

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

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Corporation Tax
TSB-A-09(8)I
Income Tax
July 21, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z090521A

The petition asks whether [REDACTED] (Petitioner) is considered a “new business” under §14 of the Tax Law. We conclude that Petitioner passes the new business test.

Facts

Petitioner was formed in 1993 as a subsidiary of [REDACTED] (Parent). Shortly thereafter, it began operations under the name [REDACTED] at an assembly plant in County A in New York, where it assembled buses until the plant closed in 2003. During its active operations in County A and thereafter, Petitioner has been taxable for franchise taxes under Article 9-A of the Tax Law, despite having no employees and operations in New York from 2003 through 2008. In 2001, another entity named [REDACTED] (Company A) merged with and into Petitioner. Petitioner survived the merger, but adopted the Company A name. Petitioner represents that the acquired Company A was not a New York taxpayer before the merger. In addition, Petitioner represents that it has never been substantially similar in operation and ownership to any other business entity that is taxable or was previously taxable under certain New York business taxes.

Petitioner, which has never been certified, has completed construction of a new bus assembly plant in the County B, New York Empire Zone (EZ) and applied for certification as an EZ business under Article 18-B of the General Municipal Law. It anticipates that in 2009 it will be certified and will begin hiring employees at its new plant. Thus, assuming Petitioner is a calendar year taxpayer, its base period under §14(c)(2) is taxable years 2005 through 2008 for franchise tax purposes during which time Petitioner had no operations in New York State and no employees. For the qualified empire zone enterprise (QEZE) sales tax credit, the base period under §14(c)(3) is taxable years 2005 through 2007. Petitioner expects to hire at least one full-time employee in 2009.

Analysis

For businesses first certified under Article 18-B of the General Municipal Law on or after April 1, 2005 that have zero employment in the base period and an employment number in the zone of greater than zero for the taxable year, the employment test under §14(b) of the Tax Law will be met only if the enterprise qualifies as a new business under §14(j) of the Tax Law. When applicable, the new business test under §14 determines eligibility for the qualified empire zone enterprise (QEZE) tax benefits.

The new business test was added to the Tax Law in 2002 to stem abuses by companies that created a new entity to claim EZ tax benefits for which the existing business would not qualify. For example, when a business had reduced its number of employees in a tax year over the employment number in its base period, it would not qualify for the EZ tax credits. However, before enactment of the new business test, a new entity with a zero base period and one employee could qualify for the EZ benefits, thus circumventing the purpose of the program - to provide incentives for businesses to create

new jobs. A “new business” includes any corporation, except a corporation that is substantially similar in operation and ownership to a business entity (or entities) taxable, or previously taxable, under certain New York business taxes.¹ For purposes of the analysis, the test contemplates a comparison of at least two separate legal entities, not a comparison of one entity to itself.

Because Petitioner had zero employment in its base period, it will be subject to the new business test. Petitioner, however, is the same business entity that was created in 1993 to undertake a new operation in New York State and represents that it has never been substantially similar in operation and ownership to another business entity taxable in New York State, which is a question of fact that cannot be resolved in an Advisory Opinion. Petitioner has never claimed any EZ tax benefits, and it is not changing its corporate structure to obtain benefits that would otherwise be unavailable. Under the facts provided, Petitioner will pass the new business test under §14(j), since only one entity is involved. This conclusion is consistent with the underlying policy of the EZ program to promote job growth in New York State. The company will not be a new business for purposes of the wage tax credit and the EZ investment tax credit under §210.12(j), because it has been subject to tax under Article 9-A for more than 5 taxable years.

DATED: July 21, 2009

/S/
Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

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¹ §14(j)(1) of the Tax Law.