New York State Department of Taxation and Finance
Office of Counsel

TSB-A-16(1)C
Corporation Tax
January 11, 2016

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C141209A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [redacted]. Petitioner asks whether it may aggregate the activities and employees of two majority owned partnerships for purposes of satisfying the principally used and employment tests of the New York State ("NYS") Investment Tax Credit ("ITC").[1]

We conclude that Petitioner may aggregate the activities and employees of two majority owned partnerships for purposes of satisfying the principally used and employment tests of the NYS ITC for the reasons set forth below.

Facts

According to the petition, Petitioner is a corporation that indirectly owns 98.7 % of the interests of [redacted] ("Partnership A"), and 92.9% of the interests of [redacted] ("Partnership B"). Partnership A is a limited partnership for federal and NYS tax purposes. Partnership B is a limited liability company treated as a partnership for federal and NYS tax purposes.

Through a disregarded entity, Partnership A indirectly owns [redacted] ("SMLLC #1"), a single member limited liability company ("SMLLC") that is disregarded for federal and NYS tax purposes. SMLLC #1 is an SEC-registered broker-dealer. Partnership B directly owns 100% of [redacted] ("SMLLC #2"), also a SMLLC that is disregarded for federal and NYS tax purposes and is a Securities and Exchange Commission ("SEC") -registered broker-dealer.

Partnership A has purchased and placed in service property that is used by employees of both Partnership A and Partnership B in the ordinary course of their broker-dealer businesses in connection with the purchase or sale of stocks, bonds, or other securities, or of commodities.

Based on their activities in New York and the activities of their disregarded broker-dealer entities (SMLLC #1 and SMLLC #2), Partnership A and Partnership B each file in New York a Form IT-204, *Partnership Return*. Petitioner is subject to the NYS franchise tax under Article 9-A and reports its proportionate share of the partnership activities of both Partnership A and Partnership B. With respect to its interests in Partnership A and Partnership B, Petitioner computes its franchise tax using the aggregate method.

[1] While Petitioner does not specify as to which taxable year the question is asked, Petitioner does explicitly refer to New York Tax Law § 210(12) in its Preliminary Statement and elsewhere in the petition. Therefore, this advisory opinion will reference the provisions of Article 9-A as they were in effect on December 31, 2014, and it is assumed that the questions asked concern a tax year that began prior to January 1, 2015.

Analysis

According to New York Tax Law § 210(12)(a), a qualifying taxpayer shall be allowed an ITC against the tax imposed by Article 9-A. The amount of the credit is a percentage of the taxpayer's investment credit base, defined as the cost or other basis for federal income tax purposes of tangible personal property and other tangible property, including buildings and structural components of buildings, less the amount of the nonqualified nonrecourse financing with respect to such property to the extent such financing would be excludible from the credit base pursuant to Internal Revenue Code (IRC) § 46(c)(8).

Tax Law § 210(12)(b)(i) further defines the property qualifying for the ITC as including, as pertinent to this petition, buildings and structural components of buildings, that:

(1) are depreciable pursuant to IRC § 167;
(2) have a useful life of four years or more;
(3) are acquired by purchase as defined in IRC § 179(d);
(4) have a situs in NYS; and
(5) are principally used in the ordinary course of the taxpayer's trade or business as a broker or dealer in connection with the purchase or sale of stocks, bonds or other securities as defined in IRC § 475(c)(2), or of commodities as defined in IRC § 475(e).

This fifth requirement for ITC property is the "use" test at issue in this petition.

Tax Law § 210(12)(b)(i) also provides that the ITC, otherwise available to a taxpayer using qualified property in the ordinary course of the taxpayer's trade or business as a broker or dealer in connection with the purchase or sale of stocks, bonds or other securities, or of commodities, shall not be allowed unless:

(1) 80% or more of the employees performing the administrative and support functions[2] resulting from or related to the qualifying uses of such equipment are located in NYS;
(2) the average number of employees that perform the administrative and support functions resulting from or related to the qualifying uses of such equipment and are located in NYS during the taxable year for which the credit is claimed is equal to or greater than 95% of the average number of employees that perform these functions and are located in this state during the thirty-six months immediately preceding the year for which the credit is claimed; or
(3) the number of employees located in NYS during the taxable year for which the credit is claimed is equal to or greater than 90% of the number of employees located in this state on December 31st, 1998 or, if the taxpayer was not a calendar year taxpayer in 1998, the last day of its first taxable year ending after December 31st, 1998.[3]

[2] As pertinent to this petition, employees performing administrative support functions include all employees other than the brokers or dealers engaged in the purchase or sale of stocks, bonds, other securities, or of commodities. TSB-M-98 (08)C.

[3] If the taxpayer becomes subject to tax in this state after the taxable year beginning in 1998, then the taxpayer is not required to satisfy the employment test provided for its first taxable year. The employment test instead will be based

These are the three "employment tests," only one of which must be satisfied for a taxpayer to qualify for the ITC. [4]

Petitioner asserts that, for purposes of the questions presented by this petition, the property purchased and placed in service by Partnership A, as described above, meets each of the first four requirements listed above for ITC-qualified property and the only issue presented, on the question of whether or not this property is ITC-qualified property, is whether the property is principally used in the ordinary course of the taxpayer's trade or business as a broker or dealer in connection with the purchase or sale of stocks, bonds or other securities, or of commodities. In this regard, Petitioner requests a determination that Petitioner may aggregate the activities of the employees of Partnership A and Partnership B to meet this fifth requirement of ITC-qualified property. Implicit in making this determination, however, are the necessary conclusions, or not, that Petitioner may be considered to be in the trade or business of a broker or dealer in connection with the purchase or sale of stocks, bonds or other securities, or of commodities; and that Petitioner may be considered to have purchased the property placed in service. The final question is whether Petitioner may aggregate the employees of Partnership A and Partnership B to meet one of the employment tests.

May Petitioner be considered to be in the trade or business of a broker or dealer in connection with the purchase or sale of stocks, bonds or other securities, or of commodities?

In order to qualify for the ITC, Petitioner must be considered to be a "registered securities or commodities broker or dealer." Tax Law § 210(12)(b)(i). A registered securities or commodities broker or dealer is a broker or dealer that is registered with the SEC or the Commodities Futures Trading Commission. See TSB-M-00(5)C. Under the facts presented, Petitioner itself is not registered with either of those commissions. However, the SMLLCs identified in the Petition, which are owned indirectly by Petitioner through partnerships, are registered with the SEC.

A SMLLC that is treated as an entity disregarded from its single member for federal tax purposes will be disregarded for State tax purposes as well. See 26 CFR § 301.7701-3(b)(1)(ii); NYS Tax Publication 16. When a partnership is the single member of a SMLLC, the SMLLC is treated as a part of the partnership. Thus, as Partnership B is the single member of SMLLC #2, SMLLC #2 is treated as a part of Partnership B. See TSB-A-13(11)C. The Department has concluded that certification under the Empire Zones Program of a SMLLC that is a disregarded entity treated for tax purposes as a division of its single member is treated as the certification of the single member. See TSB-A-12(6)C. This type of conclusion has been extended to the registration of broker-dealers with the SEC. TSB-A-13(11)C. Thus, if a SMLLC that is treated for tax purposes as a disregarded entity is a registered broker-dealer, its single member should be treated as a registered broker-dealer. Therefore Partnership B should also be treated as a broker-

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on the number of employees located in New York State on the last day of the first taxable year the taxpayer is subject to tax in this state.

[4] Notwithstanding references in the statute to "such equipment", TSB-M-98 (08)C clarifies that the employment tests also contemplate qualifying uses of buildings and structural components of buildings which satisfy the elements for ITC-qualifying property found in Tax Law § 210(b)(i).

dealer. A similar analysis leads to the conclusion that Partnership A should also be treated as a broker-dealer because SMLLC #1 is a SMLLC and Partnership A owns 100% of SMLLC #1 through an affiliate that is also a disregarded entity. As both SMLLC #1 and this affiliate are disregarded entities, SMLLC #1 ultimately should be treated as a part of Partnership A. This analysis does not, however, directly apply to Petitioner because neither Partnership A nor Partnership B are SMLLCs or disregarded entities, and Petitioner does not own 100% of either Partnership A or Partnership B.

Nevertheless, Section 3-13.1 of the Corporate Franchise Tax Regulations states that "a taxpayer that is a partner in a partnership shall compute its tax with respect to its interest in such partnership under the aggregate method or entity method, whichever applies" according to the rules in § 3-13.2 of the regulations. 20 NYCRR 3-13.1(a). Taxpayers with more than a 5% interest in a partnership are required to use the aggregate method unless they are unable to access the information necessary to compute their tax using this method. 20 NYCRR 3-13.2. When using the aggregate method, "a corporate partner is viewed as having an undivided interest in the partnership's assets, liabilities and items of receipts, income, gain, loss and deduction. Under the aggregate method, the partner is treated as participating in the partnership's transactions and activities." 20 NYCRR 3-13.a (b). An Article 9-A taxpayer that uses the aggregate method to calculate its tax with respect to its interest in a partnership must use "its distributive share of the partnership's receipts … within and without NYS … in computing its business allocation percentage." 20 NYCRR 4-6.5(a)(1). To do so, the taxpayer must calculate its receipts factor by adding its own business receipts within NYS to its distributive share of the partnership's receipts. A taxpayer that is a corporate partner in a partnership that is a registered broker-dealer would utilize the allocation rules for registered security brokers and dealers provided for under Tax Law § 210.3(a)(9) for its distributive share of the receipts from the partnership.[5] Section 4-4.7(c). In sum, a taxpayer that is a corporate partner in a partnership that is a registered broker-dealer will be deemed to be a registered broker-dealer for purposes of qualifying for the ITC. TSB-A-13(11)C. In this matter, Petitioner is a corporate partner in both Partnership A and Partnership B, which are both deemed to be registered broker-dealers. Petitioner also uses the aggregate method with respect to its interests in Partnership A and Partnership B to compute its franchise tax. Therefore, under this analysis, Petitioner is deemed to be a registered broker-dealer (and thus considered to be in the trade or business of a broker or dealer in connection with the purchase or sale of stocks, bonds or other securities, or of commodities) solely for purposes of the ITC for its allocable share of the cost or other basis of the property put in service by Partnership A, assuming this property is ITC-qualified property.[6]

May Petitioner be considered to have purchased the property placed in service?

As stated in the petition and above, Partnership A purchased the property placed in service as to which Petitioner seeks the ITC. In TSB-A-87(9)C, one of the issues raised for purposes of Article 9-A of the Tax Law was whether or not a corporate partner of a partnership

[5] But only for its distributive share of the receipts from the partnership; the taxpayer could not use the allocation rules for registered security brokers and dealers for its own business receipts that are not part of the distributive share of the receipts from the partnership.

[6] This portion of this advisory opinion does not extend beyond this specific conclusion under the facts presented and questions posed in the petition.

would be able to claim its allocable share of the cost or other basis of tangible personal property for purposes of the ITC pursuant to Tax Law § 210.12(a) where the partnership purchased the tangible personal property that otherwise qualified for the credit. One requirement at issue was whether the property qualifying for the investment tax credit was "acquired by the taxpayer" by purchase as defined in IRC § 179(d), notwithstanding that the petitioner was a corporate partner of a partnership that actually purchased the property. The Department concluded that tangible property that a partnership purchases, as defined in IRC § 179(d), is deemed to be purchased by each partner to the extent of the partner's allocable or pro rata share of the partnership's property. Accordingly, tangible property that is deemed to be purchased by a corporate partner pursuant to IRC § 179(d) will be deemed to be acquired by purchase for purposes of Tax Law § 210.12(b). Therefore, Petitioner here may be considered to have purchased the property placed in service by Partnership #1 for purposes of qualifying for the ITC.

May Petitioner aggregate the activities of the employees of Partnership A and Partnership B to establish that the property put in service by Partnership A is principally used in the ordinary course of Petitioner's trade or business as a broker or dealer in connection with the purchase or sale of stocks, bonds or other securities, or of commodities?

According to Tax Law § 210(12)(b)(i), property purchased by a taxpayer affiliated with a regulated broker-dealer is allowed an ITC if the property is principally used by its affiliated regulated broker-dealer in the ordinary course of the trade or business as a broker or dealer in connection with the purchase or sale of stocks, bonds or other securities, or of commodities. Tax Law § 210(12)(b)(i) further provides, in pertinent part, that, for purposes of determining if the property is principally used in qualifying uses, the uses by the taxpayer and its affiliated regulated broker-dealer in the ordinary course of the trade or business as a broker or dealer in connection with the purchase or sale of stocks, bonds or other securities, or of commodities may be aggregated.

In this case, as discussed and qualified above, Petitioner may be considered to have purchased the property placed in service by Partnership A and is deemed to be a registered broker-dealer. Therefore, under Tax Law § 210(12)(b)(i), Petitioner may aggregate its uses of the property and the uses of the property of its affiliated regulated broker-dealers for purposes of determining if the property is principally used in the ordinary course of the its trade or business as a broker or dealer in connection with the purchase or sale of stocks, bonds or other securities, or of commodities. This is in accord with TSB-A-87(9)C, wherein it was concluded that the New York State Legislature intended, through the legislation enacting the ITC, that a corporate partner of a partnership would be allowed its allocable share of the cost or other basis of qualifying tangible personal property where the property qualifying for the credit was purchased by the partnership. In reaching this conclusion, TSB-A-87(9)C approved the pass-through to the corporate partner of the principal uses of the qualifying property.

Therefore, Petitioner may aggregate the activities of the employees of SMLLC #1 and SMLLC #2, to the extent those particular activities are qualifying uses of the property. In order to satisfy the use test, the aggregated qualifying activities of the employees of SMLLC #1 and SMLLC #2 must constitute more than 50% of the total use of the property placed in service by Partnership A. See 20 NYCRR 5-2.4 (*principally used* means more than 50%). In this regard, a

building is "principally used" for qualifying activities if more than 50% of the usable business floor space is used in qualifying activities. TSB-A-10(9)C.

May Petitioner aggregate the employees of Partnership A and Partnership B to satisfy one of the three employment tests?

According to Tax Law § 210(12)(b)(i), a taxpayer shall not be allowed the ITC in connection with ITC-qualified property principally used in the ordinary course of the taxpayer's trade or business as a broker or dealer in connection with the purchase or sale of stocks, bonds or other securities, or of commodities, unless one of the three employment tests described above is satisfied. Tax Law § 210(12)(b)(i) additionally provides, in pertinent part, that if the uses of the property in question must be aggregated to determine whether the property is principally used in qualifying uses, then either each affiliate using the property must satisfy an employment test or an employment test must be satisfied through the aggregation of the employees of the taxpayer and its affiliated regulated broker-dealer(s).

As the Partnership A and Partnership B broker-dealer uses of the property put in service by Partnership A may be aggregated to determine whether the property is principally used in qualifying uses, an employment test may be satisfied through the aggregation of the employees of Partnership A and Partnership B insofar as they are employees of SMLLC #1 and SMLLC #2. Once again, this is because the employees of SMLLC #1 and SMLLC #2 are deemed to be the employees of Partnership A and Partnership B because SMLLC #1 and SMLLC #2 are disregarded entities and Partnership A and Partnership B are deemed to be broker-dealers based on the status of SMLLC #1 and SMLLC #2 as registered broker-dealers. For the first two of the employment tests set forth above, only employees performing the administrative and support functions resulting from or related to the qualifying uses of the property may be aggregated.

DATED: January 11, 2016

/S/
DEBORAH R. LIEBMAN
Deputy Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.