

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

TSB-A-07(2)I
Income Tax
April 12, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I061220B

On December 20, 2006, a Petition for Advisory Opinion was received from H. Henry Elghanayan; Kamran T. Elghanayan; Frederick Elghanayan; Master HTF, LLC; East Coast 1, LLC; East Coast 2, LLC; East Coast 3, LLC; East Coast 4, LLC; East Coast 5, LLC; East Coast 6, LLC; East Coast 7, LLC (collectively, Petitioners); c/o Jack Mandel, Peter Guy, and Bartley Fisher, c/o Bryan Cave, LLP, 1290 Avenue of the Americas, New York, New York 10104.

The issue raised by Petitioners is whether adding another party to one or more of their brownfield cleanup agreements (Agreements) and to the Certificates of Completion (COC) with respect to certain brownfield sites will jeopardize any brownfield tax credits otherwise allowable to Petitioners under sections 21, 22, and 23 of the Tax Law.

Petitioners submitted the following facts as the basis for this Advisory Opinion.

Master HTF, LLC (Master) is an entity that is treated as a partnership for federal and New York State income tax purposes. Its three principal owners are H. Henry Elghanayan, Kamran T. Elghanayan, and Frederick Elghanayan. Master, indirectly through one or more entities that are partnerships or disregarded entities for federal and New York income tax purposes, owns membership interests in East Coast 1, LLC; East Coast 2, LLC; East Coast 3, LLC; East Coast 4, LLC; East Coast 5, LLC; East Coast 6, LLC; and East Coast 7, LLC. Each of the East Coast LLCs is a lessee of land located in the City of New York (the Property) pursuant to a 99-year land lease from Queens West Development Corporation (QWDC), a corporation organized under the laws of the state of New York and a subsidiary of the New York State Urban Development Corporation d/b/a the Empire State Development Corporation, a public benefit corporation under the laws of the state of New York.

The Property encompasses former industrial sites that are contaminated with certain hazardous substances, sites commonly known as “brownfields.” One or more of the East Coast LLCs (or affiliates thereof) (collectively, the Petitioner Group) have made applications to enter the Brownfield Cleanup Program associated with the brownfield credits. The Petitioner Group currently plans to enter into Agreements with the Department of Environmental Conservation (DEC) to clean up and remediate the sites and construct new buildings on the sites. Except for QWDC’s limited involvement, the Petitioner Group is solely responsible for the design, construction, and financing of the buildings to be constructed on the sites.

Under an agreement with the Petitioner Group, QWDC is constructing parkland in certain areas of one or more of the sites and is also constructing roads and certain infrastructure improvements, such as sewers, on one or more of the sites. Except for certain costs related to the parkland, roads, or other infrastructure improvements, the Petitioner Group is expending almost

all of the clean-up costs and construction funds associated with the Agreements prior to the issuance of one or more COCs. The Petitioner Group is the sole developer of all buildings located on each of the sites, with QWDC having no material role in the construction of the buildings on the sites.

QWDC seeks to be added to the Agreements between the Petitioner Group and DEC and to be included on the COC to be issued to the Petitioner Group for each of the sites. Among other things, this will permit QWDC to obtain the benefits of liability waivers available to participants in the Agreements who obtain a COC. Petitioners will claim brownfield tax credits only for costs paid or incurred by a member of the Petitioner Group with respect to the construction work such member performs on the sites.

QWDC will not seek to claim any brownfield tax credits. Although no transfers or sales of QWDC's membership interest are currently contemplated, it is possible QWDC could transfer or sell some or all of its interest in the Property in the future, and the transferee or purchaser may assume all or part of the obligation for non-Petitioner expenditures. It is possible that a future transferee or purchaser of QWDC's interest may seek to claim certain tax credits under the brownfield credit provisions with respect to non-Petitioner expenditures.

Applicable law and regulations

Section 21(a) of the Tax Law provides for the brownfield redevelopment tax credit and provides, in part:

Allowance of credit. (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.

(2) Site preparation credit component. The site preparation credit component shall be equal to the applicable percentage of the site preparation costs paid or incurred by the taxpayer with respect to a qualified site. The credit component amount so determined with respect to a site's qualification for a certificate of completion shall be allowed for the taxable year in which the effective date of the certificate of completion occurs. The credit component amount determined other than with respect to such qualification shall be allowed for the taxable year in which the improvement to which the applicable costs apply is placed in service for up to five taxable years after the issuance of such certificate of completion.

(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. The tangible property credit component shall be allowed with respect to property leased to a second party only if such second party is either (i) not a party responsible for the disposal of hazardous waste or the discharge of petroleum at the site according to applicable principles of statutory or common law liability, or (ii) a party responsible according to applicable principles of statutory or common law liability if such party's liability arises solely from operation of the site subsequent to the disposal of hazardous waste or the discharge of petroleum, and is so certified by the commissioner of environmental conservation at the request of the taxpayer, pursuant to section 27-1419 of the environmental conservation law. Notwithstanding any other provision of law to the contrary, in the case of allowance of credit under this section to such a lessor, the commissioner shall have the authority to reveal to such lessor any information, with respect to the issue of qualified use of property by the lessee, which is the basis for the denial in whole or in part, or for the recapture, of the credit claimed by such lessor.

(4) On-site groundwater remediation credit component. The on-site groundwater remediation credit component shall be equal to the applicable percentage of the on-site groundwater remediation costs paid or incurred by the taxpayer with respect to a qualified site (to the extent that such groundwater remediation costs are not included in the determination of the site preparation credit or the cost or other basis included in the determination of the tangible property credit). The credit component so determined for costs incurred and paid with respect to and prior to the issuance of a certificate of completion shall be allowed for the taxable year in which the effective date of the issuance of a certificate of completion occurs. The credit component amount determined in taxable years after the effective date of the issuance of a certificate of completion shall be allowed in the taxable year such qualified costs are incurred and paid for up to five taxable years after the issuance of such certificate of completion.

Section 22 of the Tax Law provides, in part:

Tax credit for remediated brownfields. (a) Definitions. As used in this section the following terms shall have the following meanings:

(1) Certificate of completion. A "certificate of completion" issued by the commissioner of environmental conservation pursuant to section 27-1419 of the environmental conservation law.

(2) Qualified site. For purposes of this section, a "qualified site" is a site with respect to which a certificate of completion has been issued by the commissioner of environmental conservation pursuant to section 27-1419 of the environmental conservation law.

(3) Developer. (i) A "developer" is a taxpayer under article nine, nine-A, twenty-two, thirty-two or thirty-three of this chapter who or which either (I) has been issued a certificate of completion with respect to a qualified site or (II) has purchased or in any other way has been conveyed all or any portion of a qualified site from a taxpayer or any other party who or which has been issued a certificate of completion with respect to such site provided, such purchase or conveyance occurs within seven years of the effective date of the certificate of completion issued with respect to such qualified site. Provided further, that the taxpayer who or which is purchasing all or any portion of a qualified site and the taxpayer or any other party who or which has been issued a certificate of completion with respect to such site may not be related persons, 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.

(ii) Where the entity to whom a certificate of completion has been issued is a partnership, or where the entity which has purchased all or any portion of a qualified site from a taxpayer who or which has been issued a certificate of completion with respect to such site within the applicable time limit is a partnership, any partner in such partnership who or which is taxable under article nine, nine-A, twenty-two, thirty-two or thirty-three of this chapter shall be a developer under this paragraph. Where the entity to whom a certificate of completion has been issued is a New York S corporation, or where the entity which has purchased all or any portion of a qualified site from a taxpayer who or which has been issued a certificate of completion with respect to such site within the applicable time limit is a New York S corporation, any shareholder in such New York S corporation shall be a developer under this paragraph.

* * *

(b) Remediated brownfield credit for real property taxes for qualified sites.

(1) Allowance of credit. A developer of a qualified site who or which is 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 paragraph nine of this subdivision, for eligible real property taxes imposed on such site.

(2) Amount of credit. The amount of the credit shall be twenty-five percent of the product of (i) the benefit period factor, (ii) the employment number factor, and (iii) the eligible real property taxes paid or incurred by the developer of the qualified site during the taxable year (or the pro rata share of such taxes in the case of a partner in a

partnership or a shareholder in a New York S corporation), except that if the real property which is the subject of the credit provided for under this section is attributed to a qualified site located in an environmental zone as defined in paragraph five of subdivision (a) of this section, the amount of the credit shall be the product of the factors and taxes referred to in subparagraphs (i), (ii) and (iii) of this paragraph. However, the amount of the credit may not exceed the credit limitation set forth in paragraph seven of this subdivision.

Section 23 (a) of the Tax Law provides for the environmental remediation insurance credit and provides, in part:

Allowance of credit. 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 (e) of this section. The amount of such credit shall be equal to the lesser of thirty thousand dollars or fifty percent of the premiums paid on or after the date of the brownfield site cleanup agreement executed by the taxpayer and the department of environmental conservation pursuant to section 27-1409 of the environmental conservation law by the taxpayer for environmental remediation insurance issued with respect to a qualified site.

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 606(ee) of the Tax Law provides:

Remediated brownfield credit for real property taxes for qualified sites. (1) Allowance of credit. A taxpayer which is a developer of a qualified site shall be allowed a credit for eligible real property taxes, to be computed as provided in subdivision (b) of section twenty-two of this chapter, against the tax imposed by this article. For purposes of this subsection, the terms "qualified site" and "developer" shall have the same meaning as set forth in paragraphs two and three, respectively, of subdivision (a) of section twenty-two of this chapter.

(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 606(ff) of the Tax Law provides:

Environmental remediation insurance credit. (1) Allowance of credit. A taxpayer shall be allowed a credit, to be computed as provided in section twenty-three 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.

Opinion

Section 21 of the Tax Law provides a brownfield redevelopment tax credit that is equal to the sum of a site preparation credit component, a tangible property credit component, and an on-site groundwater remediation credit component. The site preparation credit component is equal to the applicable percentage of the site preparation costs paid or incurred by the taxpayer with respect to a qualified site. The tangible property credit component is 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, that constitute qualified tangible property. The on-site groundwater remediation credit component is equal to the applicable percentage of the on-site groundwater remediation costs paid or incurred by the taxpayer with respect to a qualified site (to the extent that such groundwater remediation costs are not included in the determination of the site preparation credit or the cost or other basis included in the determination of the tangible property credit).

Section 22 of the Tax Law provides a credit for real property taxes for qualified sites. The amount of the credit is 25% of the product of (i) the benefit period factor, (ii) the employment number factor, and (iii) the eligible real property taxes paid or incurred by the developer of the qualified site during the taxable year.

Section 23 of the Tax Law provides for a credit equal to the lesser of \$30,000 or 50% of the premiums paid on or after the date of the brownfield site cleanup agreement executed by the taxpayer and the DEC pursuant to section 27-1409 of the Environmental Conservation Law by the taxpayer for environmental remediation insurance issued with respect to a qualified site.

TSB-A-07(2)I
Income Tax
April 12, 2007

The brownfield credits under sections 21, 22, and 23 of the Tax Law relate to the Petitioner Group's costs paid or incurred for site preparation, qualified tangible property, groundwater remediation, real property taxes, and insurance premiums. Adding QWDC to one or more of the Agreements and to the COC with respect to certain brownfield sites (including the possibility that QWDC may transfer or sell some or all of its interest in the Property and the transferee or purchaser may seek to claim brownfield credits with respect to non-Petitioner expenditures) will not jeopardize any brownfield tax credits otherwise allowable to Petitioners for such costs paid or incurred by Petitioners.

DATED: April 12, 2007

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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