

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-15(7)I
Income Tax
July 17, 2015

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. 1141104B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks how to apply the requirement in the historic homeownership rehabilitation tax credit that at least five percent of total expenditures made in a rehabilitation process be attributable to the exterior of the building (“five percent rule”), when the process stretches over multiple tax years.

We conclude that the five percent requirement applies to the total qualified rehabilitation expenditures of each separate rehabilitation project for which a taxpayer seeks to claim a tax credit.

Facts

In 2011, Petitioner submitted a New York State Office of Parks, Recreation and Historic Preservation Historic Homeownership Rehabilitation Tax Credit Application (the “Application”) Part 1 and Part 2 to the New York State Office of Parks, Recreation and Historic Preservation (“OPRHP”). In Part 1, question 4 of the application Petitioner indicated, among other things, that at least \$5,000 was being spent on the rehabilitation, at least 5% of the total rehabilitation costs were being spent on the exterior and the total estimated cost of the project would be \$100,000.

In Part 2 of the Application, Petitioner identified the scope of the work proposed for the home rehabilitation project, including several interior and exterior items. Part 2 items included: rebuilding three chimneys, installing a new roof, work related to a downstairs bathroom and hallway, work related to an upstairs bathroom and bedroom, a front porch rebuild, rear porch repair, cupola repair, attic rehab/mechanicals, basement/flooring mechanicals, wall repairs, bathroom installation, door restoration and interior painting.

As of December 31, 2014, Petitioner completed approximately \$54,000.00 of work for the rehabilitation project and of that amount approximately 50 percent of those costs were for exterior costs. In 2012, 2013 and 2014, Petitioner submitted an Application, Part 3 to OPRHP for the yearly expenses relating to Petitioner’s 2011 application. In 2012 and 2013, OPRHP issued to Petitioner, in each of those years, a Certificate of Completion (“COC”). In 2014, OPRHP denied Petitioner’s Part 3 expenditures and did not issue a COC. OPRHP denied the Part 3 because less than five percent of Petitioner’s 2014 project expenditures were for exterior expenditures and OPRHP concluded, therefore, that Petitioner did not meet the five percent rule.

Petitioner claims that the five percent rule should not be applied to each Part 3 submitted for the project. Rather, the five percent rule should apply to the total project expenditures of \$100,000, as set forth in his 2011 application. Petitioner states that of the nearly \$54,000 costs incurred to date, about 50 percent are exterior costs and the credit should be allowed for 2014.

Analysis

The NY historic homeownership rehabilitation credit is administered by OPRHP and is provided for in Tax Law § 606(pp). This section provides that a taxpayer is eligible for a historic homeownership rehabilitation credit in an amount equal to twenty percent of a taxpayer's qualified rehabilitation expenditures made with respect to a qualified historic home. The credit is allowed in the taxable year that the final certification step of the certified rehabilitation is completed (Tax Law § 606(pp)(1)).

A "qualified rehabilitation expenditure" must, among other requirements, be in connection with a certified rehabilitation of a qualified historic home (Tax Law § 606(pp)(3)(A)(i)). An expenditure in connection with the rehabilitation of a qualified historic home is not a qualified rehabilitation expenditure unless at least 5% of the total expenditures made in the rehabilitation process are allocable to the rehabilitation of the exterior of such building (Tax Law § 606(pp)(3)(C)). Also, qualified rehabilitation expenditures are treated as made on the date of the final certification (Tax Law § 606(pp)(9)).

The term "certified rehabilitation" means any rehabilitation of a certified historic structure that has been approved and certified as being consistent with the standards established by, among others, the Commissioner of OPRHP (Tax Law § 606(pp)(4)(A)). A certified rehabilitation requires a three-step process: 1) an initial certification that the structure meets the definition of the term "certified historic structure"; 2) a second certification, issued prior to construction, that the proposed rehabilitation work meets the standards established by OPRHP; and 3) a final certification issued when construction is complete certifying that the work was completed as proposed and that the costs are consistent with the work completed (Tax Law § 606(pp)(4)(B)). The final certification is acceptable proof that the expenditures are qualified rehabilitation expenditures for purposes of claiming the credit (Tax Law § 606(pp)(4)(B)(iii)).

OPRHP administers the tax credit program by requiring a taxpayer to submit a three-part application that mirrors the required three-step certified rehabilitation process above. In Part 1, OPRHP determines if a structure meets the definition of a "certified historic structure" based on information provided by the taxpayer. In Part 2, OPRHP makes a preliminary certification that the taxpayer's proposed project satisfies the standards for rehabilitation, prior to when work begins. In Part 3, OPRHP issues a final certification to a taxpayer, a COC, if OPRHP approves the taxpayer's submission of the final costs and completed project. When a taxpayer receives a COC, the taxpayer is allowed to claim the tax credit, and those qualified rehabilitation expenditures are treated as being made on the date of the final certification.

When Petitioner applied for the tax credit, he had the option to either: 1) apply for a tax credit for each separate rehabilitation project to be completed on his historic home, and then claim a tax credit upon the satisfactory completion of each project, or 2) apply for a tax credit for the total project costs of rehabilitating his historic home, and then claim a tax credit for the total

project expenses at the conclusion of the rehabilitation. In this case, Petitioner chose to claim tax credits in 2012, 2013 and 2014, as separate rehabilitation projects were completed.

In 2014, Petitioner's Part 3 Application for rehabilitation expenses was denied because Petitioner did not incur any exterior expenses in 2014, and therefore, did not meet the five-percent rule. Petitioner argues that the rehabilitation expenses incurred from all his completed projects from 2012, 2013 and 2014, and the exterior expenses relating to those projects, should be used to determine if the five-percent rule is satisfied. Using those figures, Petitioner claims that the exterior costs to date are almost half of the total costs incurred in rehabilitating his home and meet the five-percent rule. Petitioner argues that the words *rehabilitation process* contained in Tax Law § 606(pp)(3)(C), which states that the term qualified rehabilitation expenses... "shall not include any expenditures in connection with the rehabilitation of a qualified historic home unless at least 5% of the total expenditures made in the *rehabilitation process* are allocable to the rehabilitation of the exterior of such building," are referring to the total of all rehabilitation project expenses made to date, and not to the expenses incurred for the separate rehabilitation project in 2014.

We disagree with Petitioner's interpretation of the Tax Law. The historic homeownership rehabilitation credit is allowed only for qualified rehabilitation expenditures made in connection with a certified rehabilitation of a qualified historic home. The certified rehabilitation is determined using a three-step certification process and the credit is allowed only when the final certification of that three-step process is complete. This certification process concludes when OPRHP issues a final certification or COC to the taxpayer, and, at that point, a taxpayer is allowed to claim a tax credit. If the taxpayer incurs rehabilitation expenses in the following year and seeks to claim a tax credit for those expenses, the taxpayer must again apply for a tax credit using the same three-step certification process for the new expenses and those new expenses must meet the statutory requirements.¹ The statute does not contemplate an ongoing certification process that keeps track of a taxpayer's prior credit expenses to determine if a new project comes within the five-percent rule.

Accordingly, the five-percent rule's reference to the term "rehabilitation process" is referring to a certified rehabilitation's three-step certification process and it requires that at least five-percent of a taxpayer's expenses be exterior expenses for each separate rehabilitation project for which the taxpayer seeks to claim a credit.

In this case, Petitioner, by submitting Part 3 in 2012, 2013, and 2014, chose to treat his rehabilitation as separate rehabilitation projects and to claim a tax credit for his separate rehabilitation projects incurred over 2012, 2013 and 2014. By taking this action, Petitioner must satisfy the five percent rule each year. Since his exterior expenses do not satisfy that rule in 2014, OPRHP correctly refused to issue a COC in 2014. However, Petitioner could have chosen, and may consider claiming a tax credit when all of the rehabilitation work of the estimated \$100,000 rehabilitation project is completed, assuming the total exterior expenses meet the five-percent rule. If Petitioner chooses to claim a tax credit upon completion of the total project,

¹ In this case, it appears that OPRHP chose to treat the Parts 1 and 2 filed by Petitioner in 2011 as being applicable to the rehabilitation completed in 2012, 2013, and 2014. We presume that they will continue to follow that procedure for future years until the entire rehabilitation work described in the Part 1 filed by Petitioner is completed. However, Petitioner will need to confirm this with OPRHP.

Petitioner will need to file amended returns for 2012 and 2013 to disclaim the credits for those years.

DATED: July 17, 2015

/S/

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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.