

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

TSB-A-05(9)C
Corporation Tax
July 21, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C050202A

On February 2, 2005, a Petition for Advisory Opinion was received from Mod-Pac Corp., 1801 Elmwood Avenue, Buffalo, New York 14207-2496.

The issue raised by Petitioner, Mod-Pac Corp., is whether it may claim the Empire zone (EZ) wage tax credit, the QEZE tax reduction credit, the QEZE credit for real property taxes, and the EZ employment incentive credit for the short taxable year, January 1- March 14, 2003, based on a determination of the average number of full-time employees (excluding general executive officers) who worked more than half of the taxable year.

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

Petitioner is a C corporation, incorporated in the state of New York on November 8, 1968, subject to tax under Article 9-A of the Tax Law. Petitioner was certified under Article 18-B of the General Municipal Law in the city of Buffalo EZ, effective June 15, 2002 (i.e., the effective date of the EZ boundary revision). Prior to March 14, 2003, Petitioner was a wholly owned subsidiary of another New York corporation. For federal income tax purposes, the parent corporation and affiliates filed returns on a consolidated basis. Petitioner, however, filed in New York State on a separate company basis. Neither the parent corporation nor any other affiliated companies had ever applied for certification under Article 18-B of the General Municipal Law prior to this time. Petitioner has two operating divisions; one located in the city of Buffalo EZ, the other located in New York State but not in an empire zone.

On March 14, 2003, Petitioner was spun-off from its parent corporation. Due to the fact that Petitioner was no longer part of the federal consolidated tax group of the parent company, Petitioner filed two short-year tax returns for 2003 (i.e., January 1- March 14, 2003, and March 15 - December 31, 2003) for both federal and New York State tax purposes.

Applicable law and regulations

Section 210.12-C of the Tax Law provides, in part:

Empire zone employment incentive credit (EDZ-EIC). (a) Where a taxpayer is allowed a credit under subdivision twelve-B of this section, the taxpayer shall be allowed a credit for each of the three years next succeeding the taxable year for which the credit under such subdivision twelve-B is allowed ... provided, however, that the credit allowable under this subdivision for any taxable year shall only be allowed if the average number of employees employed by the taxpayer in the empire zone ... is at least one

hundred one percent of the average number of employees employed by the taxpayer in such empire zone ... during the taxable year immediately preceding the taxable year for which the credit under such subdivision twelve-B is allowed....

(b) The average number of employees employed in an empire zone ... in a taxable year shall be computed by ascertaining the number of such employees within such zone, or, where applicable, in the geographic area subsequently constituting such zone, except general executive officers, 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 in the taxable year, by adding together the number of employees ascertained on each of such dates and dividing the sum so obtained by the number of such above-mentioned dates occurring within the taxable year....

Section 210.19 of Article 9-A of the Tax Law provides, in part:

Empire zone wage tax credit. (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.

(b) For the purposes of this subdivision, the following terms shall have the following meanings: (1) "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 ... as an empire zone....

* * *

(3) "Average number of individuals, excluding general executive officers, employed full-time" shall be computed by ascertaining 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 each taxable year or other applicable period, by adding together the number of such individuals ascertained on each of such dates and dividing the sum so obtained by the number of such dates occurring within such taxable year or other applicable period.

* * *

(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,

* * *

(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.

Section 210.27 of the Tax Law provides, in part:

QEZE credit for real property taxes. (a) 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, ...

Section 210.28 of the Tax Law provides, in part:

QEZE tax reduction credit. (a) 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, ...

Section 14(g) of the Tax Law provides, in part:

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....

Section 15 of the Tax Law provides, in part:

(b) Amount of credit. (1) In the case of a business enterprise which is first certified under article eighteen-B of the general municipal law before April first, two thousand five, the amount of the credit shall be equal to the product ... 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....

* * *

(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.

* * *

(h) Definitions and cross-references. For definitions of terms used in this section see section fourteen of this article....

Section 16 of the Tax Law provides, in part:

(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....

Section 5-11.2 of the Business Corporation Franchise Tax Regulations ("Article 9-A Regulations") provides, in part:

(a) The average number of employees employed in the economic development zone ... in a taxable year ... is computed as follows:

(1) ascertain the number of employees within the economic development zone, designated pursuant to article 18-B of the General Municipal Law ... except general executive officers, employed by the taxpayer on March 31st, June 30th, September 30th, and December 31st in the taxable year;

(2) add together the number of such employees ascertained on each of such dates;

and

(3) divide the sum by the number of such dates occurring within the taxable year.

(b) In the case of a taxpayer having a short taxable year which does not include any of the dates set forth in paragraph (a)(1) of this section, the number of employees within such economic development zone employed by the taxpayer on the last day of such taxable year shall constitute the average number of employees for such taxable year.

Opinion

Pursuant to sections 210.19, 210.12-C, and 14(g) of the Tax Law, the dates March 31, June 30, September 30, and December 31, within the taxable year, are used to determine the average number of employees employed by the taxpayer for purposes of computing the EZ wage tax credit, the EZ employment incentive credit, the QEZE tax reduction credit, and the QEZE credit for real property taxes.

Based on the facts presented, Petitioner filed a short-year tax return for the period January 1- March 14, 2003, and none of the statutorily required dates referred to above for determining the average number of employees occurred during such period. However, Petitioner is not precluded from claiming the EZ wage tax credit, the EZ employment incentive credit, the QEZE tax reduction credit, and the QEZE credit for real property taxes for such short year, if it otherwise meets the statutory requirements for such credits. Pursuant to section 5-11.2 of the Article 9-A Regulations, if a short taxable year does not include any of the statutorily required dates, the number of employees employed by the taxpayer on the last day of such taxable year shall constitute the average number of employees for such taxable year. Section 5-11.2 of the Article 9-A regulations pertains to the EZ employment incentive credit, but the rule concerning the average number of employees for a short taxable year may be applied to the other credits referred to in this Opinion. Accordingly, Petitioner is required to use the number of eligible employees employed by Petitioner on March 14, 2003, the last day of Petitioner's short taxable year, as the average number of employees for such taxable year for purposes of computing the EZ wage tax credit, the EZ employment incentive credit, the QEZE tax reduction credit, and the QEZE credit for real property taxes.

DATED: July 21, 2005

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