New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-10(12)C
Corporation Tax
October 20, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C100527B

[redacted] (**"**Petitioner"), a single member limited liability company (SMLLC) treated as a disregarded entity (DE), asks several questions pertaining to its potential eligibility to claim the qualified empire zone enterprise (QEZE) real property tax credit (RPTC). Petitioner will file a return with its single member ("Subsidiary") and Petitioner's to-be-formed SMLLC DE ("NewCo").

Facts

Petitioner is a single-member limited liability company (SMLLC) owned by a wholly-owned subsidiary (Subsidiary) of a large publicly-traded Delaware company (Parent) doing business in multiple states, including New York. For tax purposes, Petitioner is treated as a disregarded entity (DE). Petitioner and Subsidiary are both holding companies. Subsidiary files on a calendar year basis in New York under Article 9-A as part of a combined report that includes Parent. Petitioner is a Delaware company formed on January 27, 2010 and certified as an empire zone (EZ) business pursuant to Article 18-B of the General Municipal Law, effective March 30, 2010. In the fall of 2010 or the spring of 2011 after the Empire Zones Program expires, Petitioner will form an SMLLC DE (NewCo) to purchase and own real property, oversee construction of improvements on the property, and, when the improvements are completed, lease space on the property to other entities owned by Parent. NewCo is expected to have at least one full-time employee in taxable year 2011 and for the subsequent nine taxable years. Neither Petitioner nor Parent has ever had any employees or owned or leased any real property in New York.

Analysis

I. Petitioner asks whether Subsidiary, Petitioner, and NewCo will be considered one taxpayer for purposes of Article 9-A of the Tax Law and the QEZE RPTC. We conclude that Subsidiary, Petitioner, and NewCo ("the Aggregated Group") will be considered one taxpayer that is a member of a combined report for purposes of calculating the Article 9-A franchise tax liability including the QEZE RPTC.

In order to claim the QEZE RPTC, a taxpayer must be certified as an EZ business pursuant to Article 18-B of the General Municipal Law and meet an employment test.[1] Petitioner was certified in March, 2010. An SMLLC/DE and its single member will be regarded as one taxpayer for purposes of the Article 9-A franchise tax. Therefore, Petitioner, Subsidiary, and NewCo will be considered one taxpayer for purposes of the QEZE RPTC, and Petitioner's certification will be imputed to that taxpayer. The employment test will be calculated using the employment numbers of all three entities, none of which to date has ever hired an employee. The effective date of the certification is the earliest effective certification date in that group.

II. Petitioner next asks whether the Aggregated Group (collectively, the "Taxpayer") will meet the employment test under Section 14(b) of the Tax Law, including whether the Taxpayer constitutes a new business under Section 14(j) of the Tax Law. We conclude that Taxpayer will fail the employment

[1] *See* Tax Law §14(a).

test unless it qualifies as a new business, and, that based on the information provided with the petition, Petitioner will pass the new business test.

In the case of a business enterprise that is first certified on or after April 1, 2005, the employment test will be met with respect to a taxable year if the business enterprise's employment number in the state and the EZs for that taxable year exceeds its employment number in the state and the EZs, respectively, for the base period.[2] As stated above, the employment test will be calculated using the employment numbers from Petitioner, Subsidiary, and NewCo. If an entity has a base period of zero years or zero employment in its base period, and the entity 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 Section 14(j) of the Tax Law.[3] For business enterprises first certified after April 1, 2005, the base period means the four taxable years immediately proceeding the taxable year in which the business enterprise was first certified.[4] The Taxpayer was first certified effective March 30, 2010 and had no employees in any of the preceding four taxable years. Thus, the Taxpayer will have a zero base period and zero employees in the base period, and it will be subject to the new business test in §14(j) of the Tax Law in any taxable year that the Taxpayer has an employee in the zone.

A new business includes any business enterprise unless the business enterprise is substantially similar in operation and in ownership to a business entity taxable or previously taxable under certain sections of the Tax Law.[5] The Taxpayer will be substantially similar in ownership to another business entity taxable or previously taxable under certain sections of the Tax Law, because the Taxpayer at all times will be wholly-owned by Parent, and the Parent owns directly or indirectly other New York taxpayers. As to whether the Taxpayer will be substantially similar in operation to a business entity taxable or previously taxable under certain sections of the Tax Law, based on the facts provided in conjunction with the petition, it appears that the Taxpayer will not be substantially similar in operation to another business entity taxable or previously taxable under certain sections of the Tax Law.

III. Petitioner asks whether the Taxpayer must calculate its QEZE RPTC credit in accordance with Section 15(f-1) of the Tax Law with respect to NewCo's building project. We conclude that the amount calculated pursuant to Section 15(f-1) must be measured against the amount calculated pursuant to Section 15(b)(2) of the Tax Law and the eligible real property taxes paid in order to determine the amount of allowable credit.

For a business enterprise first certified on or after April 1, 2005, the amount of the QEZE RPTC is the greater of the amount determined pursuant to Section 15(b)(2)[6] of the Tax Law, relating to wages and benefits paid to net new employees, or the capital investment amount determined under Section 15(f-1), not to exceed the amount of the Taxpayer's eligible real property taxes for the taxable year. As noted above, the QEZE RPTC employment test will be calculated by aggregating the number of employees for Petitioner, Subsidiary, and NewCo, as will the employment numbers for the calculation of the net new employees. For calculation of the capital investment amount, each entity in the aggregated group will first calculate its own capital investment limitation under Section 15(f-1) of the Tax Law, and then those separate amounts will be aggregated to arrive at the capital investment limitation. This limitation will

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[2] Tax Law §14(b)(4).
[3] *Id.*
[4] Tax Law §14(c)(2).
[5] Tax Law §14(j)(2).
[6] The product of a percentage of total wages, health benefits, and retirement benefits paid to or on behalf of net new employees during the taxable year, not to exceed $10,000 per employee.

then be measured against the employees' wages and benefits factor computed under Section 15(b)(2) and the eligible real property taxes paid to determine the credit allowable amount.

DATED: October 20, 2010

/S/
DANIEL SMIRLOCK
Deputy Commissioner and Counsel

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