New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-04(7)C
Corporation Tax
April 16, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C030801A

On August 1, 2003, a Petition for Advisory Opinion was received from JML Optical Industries, Inc., 690 Portland Avenue, Rochester, New York 14621.

The issues raised by Petitioner, JML Optical Industries, Inc., are:

1. Whether new jobs are considered to be created upon the creation of a newly formed corporation operating within an empire zone (EZ), and the subsequent merger of a related corporation into such newly formed corporation, for purposes of the EZ wage tax credit under section 210.19 of the Tax Law.

2. Whether Petitioner may include employees from a predecessor related corporation in determining the number of qualified employees eligible for the EZ wage tax credit under section 210.19 of the Tax Law, if the related corporation was never allowed an EZ wage tax credit with respect to such employees.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner was incorporated under the laws of New York State on June 11, 2002. On July 31, 2002, Corporation A, a related corporation located in New York, was merged into Petitioner with Petitioner as the surviving corporation and Corporation A ceasing to exist. Petitioner's location is the same as Corporation A prior to the merger. Corporation A's location was designated as an EZ on June 6, 2002. Petitioner became certified under Article 18-B of the General Municipal Law on July 17, 2002.

The majority of the employees currently working for Petitioner were employees of Corporation A prior to the merger. Corporation A was never allowed, nor did it ever claim, the EZ wage tax credit with respect to any of its employees.

Applicable law

Section 210.19 of the Tax Law provides for an EZ wage tax credit, in part, as follows:

(a) A taxpayer shall be allowed a credit, to be computed as hereinafter provided, against the tax imposed by this article where the taxpayer has been certified pursuant to article eighteen-B of the general municipal law. The amount of such credit shall be as prescribed by paragraph (d) hereof.

(b) For the purposes of this subdivision, the following terms shall have the following meanings: (1) "Empire zone wages" means wages paid by the taxpayer for full-time employment, other than to general executive officers, during the taxable year in an area designated or previously designated as an empire zone or zone equivalent area pursuant to article eighteen-B of the general municipal law, where such employment is in a job created in the area (i) during the period of its designation as an empire zone, (ii) within four years of the expiration of such designation, or (iii) during the ten year period immediately following the date of designation as a zone equivalent area, provided, however, that if the taxpayer's certification under article eighteen-B of the general municipal law is revoked with respect to an empire zone or zone equivalent area, any wages paid by the taxpayer, on or after the effective date of such decertification, for employment in such zone shall not constitute empire zone wages.

(2) "Targeted employee" means a New York resident who receives empire zone wages and who is (A) an eligible individual under the provisions of the targeted jobs tax credit (section fifty-one of the internal revenue code), (B) eligible for benefits under the provisions of the job training partnership act ... (C) a recipient of public assistance benefits or (D) an individual whose income is below the most recently established poverty rate promulgated by the United States department of commerce, or a member of a family whose family income is below the most recently established poverty rate promulgated by the appropriate federal agency.

* * *

(c) The credit provided for herein shall be allowed only where the average number of individuals, excluding general executive officers, employed full-time by the taxpayer in (A) the state and (B) the empire zone or area previously constituting such zone or zone equivalent area, during the taxable year exceeds the average number of such individuals employed full-time by the taxpayer in (A) the state and (B) such zone or area subsequently or previously constituting such zone or such zone equivalent area, respectively, during the four years immediately preceding the first taxable year in which the credit is claimed with respect to such zone or area. Where the taxpayer provided full-time employment within (A) the state or (B) such zone or area during only a portion of such four-year period, then for purposes of this paragraph the term "four years" shall be deemed to refer instead to such portion, if any.

* * *

(d) The amount of the credit shall equal the sum of (1) the product of three thousand dollars and the average number of individuals (excluding general executive officers) employed full-time by the taxpayer, computed pursuant to the provisions of subparagraph three of paragraph (b) of this subdivision, who

(A) received empire zone wages for more than half of the taxable year,

(B) received, with respect to more than half of the period of employment by the taxpayer during the taxable year, an hourly wage which was at least one hundred thirty-five percent of the minimum wage specified in section six hundred fifty-two of the labor law, and

(C) are targeted employees; and

(2) the product of fifteen hundred dollars and the average number of individuals (excluding general executive officers and individuals described in subparagraph one of this paragraph) employed full-time by the taxpayer, computed pursuant to the provisions of subparagraph three of paragraph (b) of this subdivision, who received empire zone wages for more than half of the taxable year.

* * *

(3) For purposes of calculating the amount of the credit, individuals employed within an empire zone or zone equivalent area within the immediately preceding sixty months by a related person, as such term is defined in subparagraph (c) of paragraph three of subsection (b) of section four hundred sixty-five of the internal revenue code, shall not be included in the average number of individuals described in subparagraph one or subparagraph two of this paragraph, unless such related person was never allowed a credit under this subdivision with respect to such employees.

Section 465(b)(3)(C) of the Internal Revenue Code provides:

Related person. – For purposes of this subsection, a person (hereinafter in this paragraph referred to as the "related person") is related to any person if –

(i) the related person bears a relationship to such person specified in section 267(b) or section 707(b)(1), or

(ii) the related person and such person are engaged in trades or business under common control (within the meaning of subsections (a) and (b) of section 52).

For purposes of clause (i), in applying section 267(b) or 707(b)(1), "10 percent" shall be substituted for "50 percent".

Opinion

Before a taxpayer is allowed to claim an EZ wage tax credit under section 210.19 of the Tax Law, the taxpayer must be certified under Article 18-B of the General Municipal Law, and must meet certain increased employment levels in New York State and in the EZ during the taxable year.

The EZ wage tax credit under section 210.19 of the Tax Law is allowed only with respect to empire zone wages paid by the taxpayer for full-time employment, excluding general executive officers, during the taxable year in the EZ where such employment is in a job created in the area since it became an EZ. See section 210.19(b)(1) of the Tax Law. The credit is allowed only where the average number of individuals, excluding general executive officers, employed full-time by a taxpayer in New York State and in the EZ during the taxable year exceeds the average number of such individuals employed full-time by the taxpayer in New York State and in the EZ during the four years immediately preceding the first taxable year in which the credit is claimed with respect to such zone. If the taxpayer did not provide full-time employment for such four year period, then section 210.19(c) of the Tax Law provides that the term "four years" shall be deemed to refer instead to such portion, if any.

With respect to Issue 1, in construing the phrase *jobs created in the area*, as used in section 210.19(b)(1) of the Tax Law, it is instructive to look to the General Municipal Law, which established the EZ program.

In the statement of legislative findings pursuant to the creation of the EZ program, the legislature declared:

> [i]t is the public policy of the state to offer special incentives and assistance that will promote the development of new businesses, the expansion of existing businesses and the development of human resources within these economically impoverished areas *and to do so without encouraging the relocation of business investment from other areas of the state*. (General Municipal Law, section 956, emphasis added.)

Thus, the statute provides that a business which has shifted its operations, or some portions thereof, from an area within New York State not designated as an EZ to an area so designated shall not be certified to receive such benefits, except where

- the shift is entirely within a municipality and has been approved by the local governing body of the municipality,

- it has been established after a public hearing that extraordinary circumstances exist which warrant the relocation of the business, in whole or in part, into an EZ from another municipality and the municipality from which the business is relocating approves of such relocation, or

- such shift in operation is from a business incubator facility operated by a municipality or by a public or private not-for-profit entity. (General Municipal Law, section 959(a))

In light of the above, we will look to the principles of the General Municipal Law to determine whether jobs which existed in New York State outside of the EZ following its designation and were moved inside the EZ after its designation, are *jobs created* by Petitioner for purposes of the EZ wage tax credit.

Petitioner was incorporated on June 11, 2002, and was certified under Article 18-B of the General Municipal Law on July 17, 2002. Pursuant to the merger, Corporation A was merged into Petitioner on July 31, 2002, with Petitioner as the surviving corporation. As a result of the merger, Corporation A ceased to exist. Petitioner is located where Corporation A was located, and that location became an EZ on June 6, 2002. The majority of Petitioner's employees were employees of Corporation A before the merger. Although Corporation A ceased to exist as a result of the merger into Petitioner, Petitioner possesses all the rights, privileges, immunities, powers and purposes of Corporation A, all of Corporation A's property is vested in Petitioner, and Petitioner assumed and is liable for all the liabilities, obligations and penalties of Corporation A. (Business Corporation Law, section 906 (b)) Consequently, Corporation A's rights, privileges, immunities, powers, liabilities and obligations with respect to its employees did not terminate under the merger, but instead were transferred to Petitioner. Since the employees Petitioner acquired as a result of the merger, were employees of Corporation A located within the EZ at the time of the merger, Petitioner did not create any new jobs in the EZ as a result of the merger within the meaning and intent of section 210.19(b)(1) of the Tax Law.

However, Corporation A may have created jobs in the EZ for which Petitioner may be eligible to claim an EZ wage tax credit. To the extent the jobs of Petitioner were jobs created in the EZ by Corporation A on or after June 6, 2002, and the jobs did not exist previously elsewhere in New York State, or if they did, the jobs conform to the principles in the General Municipal Law, those jobs would be *jobs created in the area* for purposes of determining *empire zone wages* under section 210.19(b)(1) of the Tax Law. Such jobs may be counted when computing Petitioner's EZ wage tax credit, provided the other credit requirements are met. Further, individuals in jobs which are created in the EZ by Petitioner, itself, on or after June 11, 2002, may also be counted when computing the credit, provided the other credit requirements are met.

Under section 210.19(c) of the Tax Law, the credit would be allowed only where the average number of individuals, excluding general executive officers, employed full-time by Petitioner in New York State and in the EZ during the taxable year exceeds the average number of such individuals employed full-time by Petitioner in New York State and in the EZ during the four years immediately preceding the first taxable year in which the credit is claimed with respect to the EZ. For purposes of determining these employment numbers, the employees of both Corporation A and Petitioner should be counted because Corporation A's rights, privileges, immunities, powers, liabilities and obligations with respect to its employees were transferred to Petitioner and did not terminate under the merger. To the extent that an individual was employed full-time by both

Corporation A before the merger and Petitioner after the merger, such employee should only be counted once during the taxable year. If Petitioner and Corporation A provided full-time employment within New York State or the EZ during only a portion of the *four years immediately preceding the first taxable year in which the credit is claimed* then the term *four years* refers to such portion that full-time employment was provided.

With respect to Issue 2, section 210.19(d)(3) of the Tax Law provides that for purposes of calculating the amount of the credit, individuals employed within an EZ within the immediately preceding 60 months by a related person may be included in the average number of individuals described in subparagraph (1) or (2) of section 210.19(d) of the Tax Law, only if the related person was never allowed an EZ wage tax credit under section 210.19 of the Tax Law with respect to such employees.

In this case, Corporation A, the related corporation that was merged into Petitioner, had employees located within an EZ within the 60 months preceding the merger in 2002. However, Petitioner states that Corporation A never claimed an EZ wage tax credit with respect to any of its employees. Accordingly, Petitioner may include the employees of Corporation A in determining the number of qualified employees eligible for the EZ wage tax credit under section 210.19 of the Tax Law.

DATED: April 16, 2004

/s/
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.