

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

TSB-A-02(21)C
Corporation Tax
TSB-A-02(59)S
Sales Tax
December 12, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z020129B

On January 29, 2002, a Petition for Advisory Opinion was received from Willow Run Foods, Inc., P.O. Box 1350 Binghamton, New York 13901.

The issue raised by Petitioner, Willow Run Foods, Inc., is whether it is considered to have existed in an Empire Zone during the entire base period for purposes of the employment test in determining whether Petitioner is a Qualified Empire Zone Enterprise (“QEZE”) under Sections 14 and 1101(b)(23) of the Tax Law.

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

Petitioner is a New York State corporation that was formed on July 1, 1950, and is a distributor and wholesaler of food and non-food products to the fast food industry. Petitioner operated out of its warehouse and transportation center on Jensen Road in Vestal, New York from inception through March of 1999. The Vestal, New York location has never been designated as an Empire Zone. On November 6, 1998, Petitioner acquired land in Kirkwood, New York for the purposes of constructing a new warehouse and distribution center. The new facility was constructed, and on March 10, 1999, Petitioner moved its operations from the Vestal site to the Kirkwood site. Subsequent to this, the Vestal site was sold. On June 17, 1999, the Kirkwood site was designated as part of an Empire Zone. On September 22, 1999, Petitioner was certified, under Article 18-B of the General Municipal Law, as an Empire Zone business.

Petitioner is in the process of completing an application to determine if it is a QEZE for purposes of Sections 14 and 1101(b)(23) of the Tax Law on Form DTF-80, *Application for a Qualified Empire Zone Enterprise (QEZE) Sales Tax Certification*.

Applicable Law

Section 14 of the Tax Law, as amended by Chapter 85 of the Laws of 2002 and applicable to taxable years beginning on and after January 1, 2001 [except where noted], contains the provisions for the Empire Zones program as follows:

(a) Qualified empire zone enterprise. A business enterprise which is certified under article eighteen-B of the general municipal law prior to July first, two thousand five shall be a “qualified empire zone enterprise”:

(1) for purposes of article nine-a, twenty-two, thirty-two and thirty-three of this chapter, for each of the taxable years within the “business tax benefit period,” which period shall consist of (A) in the case of a business enterprise with a test date occurring on or before December thirty-first, two thousand one, the first fifteen taxable years beginning on or after January first, two thousand one, and (B) in the case of a business enterprise with a test date occurring on or after January first, two thousand two, the fifteen taxable years next following the business enterprise’s test year, but only with respect to each of such fifteen years for which the employment test is met, and

(2) for purposes of articles twenty-eight and twenty-nine of this chapter, during the “sales and use tax benefit period.” Such period shall consist of one hundred twenty consecutive months beginning on the later of (A) March first, two thousand one, or (B) the first day of the month next following the date of issuance of a qualified empire zone enterprise certification by the commissioner under subdivision (h) of this section. Provided however, such period shall not include any month falling within a taxable year immediately preceded by a taxable year with respect to which the business enterprise did not meet the employment test.

(b) Employment test. (1) General. The employment test shall be met with respect to a taxable year if the business enterprise’s employment number in empire zones for such taxable year equals or exceeds its employment number in such zones for the base period, and its employment number in the state outside of such zones for such taxable year equals or exceeds its employment number in the state outside of such zones for the base period. If the base period is zero years and the enterprise has an employment number in such zone of greater than zero with respect to a taxable year, then the employment test will be met only if the enterprise qualifies as a new business under subdivision (j) of this section.

(2) Change in zone boundaries or newly designated zones. Provided, however, where there has been one or more revisions of the boundaries of an empire zone that resulted in the inclusion of the business enterprise within such zone, the employment test shall be determined with respect to a taxable year as if the boundaries of the revised zone on the last day of the taxable year existed during the base period and test year and as if the enterprise had been located in the revised zone during its base period and test year. In addition, where an area has been newly designated as an empire zone, the employment test shall be determined with respect to a taxable year as if such newly designated zone existed during the base period and test year and as if the enterprise had been located in the newly designated zone during its base period and test year.

* * *

(c) Base period. The term “base period” means the five taxable years immediately preceding the test year. If the business enterprise has fewer than five such years, then the term “base period” means such smaller set of years.

(d) Test year. The term “test year” means the last taxable year of the business enterprise ending before the test date. If a business enterprise does not have a taxable year that ends on or before the test date, such enterprise shall be deemed to have a test year which shall be either the last calendar year ending on or before its test date, or if the enterprise has as its taxable year a fiscal year, the last such fiscal year ending on or before its test date (whether or not the enterprise in fact had a taxable year during that period).

(e) Test date. The term “test date” means the later of July first, two thousand or the date prior to July first, two thousand five on which the business enterprise was first certified under article eighteen-B of the general municipal law.

(f) Taxable year. The term “taxable year” means the taxable year of the business enterprise under section one hundred eighty-three, one hundred eight-four, one hundred eighty-five or former section one hundred eighty-six of article nine, or under article nine-A, twenty-two, thirty-two or thirty-three of this chapter. If a business enterprise does not have a taxable year because it is exempt from taxation or otherwise not required to file a return under any of such sections of article nine or under article nine-A, twenty-two, thirty-two or thirty-three, then the term “taxable year” means (i) the business enterprise’s federal taxable year, or, (ii) if the enterprise does not have a federal taxable year, the calendar year.

(g) Employment number. The term “employment number” shall mean the average number of individuals, excluding general executive officers (in the case of a corporation), employed fulltime by the enterprise for at least one-half of the taxable year. Such number shall be computed by determining the number of such individuals employed by the taxpayer on the thirty-first day of March, the thirtieth day of June, the thirtieth day of September and the thirty-first day of December during the applicable taxable year, adding together the number of such individuals determined to be so employed on each of such dates and dividing the sum so obtained by the number of such dates occurring within such applicable taxable year. [NOTE: The following sentence is applicable to taxable years beginning on or after January 1, 2002.] Such number shall not include individuals employed within the immediately preceding sixty months by a related person to the QEZE, as such term “related

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person” is defined in subparagraph (c) of paragraph three of subsection (b) of section four hundred sixty-five of the internal revenue code.

(h) Sales and use tax. (1) In addition to the other requirements of this section, in order for the exemptions described in subdivision (z) of section eleven hundred fifteen of this chapter or any like exemptions from taxes imposed pursuant to the authority of article twenty-nine of this chapter to apply with respect to a qualified empire zone enterprise, such enterprise shall apply to the commissioner of taxation and finance for the issuance of a qualified empire zone enterprise certification, in the manner prescribed by such commissioner. If such commissioner grants such certification, such certification shall be subject to conditions specified by such commissioner. An enterprise to which the commissioner issues such certification may furnish a qualified empire zone enterprise exempt purchase certificate to a person required to collect sales and compensating use taxes imposed under or pursuant to the authority of article twenty-eight or twenty-nine of this chapter, which certificate shall be deemed to be an exemption certificate under subdivision (c) of section eleven hundred thirty-two of this chapter....

Section 1101(b)(23) of the Tax Law provides:

Qualified empire zone enterprise. The term “qualified empire zone enterprise” shall have the same meaning that such term has in section fourteen of this chapter for purposes of this article and article twenty-nine of this chapter.

Opinion

Technical Services Division Memorandum, TSB-M-01(1)C, (1)I, dated January 16, 2001, entitled Qualified Empire Zone Enterprise (QEZE) Tax Credits (Articles 9-A, 22, 32, and 33) provides that “In the case of a newly designated zone or where the boundaries of an existing zone have been revised, the employment numbers in the base period are determined as if the new zone or the boundaries of the revised zone existed during the base period.” Technical Services Division Memorandum TSB-M-02(5)S, dated July 24, 2002, entitled Qualified Empire Zone Enterprise (QEZE) Exemptions (Articles 28 and 29), provides further that “In the case of a newly designated zone, or if the boundaries of an existing zone have been revised, the employment numbers in the base period are determined as if the new zone or the boundaries of the revised zone existed during the base period and as if the business enterprise had been located in the new or revised zone during the base period.” (Emphasis added) That is, in the situation where the Empire Zone comes to the business enterprise, either by zone boundary changes or by a newly designated Empire Zone which then includes the business enterprise in an Empire Zone, the business enterprise’s location is considered to have always been in the Empire Zone for purposes of the QEZE employment test,

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even if the business enterprise had an interim move within the State before moving from its original location in the State into the area subsequently designated an Empire Zone.

In order to meet the employment test with respect to a taxable year, the QEZE's employment number for such year both within Empire Zones and in the State outside of the zones must be equal to or exceed the employment number within the zones and in the State outside of the zones determined for the base period.

In this case, when Petitioner completes Form DTF-80, Step 5 – Employment test table for employees within Empire Zones, and Step 6 – Employment test table for employees in New York State, but outside Empire Zones, Petitioner's location would be considered to have always existed in the Empire Zone during the entire base period.

Accordingly, as long as Petitioner's employment number remains the same or increases in the tax year as compared to the base period, Petitioner satisfies the QEZE employment test.

DATED: December 12, 2002

/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.