

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

TSB-A-09(10)C
Corporation Tax
TSB-A-09(6)I
Income Tax
June 29, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z090529A

The Petitioners are the [REDACTED] (Petitioner A) and [REDACTED] (Petitioner B), owned by Petitioner A; collectively, they will be referred to as “Petitioners.” They ask whether a newly formed entity, or in the alternative, a division of Petitioner B, a foreign corporation, will be eligible to claim the qualified empire zone enterprise (QEZE) tax reduction credit (TRC) and the wage tax credit (WTC), as long as the employment test and other requirements of the applicable statutes are met. We conclude that under the facts presented, either entity will be eligible to claim the credits, beginning in its second taxable year.

Facts

In Petitioner A’s consolidated group, there are four separate corporations doing business in New York State. All of these companies are in the business of selling and servicing auto insurance policies, and all are certified as Empire Zone (EZ) businesses under Article 18-B of the General Municipal Law.

Petitioner B is an insurance agency that sells various non-auto lines of insurance – primarily homeowners’ insurance. It is also part of Petitioner A’s consolidated group. Petitioner B conducts all its operations in Fredericksburg, Virginia location, but it uses independent agents throughout the United States. Although Petitioner B has reported the income generated from these agents’ New York sales on its New York franchise tax returns and paid the minimum tax, Petitioners represent that these agents are not employees of Petitioner B, and that Petitioner B has no other business operations or employees in New York.

Petitioner A would like to expand the operations for homeowners’ insurance sales, etc., potentially locating a facility in Amherst, New York. It may form a new company or use a division of Petitioner B to administer the business operations in New York. All the employees will be newly hired employees of the company. Petitioners represent that the new operation will hire some full-time employees in 2009, become certified as a Regionally Significant Project (RSP) in 2010, and hire additional employees in 2010. Our conclusion is predicated on those representations.

Analysis

In order to qualify for the QEZE TRC, an entity must be certified as an EZ business and pass the employment test.¹ Designation of its location as a RSP and certification of the business entity will satisfy the certification requirement. The employment test will be met if the business enterprise’s employment number in the New York State and in the EZs for a taxable year exceeds its employment number in the state and the EZs, respectively, for the base period.² For an entity certified on or after April 1, 2005, the base period is the 4 taxable years (or less than 4 years if the company has been subject to tax in New York for fewer than 4 years) immediately preceding the year the entity is certified.³ In calculating the employment number, general

¹ §14(a) of the Tax Law.

² §14(b)(4) of the Tax Law.

³ §14(c)(2) of the Tax Law.

executive officers and related persons⁴ are not counted. If a business certified on or after April 1, 2005 has zero years in the base period or the base period employment is zero, and the entity has an employment number in the zone of greater than zero for the taxable year, the employment test will be met only if the enterprise qualifies as a new business under §14(j) of the Tax Law.⁵ If the business enterprise - whether it is a new entity or a division of Petitioner B - has at least one full-time employee for at least half the 2009 tax year, and it becomes certified in the 2010 tax year, it will have an employee in its base period, and thus, the “new business test” will not be applicable. Additionally, if the business enterprise increases its full-time employees in the 2010 taxable year, it will be eligible to claim the QEZE TRC in 2010. It does not matter for eligibility purposes whether the business enterprise is operated by a new entity or Petitioner B.

In order to qualify to claim the WTC, an entity must be certified as an EZ business and employ an average number of full-time employees (not counting general executive officers) in both New York State and the EZ during the tax year that exceeds the number of employees in New York State and the EZ during the base period.⁶ The base period for WTC purposes is the same as the base period for the QEZE TRC. Individuals employed in an EZ within the immediately preceding 60 months by a related person⁷ must also be excluded from the employment number unless a WTC was never taken for the employee. If Petitioner B is designated a RSP in 2010 and continues to expand its employment rolls in 2010 so that the average number of full-time employees meets the statutory requirements, it will be eligible to claim the WTC. Employees hired before the designation of the location as a RSP cannot be counted for purposes of claiming the WTC. Neither Petitioner B nor a new entity, owned more than 50% by a New York taxpayer, will qualify as a “new business” under §210.12(j), and thus cannot treat any of the WTC as an overpayment eligible for refund.

DATED: June 29, 2009

/S/

Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

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.

⁴ Defined in IRC §465(b)(3)(C).

⁵ §14(b)(4) of the Tax Law.

⁶ §210.19 of the Tax Law.

⁷ Defined in IRC §465(b)(3)(C).