STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
GLEN AND ANABELA SCUDERI	:	DETERMINATION DTA NOS. 827974
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2012 through 2016.	:	AND 828614

Petitioners, Glen and Anabela Scuderi, filed petitions for redetermination of deficiencies under article 22 of the Tax Law for the years 2012 through 2016.

On July 27, 2018, petitioners, appearing pro se, and the Division of Taxation, by its representative, Amanda Hiller, Esq. (Jennifer L. Hink-Brennan, Esq., of counsel), waived a hearing and agreed to submit these matters for consolidated determination based upon documents and briefs to be submitted by December 19, 2018, which date began the six-month period for issuance of this determination. After review of the evidence and arguments presented, James P. Connolly, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly disallowed the empire zone real property tax credits claimed by petitioners for the years 2012 through 2016.

FINDINGS OF FACT

1. Petitioners, Glen and Anabela Scuderi, filed joint New York nonresident and part-year resident income tax returns (forms IT-203) for the years 2012 through 2016 (years at issue), on which they claimed, on a flow through basis, the qualified empire zone enterprise (QEZE) real

property tax credit (RPTC) allegedly earned by 137 South 4th Avenue Management, LLC (the LLC), a disregarded entity owned by Glen Scuderi. Petitioners' forms IT-203 for 2012 through 2015 attached a claim for QEZE credit for real property taxes (form IT-606). The copy of petitioners' form IT-203 for 2016 in the record does not have any form IT-606 attached, but petitioners claimed the RPTC on line 12g of their attachment for other tax credits and taxes (form IT-203-att). On each of the forms IT-606, petitioners claimed that the LLC had a single full-time employee for each quarter in the year and a "0" base period employment number.

2. The LLC was certified as a QEZE effective January 22, 2004, pursuant to article 18-B of the General Municipal Law. While the parties do not discuss the nature of the LLC's business, it appears that, based on a rental agreement in the record, the LLC rented out a building in Mount Vernon, New York.

3. The Division of Taxation (Division) commenced an audit of petitioners' personal income tax returns for the years 2012 through 2014 by sending a letter, dated July 3, 2015, to petitioners, asking for documentation to verify the employee claimed for purposes of the RPTC, including information as to the employee's name, social security number, hire date, and the number of hours worked each quarter in those tax years, along with a copy of any employment agreement made between the employee and the LLC.

4. The Division received a packet of information from the petitioners on August 28, 2015. The handwritten cover letter, signed by Mr. Scuderi, stated that the requested documents were attached. A page in the packet stated the following:

"137 SOUTH 4th AVENUE MANAGEMENT LLC
EMPLOYEE LIST
RALEIGH BELLAMY
S.S. # [ ]
HIRE: FEB. 2009-PRESENT
HRS WORKED PER WEEK: 30 HRS FOR
YEARS 2012, 2013, 2014"

Included in the packet for each year was a one-page document entitled "Timesheet," by the payroll company Paychex, which listed Raleigh Bellamy as the employee of the LLC, and showed his wages to be "$800.00/Pay Period." The page had a box to report the employee's "Regular hours." Handwritten into that box was "30 hours/week." The payroll information, along with a copy of a first page of the LLC's quarterly combined withholding, wage reporting and unemployment insurance return-attachment (form NYS-45-ATT) for the last quarter of 2012, indicated that the LLC paid Mr. Bellamy $9,600.00, $8,000.00, and $9,600.00 in total wages in, respectively, 2012, 2013, and 2014.

5. The Division sent a follow-up letter dated October 2, 2015, which asserted that an employee used to claim the RPTC must be employed full-time for at least 35 hours a week and asked petitioners to explain how Mr. Bellamy, therefore, could be claimed as a qualifying full-time employee in the empire zone based on the information provided.

6. The Division received a second packet of information from petitioners on November 30, 2015 in response to its October 2, 2015 letter. In the handwritten cover letter, Mr. Scuderi stated, in pertinent part, that "I had previously made a mistake with the hrs worked. The documents are attached for correction. There were 35 hrs per-week worked." The documentation in the packet was the same as the documentation included in petitioners' letter described in finding of fact 4, except that all references to "30" were changed to "35."

7. The Division sent a follow-up letter dated December 10, 2015, requesting additional information, including a copy of the employment contract signed and dated by the claimed employee at the time of his hire, the scheduled work hours for the employee, and any information in regard to other benefits or compensation provided to the employee.

8. In response, as pertinent to the issues herein, Mr. Scuderi sent the Division, in February 2016, a copy of an employment agreement between the LLC and Mr. Bellamy, which was signed by Mr. Scuderi and Mr. Bellamy on March 4, 2009. The agreement was a 16-bullet point list of "Responsibilities," which included cleaning the exterior premises and sweeping and mopping interior spaces on a daily basis, and "respond[ing] to tenant issues on site as needed." The last bullet point in the list was the following: "Work hours are flexible during day and evening but will total 35 hours per week."

9. By letter dated March 4, 2016, the Division advised petitioners that, based on its review of "the employee's information and wages," it had concluded that the LLC did not have a full-time employee for at least half the tax year for the tax years 2012 through 2014, thereby reducing the employment increase factor to zero, and requiring the claim for the RPTC to be denied. Based on that conclusion, the Division issued three notices of deficiency to petitioners, each dated March 3, 2016, asserting additional personal income tax due from petitioners, plus interest, as shown in the following table:

Notice No.	Year	Tax Amount Asserted Due
L-044477626	2012	$25,312.00
L-044477627	2013	$17,668.00
L-044477628	2014	$30,471.00

10. The Division also audited petitioners' 2015 and 2016 personal income tax returns. By letter dated May 24, 2017, the Division informed petitioners that "[a] review of the LLC's employee's wages indicated that there was not a full-time employee for at least half of the tax year for the years ended December 31, 2015, and December 31, 2016," which resulted in a full-time employment number of zero and the denial of the RPTC sought by the LLC. The audit reports for those years show that, in determining the number of hours worked by the LLC's employee, the auditor divided the total wages earned by the employee for the quarter in question by the minimum wage in effect for that quarter. While the analysis concluded that Mr. Bellamy did not work 35 or more hours for at least half the year in tax years 2015 and 2016, the audit reports do not disclose the source of the information as to the total quarterly wages paid by the LLC to Mr. Bellamy in those years.[1]

11. As a result of the above audits of petitioners' forms IT–203 for 2015 and 2016, the Division issued to petitioners two notices of deficiency (notice numbers L-046511469 and L-046512998), dated December 14, 2017, imposing respectively $9,952.55 and $16,561.00 in additional tax due for 2015 and 2016, plus interest.

12. In its submissions in this matter, the Division included a copy of the hearing memorandum that petitioners filed in this matter pursuant to § 3000.14 of the Tax Appeals Tribunal's Rules of Practice and Procedure, and several of the attachments thereto. In a letter to the administrative law judge, dated July 17, 2018 and attached to that hearing memorandum, Mr. Scuderi stated in part:

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[1] The Division's letters to petitioners described in findings of fact 3, 5 and 10 all make note of the fact that, in the Division's view, petitioners also miscalculated the LLC's benefit period factor in computing their RPTC. Petitioners' responses to these letters did not agree with that conclusion. Because petitioners' briefs in this matter do not raise the benefit period factor issue, and the issue would be moot if the Division's reduction of the LLC's employment increase factor to zero is upheld, this determination does not address the issue.

> "For the years 2012-2015 I figured a 30 hour week for a full-time employee according to the Affordable Care Act. * * * I figured the wages and credits for Mr. Bellamy would cover the full-time requirement. * * * The Affordable Care Act is the only law which states that the minimum requirement for a full-time employee is 30 hours of service per week. This is [what] I base my original wage calculation on. * * * Since the purpose of the Empire Zone program was to create jobs in the zone, I have met the requirement and paid a full-time wage."

13. As part of their submissions in this matter, petitioners submitted an affidavit of Mr. Bellamy, dated October 24, 2018. In the affidavit, Mr. Bellamy asserted that he was hired in 2009 as a manager/superintendent for the building at 137 South 4th Ave, Mount Vernon, New York, and that he "worked 35 hours per week every other week for the years 2009-2016."

14. In its submissions in this matter, the Division introduced an affidavit, dated September 17, 2018, of Bruce C. Mereness, a Tax Technician II who supervised the audit. Mr. Mereness' affidavit presents an analysis using the annual wages the LLC reported to the Division to show that if the LLC paid the applicable minimum wage for each of the years at issue, it did not pay Mr. Bellamy for 35 or more hours per week of employment.

15. Judicial notice is taken of the fact that for the years 2012 through 2016, the instructions to the form IT-606 advised filers that "[f]ull-time employment means a job consisting of at least 35 hours per week or two or more jobs that together constitute the equivalent of a job of at least 35 hours per week."[2]

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[2] The State Administrative Procedure Act § 306 (4) permits the taking of official notice in administrative proceedings if judicial notice could be taken. A court may only take judicial notice of particular facts if the items are of common knowledge or are determinable by referring to a source of indisputable accuracy (***see Matter of Crater Club v Adirondack Park Agency***, 86 AD2d 714 [3d Dept 1982], ***affd*** 57 NY2d 990 [1982]). Courts today will often judicially notice matters of public record (Fisch on New York Evidence, § 1063 at 600 [2d ed 1977]).

CONCLUSIONS OF LAW

A. At issue herein is the LLC's eligibility for the RPTC for the years 2012 through 2016, which, if properly claimed, flowed through to petitioners under Tax Law § 606 (bb) (***see*** Tax Law § 2 [6]). The RPTC was one of the empire zone credits created by chapter 63 of the Laws of 2000 and amended by chapter 85 of the Laws of 2002. The Legislature enacted the empire zones program to spur economic growth and job creation (***see*** General Municipal Law § 956; ***Matter of Hucko Trust***, Tax Appeals Tribunal, September 19, 2013). A tax credit is a particularized species of exemption from tax (***see Matter of New York Fuel Terminal Corp.***, Tax Appeals Tribunal, August 27, 1998) and, therefore, petitioners bear the burden of showing "a clear cut entitlement" to the credit (***Matter of Luther Forest Corp. v McGuiness***, 164 AD2d 629, 632 [3d Dept 1991]).

B. Under Tax Law § 15 (b) (1), for an enterprise certified before April 1, 2005, the amount of the RPTC is equal to the product of (i) the benefit period factor, (ii) the employment increase factor, and (iii) the eligible real property taxes paid or incurred by the enterprise during the taxable year. In denying the credits taken by petitioners, the Division reduced to zero the employment increase factor for each of the years at issue.

C. In order to calculate the employment increase factor under Tax Law § 15 (d), it is necessary to know both the enterprise's employment number for the taxable year as well as the enterprise's test year employment number. It is undisputed that the LLC's test year employment number is zero. The only remaining question is the LLC's employment number for the tax years at issue.

D. Tax Law § 14 (g) (1) defines "employment number" as "the average number of individuals, excluding general executive officers (in the case of a corporation), employed

full-time by the enterprise for at least one-half of the taxable year." Article 22 does not define "employed full-time," but in its technical memorandum explicating chapter 63, the Division opined that "'[e]mployed full-time' means a job consisting of at least 35 hours per week and includes two or more jobs which together constitute the equivalent of a job of at least 35 hours per week" (TSB-M-01[1][I]). This "at least 35 hours per week" standard also appeared in the instructions to the form IT-606 for the years at issue. Petitioners do not challenge this standard for full-time employee status in this matter. The issue here, instead, focuses on the "for at least one-half of the taxable year" language in Tax Law § 14 (g) (1). Specifically, petitioners argue that the LLC's sole employee, Mr. Bellamy, met that standard by working 35 hours every *other* week for the years at issue. The Division argues, in turn, that even if Mr. Bellamy worked 35 hours every other week for the years at issue, he would not qualify as having worked full-time "for at least one-half of the taxable year" for those years because of the weeks during the year when he did not work.

This dispute between the parties amounts to a question of statutory interpretation, as petitioners take the position that an employee is employed full-time for "for at least one-half of the taxable year" for purposes of the employment increase factor if the employee meets the 35 hours worked standard for any 26 weeks in the year, whereas the Division claims that the 6 month period during which the employee allegedly worked at least 35 hours a week must be a continuous one. In cases of statutory interpretation, for a petitioner's construction of a statute to prevail, petitioner must show that its construction is the only reasonable one (***see Matter of American Food & Vending Corp. v New York State Tax Appeals Trib***., 144 AD3d 1227 [3d Dept 2016]). The Division's position that the half-year period referenced in the Tax Law § 14 (g) must be a continuous one is consistent with its memorandum explaining the revised QEZE

credits (***see*** TSB-M-2006(2)I, dated February 2, 2006). There, in carving out an exception applicable to seasonal employees from the general rule for determining when an employee qualifies as an individual employed full-time for at least a half-year for purposes of the RPTC, the Division required that the employment be continuous: "A seasonal business (a business that regularly operates for less than an entire tax year, e.g., ski resort) that employs individuals full-time for at least three months of continuous duration may include those individuals in the employment number." Moreover, by ignoring weeks during the year when the LLC's employee claimed not to work at all, petitioners' construction of the "individuals . . . employed full-time . . . for at least one-half of the taxable year" language leads to an anomaly, *viz.*, that an employee working 34 hours a week for the entire year would not be includible for purposes of the employment increase factor, but an employee who worked much less, at 35 hours every other week, would be includible in computing that factor. The Division's interpretation that the half-year period must be a continuous one (i.e., that hours worked during all weeks in the half-year period must be considered) avoids this anomaly.

The only argument that petitioners make to show the unreasonableness of the Division's interpretation of the operative phrase "individuals . . . employed full-time . . . for at least one-half of the taxable year" is that the Division's interpretation, which results in their not qualifying for the RPTC here, is inconsistent with the economic development policy goal that underlies the QEZE tax credits. Petitioners are correct in claiming that the purpose of the QEZE tax credits was to spur economic growth and job creation in economically distressed areas (***see*** General Municipal Law § 956; ***Matter of Spiezio***, Tax Appeals Tribunal, July 19, 2016). However, in crafting legislation to achieve that goal, the Legislature elected to grant the RPTC only to taxpayers who created new full-time jobs lasting "for at least one-half of the

taxable year." Thus, in citing the economic development rationale for the QEZE credits, petitioners merely beg the question of what the Legislature meant by "for at least one-half of the taxable year."

In sum, because petitioners have not shown that their interpretation of the definition of employment increase factor in Tax Law § 14 (g) (1) is the only reasonable one, the Division's interpretation must prevail. It follows that, if the LLC's sole employee worked 35 hours every other week for each of the years at issue, as petitioners' submissions here contend, that employee is not includible in the employment increase factor. This means, in turn, that the LLC, and petitioners derivatively, are not entitled to any RPTC for the years at issue.

E. Even if petitioners are correct that an individual working for 35 hours every other week would be an includible employee in computing the employment increase factor, petitioners would still not prevail in this matter. The only proof petitioners submitted in support of that contention is an affidavit from Mr. Bellamy. The assertion in the affidavit that Mr. Bellamy worked only every other week contradicts the employment agreement, which mandates that, Mr. Bellamy, as the apartment building supervisor, work "35 hours per week," sets forth two duties that he must do "daily," and requires him to be available "as needed" to respond to tenants' complaints (***see*** finding of fact 8). Moreover, Mr. Bellamy's statement in his affidavit that he only works every other week also contradicts Mr. Scuderi's assertions that Mr. Bellamy worked 30 or 35 hours *per week* (***see*** findings of fact 4, 6, and 12). Under these circumstances, the Bellamy affidavit is not sufficient to provide "clear cut" evidence that he was an includible employee for purposes of the employment increase factor, even assuming, as petitioners contend, that the "one-half of the taxable year" period does not have to be a continuous one (***see Matter of Luther Forest Corp. v McGuiness***; ***see also Matter of Spiezio***

["(T)he burden of proof in this matter rests on petitioners. Thus, the risk of submitting their case on the papers, rather than proceeding by hearing, also rests on petitioners"]).

F. As an alternate argument to support its claim that petitioners have not met their burden of proving that the LLC employed Mr. Bellamy for 35 or more hours weekly for at least half of each of the years at issue, the Division points to its analysis showing that the amount of annual wages the LLC reported to the Division was inconsistent, for each of the years at issue, with paying Mr. Bellamy for 35 hours or more of wages for 52 weeks, assuming that the LLC paid Mr. Bellamy at least the minimum wage in effect for each of those years (***see*** finding of fact 14). Among other problems, this analysis assumes that, for Mr. Bellamy to be considered an employee for purposes of the RPTC, the LLC must have paid him at least at the minimum wage rate, an assumption for which the Division presents no support. Because the assumption appears unfounded, the Division's alternate argument is rejected. Notwithstanding the rejection of this argument, however, because it has been determined in conclusions of law D and E above that petitioners have not met their burden of showing that Mr. Bellamy was employed for 35 hours or more for at least half a year for each of the years at issue, the Division's reduction of the LLC's employment increase factor to zero for each of those years is upheld.

G. Finally, in their reply brief, petitioners also assert that they had claimed the flow-through RPTC for years prior to 2012 and the Division never advised them of any issue with the full-time status of the LLC's sole employee until 2015. Petitioners maintain that the Division is ignoring this "precedent" in now denying them any RPTC for the years at issue based on Mr. Bellamy's work hours being insufficient to qualify him as an employee for purposes of the employment increase factor.

Petitioners are arguing, in effect, that the Division should be estopped from denying the RPTC they claimed for the years at issue because the Division failed to make any adjustments in the RPTC claimed by petitioners as a flow through from the LLC in earlier years. Petitioners cite to nothing in the record to support the factual predicate to their estoppel argument – that they claimed the RPTC in years prior to the years at issue and the Division made no adjustment. Review of the record has not revealed any support for those assertions. Moreover, even if there was a factual basis for the argument, the estoppel doctrine would still not apply. The Tax Appeals Tribunal has stated that:

> "[a] taxpayer attempting to invoke the doctrine of estoppel against the State has a steep hill to climb. As a general rule, the doctrine cannot be invoked against the State or its governmental units unless such exceptional facts exist as would require its application in order to avoid a manifest injustice" (***see Matter of Wolfram v Abbey***, 55 AD2d 700 [1976]). This rule is particularly applicable with respect to a taxing authority since sound public policy favors full and uninhibited enforcement of tax laws (***Matter of Turner Constr. Co. v State Tax Commn.***, 57 AD2d 201 [1977]). Thus, the application of the estoppel doctrine against a taxing authority must be limited to the truly unusual fact situations (***Matter of Sodexho USA, Inc.***, Tax Appeals Tribunal, November 21, 2007, citing ***Schuster v Commissioner***, 312 F2d 311 [1962])" (***Matter of Washington Square Hotel LLC***, Tax Appeals Tribunal, July 19, 2016).

As the ***Washington Square Hotel LLC*** matter demonstrates, this is not the type of extreme situation that would justify application of the estoppel doctrine. Petitioner in that matter argued that the Division should be estopped from denying its refund claims for sales tax paid on its purchases of restaurant meals during the audit period because the Division had not objected to credits the petitioner had taken for the sales tax paid on such purchases in periods prior to the audit period. In rejecting that argument, the Tribunal noted that the Division had not advised the petitioner that it could claim a credit for the sales tax it paid on such purchases. Similarly here, petitioners have not even asserted, let alone proven, that the

Division advised petitioners that Mr. Bellamy's weekly work hours were sufficient to qualify him as a full-time employee for purposes of the RPTC.

H. The petitions of Glen and Anabala Scuderi are denied and the notices of deficiency dated March 3, 2016, and December 14, 2017, respectively, are sustained.

DATED: Albany, New York
June 6, 2019

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE