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## NY Empire Zone Liability Hinges On Property Rights Question

By **Pete Brush**

Law360, New York (April 23, 2013, 7:56 PM ET) -- New York's top court heard arguments Tuesday on whether economic benefits given to businesses through the Empire Zone Act, and then retroactively stripped away, were tax breaks or rock-solid property rights, and experts say the answer could leave companies on the hook for millions of dollars.

A group of corporations whose benefits were revoked is battling with the state over whether it can retroactively apply April 2009 changes to the law. The businesses lost the benefits because they allegedly weren't returning enough value to the state in the form of wages and growth investment.

More than 9,000 businesses, large and small, have won certification under the Empire Zone Act, enacted in 2000 and designed to foster growth in economically challenged areas of the state. But the 2009 changes triggered hundreds of revocations, representing more than \$50 million in benefits, and a flood of administrative appeals and court challenges.

"Essentially the decertifications in mid-2009, but retroactive to Jan. 1, 2008, stripped businesses of approximately 18 months of benefits," said Syracuse, N.Y.-based Hiscock & Barclay LLP commercial litigation attorney David G. Burch Jr.

The New York Court of Appeals heard Tuesday from nine businesses that argued the changes could apply only going forward because the law's proponents had "induced them" to move into the struggling zones and invest — not to just passively take tax breaks.

Laws applying retroactively to tax matters have been upheld in New York under a test created by the Court of Appeals in a 1987 decision called *Replan Development v. Department of Housing Preservation*, but retroactivity is a far tougher sell when it comes to property rights.

"Arguments in the cases today focused largely on whether the taxpayers have a protected property right in receipt of the already earned benefits, or whether the benefits are merely a tax exemption, like that in *Replan*, that the state can revoke at will as a matter of 'legislative grace,'" Burch said.

The businesses contend the benefits under the law went far beyond tax breaks, because the businesses actively moved into the depressed areas and set up shop. Having already prevailed on the retroactivity question in two midlevel state appeals courts, the businesses may have the upper hand.

As arguments began, the court immediately began peppering the state's lawyer, Deputy Solicitor General Andrew D. Bing, with questions about the wisdom of applying changes retroactively.

"The rug wasn't being pulled out from under anybody here," Bing said.

But Judge Susan P. Read worried applying a law like this one retroactively could serve as a "disincentive" for businesses to participate in future economic initiatives.

While Bing suggested tax theory and precedent should apply to the matter, lawyers for the businesses, including attorney Jennifer C. Persico of Mosey Persico, cast the legislative change as an unconstitutional infringement on property rights.

"The state induced all of the petitioners here to make these investments," said Persico, who represents Buffalo, N.Y.-based commercial rental property owner J-P Group LLC, insisting that any changes to the law should be applied only prospectively.

Part of the unhappiness on the part of the businesses over the 2009 changes to the law was, they said, that the Legislature appeared simply to be unhappy with the amount of tax benefits it was handing out, Buffalo-based Hodgson Russ LLP commercial litigator Michelle Merola told the court on behalf of her client, Hague Corp.

"The government had buyer's remorse," she said.

Merola's colleague Christopher Doyle, a state and local tax partner, agreed the government bore some culpability for the legal morass the 2009 change has created.

"Going back to 2000, when the Empire Zone program was passed, it had problems. It turned out to be a program that was more beneficial than the Legislature intended," he said. "The Legislature got stuck with a bad deal, and they tried to change the law going backwards. I don't think that was a good idea. If you're going to change the law, change it going forward."

In 2010 the Legislature went back again to make sure retroactivity was explicit in the law. No more Empire Zone certifications were granted after June 2010, marking the beginning of the end for the ill-fated initiative. But benefits to existing Empire Zone Act-certified companies will be paid through 2019.

One business in the litigation, WL LLC, is also still challenging its decertification.

The businesses are represented before the Court of Appeals by Jonathan B. Fellows of Bond Schoeneck & King PLLC, Jennifer C. Persico of Mosey Persico, Philip M. Halpern of Collier Halpern Newberg Nolletti & Bock LLP, Michelle Merola of Hodgson Russ LLP and Robert K. Weiler of Bousquet Holstein PLLC.

The cases are James Square Associates LP v. Mullen, J-P Group LLC v. New York State Department of Economic Development, Morris Builders LP v. Empire Zone Designation Board, Hague Corp. v. Empire Zone Designation Board and WL LLC v. Department of Economic Development, numbers 87-91, in the New York State Court of Appeals.

--Editing by Kat Laskowski and Katherine Rautenberg.

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