

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

TSB-A-06(8)I
Income Tax
November 30, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I060130B

On January 30, 2006, a Petition for Advisory Opinion was received from Metro Management I, LLC, c/o Jon Schuyler Brooks, Esq., 930 Broadway, Woodmere, New York 11598.

The issue raised by Petitioner, Metro Management I, LLC, is how to allocate a brownfield redevelopment tax credit, relating to qualified tangible property, among partners of a New York limited partnership (LP) when the costs incurred by the partnership are over multiple tax years and ownership interest in the partnership changes.

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

Petitioner is a New York Limited Liability Company (LLC) that is treated as a partnership for federal income tax purposes. All partners of Petitioner are individuals who are residents of New York State. Petitioner is a general partner and has a 99.1% interest in LP. Both Petitioner's and LP's taxable year is a calendar year. LP's partnership agreement does not specifically provide as to any partner's distributive share of income, gain, loss, deduction or credit (or item thereof). LP and another limited liability company (Commercial) are parties to a Brownfield Cleanup Agreement executed with the New York State Department of Environmental Conservation (DEC) to remediate and redevelop a qualified site.

The redevelopment plan consists of the construction of an eight-story building, divided into two units pursuant to a condominium plan filed with and approved by the Office of the Attorney General of the State of New York. One unit, occupying the first floor will be built and owned by Commercial and will be leased to a single commercial tenant. The second unit encompasses floors two through eight and will contain approximately one hundred units of affordable rental housing and will be built and owned by LP.

DEC has issued a Certificate of Completion (COC) jointly to LP and Commercial allowing each to claim its respective brownfield redevelopment tax credit.

The qualified tangible property will be placed in service on the qualified site within ten years from the date of issuance of the COC.

Petitioner retains ownership interest in LP from the date LP first incurs costs related to the qualified tangible property through the date the qualified tangible property is placed in service.

Petitioner describes two hypothetical situations involving change in ownership of partnership interest in LP:

1. Qualified tangible property will be placed in service on December 30, 2006. On January 3, 2007, Petitioner's ownership interest in LP will be reduced from 99.1% to .9%.
2. Qualified tangible property will be placed in service on January 30, 2007. On February 28, 2007, Petitioner's ownership interest in LP will be reduced from 99.1% to .9%.

Applicable law and regulations

Section 21(a) of the Tax Law provides, in part:

(1) General. A taxpayer subject to tax under article nine, nine-A, twenty-two, thirty-two or thirty-three of this chapter shall be allowed a credit against such tax, pursuant to the provisions referenced in subdivision (f) of this section. Such credit shall be allowed with respect to a qualified site, as such term is defined in paragraph one of subdivision (b) of this section. The amount of the credit in a taxable year shall be the sum of the credit components specified in paragraphs two, three and four of this subdivision applicable in such year.

* * *

(3) Tangible property credit component. The tangible property credit component shall be equal to the applicable percentage 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, which constitute qualified tangible property. The credit component amount so determined shall be allowed for the taxable year in which such qualified tangible property is placed in service on a qualified site with respect to which a certificate of completion has been issued to the taxpayer for up to ten taxable years after the date of the issuance of such certificate of completion. . . .

Section 21(b)(1) of the Tax Law provides:

Qualified site. A "qualified site" is a site with respect to which a certificate of completion has been issued to the taxpayer by the commissioner of environmental conservation pursuant to section 27-1419 of the environmental conservation law.

Section 606(dd) of the Tax Law provides:

Brownfield redevelopment tax credit.

(1) Allowance of credit. A taxpayer shall be allowed a credit, to be computed as provided in section twenty-one of this chapter, against the tax imposed by this article.

(2) Application of credit. If the amount of the credit allowed under this subsection for any taxable year shall exceed the taxpayer's tax for such year, the excess shall be treated as an overpayment of tax to be credited or refunded in accordance with the provisions of section six hundred eighty-six of this article, provided, however, that no interest shall be paid thereon.

Section 607(a) of the Tax Law provides:

General. Any term used in this article shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required but such meaning shall be subject to the exceptions or modifications prescribed in this article or by statute. Any reference in this article to the laws of the United States shall mean the provisions of the internal revenue code of nineteen hundred eighty-six (unless a reference to the internal revenue code of nineteen hundred fifty-four is clearly intended), and amendments thereto, and other provisions of the laws of the United States relating to federal income taxes, as the same may be or become effective at any time or from time to time for the taxable year.

Section 702(a) of the Internal Revenue Code (IRC) provides, in part:

General Rule. In determining his income tax, each partner shall take into account separately his distributive share of the partnership's -- . . .

(7) other items of income, gain, loss, deduction, or credit, to the extent provided by regulations prescribed by the Secretary, and

(8) taxable income or loss, exclusive of items requiring separate computation under other paragraphs of this subsection.

Section 704 of the IRC provides, in part:

(a) Effect of Partnership Agreement. A partner's distributive share of income, gain, loss, deduction, or credit shall, except as otherwise provided in this chapter, be determined by the partnership agreement.

(b) Determination of Distributive Share. A partner's distributive share of income, gain, loss, deduction, or credit (or item thereof) shall be determined in accordance with the partner's interest in the partnership (determined by taking into account all facts and circumstances), if

(1) the partnership agreement does not provide as to the partner's distributive share of income, gain, loss, deduction or credit (or item thereof) or

(2) the allocation to a partner under the agreement of income, gain, loss, deduction, or credit (or item thereof) does not have substantial economic effect. . . .

Section 706(a) of the IRC provides:

Year in Which Partnership Income Is Includible. In computing the taxable income of a partner for a taxable year, the inclusions required by section 702 and section 707(c) with respect to a partnership shall be based on the income, gain, loss, deduction, or credit of the partnership for any taxable year of the partnership ending within or with the taxable year of the partner.

Section 706(c)(2)(B) of the IRC provides:

Disposition of less than entire interest. The taxable year of a partnership shall not close (other than at the end of a partnership's taxable year as determined under subsection (b)(1)) with respect to a partner who sells or exchanges less than his entire interest in the partnership or with respect to a partner whose interest is reduced (whether by entry of a new partner, partial liquidation of a partner's interest, gift, or otherwise).

Section 706(d)(1) of the IRC provides, in part:

In general. Except as provided in paragraphs (2) and (3), if during any taxable year of the partnership there is a change in any partner's interest in the partnership, each partner's distributive share of any item of income, gain, loss, deduction, or credit of the partnership for such taxable year shall be determined by the use of any method prescribed by the Secretary by regulations which takes into account the varying interests of the partners in the partnership during such taxable year.

Section 1.706-1(c)(4) of the Treasury Regulations provides, in part:

Disposition of less than entire interest. If a partner sells or exchanges a part of his interest in a partnership, or if the interest of a partner is reduced, the partnership taxable year shall continue to its normal end. In such case, the partner's distributive share of items which he is required to include in his taxable income under the provisions of section 702(a) shall be determined by taking into account his varying interests in the partnership during the partnership taxable year in which such sale, exchange, or reduction of interest occurred.

Opinion

Pursuant to section 607(a) of the Tax Law, any term used for purposes of the New York personal income tax shall have the same meaning as used in the laws of the United States relating to federal income taxes unless a different meaning is clearly required.

Section 702(a) of the IRC provides that each partner shall take into account separately his distributive share of the partnership's credit. Section 704(a) of the IRC provides that a partner's distributive share of the partnership's credit is determined by the partnership agreement. Pursuant to section 704(b) of the IRC, if a partnership agreement does not provide as to the partner's distributive share of the credit, or the allocation to a partner under the agreement does not have substantial economic effect, a partner's distributive share of a credit is determined in accordance with the partner's interest in the partnership. In general, the allocation of tax credits for New York personal income tax purposes is determined in accordance with the same allocation that partners use to divide the taxable income or loss described in section 702(a)(8) of the IRC.

Pursuant to section 21(a)(3) of the Tax Law, the tangible property credit component of the brownfield redevelopment tax credit is allowable for the taxable year in which qualified tangible property is placed in service on a qualified site with respect to which a certificate of completion has been issued. Pursuant to section 706(a) of the IRC, Petitioner includes its share of the credit from LP for the taxable year of LP ending within or with the taxable year of Petitioner. Both Petitioner's and LP's taxable year is the calendar year.

With respect to hypothetical situation 1, the qualified tangible property will be placed in service on December 30, 2006. Accordingly, the credit is allowable in 2006. Petitioner's distributive share of the credit is allocable to Petitioner in accordance with the allocation used by LP to divide the taxable income or loss described in section 702(a)(8) of the IRC. Therefore, Petitioner's distributive share of LP's allowable brownfield redevelopment tax credit for tax year 2006 is 99.1%.

With respect to hypothetical situation 2, the qualified tangible property will be placed in service on January 30, 2007. Accordingly, the credit is allowable in 2007. Petitioner's distributive share of the credit is allocable to Petitioner in accordance with the allocation used by LP to divide the taxable income or loss described in section 702(a)(8) of the IRC. On February 28, 2007, Petitioner's ownership interest in LP will be reduced from 99.1% to .9%. Pursuant to section 706(d)(1) of the IRC, as a result of the change in Petitioner's interest in the partnership, Petitioner's distributive share of the credit is determined by taking into account LP's varying interests of partners in the partnership during the partnership taxable year. Petitioner's ownership interest in LP at the time the property will be placed in service on January 30, 2007, is 99.1%. Section 706 of the IRC has been construed by the courts to prohibit allocation of partnership losses to a new partnership interest that occurred subsequent to the date that the losses were sustained by the partnership (see *Richardson v Commissioner of Internal Revenue*,

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693 F2d 1189). Pursuant to section 706, therefore, the tangible property credit component of the brownfield credit may not be allocated to a new partnership interest that occurred subsequent to the date that the property was placed in service. Accordingly, Petitioner's distributive share of LP's allowable brownfield redevelopment tax credit (which subsequently flows through Petitioner to its partners) for tax year 2007 is 99.1%.

It should be noted that this Advisory Opinion does not address whether the brownfield redevelopment tax credit is allowable in the present case with respect to the tangible property to be placed in service.

DATED: November 30, 2006

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