

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

TSB-A-03(8)C
Corporation Tax
September 2, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C030514A

On May 14, 2003, a Petition for Advisory Opinion was received from NBT Bancorp Inc., 52 South Broad Street, Norwich, New York 13815.

The issue raised by Petitioner, NBT Bancorp Inc., is whether for purposes of the empire zone tax credit provisions under sections 14, 15, 16 and 1456(e), (o) and (p) of the Tax Law, employees in an empire zone refers to all employees of a taxpayer within any and all empire zones in which the taxpayer has operations.

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

Petitioner's subsidiary, NBT Bank, N.A., is subject to franchise tax under Article 32 of the Tax Law, and operates in locations throughout New York State, some in empire zones. NBT Bank, N.A. is currently working to become certified in all empire zone locations.

Applicable Law

Section 14 of the Tax Law provides, in part:

(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 articles ... thirty-two ... 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 . . .

* * *

(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

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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.

* * *

(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 full-time 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. Such number shall not include individuals employed within the immediately preceding sixty months by a related person to the QEZE, as such term "related person" is defined in subparagraph (c) of paragraph three of subsection (b) of section four hundred sixty-five of the internal revenue code. . . .

Section 15 of the Tax Law provides for a QEZE credit for real property taxes as follows:

(a) Allowance of credit. A taxpayer which is a ... (QEZE), ... or a member of a partnership which is a QEZE, and which is subject to tax under article ... thirty-two ... of this chapter, shall be allowed a credit against such tax, pursuant to the provisions referenced in subdivision (f) of this section, for eligible real property taxes.

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(b) Amount of credit. The amount of the credit shall be the product (or pro rata share of the product, in the case of a member of a partnership) of (i) the benefit period factor, (ii) the employment increase factor and (iii) the eligible real property taxes paid or incurred by the QEZE during the taxable year. However, the amount of the credit may not exceed the credit limitation set forth in subdivision (f) of this section.

* * *

(d) Employment increase factor. The employment increase factor is the amount, not to exceed 1.0, which is the greater of:

(1) the excess of the QEZE's employment number in the empire zones with respect to which the QEZE is certified pursuant to article eighteen-B of the general municipal law for the taxable year, over the QEZE's test year employment number in such zones, divided by such test year employment number in such zones; or

(2) the excess of the QEZE's employment number in such zones for the taxable year over the QEZE's test year employment number in such zones, divided by 100.

(3) For purposes of paragraph one of this subdivision, where there is an excess as described in such paragraph, and where the test year employment number is zero, then the employment increase factor shall be 1.0.

* * *

(h) Definitions and cross-references. For definitions of terms used in this section see section fourteen of this article. For application of the credit provided for in this section, see the following provisions of this chapter:

* * *

(2) Article 32: Section 1456: subsection (o)

Section 16 of the Tax Law provides for a QEZE tax reduction credit as follows:

(a) Allowance of credit. A taxpayer which is a ... (QEZE), ... or a member of a partnership which is a QEZE, and which is subject to tax under article ... thirty-two ... of this chapter, shall be allowed a credit against such tax, pursuant to the provisions referenced in subdivision (g) of this section, to be computed as hereinafter provided.

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(b) Amount of credit. The amount of the credit shall be the product of (i) the benefit period factor, (ii) the employment increase factor, (iii) the zone allocation factor and (iv) the tax factor.

* * *

(d) Employment increase factor. The employment increase factor for the taxable year shall be as prescribed in subdivision (d) of section fifteen of this article.

* * *

(g) Definitions and cross-references. For definitions of terms used in this section see sections fourteen and fifteen of this article. For application of the credit provided for in this section, see the following provisions of this chapter:

* * *

(1) Article 32: Section 1456: subsection (p)

Section 1456(e) of the Tax Law provides for an empire zone wage tax credit as follows:

(1) 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 in paragraph four hereof.

(2) For purposes of this subsection, the following terms shall have the following meanings: (A) "Empire zone wages" means wages paid by the taxpayer for full-time employment, other than to general executive officers, during the taxable year in an area designated or previously designated as an empire zone or zone equivalent area pursuant to article eighteen-B of the general municipal law where such employment is in a job created in the area (i) during the period of its designation as an empire zone, (ii) within four years of the expiration of such designation, or (iii) during the ten year period immediately following the date of designation as a zone equivalent area, provided, however, that if the taxpayer's certification under article eighteen-B of the general municipal law is revoked with respect to an empire zone or zone equivalent area, any wages paid by the taxpayer, on or after the effective date of such decertification, for employment in such zone shall not constitute empire zone wages.

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(3) The credit provided for herein shall be allowed only where the average number of individuals, excluding general executive officers, employed full-time by the taxpayer in (i) the state and (ii) the empire zone or area previously constituting such zone or zone equivalent area, during the taxable year exceeds the average number of such individuals employed full-time by the taxpayer in (i) the state and (ii) such zone or area subsequently or previously constituting such zone or such zone equivalent area, respectively, during the four years immediately preceding the first taxable year in which the credit is claimed with respect to such zone or area. Where the taxpayer provided full-time employment within (i) the state or (ii) such zone or area during only a portion of such four-year period, then for purposes of this paragraph the term "four years" shall be deemed to refer instead to such portion, if any.

* * *

(4) The amount of the credit shall equal the sum of (i) (A) 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 (C) of paragraph two of this subsection, who (i) received empire zone wages for more than half of the taxable year, (ii) 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 (iii) are targeted employees; and

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

* * *

(C) For purposes of calculating the amount of the credit, individuals employed within an empire zone or zone equivalent area within the immediately preceding sixty months by a related person, as such term is defined in subparagraph (c) of paragraph three of subsection (b) of section four hundred sixty-five of the internal revenue code, shall not be included in the average number of individuals described in subparagraph (A) or subparagraph (B) of this paragraph, unless such related person was never allowed a credit under this subdivision with respect to such employees. . . .

Section 465(b)(3)(C) of the Internal Revenue Code provides:

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Related person. – For purposes of this subsection, a person (hereinafter in this paragraph referred to as the “related person”) is related to any person if –

- (i) the related person bears a relationship to such person specified in section 267(b) or section 707(b)(1), or
- (ii) the related person and such person are engaged in trades or business under common control (within the meaning of subsections (a) and (b) of section 52).

For purposes of clause (i), in applying section 267(b) or 707(b)(1), “10 percent” shall be substituted for “50 percent”.

Section 1456(o)(1) of the Tax Law provides for a QEZE credit for real property taxes as follows:

Allowance of credit. A taxpayer which is a qualified empire zone enterprise shall be allowed a credit for eligible real property taxes, to be computed as provided in section fifteen of this chapter, against the tax imposed by this article.

Section 1456(p)(1) of the Tax Law provides for a QEZE tax reduction credit as follows:

Allowance of credit. A taxpayer which is a qualified empire zone enterprise shall be allowed a QEZE tax reduction credit, to be computed as provided in section sixteen of this chapter, against the tax imposed by this article.

Opinion

For purposes of the employment test under section 14(b) of the Tax Law, in determining whether NBT Bank, N.A. is a qualified empire zone enterprise (QEZE), NBT Bank, N.A.’s employment number in the empire zones includes employees in all empire zones, regardless of whether NBT Bank, N.A. is certified in a particular zone.

Assuming NBT Bank, N.A. is a QEZE under section 14 of the Tax Law, for purposes of the employment increase factor under section 15(d) of the Tax Law, in determining the amount of the QEZE credit for real property taxes allowed pursuant to section 1456(o) of the Tax Law, NBT Bank, N.A.’s employment number in the empire zones includes only employees in empire zones in which NBT Bank, N.A. is certified pursuant to Article 18-B of the General Municipal Law.

Assuming NBT Bank, N.A. is a QEZE under section 14 of the Tax Law, for purposes of the employment increase factor under section 16(d) of the Tax Law (which is determined as prescribed under section 15(d) of the Tax Law), in determining the amount of the QEZE tax reduction credit allowed pursuant to section 1456(p) of the Tax Law, NBT Bank, N.A.’s employment number in the

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empire zones includes only employees in empire zones in which NBT Bank, N.A. is certified pursuant to Article 18-B of the General Municipal Law.

For purposes of computing the empire zone wage tax credit allowed under section 1456(e)(1) of the Tax Law, a separate credit must be computed for each empire zone in which NBT Bank, N.A. is certified pursuant to Article 18-B of the General Municipal Law. Therefore, when computing an empire zone wage tax credit for a particular empire zone or zone equivalent area in which NBT Bank, N.A. is certified, any reference to the empire zone or zone equivalent area means the empire zone or zone equivalent area in which NBT Bank, N.A. is certified and for which the credit is being computed.

DATED: September 2, 2003

/s/

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