

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

TSB-A-12(6)C
Corporation Tax
October 15, 2012

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C120213A

The Department of Taxation and Finance (DTF) received a Petition for Advisory Opinion from [REDACTED]. The Petitioner asks whether it will maintain its certification under Article 18-B of the General Municipal Law (GML) until April 1, 2014 and retain its eligibility for Empire Zone (EZ) tax benefits, if it is converted from a corporation to a single member limited liability company (SMLLC), treated as a disregarded entity. The Petitioner also asks whether the EZ investment tax credit (EZ ITC) and EZ employment incentive credit (EZ EIC) earned by Petitioner prior to its conversion will be able to be claimed by its single member after the conversion and have no limit as to the carry-forward period.

We conclude that Petitioner will retain its eligibility for EZ tax benefits after its conversion for the duration of its benefit period, established by its certification date prior to its conversion, provided that Petitioner meets the requirements in the Tax Law and obtains a certificate of eligibility and an EZ Retention Certificate (EZRC) from the Department of Economic Development (DED). We also conclude that Petitioner's single member may claim the carry-over EZ ITC and EZ EIC credits earned by Petitioner prior to its conversion without limit on the carry-forward period, provided that the Petitioner has an EZRC.

Facts

Petitioner was formed as a Delaware corporation in 1993 and became certified in 2000 under Article 18-B of the GML, effective December 28, 1999¹ and received an EZRC for the 2008 tax year. Prior to July 1, 2011, Petitioner was an indirect subsidiary of Parent, a New York Article 9-A taxpayer. On July 1, 2011, Petitioner was converted from a corporation into a SMLLC, treated as a disregarded entity, as were two other subsidiaries intervening between Petitioner and its Parent. There was no change in the ultimate ownership of Petitioner after the conversion, because Parent continued to be the ultimate parent company for federal tax consolidation purposes. Petitioner's conversion was treated as a transfer of assets by Petitioner under IRC Sections 332, 334(b)(1) and 337 with the acquiring SMLLC succeeding to the tax attributes under the non-recognition provisions of IRC Section 381(c). The tax consequences of income, losses, capital gains and capital losses of Petitioner and the two other indirect disregarded entities after the reorganization will continue to be reported on Parent's federal consolidated return. Additionally, although Petitioner became treated as a

¹ In 2006, there was a subsequent Certificate of Eligibility, issued to Petitioner for the same address and also effective on 12/28/99, which appears to make minor editorial corrections.

disregarded entity, it retained its federal employer identification number under which it continues to file employment tax returns to the Internal Revenue Service and to states where it maintains employment.

Analysis

Petitioner first asks whether it will maintain its certification under Article 18-B of the GML until April 1, 2014 and retain its eligibility for Empire Zone tax benefits. The Commissioner of DED has the authority to certify a business enterprise.² If Petitioner continues to be certified after its conversion and presents a certificate of eligibility and an EZRC to the Department of Taxation and Finance (DTF) along with its tax returns, DTF will accept Petitioner's certificate of eligibility as evidence that Petitioner is certified as an EZ business. A business enterprise certified in 2000 would have a benefit period of the first 15 taxable years, beginning on January 1, 2001,³ and it would be eligible to claim EZ tax benefits in each of those years, provided that the business enterprise meets the requirements provided in the Tax Law.

Petitioner further asks whether the EZ ITC and EZ EIC carry-over credits generated by Petitioner prior to the conversion will carry-over to Parent after the conversion and have no limit as to the carry-forward period. The amount of any credit allowed to a taxpayer under the EZ ITC that is not deductible in a taxable year may be carried over and deducted from the taxpayer's tax for subsequent taxable years.⁴ No limitation is provided by the law, provided that an EZRC has been issued to the taxpayer.⁵ In a corporate reorganization, the carry-over EZ ITC credits potentially may be claimed by an acquiring company or a successor to the taxpayer earning the credits. For purposes of the EZ ITC, a disposition of property on which an EZ ITC credit has been claimed generally does not occur, and no add back is required where property is transferred from a corporation as part of a transaction to which IRC Section 381(a) applies, e.g., a complete liquidation of a subsidiary under IRC Section 332 or a reorganization under certain sections of IRC Section 361, provided that the property continues in qualified use and is acquired by a certified corporation.⁶ A carry-over EZ ITC attributable to such property may be claimed by the acquiring or surviving corporation.⁷ The conversion of Petitioner fits this pattern. Petitioner's conversion from a corporate subsidiary to a disregarded SMLLC was accomplished using IRC Sections 332, 334(b)(1), and 337. Petitioner's direct owner following the conversion succeeded to the tax attributes of Petitioner at the time of the conversion under IRC Section 381(a) and (c).⁸ After the conversion, Petitioner's certification will be deemed to apply to its direct owner and flow up to Parent,

² Section 959 of the GML.

³ Section 14(a)(1)(A) of the Tax Law.

⁴ Tax Law Section 210.12-B(d).

⁵ Tax Law Section 210-12-B(d-1).

⁶ 20 NYCRR Section 5-10.8(g).

⁷ Id.

⁸ IRC Section 381(c), referenced in the facts supplied by Petitioner, enumerates tax items that are subject to non-recognition by IRC Section 381(a).

