

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-99(2)C
Corporation Tax
January 25, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C981027A

On October 27, 1998, a Petition for Advisory Opinion was received from Woerner Industries, Inc., 485 Hague Street, Rochester, New York 14606.

The issue raised by Petitioner, Woerner Industries, Inc., is whether new Woerner Industries, Inc. would be allowed to claim the economic development zone ("EDZ") wage tax credit, under section 210.19 of the Tax Law, and the EDZ investment tax credit, under section 210.12-B of the Tax Law, for taxable years beginning on or after June 5, 1998.

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

A & C Acquisitions, Inc. was formed on April 20, 1998. On June 5, 1998, A & C Acquisitions, Inc. acquired all of the assets of Woerner Industries, Inc. (old) including the company name and all intangibles. A & C Acquisitions, Inc. then changed its name to Woerner Industries, Inc. (new). Simultaneously, old Woerner Industries, Inc. changed its name to Gignar Industries, Inc.

New Woerner Industries, Inc., hired all of the employees of the old Woerner Industries, Inc. There has never been any relationship between new Woerner Industries, Inc., the acquiring corporation, and old Woerner Industries Inc., the acquired corporation. The old Woerner Industries, Inc. did not apply for EDZ Certification, and therefore, it had never taken an EDZ wage tax credit or an EDZ investment tax credit. New Woerner Industries, Inc. has applied for EDZ certification.

Discussion

Section 210.12-B(a) of the Tax Law provides that a taxpayer shall be allowed an EDZ investment tax credit ("EDZ-ITC") against the tax imposed under Article 9-A of the Tax Law if the taxpayer has been certified pursuant to Article 18-B of the General Municipal Law. The amount of the credit is 10 percent of 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, described in section 210.12-B(b) of the Tax Law, which is located within a designated EDZ pursuant to Article 18-B of the General Municipal Law, but only if the acquisition, construction, reconstruction or erection of such property occurred or was commenced on or after the date of such designation and prior to the expiration thereof.

Section 210.12-B(e) of the Tax Law provides that property which qualifies for the investment tax credit provided under section 210.12 of the Tax Law may be treated as property principally used

by the taxpayer in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, viticulture or commercial fishing, provided the property otherwise qualifies under section 210.12-B(b) of the Tax Law, in which event a credit shall not be allowed under section 210.12 of the Tax Law.

Section 5-10.1(b) of the Business Corporation Franchise Tax Regulations ("Article 9-A Regulations") provides that in order to claim a EDZ-ITC, a taxpayer must be certified pursuant to Article 18-B of the General Municipal Law during the taxable year, or have applied for such certification on or before the last day of the taxable year, in which the property for which the EDZ-ITC is claimed becomes qualified property.

Section 210.12-B(d) of the Tax Law provides that the EDZ-ITC allowed for any taxable year shall not reduce the tax due for such year to less than the higher of the amounts prescribed in section 210.1(c) and (d) of the Tax Law. However, if the amount of the EDZ-ITC allowed for any taxable year reduces the tax to such amount, any amount of EDZ-ITC not deductible in such taxable year may be carried over to the following year or years and may be deducted from the taxpayer's tax for such year or years. In lieu of such carryover, any such taxpayer which qualifies as a new business under section 210.12(j) of the Tax Law may elect, on its report for its taxable year with respect to which the EDZ-ITC is allowed, to treat 50 percent of the amount of such carryover as an overpayment of tax to be credited or refunded in accordance with the provisions of section 1086 of the Tax Law.

Section 210.19(a) of the Tax Law provides that a taxpayer shall be allowed an EDZ wage tax credit against the tax imposed under Article 9-A of the Tax Law where the taxpayer has been certified pursuant to Article 18-B of the General Municipal Law. The credit shall be allowed only with respect to the first taxable year during which payments of EDZ wages are made and the conditions contained in section 210.19(c) are satisfied, and with respect to each of the four taxable years next following if the conditions continue to be satisfied for those taxable years.

Section 5-9.1(b) of the Article 9-A Regulations provides that in order to claim an EDZ wage tax credit, a taxpayer must be certified pursuant to Article 18-B of the General Municipal Law during the taxable year, or have applied for such certification on or before the last day of the taxable year, in which the eligibility requirements have been met.

Section 210.19(b)(1) of the Tax Law defines EDZ wages as 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 EDZ or zone equivalent area pursuant to Article 18-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 economic development zone,

(ii) within four years of the expiration of such designation, or

(iii) during the five year period immediately following the date of designation as a zone equivalent area.

Section 210.19(c) of the Tax Law provides that the EDZ wage tax credit shall be allowed only where the average number of individuals, excluding general executive officers, employed full-time by the taxpayer in (A) New York State and (B) such EDZ 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) New York State and (B) such zone or area subsequently or previously constituting such zone or 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) New York State or (B) such zone or area during only a portion of such four-year period, then the term "four years" shall be deemed to refer instead to such portion, if any.

Section 210.19(e) of the Tax Law provides that the EDZ wage tax credit and carryovers of such credit allowed for the taxable year shall not, in the aggregate, reduce the tax due for such year to less than the higher of the amounts prescribed in section 210.1(c) and (d) of the Tax Law. However, if the amount the EDZ wage tax credit or carryovers of such credit, or both, allowed for any taxable year reduces the tax to such amount, or if any part of the credit or carryovers of such credit may not be deducted from the tax otherwise due by reason of the final sentence of section 210.19(d) of the Tax Law, any amount of such EDZ wage tax credit or carryovers of such credit thus not deductible in such taxable year may be carried over to the following year or years and may be deducted from the tax for such year or years. In lieu of such carryover, any such taxpayer which qualifies as a new business under section 210.12(j) of the Tax Law may elect, on its report for its taxable year with respect to which such credit is allowed, to treat 50 percent of the amount of such carryover as an overpayment of tax to be credited or refunded in accordance with the provisions of section 1086 of the Tax Law.

Section 210.12(j) of the Tax Law defines a "new business" as any corporation except:

1. a corporation in which over 50 percent of the number of shares of stock entitling their holders to vote for the election of directors or trustees is owned or controlled, either directly or indirectly, by a taxpayer subject to tax under Article 9-A; section 183, 184, 185, 186 of Article 9; Article 32 or 33 of the Tax Law; or

2. a corporation that is substantially similar in operation and in ownership to a business entity or entities taxable, or previously taxable under Article 9-A; section 183, 184, 185, or 186 of Article 9; Article 32 or 33; or Article 23 or that would have been subject to tax under Article 23, as such article was in effect on January 1, 1980,

or the income (or losses) of which is (or was) includable under Article 22 of the Tax Law whereby the intent and purpose of section 210.19(e) of the Tax Law with respect to refunding of credit to new business would be evaded; or

3. a corporation that has been subject to tax under Article 9-A for more than four years (excluding short periods) before each tax year during which the taxpayer becomes eligible for the EDZ-ITC or EDZ wage tax credit (that is, the year for which the credit is allowed).

Conclusions

For purposes of this advisory opinion, it is assumed that new Woerner Industries, Inc., is a certified zone business pursuant to Article 18-B of the General Municipal Law and has property and full-time employees in a designated EDZ pursuant to such Article 18-B.

With respect to the EDZ wage tax credit, New Woerner Industries, Inc., meets the conditions of section 210.19(c) of the Tax Law with respect to the four year test period for the average number of full-time employees because it did not exist as a corporation during those four years. New Woerner Industries, Inc. was not incorporated until April 20, 1998, and it did not have any employees prior to that time.

However, to qualify for the EDZ wage tax credit, new Woerner Industries, Inc. must have paid EDZ wages as defined in section 210.19(b) of the Tax Law to an employee (or employees) in a job (or jobs) created in the EDZ area during the period of its designation as an EDZ. The employees of new Woerner Industries, Inc. working in the EDZ meet this requirement, because new Woerner Industries, Inc. and old Woerner Industries, Inc. were unrelated corporations, and the former employees of old Woerner Industries, Inc. entered into a new employment relationship with new Woerner Industries, Inc. which is separate and apart from their former employment relationship with old Woerner Industries, Inc.

Therefore, new Woerner Industries, Inc. may claim an EDZ wage tax credit, for taxable years beginning on or after June 5, 1998, for its employees that were formerly employed by old Woerner Industries, Inc., who are working in the designated EDZ and meet all of the requirements of section 210.19 of the Tax Law. However, there are not enough facts presented in this advisory opinion to determine whether new Woerner Industries, Inc. meets all of those requirements.

With respect to the EDZ-ITC provided in section 210.12-B of the Tax Law, new Woerner Industries, Inc. may claim the credit, for taxable years beginning on or after June 5, 1998, if it has property located in the designated EDZ and the property meets all of the requirements of section 210.12-B of the Tax Law. However, there are not enough facts presented in this advisory opinion to determine whether new Woerner Industries, Inc.'s property meets all of those requirements. Note

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that if the EDZ-ITC is claimed under section 210.12-B of the Tax Law, new Woerner Industries, Inc. may not claim the ITC provided in section 210.12 of the Tax Law.

It appears that new Woerner Industries, Inc., may be considered a new business for purposes of section 210.12(j) of the Tax Law. If so, it may elect to treat a portion of its EDZ wage tax credit and EDZ-ITC as an overpayment of tax to be credited or refunded as provided in sections 210.19(e) of the Tax Law and 210.12-B(d) of the Tax Law.

DATED: January 25, 1999

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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