

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

TSB-A-03(4)C
Corporation Tax
April 11, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C030220A

On February 20, 2003, a Petition for Advisory Opinion was received from Commodore Aviation, Inc., P.O. Box 661078, Miami, Florida 33266.

The issue raised by Petitioner, Commodore Aviation, Inc. is whether it will qualify as a new business under section 210.12(j) of the Tax Law for purposes of claiming a refund of the empire zone wage tax credit pursuant to section 210.19 of the Tax Law.

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

Petitioner is a Delaware corporation that currently operates a facility in Florida providing aircraft maintenance, repair and overhaul services as well as other aviation related services. Petitioner has no other locations and no other lines of business. During its corporate existence, Petitioner has not conducted business in New York State.

Petitioner currently is a wholly-owned subsidiary of Israel Aircraft Industries International, Inc., a Delaware corporation ("IAII"). IAII is a wholly-owned subsidiary of Israel Aircraft Industries Limited, an Israeli corporation ("IAI"). IAII provides logistic and marketing support to IAI in the United States for an arm's length fee with respect to sales of commercial and private aircraft. IAII maintains an administrative office in New York City, that, among other activities, provides administrative services for Petitioner, such as preparing financial reports and acquiring insurance policies, for a fee determined by using third party arm's length pricing rates. IAII does not have any other presence in New York State. IAII has other subsidiaries that are New York taxpayers. Astra Jet Corporation consigns Astra spare parts for use in Gulfstream jets, and Israel Aircraft Services Inc. is a holding company that is the single member of Aviation Services International LLC which conducts marketing for sales of aircraft within the United States. These entities do not conduct activities similar to those conducted by Petitioner.

IAI is a globally recognized leader in developing military and commercial aerospace technology. IAI operates a division called the Bedek Group, which provides maintenance, overhaul, modification, repair and testing of commercial airplanes for many of the leading airlines and manufacturers worldwide. Petitioner is engaged in the same line of business as the Bedek Group, i.e. providing aircraft maintenance, repair and overhaul services in the United States.

The Corporate Secretary of IAII is also the Corporate Secretary of Petitioner. No other officer of IAII is an officer of Petitioner. Two of eight members of IAII's Board of Directors are also on Petitioner's Board of Directors. Three members of Petitioner's Board of Directors are "outside directors" not affiliated with either IAI or IAII. In addition, Petitioner is managed

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independently and IAI has no involvement in the day to day operations of Petitioner. Petitioner's Chairman is the General Manager of the Bedek Group. Such Chairman as well as the Financial Director of the Bedek Group and the General Counsel of IAI are three of the ten members of the Board of Directors of Petitioner.

Petitioner is contemplating the transfer of its facility in Florida to the former Griffiss Air Force Base in Rome, New York. The facility in Rome, New York is contained within an Empire Zone, pursuant to Article 18-B of the General Municipal Law. Petitioner is negotiating a twenty year sublease of the facility with the Griffiss Local Development Corporation with options for three successive renewal terms of ten years each. The target date for Petitioner to commence operations at the New York site is October 1, 2003. Petitioner will apply for certification pursuant to Article 18-B of the General Municipal Law as a business enterprise eligible for Empire Zone economic incentive benefits. Petitioner estimates that economic incentives and opportunities available at the new facility may enable it to create an estimated five hundred jobs over the first five years of operation.

Prior to October 1, 2003, in part to allow IAI to obtain a direct ownership interest in Commodore and facilitate oversight of Petitioner, the equity ownership of Petitioner will be recapitalized. Pursuant to the recapitalization, IAI (which now holds 150 shares of stock) will exchange such stock for 100 shares of class A voting shares. IAI will guarantee portions of the sublease obligations of Petitioner and will provide other consideration to Petitioner in exchange for 80 class B voting shares and the issuance to a foreign subsidiary of IAI of 21 class B voting shares, whereby more than 50 percent of the total number of voting shares outstanding after the recapitalization contributions will not be owned by IAI. Since the class A voting shares will entitle the holder to five votes per share, versus one vote per share for the class B voting shares, IAI will continue to have more than 80 percent of the voting power and value of Petitioner. This will allow IAI to continue to file its federal income tax returns on a consolidated basis with Petitioner and IAI's other subsidiaries which constitute the United States group of entities owned by IAI.

Applicable Law and Regulations

Section 210.19 of the Tax Law provides for an empire zone wage tax credit, in part, as follows:

(a) A taxpayer shall be allowed a credit, to be computed as hereinafter provided, against the tax imposed by this article where the taxpayer has been certified pursuant to article eighteen-B of the general municipal law. The amount of such credit shall be as prescribed by paragraph (d) hereof.

* * *

(d) The amount of the credit shall equal the sum of (1) the product of three thousand dollars and the average number of individuals (excluding general executive officers) employed full-time by the taxpayer, computed pursuant to the provisions of subparagraph three of paragraph (b) of this subdivision, who

(A) received empire zone wages for more than half of the taxable year,

(B) received, with respect to more than half of the period of employment by the taxpayer during the taxable year, an hourly wage which was at least one hundred thirty-five percent of the minimum wage specified in section six hundred fifty-two of the labor law, and

(C) are targeted employees; and

(2) the product of fifteen hundred dollars and the average number of individuals (excluding general executive officers and individuals described in subparagraph one of this paragraph) employed full-time by the taxpayer, computed pursuant to the provisions of subparagraph three of paragraph (b) of this subdivision, who received empire zone wages for more than half of the taxable year.

Provided, further, however, that the credit provided for herein with respect to the taxable year, and carryovers of such credit to the taxable year, deducted from the tax otherwise due, may not, in the aggregate, exceed fifty percent of the tax imposed under section two hundred nine computed without regard to any credit provided for by this article.

* * *

(e) The credit and carryovers of such credit allowed under this subdivision for any taxable year shall not, in the aggregate, reduce the tax due for such year to less than the higher of the amounts prescribed in paragraphs (c) and (d) of subdivision one of this section. However, if the amount of credit or carryovers of such credit, or both, allowed under this subdivision for any taxable year reduces the tax to such amount, or if any part of the credit or carryovers of such credit may not be deducted from the tax otherwise due by reason of the final sentence of paragraph (d) hereof, any amount of credit or carryovers of such credit thus not deductible in such taxable year may be carried over to the following year or years and may be deducted from the tax for such year or years. In lieu of such carryover, any such taxpayer which qualifies as a new business under paragraph (j) of subdivision twelve of this section may elect, on its report for its taxable year with respect to which such

credit is allowed, to treat fifty percent of the amount of such carryover as an overpayment of tax to be credited or refunded in accordance with the provisions of section ten hundred eighty-six of this chapter. Provided, however, the provisions of subsection (c) of section ten hundred eighty-eight of this chapter notwithstanding, no interest shall be paid thereon.

Section 210.12(j) of the Tax Law provides that:

For purposes of paragraph (e) of this subdivision, a new business shall include any corporation, except a corporation which:

(1) over fifty percent of the number of shares of stock entitling the holders thereof to vote for the election of directors or trustees is owned or controlled, either directly or indirectly, by a taxpayer subject to tax under this article; section one hundred eighty-three, one hundred eighty-four or one hundred eighty-five of article nine; article thirty-two or thirty-three of this chapter; or

(2) is substantially similar in operation and in ownership to a business entity (or entities) taxable, or previously taxable, under this article; section one hundred eight-three, one hundred eighty-four, one hundred eighty-five or one hundred eighty-six of article nine; article thirty-two or thirty-three of this chapter; article twenty-three of this chapter or which would have been subject to tax under such article twenty-three (as such article was in effect on January first, nineteen hundred eighty) or the income (or losses) of which is (or was) includable under article twenty-two of this chapter whereby the intent and purpose of this paragraph and paragraph (e) of this subdivision with respect to refunding of credit to new business would be evaded; or

(3) has been subject to tax under this article for more than five taxable years (excluding short taxable years).

Opinion

The empire zone wage tax credit under section 210.19 of the Tax Law was added by Chapter 686 of the Laws of 1986. This provision was part of New York State's economic development program specifically designed to meet the needs of the communities that had failed to participate fully in the economic resurgence and growth of New York State, by offering significant tax incentives to spark development and revitalize those distressed areas and benefit both the

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economy of those communities as well as their residents. (Governor's Mem approving L 1986, ch 686, 1986 McKinney's Session Laws of NY, at 3186).

The provision of the empire zone wage tax credit under section 210.19(e) of the Tax Law that allows a taxpayer which qualifies as a new business to elect to treat 50 percent of the amount of the credit carryover as an overpayment of tax to be refunded was added by Chapter 708 of the Laws of 1993. The Governor, in his approval memorandum, stated, in part:

The bill, part of my 1993 Legislative Program, makes comprehensive reforms to the Economic Development Zones Program by changing the program evaluation process, eligibility criteria, administration and structure as recommended by the Economic Development Zones Review Commission, and by enhancing the package of tax and financial incentives and special program assistance measures designed to encourage and stimulate business development in the zones.

The bill enables the State to respond to the present needs of communities facing severe economic downturns brought on by substantial job loss, such as ... the planned closing and realigning of military bases and facilities affecting the ... Rome areas. The bill will ensure that the State can quickly provide additional tax resources and programs to encourage new business development which will create new jobs.... (Governor's Mem approving L 1993, ch 708, 1993 NY Legis Ann, at 549.)

In this case, Petitioner is contemplating the transfer of its facility in Florida to the former Griffiss Air Force Base in Rome, New York which is contained within an Empire Zone pursuant to Article 18-B of the General Municipal Law. Petitioner is negotiating a twenty year sublease of the facility with the Griffiss Local Development Corporation with options for three successive renewal terms of ten years each, and has a target date of October 1, 2003 for starting operations in New York State.

With respect to the question of whether Petitioner would be considered to be a new business under section 210.12(j) of the Tax Law for the purpose of being eligible for a refund, in lieu of a carryover, of the empire zone wage tax credit under section 210.19(e) of the Tax Law, Petitioner must not meet any of the three exceptions contained in such section 210.12(j).

First, Petitioner must not be a corporation in which over 50 percent of the number of shares of stock entitling their holders to vote for the election of directors or trustees is owned or controlled, either directly or indirectly, by a taxpayer subject to tax under Article 9-A; section 183, 184, or 185 of Article 9; Article 32 or 33 of the Tax Law. Petitioner is currently wholly owned by IAI which is subject to tax under Article 9-A of the Tax Law. However, Petitioner states that prior to October 1, 2003, the equity ownership of Petitioner will be recapitalized whereby IAI and a foreign

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subsidiary of IAI in return for providing sublease guarantees and other valuable consideration to Petitioner will receive voting shares constituting more than 50 percent of voting shares outstanding after such recapitalization, and IAI's share of stock ownership, measured by voting shares, will be reduced from 100 percent to less than 50 percent of the total number of voting shares of Petitioner.

Second, Petitioner must not be a corporation that is substantially similar in operation and in ownership to a business entity or entities taxable, or previously taxable under Article 9-A; section 183, 184, or 185 of Article 9; Article 32 or 33; or Article 23 or that would have been subject to tax under Article 23, as such article was in effect on January 1, 1980, or the income (or losses) of which is (or was) includable under Article 22 of the Tax Law whereby the intent and purpose of sections 210.12(e) or 210.12B(d) of the Tax Law with respect to refunding of credit to new business would be evaded. Petitioner and IAI have not and will not be substantially similar in operation. Petitioner now provides and will provide maintenance, repair and overhaul services as well as other related aviation services in New York State, and IAI provides, in New York State, logistic and marketing support for IAI with respect to sales of commercial and private aircraft and administrative services, in exchange for a third party arm's length fee, for Petitioner. IAI's subsidiaries that are New York taxpayers do not conduct operations similar to those conducted by Petitioner.

Third, Petitioner must not be a corporation that has been subject to tax under Article 9-A for more than five taxable years (excluding short taxable years) before each tax year during which the taxpayer becomes eligible for the empire zone wage tax credit. Petitioner states that it has not been subject to New York franchise tax.

The purpose of the empire zone wage tax credit under section 210.19 of the Tax Law was to encourage and stimulate business development in empire zones in New York State, as part of the empire zone program, to provide benefits for certain areas that continue to face persistent problems of long-term unemployment and poverty, and to improve services to targeted workers and employee benefits of the businesses within a zone. In particular, the purpose of section 210.19(e) of the Tax Law, in allowing a taxpayer that is a new business to treat fifty percent of the amount of an empire zone wage tax credit carryover as an overpayment of tax to be refunded, was to respond to the needs of communities that faced severe economic downturns brought on by substantial job loss, such as the closing of Griffiss Air Force Base in Rome, New York, by encouraging new business development to create new jobs in these distressed areas, including the Rome area.

In order to give effect to the Legislature's purpose, the statute should be interpreted to recognize the unique circumstances of ownership and control of Petitioner by IAI through IAI, when considering whether Petitioner is a new business for purposes of the refundable empire zone wage tax credit. To do otherwise would defeat such purpose. (cf., Symphony Space v Tishelman, 60 NY2d 33; Brooklyn Union Gas v Commr of Dept of Fin., 108 AD2d 74, revd on other grounds 67 NY2d 1036). In this case, after the recapitalization:

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(1) Over 50 percent of the total number of shares of Petitioner's stock entitling their holders to vote for the election of directors or trustees will be owned or controlled, either directly or indirectly by IAI and a foreign subsidiary of IAI neither of which are subject to New York State franchise tax. While IAI will continue to have more than 80 percent of the voting power (and value) of the total voting stock to facilitate the continuance of IAI's United States affiliates' ability to file as a consolidated group for federal income tax purposes, IAI is not involved in the day to day operations of Petitioner. IAI's General Manager of the Bedek Group is the Chairman of Petitioner, and is also on Petitioner's Board of Directors along with the Financial Director of the Bedek Group and the General Counsel for IAI. In addition, direct ownership by IAI of Petitioner will facilitate oversight of Petitioner under the Bedek Group of IAI.

(2) Subsidiaries of IAI and IAI that are New York taxpayers do not conduct operations similar to those conducted by Petitioner in providing maintenance, repair and overhaul services as well as other aviation related services for IAI in New York. IAI will not be similar to Petitioner in operations. IAI's activities in New York State involve logistic and marketing support for IAI in the United States with respect to sales of commercial and private aircraft, and providing administrative services for Petitioner at third party arm's length pricing. While IAI will be providing some services for Petitioner in New York, those services are administrative only and not similar to the activities of Petitioner in providing aircraft maintenance, repair and overhaul services as well as other related aviation services in New York State.

(3) Petitioner has not been subject to franchise tax in New York State.

Accordingly, Petitioner will not meet any of the three exceptions contained in such section 210.12(j) of the Tax Law. Therefore, Petitioner will be considered a "new business" pursuant to sections 210.12(j) and 210.19(e) of the Tax Law, for purposes of the refundable empire zone wage tax credit, for those taxable years that it meets the requirements of section 210.12(j)(3) of the Tax Law. However, this advisory opinion does not address the issue of whether Petitioner will, in fact, qualify for the empire zone wage tax credit under section 210.19 of the Tax Law.

DATED: April 11, 2003

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