

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

TSB-A-05(4)C
Corporation Tax
March 10, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C040519A

On May 19, 2004, a Petition for Advisory Opinion was received from Atlas Park, LLC, 555 Fifth Avenue, 16th Floor, New York, New York 10017.

The issue raised by Petitioner, Atlas Park, LLC, is whether Petitioner or Petitioner's owner (if Petitioner is treated as a disregarded entity for purposes of the Article 9-A franchise tax) will be able to claim Brownfield Cleanup Program tax credits, under sections 21(a)(2) and (3), and 22 of the Tax Law, if it receives a certificate of completion or places property in service prior to Petitioner's first taxable year beginning on or after April 1, 2005.

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

Petitioner is a New York limited liability company. Petitioner has one owner, The Hemmerdinger Corporation (Owner). Owner is subject to franchise tax under Article 9-A of the Tax Law. Petitioner and Owner are calendar year taxpayers. Petitioner may be treated as a disregarded entity for federal income tax purposes and New York State franchise tax purposes.

Petitioner owns and is redeveloping a 12 acre site in New York State (the Site). The overall project includes demolition of 16 existing buildings on the Site, rehabilitation of 4 other existing buildings, and the construction of several new buildings. Upon completion, the Site will be a retail/office complex with extensive parking facilities and open air courtyards.

The redevelopment involves costs incurred by Petitioner to qualify the Site for the certificate of completion issued by the New York State Department of Environmental Conservation (DEC), and other site preparation costs incurred by Petitioner. The improvements for which such additional costs are incurred will be placed in service at the time the first buildings on the Site are placed in service. In addition, Petitioner will incur costs for qualified tangible property to be located at the Site.

On March 5, 2004, Petitioner and the DEC entered into a brownfield cleanup agreement with respect to the Site (the BCA). The BCA does not provide for any on-site groundwater remediation.

All costs described above will be paid or incurred on or after the date of the BCA. Petitioner anticipates that it will receive its certificate of completion from DEC, and that certain improvements and all of the qualified tangible property will be placed in service, on or before December 31, 2005.

In addition, Petitioner is paying property taxes with respect to the Site, and will continue to pay property taxes, presumably increased property taxes, after the project is complete and the Site improvements are placed in service.

Applicable law

Section 21 of the Tax Law, as added by Chapter 1 of the Laws of 2003, and amended by Chapter 577 of the Laws of 2004, provides for a brownfield redevelopment tax credit, in part, as follows:

(a) Allowance of credit. (1) General. A taxpayer subject to tax under article ... nine-A ... of this chapter shall be allowed a credit against such tax, pursuant to the provisions referenced in subdivision (f) of this section. Such credit shall be allowed with respect to a qualified site, as such term is defined in paragraph one of subdivision (b) of this section. The amount of the credit in a taxable year shall be the sum of the credit components specified in paragraphs two, three and four of this subdivision applicable in such year.

(2) Site preparation credit component. The site preparation credit component shall be equal to the applicable percentage of the site preparation costs paid or incurred by the taxpayer with respect to a qualified site. The credit component amount so determined with respect to a site's qualification for a certificate of completion shall be allowed for the taxable year in which the effective date of the certificate of completion occurs. The credit component amount determined other than with respect to such qualification shall be allowed for the taxable year in which the improvement to which the applicable costs apply is placed in service for up to five taxable years after the issuance of such certificate of completion.

(3) Tangible property credit component. The tangible property credit component shall be equal to the applicable percentage of the cost or other basis for federal income tax purposes of tangible personal property and other tangible property, including buildings and structural components of buildings, which constitute qualified tangible property. The credit component amount so determined shall be allowed for the taxable year in which such qualified tangible property is placed in service on a qualified site with respect to which a certificate of completion has been issued to the taxpayer for up to ten taxable years after the date of the issuance of such certificate of completion. The tangible property credit component shall be allowed with respect to property leased to a second party only if such second party is either (i) not a party responsible for the disposal of hazardous waste or the discharge of petroleum at the site according to applicable principles of statutory or common law liability, or (ii) a party responsible according to applicable principles of statutory or common law liability if such party's liability arises solely from operation of the site subsequent to the disposal of hazardous waste or the discharge of petroleum, and is so certified by the commissioner of environmental conservation at the request of the taxpayer, pursuant to section 27-1419 of the

environmental conservation law. Notwithstanding any other provision of law to the contrary, in the case of allowance of credit under this section to such a lessor, the commissioner shall have the authority to reveal to such lessor any information, with respect to the issue of qualified use of property by the lessee, which is the basis for the denial in whole or in part, or for the recapture, of the credit claimed by such lessor.

* * *

(6) Site preparation costs ... paid or incurred by the taxpayer with respect to a qualified site and the cost or other basis for federal income tax purposes of tangible personal property and other tangible property, including buildings and structural components of buildings, which constitute qualified tangible property shall only include costs paid or incurred by the taxpayer on or after the date of the brownfield site cleanup agreement executed by the taxpayer and the department of environmental conservation pursuant to section 27-1409 of the environmental conservation law.

* * *

(b) Definitions. As used in this section, the following terms shall have the following meanings:

(1) Qualified site. A “qualified site” is a site with respect to which a certificate of completion has been issued to the taxpayer by the commissioner of environmental conservation pursuant to section 27-1419 of the environmental conservation law.

(2) Site preparation costs. The term “site preparation costs” shall mean all amounts properly chargeable to a capital account, (i) which are paid or incurred in connection with a site’s qualification for a certificate of completion, and (ii) all other site preparation costs paid or incurred in connection with preparing a site for the erection of a building or a component of a building, or otherwise to establish a site as usable for its industrial, commercial (including the commercial development of residential housing), recreational or conservation purposes. Site preparation costs shall include, but not be limited to, the costs of excavation, temporary electric wiring, scaffolding, demolition costs, and the costs of fencing and security facilities. Site preparation costs shall not include the cost of acquiring the site and shall not include amounts included in the cost or other basis for federal income tax purposes of qualified tangible property, as described in paragraph three of this subdivision.

(3) Qualified tangible property. “Qualified tangible property” is property which:

(A) is depreciable pursuant to section one hundred sixty-seven of the internal revenue code,

(B) has a useful life of four years or more,

(C) has been acquired by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code,

(D) has a situs on a qualified site in this state, and

(E) is principally used by the taxpayer for industrial, commercial, recreational or environmental conservation purposes (including the commercial development of residential housing).

* * *

(5) Certificate of completion. A “certificate of completion” issued by the commissioner of environmental conservation pursuant to section 27-1419 of the environmental conservation law.

* * *

(c) Qualifying property. Property which qualifies for the credit provided for under this section and also for a credit provided for (1) under either subdivision twelve or subdivision twelve-B of section two hundred ten of this chapter, or both ... may be the basis for either the credit provided for under this section or one of the credits enumerated in paragraph one ... of this subdivision, but not both.

* * *

(f) Cross-references. For application of the credit provided for in this section, see the following provisions of this chapter:

* * *

(2) Article 9-A: Section 210, subdivision 33

Section 22 of the Tax Law, as added by Chapter 1 of the Laws of 2003, and amended by Chapter 577 of the Law of 2004, provides for a tax credit for remediated brownfields, in part, as follows:

(a) Definitions. As used in this section the following terms shall have the following meanings:

(1) Certificate of completion. A “certificate of completion” issued by the commissioner of environmental conservation pursuant to section 27-1419 of the environmental conservation law.

(2) Qualified site. For purposes of this section, a “qualified site” is a site with respect to which a certificate of completion has been issued by the commissioner of environmental conservation pursuant to section 27-1419 of the environmental conservation law.

(3) Developer. (i) A “developer” is a taxpayer under article ... nine-A ... of this chapter who or which either (I) has been issued a certificate of completion with respect to a qualified site or (II) has purchased or in any other way has been conveyed all or any portion of a qualified site from a taxpayer or any other party who or which has been issued a certificate of completion with respect to such site provided, such purchase or conveyance occurs within seven years of the effective date of the certificate of completion issued with respect to such qualified site. Provided further, that the taxpayer who or which is purchasing all or any portion of a qualified site and the taxpayer or any other party who or which has been issued a certificate of completion with respect to such site may not be related persons, 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.

(ii) Where the entity to whom a certificate of completion has been issued is a partnership, or where the entity which has purchased all of any portion of a qualified site from a taxpayer who or which has been issued a certificate of completion with respect to such site within the applicable time limit is a partnership, any partner in such partnership who or which is taxable under article nine, nine-A, twenty-two, thirty-two or thirty-three of this chapter shall be a developer under this paragraph....

* * *

(b) Remediated brownfield credit for real property taxes for qualified sites. (1) Allowance of credit. A developer of a qualified site who or which is subject to tax under article ... nine-A ... of this chapter, shall be allowed a credit against such tax, pursuant to the provisions referenced in paragraph nine of this subdivision, for eligible real property taxes imposed on such site.

(2) Amount of credit. The amount of the credit shall be twenty-five percent of the product of (i) the benefit period factor, (ii) the employment number factor, and (iii) the eligible real property taxes paid or incurred by the developer of the qualified site during the taxable year ... except that if the real property which is the subject of the credit provided for under this section is attributed to a qualified site located in an environmental zone as defined in paragraph five of subdivision (a) of this section, the amount of the credit shall be the product of the factors and taxes referred to in subparagraphs (i), (ii) and (iii) of this paragraph. However, the amount of the credit may not exceed the credit limitation set forth in paragraph seven of this subdivision.

(3) Benefit period factor. The benefit period factor is a numerical value corresponding with a benefit period of ten consecutive taxable years commencing in the

taxpayer's taxable year during which the certificate of completion is issued for the qualified site or the taxpayer's first taxable year commencing on or after April first, two thousand five, whichever is later....

* * *

(5) Eligible real property taxes. The term "eligible real property taxes" means taxes imposed on real property which consists of a qualified site owned by the developer, provided such taxes become a lien on the real property in a period during which the real property is a qualified site. In addition, the term "eligible real property taxes" includes payments in lieu of taxes by the developer, with respect to a qualified site, to the state, a municipal corporation or a public benefit corporation pursuant to a written agreement entered into between the developer and the state, a municipal corporation or a public benefit corporation. Provided, however, such a payment in lieu of taxes shall not constitute eligible real property taxes in any taxable year to the extent that such payment exceeds the product of (A) the greater of (i) the basis for federal income tax purposes, determined on the date the taxpayer becomes a developer as defined under this section, of real property, including buildings and structural components of buildings, owned by the developer and located on a qualified site with respect to which the taxpayer is a developer, or (ii) the basis for federal income tax purposes of such real property described in clause (i) of this subparagraph on the last day of the taxable year, and (B) the estimated effective full value tax rate within the county in which such property is located, as most recently reported to the commissioner by the secretary of the state board of real property services, or his or her designee. The state board shall annually calculate estimated and effective full value tax rates within each county for this purpose based upon the most current information available to it in relation to county, city, town, village and school district taxes. Provided further, where the amount of the credit determined under paragraph two of this subdivision is the total product of the factors and tax specified therein, the term "eligible real property taxes" under this paragraph shall apply only to taxes imposed on real property which is attributed to a qualified site located in an environmental zone....

* * *

(9) Cross-references. For application of the credit provided for in this subdivision, see the following provisions of this chapter:

* * *

(ii) Article 9-A: Section 210: subdivision 34

Section 210.33 of the Tax Law, as added by Chapter 1 of the Laws of 2003, provides as follows:

Brownfield redevelopment tax credit. (a) Allowance of credit. A taxpayer shall be allowed a credit, to be computed as provided in section twenty-one of this chapter, against the tax imposed by this article.

(b) Application of credit. The credit allowed under this subdivision for any taxable year shall not reduce the tax due for such year to less than the higher amount prescribed in paragraphs (c) and (d) of subdivision one of this section. However, if the amount of credits allowed under this subdivision for any taxable year reduces the tax to such amount, any amount of credit thus not deductible in such taxable year shall be treated 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 210.34 of the Tax Law, as added by Chapter 1 of the Laws of 2003 and amended by Chapter 577 of the Laws of 2004, provides as follows:

Remediated brownfield credit for real property taxes for qualified sites. (a) Allowance of credit. A taxpayer which is a developer of a qualified site shall be allowed a credit for eligible real property taxes, to be computed as provided in subdivision (b) of section twenty-two of this chapter, against the tax imposed by this article. For purposes of this subdivision, the terms “qualified site” and “developer” shall have the same meaning as set forth in paragraphs two and three, respectively, of subdivision (a) of section twenty-two of this chapter.

(b) Application of credit. The credit allowed under this subdivision for any taxable year shall not 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 allowed under this subdivision for any taxable year reduces the tax to such amount, any amount of credit thus not deductible in such taxable year shall be treated 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 33 of Part H of Chapter 577 of the Laws of 2004 amended the effective date for the provisions of sections 21 and 22 of the Tax Law as added by Chapter 1 of the Laws of 2003. The effective date provisions, as amended, provide, in part:

This act shall take effect immediately, except that sections one through twenty-nine of this act shall apply to taxable years beginning on or after April 1, 2005 ... Where any provision of this act provides that a credit shall be allowed for the taxable year in which the effective date of the certificate of completion occurs or a credit shall be allowed for the taxable year in which certain property is placed in service, where the effective date of

the certificate of completion or the date the property is placed in service occurs prior to a taxable year beginning on or after April 1, 2005, for purposes of being allowed a credit, such effective date of the certificate of completion and such date the property is placed in service shall be treated as if such date occurred in the first taxable year occurring on or after April 1, 2005.

Opinion

The classification accorded an LLC for federal income tax purposes will be followed for purposes of Article 9-A of the Tax Law. (See *McDermott, Will & Emery*, Adv Op Comm T&F, July 24, 1996, TSB-A-96(19)C; *FGIC CMRC Corp*, Adv Op Comm T&F, April 1, 1996, TSB-A-96(11)C; Technical Services Bureau Memorandum entitled *New York Tax Status of Limited Liability Companies and Partnerships*, October 25, 1994, TSB-M94(6)I, (8)C; and Treasury Regulation section 301.7701-3.) Accordingly, if Petitioner is classified as a separate entity for federal income tax purposes, Petitioner is treated as a corporation taxable under Article 9-A of the Tax Law. If Petitioner is not classified as an entity separate from Owner for federal income tax purposes (a disregarded entity), Petitioner is considered a branch or division of Owner.

Section 21(a)(2) of the Tax Law provides for the site preparation credit component of the brownfield redevelopment tax credit which is equal to the applicable percentage of the site preparation costs paid or incurred by the taxpayer with respect to a qualified site. The amount of the site preparation credit component attributable to a site's qualification for a certificate of completion shall be allowed for the taxable year in which the effective date of the certificate of completion occurs. The amount of the site preparation credit component not attributable to a site's qualification for a certificate of completion shall be allowed for the taxable year in which the improvement to which the applicable costs apply is placed in service for up to five taxable years after the issuance of such certificate of completion.

Section 21(a)(3) of the Tax Law provides for the tangible property credit component of the brownfield redevelopment tax credit which is based on the cost or other basis determined for federal income tax purposes of tangible personal property and other tangible property, including buildings and structural components of buildings, which constitute qualified tangible property. Tangible personal property and other tangible property, including buildings and structural components of buildings, will be treated as *qualified tangible property* if the property meets the conditions contained in section 21(b)(3) of the Tax Law. The tangible property credit component shall be allowed for the taxable year in which such qualified tangible property is placed in service on a qualified site with respect to which a certificate of completion has been issued to the taxpayer for up to ten taxable years after the date of the issuance of such certificate of completion.

Section 22(b)(1) of the Tax Law provides for the remediated brownfield credit for real property taxes for qualified sites. The credit provides that a developer, as defined in section 22(a)(3) of the Tax Law, of a qualified site which is subject to tax under Article 9-A of the Tax

Law shall be allowed a credit against such tax, for eligible real property taxes imposed on such site as defined in section 22(b)(5) of the Tax Law. Pursuant to section 22(b)(3) of the Tax Law, the credit may be claimed for a benefit period of ten consecutive taxable years commencing in the taxpayer's taxable year during which the certificate of completion is issued for the qualified site or the taxpayer's first taxable year commencing on or after April 1, 2005, whichever is later.

Pursuant to section 33 of Part H of Chapter 577 of the Laws of 2004, where the effective date of a certificate of completion or the date property is placed in service occurs prior to a taxable year beginning on or after April 1, 2005, for purposes of the credit determined under section 21 of the Tax Law, the effective date of the certificate of completion or such date the property is placed in service shall be treated as if such date occurred in the first taxable year occurring on or after April 1, 2005.

In this case, Petitioner is a calendar year taxpayer. Petitioner owns and is remediating and redeveloping the Site. The project includes the demolition of 16 existing buildings on the Site, the rehabilitation of 4 other existing buildings and the construction of several new buildings. The redevelopment involves costs to qualify the Site for the certificate of completion, and other site preparation costs. The improvements for which such additional costs are incurred will be placed in service at the time the first buildings on the Site are placed in service. In addition, Petitioner will incur costs for qualified tangible personal property to be located at the Site. Petitioner anticipates that it will receive its certificate of completion before calendar year 2006.

With respect to the site preparation credit component of the brownfield redevelopment tax credit under section 21(a)(2) of the Tax Law, Petitioner indicates that it has costs in connection with the Site's qualification for the certificate of completion that are incurred after March 5, 2004 (the date Petitioner entered into a BCA with the DEC to qualify the Site for the certificate of completion). This credit component is based on the site preparation costs that meet the requirements of section 21(b)(2) of the Tax Law and will be allowed for the taxable year in which the effective date of the certificate of completion occurs. If Petitioner receives its certificate of completion during a taxable year before calendar year 2006, Petitioner or Owner (if Petitioner is a disregarded entity and treated as a branch or division of Owner) will be allowed the site preparation credit component under section 210.33 of the Tax Law, for taxable year 2006 (its first taxable year beginning on or after April 1, 2005), as determined under section 21(a)(2) of the Tax Law.

In addition, Petitioner indicates that it has other site preparation costs relating to improvements that will be placed in service at the time the first buildings on the Site are placed in service. These costs are incurred after March 5, 2004. If these site preparation costs meet the requirements of section 21(b)(2) of the Tax Law, the site preparation credit component with respect to these costs will be determined under section 21(a)(2) of the Tax Law. Petitioner or Owner (if Petitioner is a disregarded entity and treated as a branch or division of Owner) will be allowed this credit component under section 210.33 of the Tax Law for the taxable year in which the improvements to which such costs apply are placed in service for up to five taxable years

after the issuance of the certificate of completion. If such improvements are placed in service during a taxable year before calendar year 2006, this credit component will be allowed in taxable year 2006.

With respect to the tangible property credit component of the brownfield redevelopment tax credit under section 21(a)(3) of the Tax Law, if the property placed in service at the Site in connection with the rehabilitation of the four existing buildings and the construction of new buildings on the Site meets the conditions of section 21(b)(3) of the Tax Law, then such property will be treated as *qualified tangible property* for purposes of computing the tangible property credit component of the brownfield redevelopment tax credit under section 21 of the Tax Law. Further, the cost or other basis for federal income tax purposes of such qualified tangible property placed in service on a qualified site that is paid or incurred on or after March 5, 2004, may be included in determining the tangible property credit component under section 21(a)(3) of the Tax Law. Petitioner or Owner (if Petitioner is a disregarded entity and treated as a branch or division of Owner) may claim the tangible property credit component under section 210.33 of the Tax Law for the taxable year the qualified tangible property is placed in service on the Site for which a certificate of completion has been issued, as determined under section 21(a)(3) of the Tax Law. However, if Petitioner places the qualified tangible property in service during a taxable year before calendar year 2006, this credit component will be allowed under section 210.33 of the Tax Law in taxable year 2006.

With respect to the remediated brownfield credit for real property taxes for qualified sites under section 22(b)(1) of the Tax Law, Petitioner or Owner (if Petitioner is a disregarded entity and treated as a branch or division of Owner) will be a developer as defined in section 22(a)(3)(i) of the Tax Law when a certificate of completion is issued with respect to the Site. Accordingly, Petitioner or Owner (if Petitioner is a disregarded entity and treated as a branch or division of Owner) will be allowed a credit under section 210.34 of the Tax Law, as determined under section 22(b) of the Tax Law, for eligible real property taxes imposed on the Site. The remediated brownfield credit for real property taxes determined under section 22(b) of the Tax Law may be allowed for the benefit period of ten consecutive taxable years commencing in Petitioner's taxable year during which the certificate of completion is issued for the Site or Petitioner's taxable year 2006, whichever is later.

DATED: March 10, 2005

/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.