

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

TSB-A-04(3)I  
Income Tax  
May 25, 2004

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. 1030806A

On August 6, 2003, a Petition for Advisory Opinion was received from Pearl St. Brewing Co. LLC, 72 Pearl Street, Buffalo, New York 14202.

The issue raised by Petitioner, Pearl St. Brewing Co. LLC, is whether wages paid by Petitioner for full-time employment in an area designated as a zone equivalent area (ZEA) are considered in determining whether Petitioner's members are eligible for an empire zone wage tax credit under section 606(k) of the Tax Law for tax years 2003 and 2004 for wages paid by Petitioner for full-time employment in an area designated as an empire zone (EZ).

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

Petitioner is treated as a partnership for federal income tax purposes. It began doing business at its downtown Buffalo, New York location in 1997. On December 22, 1997, Petitioner was certified under Article 18-B of the General Municipal Law as a business enterprise eligible to receive ZEA program benefits. For tax years 1998 and 1999, Petitioner met the requirements of the EZ wage tax credit and its members claimed the credit under section 606(k) of the Tax Law for ZEA wages paid.

In 2000, Petitioner was informed that its business was located in an economic development zone (EDZ) (later renamed EZ). Petitioner filed and received its certification under Article 18-B of the General Municipal Law on June 2, 2000, as a business enterprise eligible to receive EZ program benefits. For tax years 2000, 2001, and 2002, Petitioner met the requirements of the EZ wage tax credit and its members claimed the credit under section 606(k) of the Tax Law for EZ wages paid.

**Applicable law**

Section 606(k) of the Tax Law provides for an EZ wage tax credit as follows:

(1) 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 18-B of the general municipal law. The amount of such credit shall be as prescribed in paragraph four of this subsection.

(2) For the purposes of this subsection, the following terms shall have the following meanings: (A) "Empire zone wages" means wages paid by the taxpayer for full-time employment during the taxable year, in an area designated or previously designated as an

empire zone or zone equivalent area pursuant to article eighteen-B of the general municipal law, where such employment is in a job created in the area (i) during the period of its designation as an empire zone, (ii) within four years of the expiration of such designation, or (iii) during the ten year period immediately following the date of designation as a zone equivalent area, provided, however, that if the taxpayer's certification under article 18-B of the general municipal law is revoked with respect to an empire zone or zone equivalent area, any wages paid by the taxpayer, on or after the effective date of such decertification, for employment in such zone shall not constitute empire zone wages.

(B) "Targeted employee" means a New York resident who receives empire zone wages and who is (i) an eligible individual under the provisions of the targeted jobs tax credit (section fifty-one of the internal revenue code), (ii) eligible for benefits under the provisions of the job training partnership act ... (iii) a recipient of public assistance benefits or (iv) an individual whose income is below the most recently established poverty rate promulgated by the United States department of commerce, or a member of a family whose family income is below the most recently established poverty rate promulgated by the appropriate federal agency.

\* \* \*

(3) The credit provided for herein shall be allowed only where the average number of individuals employed full-time by the taxpayer in (i) the state and (ii) the empire zone or area previously constituting such zone or zone equivalent area, during the taxable year exceeds the average number of such individuals employed full-time by the taxpayer in (i) the state and (ii) such zone or area subsequently or previously constituting such zone or such zone equivalent area, respectively, during the four years immediately preceding the first taxable year in which the credit is claimed with respect to such zone or area. Where the taxpayer provided full-time employment within (i) the state or (ii) such zone or area during only a portion of such four-year period, then for purposes of this paragraph the term "four years" shall be deemed to refer instead to such portion, if any.

The credit shall be allowed only with respect to the first taxable year during which payments of empire zone wages are made and the conditions set forth in this paragraph are satisfied, and with respect to each of the four taxable years next following (but only, with respect to each of such years, if such conditions are satisfied), in accordance with paragraph four of this subsection. Subsequent certifications of the taxpayer pursuant to article eighteen-B of the general municipal law, at the same or a different location in the same empire zone or zone equivalent area or at a location in a different empire zone or zone equivalent area, shall not extend the five taxable year time limitation on the allowance of the credit set forth in the preceding sentence. Provided, further, however, that no credit shall be allowed with respect to any taxable year beginning more than four years following the

taxable year in which designation as an empire zone expired or more than ten years after the designation as a zone equivalent area.

(4) The amount of the credit shall equal the sum of

(i) the product of three thousand dollars and the average number of individuals employed full-time by the taxpayer, computed pursuant to the provisions of subparagraph (C) of paragraph two of this subsection, who

(I) received empire zone wages for more than half of the taxable year,

(II) received with respect to more than half of the period of employment by the taxpayer during the taxable year, an hourly wage which was at least one hundred thirty-five percent of the minimum wage specified in section six hundred fifty-two of the labor law, and

(III) are targeted employees; and

(ii) the product of fifteen hundred dollars and the average number of individuals (excluding individuals described in subparagraph (i) of this paragraph) employed full-time by the taxpayer, computed pursuant to the provisions of subparagraph (C) of paragraph two of this subsection, who received empire zone wages for more than half of the taxable year.

## **Opinion**

With respect to LLCs, the classification accorded an LLC for federal income tax purposes will be followed for purposes of Article 22 of the Tax Law. (See Technical Services Bureau Memorandum, New York Tax Status of Limited Liability Companies and Partnerships, October 25, 1994, TSB-M-94(6)I and (8)C.) An LLC that is treated as a partnership for federal income tax purposes is treated as a partnership for purposes of Article 22 of the Tax Law. A partnership is not a taxable entity for purposes of Article 22 of the Tax Law, but partners who are individuals, estates, or trusts reflect their distributive share of items of the partnership's income, gain, loss and deduction in their New York State tax returns.

In *Sutherland Asbill & Brennan*, Adv Op Comm T&F, January 9, 2001, TSB-A-01(1)C, it was held that where an LLC that is treated as a partnership is certified pursuant to Article 18-B of the General Municipal Law, purchases tangible property that is principally used by the LLC and the LLC meets the employment increase requirements under section 210.12-B of the Tax Law for qualifying for the EZ investment tax credit, a corporate member of the LLC is allowed an EZ investment tax credit pursuant to such section 210.12-B of the Tax Law, for its allocable share of the cost or other basis of such qualifying tangible property.

TSB-A-04(3)I  
Income Tax  
May 25, 2004

Likewise, for purposes of the EZ wage tax credit under section 606(k) of the Tax Law, where an LLC that is treated as a partnership is certified pursuant to Article 18-B of the General Municipal Law and the LLC meets the requirements of section 606(k) for qualifying for the EZ wage tax credit, an individual member of the LLC is allowed an EZ wage tax credit under section 606(k) of the Tax Law based on the member's allocable share of the credit computed by the LLC.

Section 606(k) of the Tax Law provides for an empire zone wage tax credit where a taxpayer has been certified pursuant to Article 18-B of the General Municipal Law and meets certain increased employment levels in New York State.

If eligible, the amount of the credit, pursuant to section 606(k)(4) of the Tax Law, is the sum of:

(1) \$3,000 multiplied by the average number of full-time employees who are targeted employees, received EZ wages for more than one-half of the taxable year, and received an hourly wage that was at least 135% of the minimum wage specified in section 652 of the Labor Law for more than half of their period of employment by the taxpayer during the taxable year; and

(2) \$1,500 multiplied by the average number of full-time employees of the taxpayer who received EZ wages for more than one-half of the taxable year, other than an individual described in the preceding paragraph.

Pursuant to section 606(k)(3) of the Tax Law, an EZ wage tax credit is allowed for up to five consecutive taxable years. The five consecutive taxable years (including taxable years of less than 12 months) begin with the first taxable year that EZ wages are paid and the level of employment requirement is met. The EZ wage tax credit will continue to be allowed if EZ wages continue to be paid and the level of employment requirement continues to be met in each of the next four following taxable years. EZ wages are defined pursuant to section 606(k)(2)(A) and include wages paid by a taxpayer during the taxable year in an area designated or previously designated as an EZ or ZEA, provided that the employment was created in the EZ or ZEA during certain time periods as required by section 606(k)(2)(A). Subsequent certifications of the taxpayer pursuant to Article 18-B of the General Municipal Law at the same or a different location in the same EZ or ZEA or at a location in a different EZ or ZEA area shall not extend the five year time limitation on the allowance of the EZ wage tax credit.

In this case, Petitioner's first tax year that it qualified and its members claimed an EZ wage tax credit as a result of EZ wages paid was tax year 1998 based on wages paid in a ZEA. Petitioner's members also claimed an EZ wage tax credit in 1999 for EZ wages paid by Petitioner in a ZEA, and in 2000, 2001, and 2002 for EZ wages paid by Petitioner in an EZ. Therefore, the last tax year that Petitioner's members are eligible to receive an EZ wage tax credit is 2002.

TSB-A-04(3)I  
Income Tax  
May 25, 2004

Accordingly, Petitioner's members are not eligible for an EZ wage tax credit for the tax years 2003 and 2004.

DATED: May 25, 2004

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