

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(4)C
Corporation Tax
July 23, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C071204A

On December 4, 2007, a Petition for Advisory Opinion was received from Ernst & Young, LLP, 1500 Key Tower, 50 Fountain Plaza, Buffalo, New York, 14202. Petitioner, Ernst & Young, LLP, submitted additional information relating to the Petition on April 23, 2008.

The issue raised is whether the corporation described below will qualify as a “new business” under section 210.12(j) of the New York State Tax Law, and therefore be eligible for a refundable investment tax credit in its first tax year beginning in 2007, under both Scenarios 1 and 2 below.

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

OpcO, a newly formed C corporation taxable under Article 9-A of the Tax Law, was incorporated in Delaware during 2007. During 2007, OpcO purchased manufacturing assets located in New York State from an unrelated third party C corporation and began its new business operations. None of the shareholders of the unrelated third party directly or indirectly own stock in OpcO. There are no business entities currently or previously subject to tax under Articles 9, 9-A, 22, 23, 32 or 33 of the Tax Law that are substantially similar in operation and ownership to OpcO.

Scenario 1

- The stock of OpcO is 100% owned by P Corporation, a newly formed C corporation holding company that was incorporated in Delaware during 2007. P Corporation’s only asset is the stock of OpcO. P Corporation has no employees, employs no capital, does not own or lease property, does not maintain an office, and is not doing business in New York. P Corporation is not registered to do business in New York and has never filed a New York State corporate income tax return.
- Approximately 40% of the stock of P Corporation is owned by Holdco, a non-US holding company which is a disregarded entity for United States federal and New York corporate income tax purposes. Holdco has no employees in New York, employs no capital in New York, does not own or lease property, does not maintain an office, and does not do business in New York. Holdco is not registered to do business in New York and has never filed a New York State corporate income tax return.

- The stock of Holdco is 100% owned by Global Parent, a non-U.S. company, indirectly through other wholly-owned disregarded entities. Global Parent has no employees in New York, employs no capital in New York, does not own or lease property, does not maintain an office, and is not doing business in New York. Global Parent is not registered to do business in New York and has never filed a New York State corporate income tax return.
- The remaining approximately 60% of the stock of P corporation is owned by LP-2, a Delaware limited partnership. LP-2 has no employees in New York, employs no capital in New York, does not own or lease property, does not maintain an office and is not doing business in New York. LP-2 is not registered to do business in New York and has never filed a New York State partnership return. Control of the voting rights of LP-2's 60% stock ownership in P Corporation resides solely with LP, a Delaware limited partnership that is the general partner of LP-2. The limited partners of LP-2 have no voting rights over LP-2's 60% stock ownership in P Corporation.
- LP, a Delaware limited partnership, owns approximately 60% of LP-2 and is the only general partner of LP-2. LP has no employees in New York, employs no capital in New York, does not own or lease property, does not maintain an office and is not doing business in New York. LP is not registered to do business in New York and has never filed a New York State partnership return. As the general partner, LP is responsible for decisions on investments, dispositions, capital calls, etc., of LP-2. The general partner of LP is GP, a Delaware C corporation. GP owns 60% of LP. The limited partner of LP has no involvement in any decisions required to be made by LP. LP-2 has entered into a management agreement with Manager to handle investment and other decisions and to undertake day-to-day operations, if any, of LP-2. Manager, a separate legal entity indirectly owned by Global Parent, is engaged in business in New York and is a New York State taxpayer. However, Manager is not in the chain of ownership of P Corporation, LP-2, LP or GP.
- GP, a Delaware C Corporation and the general partner of LP, employs no capital in New York, does not own or lease property in New York, does not maintain an office in New York, does not do business in New York and is not filing a New York State corporate income tax return. All of GP's stock is owned either by Global Parent or a subsidiary of Global Parent. The subsidiary of Global Parent has no employees in New York, employs no capital in New York, does not maintain an office in New York, does not own or lease property in New York, does not do business in New York and has never filed a New York State corporate income tax return. In 2003, the year of its formation, GP filed a New York State corporate income tax return. Global Parent determined that this was done in error and GP has not filed a New York State corporate income tax return in any

subsequent year. GP has three directors. One director resides in Connecticut, a director resides in New York, and a director resides in Ohio. The three directors are also listed as the only officers of GP (President and two Vice-Presidents with the New York state resident being one of the Vice-Presidents). These directors/officers are all employees of other Global Parent affiliates. The directors/officers are compensated by the other Global Parent affiliates and receive no compensation from GP. No directors' meetings have been held in New York. GP has no other employees. GP's books and records are maintained in Ohio by the Ohio resident director. GP's duties are to manage LP. The New York State resident director participates in any decision that may have to be made by GP. The duties of GP and the activities of the New York State resident director on behalf of GP are limited based upon LP's delegation of virtually all of its decision-making responsibilities to Manager (see discussion concerning LP above).

None of the related corporations in the chain of ownership described above are entities that, if taxable in New York, would be subject to tax under Article 9, Article 32, or Article 33 of the Tax Law. Neither P Corporation nor GP Corporation is a corporate partner in any partnership that is doing business, employing capital, owning or leasing property, or maintaining an office in New York. It is assumed for purposes of this Advisory Opinion that Global Parent is not owned or controlled directly or indirectly by a New York State taxpayer.

Scenario 2

For Scenario 2, the facts and ownership structure are exactly the same as described above for Scenario 1 except for the following difference:

- None of GP's directors and officers resides in New York State. Any decisions or duties required by the directors/officers of GP are performed outside of New York State.

Applicable law and regulations

Section 208.2 of the Tax Law provides:

The term "taxpayer" means any corporation subject to tax under this article;

Section 209 of the Tax Law provides, in part:

1. For the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state, for all or any part of each of its fiscal or calendar years, every domestic or foreign corporation, except corporations specified in subdivision four of this section, shall annually pay a franchise tax,...

Section 210.12 of the Tax Law provides, in part:

Investment tax credit (ITC). (a) A taxpayer shall be allowed a credit, to be computed as hereinafter provided, against the tax imposed by this article. The amount of the credit shall be the per cent provided for hereinbelow of the investment credit base. The investment credit base is 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, described in paragraph (b) of this subdivision, less the amount of the nonqualified nonrecourse financing with respect to such property to the extent such financing would be excludible from the credit base pursuant to section 46(c)(8) of the internal revenue code (treating such property as section thirty-eight property irrespective of whether or not it in fact constitutes section thirty-eight property). If, at the close of a taxable year following the taxable year in which such property was placed in service, there is a net decrease in the amount of nonqualified nonrecourse financing with respect to such property, such net decrease shall be treated as if it were the cost or other basis of property described in paragraph (b) of this subdivision acquired, constructed, reconstructed or erected during the year of the decrease in the amount of nonqualified nonrecourse financing. In the case of a combined report the term investment credit base shall mean the sum of the investment credit base of each corporation included on such report. The percentage to be used to compute the credit allowed pursuant to this subdivision shall be that percentage appearing in column two which is opposite the appropriate period in column one in which the tangible personal property was acquired, constructed, reconstructed or erected, as the case may be....

(b)(i) A credit shall be allowed under this subdivision with respect to tangible personal property and other tangible property, including buildings and structural components of buildings, which are: depreciable pursuant to section one hundred sixty-seven of the internal revenue code, have a useful life of four years or more, are acquired by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code, have a situs in this state and are (A) principally used by the taxpayer in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing,...

* * *

(e) Except as otherwise provided in this paragraph, 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 allowable under this subdivision for any taxable year reduces the tax to such amount, any amount of credit ... allowed for a taxable year commencing on or after January first nineteen hundred eighty-seven and not

deductible in such year may be carried over to the fifteen taxable years next following such taxable year and may be deducted from the taxpayer's tax for such year or years. In lieu of such carryover, any such taxpayer which qualifies as a new business under paragraph (j) of this subdivision may elect to treat 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.

* * *

(j) 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 eighty-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

Tax Law section 210.12 allows a business corporation to claim an investment tax credit (ITC) against its corporate franchise tax for investments in qualified tangible property and real property. The ITC is a percentage of the cost or other federal income tax basis of such qualifying property less the amount of certain non-qualified nonrecourse financing of the property. Property qualifies for the ITC if it (1) is tangible property, including buildings and their structural components; (2) is depreciable under IRC section 167; (3) has a useful life of four or more years; (4) is acquired by the taxpayer by purchase as defined in IRC section 179(d); (5)

has a situs in New York; and (6) is principally used by the taxpayer in the production of goods. It is assumed for purposes of this Advisory Opinion that the manufacturing assets purchased by Opco will meet these statutory requirements to qualify for the ITC.

The ITC may not reduce a taxpayer's tax liability to less than the greater of its tax computed on the minimum taxable income base or its fixed dollar minimum tax. However, any ITC that cannot be used to reduce a taxpayer's current year tax liability may be carried over for the next 15 taxable years and deducted from the tax due in those taxable years.

In lieu of a credit carryover, a corporation which qualifies as a *new business*, as defined under section 210.12(j) of the Tax Law, may elect to treat an ITC carryover as an overpayment that may be refunded or credited to the tax due in the following year. A *new business* is defined as any corporation, except (1) a corporation which over 50% of the voting stock is owned or controlled, either directly or indirectly, by a taxpayer subject to tax under Article 9-A, 32, 33, or section 183, 184, or 185 of Article 9; (2) a corporation that is substantially similar in operation and ownership to a business entity (or entities) taxable, or previously taxable, under Article 9-A, 22, 32, 33, or section 183, 184, or 185 of Article 9; or Article 23, or would have been subject to tax under Article 23 (as such article was in effect on January 1, 1980); or (3) a corporation that has been subject to tax under Article 9-A for more than five taxable years (excluding short taxable years).

Opco is a C corporation that is not substantially similar in operation and ownership to any other business entity currently or previously subject to tax in New York. Opco was formed in 2007 and has not been subject to tax under Article 9-A for more than five taxable years, excluding short years. Therefore, Opco will meet the requirements for a refund of the ITC under sections 210.12(j)(2) and (3) of the Tax Law. Thus, the only issue that must be considered to determine if Opco is a new business eligible for a refund of the ITC is whether more than 50% of the number of shares of stock entitling the stockholders to vote for the election of directors or trustees is owned or controlled, directly or indirectly, by a taxpayer subject to tax under Article 9-A, 32, or 33 of the Tax Law; or section 183, 184, or 185 of Article 9 of the Tax Law. None of the business entities in Opco's chain of ownership are entities that, if taxable, would be subject to tax under Article 9, Article 32, or Article 33 of the Tax Law. Therefore, the determination of whether Opco will qualify for a refund of the investment tax credit will be based on whether any of those entities in the chain of ownership are subject to tax under Article 9-A.

Opco is directly owned by P Corporation, a holding company formed in Delaware during 2007 whose only asset is the stock of Opco. P Corporation owns 100% of Opco's stock. P Corporation has no employees, employs no capital in New York, does not maintain an office in New York, does not own or lease property in New York and is not doing business in New York. Also, P Corporation is not a corporate partner of a partnership that is conducting any of those activities in New York. Accordingly, P Corporation is not subject to tax under Article 9-A. Therefore, 100% of Opco's voting stock is directly owned by a taxpayer that is not subject to tax under Article 9-A of the Tax Law. Since Opco's stock is not directly owned by a taxpayer

subject to tax under Article 9-A, the determination of whether the ITC is refundable under section 210.12(j)(1) of the Tax Law is dependent on whether more than 50% of Opco's voting stock is owned or controlled indirectly by a corporation subject to tax under Article 9-A, through P Corporation.

P Corporation is 40% owned by Holdco, which is a non-US holding company, wholly owned by Global Parent. Holdco is a disregarded entity for federal and state tax purposes, and therefore files as a division of Global Parent. These entities are not subject to tax in New York. Therefore, the 40% of Opco's stock that is owned indirectly by Holdco and Global Parent through P Corporation is owned and controlled by an entity not subject to tax in New York.

The remaining 60% of P Corporation's stock is owned by LP-2, a Delaware limited partnership. LP-2's general partner is LP, a Delaware limited partnership. LP has control over the voting rights of LP-2's entire 60% ownership of P Corporation's stock. None of LP-2's limited partners have control over any of P Corporation's stock voting rights. Therefore, over 50% of Opco's stock voting rights are indirectly controlled by LP, a Delaware limited partnership. Since partnerships are not subject to tax under Article 9, 9-A, 32, or 33 of the Tax Law, LP-2's and LP's indirect ownership and control of more than 50% of the voting stock of Opco does not affect the determination of whether Opco is eligible for a refund of the ITC. The refundability of the credit will be dependent upon whether LP is owned or controlled, directly or indirectly, by a taxpayer subject to tax under Article 9-A of the Tax Law.

GP, a Delaware C Corporation, is the general partner of LP, who indirectly controls 60% of the voting stock of Opco through partnerships LP and LP-2, and P corporation. GP has no employees, does not employ capital in New York, does not maintain an office in New York, does not own or lease property in New York and is not doing business in New York. GP is not a corporate partner in a partnership that is doing business, employing capital, owning or leasing property or maintaining an office in New York. GP's only connection to New York is the appointment of a New York resident to GP's board of directors and as a Vice-President of GP. The New York resident director is not an employee of GP.

Section 208.2 of the Tax Law defines a *taxpayer* as any corporation subject to tax under Article 9-A. A foreign corporation is subject to tax in New York for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property, or maintaining an office in this State for all or any part of each of its fiscal or calendar years. The appointment of a New York resident individual as a corporate officer or director, if that individual is not an employee of the corporation, is not a factor in determining whether a corporation is subject to tax in New York, if the corporation is not otherwise doing business, employing capital, or owning or leasing property, or maintaining an office in New York. Based on the facts in the Petition, it appears that GP does not and has not conducted any of the activities that would subject it to tax under Article 9-A and is not a taxpayer within the meaning of section 208.2 of the Tax Law, notwithstanding its filing of a New York State corporation tax return in

2003. Assuming that GP is not a taxpayer subject to tax under Article 9-A, over 50% of Opco's stock is not owned or controlled indirectly by a taxpayer subject to tax under Article 9-A.

GP's stock is wholly owned or controlled, directly or indirectly, by either Global Parent, or a subsidiary of Global Parent, neither of which is subject to tax under Article 9-A of the Tax Law.

Therefore, it appears that over 50% percent of the number of shares of Opco's stock entitling the holders thereof to vote for the election of directors or trustees is not owned or controlled, either directly or indirectly, by a taxpayer subject to tax under Article 9-A, 32, or 33 of the Tax Law, or section 183, 184, or 185 of Article 9. Accordingly, Opco qualifies as a new business under section 210.12(j) of the Tax Law and is eligible for a refund of the investment tax credit.

Scenario 2

Since the residency of GP's directors and officers is not a factor in determining whether GP is subject to tax in New York under Article 9-A of the Tax Law, the analysis and determination of whether Opco is eligible for a refund of the investment tax credit is the same as that set forth in Scenario 1.

DATED: July 23, 2008

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Taxpayer Guidance Division

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.