empire Zone Retention Certificate (EZRC), as issued by the Empire State Development Corporation (ESDC). Such a certificate was required in order to claim empire zone tax credits for tax years 2008 and after.<sup>1</sup> Consistent with its August 19, 2002 certificate of eligibility, Memorare's EZRC (*see* exhibit G), lists Memorare's "approval date" as "12/26/2001."

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

A. The Legislature enacted the economic zones development program, now known as the empire zones program, to spur economic growth and job creation (*see* L 1986, c 686; General Municipal Law § 956).<sup>2</sup> The empire zones program is overseen by the department of economic

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<sup>1</sup> Chapter 57 of the Laws of 2009, amended the General Municipal Law to enact reforms to the empire zones program. As relevant here, the 2009 amendments required the commissioner of economic development to review all existing certified business enterprises (such as Memorare) to determine if they could continue their status as enterprises allowed to participate in the empire zones program so as to remain qualified for empire zone benefits (*see* General Municipal Law § 959 [w]). It appears that the described EZRC was issued as a consequence of such review.

<sup>2</sup> The economic development zones program was renamed and became part of the empire zones program in 2000 (*see* L 2000, c 63, § GG).

development and the ESDC, pursuant to General Municipal Law (GML) Article 18-B (*id.*; *see* Economic Development Law § 100 [33]). Under the program, the commissioner of economic development is authorized to certify “business enterprises” as eligible to receive various benefits, including tax benefits, that are available only to such certified enterprises (*see* GML § 959[a]). Among other empire zone credit provisions, Tax Law §§ 14 and 15, together, provide a refundable tax credit for eligible real property taxes, to qualified empire zone enterprises (QEZE). A QEZE is a business enterprise that has been certified under GML Article 18 , and that also meets an employment test (Tax Law § 14 [a]).<sup>3</sup>

B. Pursuant to regulations of the Department of Economic Development, the process for certification required the submission of a joint application (*see* finding of fact 3). The joint application was to be first submitted, in triplicate, to the local economic development zone administrator (local zone administrator). One copy was to be marked as the “master copy.” Upon local zone administrator approval and signature, the master copy was to be delivered to the commissioner of labor, and upon approval and signature, was thereafter to be delivered to the commissioner of economic development. Upon approval and signature, the master copy was to be delivered back to the local zone administrator. Upon receipt, the local zone administrator was to issue to the applicant business enterprise a certificate of eligibility, on behalf of the commissioner of economic development, and simultaneously send copies thereof to the commissioners of labor, economic development, and taxation and finance (*see* 5 NYCRR 11.5).

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<sup>3</sup> Eligible real property taxes means “taxes imposed on real property which is owned by the QEZE and located in an empire zone with respect to which the QEZE is certified pursuant to Article 18-B of the [GML] . . . .” (Tax Law § 15 [e])

Approval and receipt of a certificate of eligibility allowed the business enterprise to apply for the benefits available under the empire zones program.<sup>4</sup>

C. As to the certificate of eligibility, 5 NYCRR 11.6 provided that:

“The Commissioner of Economic Development shall develop a joint certificate form and distribute copies of such form to local economic development zone administrators. The certificate shall include, but not be limited to, the location of the economic development zone, the name of the business enterprise, the street address of the applicable facility within the zone, the date the certification is issued, *the effective date of the certificate* and whether it is retroactive, the period for which the certificate is in effect, and a statement to be signed by the local economic development zone administrator that he or she has been authorized by the Commissioner of Labor and the Commissioner of Economic Development to issue such joint certification.” (emphasis added)

D. In order to qualify as a QEZE, a business entity must first be certified by the commissioner of economic development via the joint application and certification process described above, and must meet an employment test (*see* conclusion of law A). In this case, there is no dispute that Memorare applied for certification, was certified, and as such became eligible to claim, among other empire zone benefits, the QEZE RPTC (*see* findings of fact 4 and 5). It is likewise not disputed that petitioners, as shareholder flow-through owners of Memorare, were entitled to receive the RPTC, and have done so for many years. The RPTC is premised upon a formula that calculates increases in employment, and may be claimed based on a benefit factor, the percentage of which, known as the benefit period factor, correlates to the taxable year in which the claim is made. The only question at issue here is the amount of RPTC to which Memorare, and therefore petitioners, were entitled for the two years in question. Specifically, the question presented devolves solely to determining the taxable year in which Memorare’s 15 year

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<sup>4</sup> Denial of a joint application for certification could be challenged upon request for a hearing with the commissioner of economic development, if filed within 30 days of receipt of such denial (*see* 5 NYCRR 11.8).

RPTC business tax benefit period commenced, from which a determination of the properly applicable benefit period factor may be made for each of the taxable years in question.<sup>5</sup>

E. The business tax benefit period for the RPTC under Tax Law § 15, is defined in relation to the business enterprise's certification date (*id*). Such benefit period is triggered by the business enterprise's first date of certification under article 18-B (*see* Tax Law § 14 [a] [1]; [d]; [e]). In 2001 (the year in which Memorare sought certification), Tax Law § 14 (a) (1) provided as follows:

“(a) Qualified empire zone enterprise. A business enterprise which is certified under Article eighteen-B of the general municipal law prior to July first, two thousand five shall be a ‘qualified empire zone enterprise’: (1) for purposes of articles nine-A, twenty-two, thirty-two and thirty-three of this chapter, for each of the fifteen taxable years next following the test year (which fifteen year period shall constitute the ‘benefit period’), but only with respect to each of such fifteen years for which the employment test is met.”

Thus, Memorare's benefit period covered the 15 years following its “test year.” The term test year, governing the benefit period, was defined by Tax Law § 14 (d) as follows:

(d) Test year. The term ‘test year’ means the last taxable year of the business enterprise ending on or before the test date.

In turn, the term test date, itself governing the term test year, was defined under Tax Law § 14 (e) by the business enterprise's certification date, as follows:

“(e) Test date. The term ‘test date’ means the later of July first, two thousand or the date prior to July first, two thousand five on which the business enterprise was certified under article eighteen-B of the general municipal law.”

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The benefit period factor is 100% of the eligible business enterprise's real property taxes for a period of 10 years, after which the benefit period factor decreases, by 20% per year, beginning with the business enterprise's 11th benefit period and continuing through its 15th benefit period, by which point in time the benefit period factor has been reduced to zero (*see* Tax Law § 15 [c]).

F. Under the foregoing, Memorare's benefit period was governed by its test year, which in turn was determined upon the basis of its test date. Memorare's test date was set as the later of either July 1, 2000, or the date prior to July 1, 2005 on which Memorare was certified by the commissioner of economic development under article 18-B of the GML. Memorare's certificate of eligibility, dated and signed as issued on August 19, 2002, included all of the information required under 5 NYCRR 11.6, including that pertaining to the effective date of Memorare's certification and, hence, its eligibility for empire zone benefits such as the RPTC (*see* finding of fact 4). Here, Memorare's effective date of certification was specifically set as December 26, 2001. This date appears on the face of Memorare's certificate of eligibility (*see* finding of fact 4), on its subsequently issued eligibility retention certificate (*see* finding of fact 15, n. 1), and it is the date consistently listed on Memorare's tax returns (as well as on petitioners' tax returns) as the date of first certification (*see* findings of fact 5 and 6). Since December 26, 2001 is later than July 1, 2000 and prior to July 1, 2005, such December 26, 2001 certification date was Memorare's test date per Tax Law § 14 (e). Its test year, i.e., the year ending on or before the test date, was thus the year ended December 31, 2000, per Tax Law § 14 (d). Therefore, Memorare's business tax benefit period, i.e., the 15 years following its test year, for purposes of the RPTC commenced with the year 2001. Accordingly, Memorare's benefit period factor for the years 2011 and 2012 was properly reduced to 80% and 60%, respectively, per Tax Law § 15 (c).

G. In 2002, the Legislature approved a package of "technical and clarifying amendments" to the QEZE provisions (*see* L 2002, c 85, applicable to taxable years beginning on and after January 1, 2001). This legislation included amendments to the definition of "business tax benefit period" in Tax Law § 14 (a) (1) and "test date" in Tax Law § 14 (e), clarifying (by inserting the word "first") that the benefit period for the QEZE RPTC is determined by the date that the QEZE

was “first” certified under article 18-B. Updated regulations pertaining to the QEZE form of certification, at 5 NYCRR 11.6, clarified the effective date of certification, by providing as follows:

“(a) The commissioner shall develop a certificate form to be signed by the commissioner, which shall include, but not be limited to the location of the empire zone, the name of the business enterprise, the street address of the applicable facility or facilities within the zone, the date the certification is issued, and the effective date of the certificate, and the period for which the certificate is in effect.

“(b) The effective date of certification shall be the date the chair of the local empire zone administrative board signed the application indicating that the local zone administrative board recommended the business enterprise for certification, unless, *upon petition by the business enterprise the commissioner [of economic development]* approves as an effective date:

(1) the date the application for certification is approved by the Commissioner [of economic development];” (emphasis added).

H. The foregoing amendment, clarifying that the benefit period for QEZE credits, including the RPTC, commences on the date that the QEZE was “first” certified” under GML article 18-B has no impact on the result herein. The 2002 amendment provided that “subsequent certifications . . . shall not extend the . . . time limitation” for the credit, and was aimed to clarify that if a business was recertified because of a move to a new location, its original certification date would control for empire zone tax credit purposes (*see Matter of Weber*, Tax Appeals Tribunal, August 25, 2016). In this case, Memorare’s first, and only, date of certification was December 26, 2001. That date was confirmed upon review and recertification of Memorare’s continuing eligibility (*see* finding of fact 15, n. 1), and such date determines Memorare’s business tax benefit period, as explained in detail above (*see* conclusion of law F).

I. Petitioners’ claim in this matter is that the commissioner of economic development misapprehended Memorare’s joint application for certification. Petitioners argue that the

information on the application, submitted in 2001, clearly leads to a conclusion that certification and was sought for the year 2002, so as to result in a tax benefit period commencing with the year 2002, based upon a test year of 2001, and a test date of 2002, per Tax Law § 14 (a) (1); (d); (e) and Tax Law § 15. First, petitioners did not provide a complete, dated joint application as part of the record herein. Moreover, even accepting the argument that the information set forth on the partial joint application in the record supports petitioners' claim, there remains no evidence that Memorare filed a petition with the commissioner of economic development or with the Empire Zone Designation Board, at any time, challenging such an alleged misapprehension or error, or seeking an alternative effective certification date.

J. The process of obtaining a certificate of eligibility, which allows access to empire zones benefits is entirely within the province of the commissioner of economic development, and hearing rights with respect to such process are, properly, within that province. As such, changes with respect to such certifications, including their effective dates, must be made (if at all) by the commissioner of economic development, and may not be made by the Division. Rather, the Division's role is to review and determine whether a business enterprise meets the requirements for obtaining the tax benefits available under the empire zones program. The first necessary requirement is simply to confirm whether, and at what point in time, the enterprise obtained its certification from the commissioner of economic development under GML article 18-B, pursuant to the certification process outlined herein. Upon discerning that a business enterprise has obtained such certification, and is thus a QEZE, the Division's role is, as here, limited to determining whether the balance of the criteria for obtaining the particular tax benefits that flow from such certification, including the RPTC, have been met. In this case, the Division properly confirmed that Memorare was certified by the commissioner of economic development, and was

thus a QEZE entitled to claim empire zone benefits, including the RPTC. The Division also properly determined that Memorare's certification was effective as of December 26, 2001, as set forth on its certificate of eligibility, such that its benefit period, as based upon such certification date, commenced with the taxable year 2001 (*see* conclusion of law F).

K. This case ultimately turns only upon whether the date of Memorare's certification of eligibility to receive empire zone benefits was properly determined by the commissioner of economic development. The Division of Tax Appeals may review challenges to the Division of Taxation's determinations as to whether, and to what extent, a business enterprise is entitled to empire zone tax benefits (i.e., whether a business enterprise has, in fact, been certified by the commissioner of economic development, so as to confirm its status as a QEZE [*see e.g.* Tax Law § 14 [a]]), and thereafter whether the business enterprise so certified as a QEZE meets the balance of the criteria set forth in the tax law with respect to the particular empire zone benefits sought, including as relevant here, identifying the effective date of such certification by the commissioner of economic development (*see e.g.* Tax Law §§ 14 [a] [1]; 15 [c]). However, the Division of Tax Appeals is not jurisdictionally authorized to review the initial matter of the process of certification of a business enterprise, including whether the date of such certification, as determined by the commissioner of economic development, was correct (*see* Tax Law §§ 2006 [4]; 2008; *Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v Tax Appeals Trib.*, 151 Misc 2d 326 [1991] [Division of Tax Appeals is a forum of limited jurisdiction whose authority to adjudicate disputes is exclusively statutory (*id*), and its jurisdiction cannot, absent legislative action, be extended to encompass areas not specifically delegated to it]).

L. The petition of Ralph Risio and Louise Risio is denied, and the notice of deficiency dated December 23, 2013, and notice of disallowance dated April 2, 2015, are hereby sustained.

DATED: Albany, New York  
January 24, 2019

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE