New York State Department of Taxation and Finance
Office of Counsel

TSB-A-20(4)I
Income Tax
June 16, 2020

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance ("DTF") received a Petition for an Advisory Opinion from [redacted] ("Petitioner"). Petitioner requests guidance on issues involving the Brownfield Redevelopment Tax Credit under Tax Law § 21.

Petitioner asks whether the limitation or "cap" on the tangible property credit component will be thirty-five million dollars (or three times the sum of site preparation costs and groundwater remediation costs, whichever is less) or forty-five million dollars (or six times the sum of site preparation costs and groundwater remediation costs, whichever is less) given that the site will be developed and used for both manufacturing and non-manufacturing activities. We conclude that, based on the facts presented, the site would be used primarily for manufacturing activities and therefore the limitation on the tangible property credit component would be the lesser of forty-five million dollars or six times the sum of the costs included in the calculation of the site preparation credit component and the on-site groundwater remediation credit component.

Facts

Petitioner is the owner of property located at [redacted]. (the "site" or "property"). Petitioner is a "business incubator" under the START-UP NY program authorized by Economic Development Law Article 21.[1] It is anticipated that the property will enter the Brownfield Cleanup Program ("BCP") sometime in the future.[2]

An 80,000 square foot building is located on the site (the "building"). The building will be occupied by three separate businesses. [redacted], a software developer, will occupy 30,000 square feet of the building. [redacted], a manufacturer of ceramic tape media, and [redacted] will occupy the remaining 50,000 square feet of the building. In its Petition, Petitioner opines that [redacted] and [redacted] will be engaged in "manufacturing" activities whereas [redacted] software development will be a non-manufacturing activity. Petitioner asks what the cap or limitation on the BCP tangible property credit component will be given the anticipated mixed use of the building.

We assume for purposes of this opinion that the site will be accepted into the BCP, that a Certificate of Completion ("CoC") for the site will be issued to Petitioner and any other relevant

[1] This opinion does not engage in an analysis of what effect, if any, Petitioner's participation in the START-UP NY program will have on its eligibility for tax credits potentially available under the Brownfield Cleanup Program.
[2] Because the site is not currently in the BCP, the amendments to the BCP signed into law on April 13, 2015, L.2015, c.56, Part BB, apply to this opinion.

business entities and individuals, and that Petitioner and all other relevant business entities and individuals will comply with all applicable laws and regulations and will not be disqualified from receiving BCP-related tax credits. We also assume for purposes of this opinion that [redacted] and [redacted] will be engaged in manufacturing activities and that [redacted] will not be engaged in manufacturing activities.[3]

Analysis

The brownfield redevelopment tax credit is comprised of several tax credits codified primarily in Tax Law § 21. At issue here is the "tangible property credit component" of Tax Law § 21(a)(3). Specifically, the issue is whether the tangible property credit component limitation or "cap" will be: (1) thirty-five million dollars or three times the sum of the costs included in the calculation of the site preparation credit component and the on-site groundwater remediation credit component, whichever is less, or (2) forty-five million dollars or six times the sum of the costs included in the calculation of the site preparation credit component and the on-site groundwater remediation credit component, whichever is less.

Tax Law § 21(a)(3-a)(A) provides, in relevant part, as follows:

> Notwithstanding any other provision of law to the contrary, the tangible property credit component available for any qualified site pursuant to paragraph three of this subdivision shall not exceed thirty-five million dollars or three times the sum of the costs included in the calculation of the site preparation credit component and the on-site groundwater remediation credit component under paragraphs two and four, respectively, of this subdivision, and the costs that would have been included in the calculation of such components if not treated as an expense and deducted pursuant to section one hundred ninety-eight of the internal revenue code, whichever is less; provided, however, that: (1) in the case of a qualified site ***to be used primarily for manufacturing activities***, the tangible property credit component available for any qualified site pursuant to paragraph three of this subdivision shall not exceed forty-five million dollars or six times the sum of the costs included in the calculation of the site preparation credit component and the on-site groundwater remediation credit component under paragraphs two and four, respectively, of this subdivision, and the costs that would have been included in the calculation of such components if not treated as an expense and deducted pursuant to section one hundred ninety-eight of the internal revenue code, whichever is less….

[3]The Petition does not request an opinion as to whether the specific activities engaged in by [redacted], and [redacted] constitute manufacturing activities, and we express no opinion herein as to whether the proposed uses of the site do or do not constitute manufacturing activities.

Id. (emphasis added).

The question, therefore, is whether the site will "be used primarily for manufacturing activities." If it is, the tangible property credit component will be the lesser of forty-five million dollars or six times the site preparation and groundwater remediation costs. If the site is not used primarily for manufacturing activities, the tangible property credit component will be the lesser of thirty-five million dollars or three times the site preparation and groundwater remediation costs.

"Manufacturing activities" is a term defined, in relevant part, as "the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing." Tax Law § 21(a)(3-a)(B). The phrase "used primarily for manufacturing activities," however, is not defined in Tax Law § 21, nor is it defined in the regulations applicable to the BCP.

Where a statute does not define a term, it is appropriate to interpret that word in its ordinary, everyday sense. *Matter of American Food and Vending Corp*., Tax Appeals Tribunal, July 30, 2015, *citing Automatique, Inc. v. Bouchard*, 97 AD2d 183 (3d. Dept. 1983). Federal tax courts and Circuit Courts of Appeal have consistently interpreted the word "primarily" in its ordinary, everyday sense. *See e.g. New Jersey Council of Teaching Hospitals v. C.I.R.*, 149 T.C. No. 22 (2017) ("primarily" interpreted to mean "of first importance" or "principally"); *Ryther v. C.I.R.*, T.C. Memo 2016-56 (2016) ("We know that 'primarily' means 'principally' or 'of first importance.'"); *Heller Trust v. C.I.R.*, 382 F.2d 675 (9th Cir. 1967) ("…'primarily' means 'of first importance' or 'principally.'") *citing Malat v. Riddell*, 383 U.S. 569 (1966). *See also* Statutes, § 234 ("Dictionary definitions may be useful as guide posts in determining the sense with which a word was used in a statute, but they are not controlling.") "'Primarily' is defined as 'first of all' (Webster's Third New International Dictionary Unabridged, p 1800) and as 'in the first or most important place', 'of first importance', 'principally' or, where the context requires, it may mean 'essentially or fundamentally' (72 C.J.S. Primarily, p. 500). As no meaning other than the usual connotation of the word 'primarily' has been indicated by the Legislature, it should be construed in accordance with its ordinary import." *Automatique, Inc. v. Bouchard, supra* at 186-187.

Although not directly applicable to the BCP, it should be noted that certain Tax Department regulations, for the most part applicable to sales tax, define "primarily" as "50 percent or more." 20 NYCRR § 528.14(c). *See also* 20 NYCRR § 528.9(a)(4) ("[a] commercial vessel [is] primarily engaged in interstate or foreign commerce when 50 percent or more of the receipts from the vessel's activities are derived from interstate or foreign commerce."); 20 NYCRR § 49.1(e) ("[a] taxpayer is 'primarily engaged' in such activity if more than 50 percent of its receipts are derived from retail sales."; 20 NYCRR § 527.8(h)(4)("[t]he word primarily used in this paragraph shall mean 50 percent or more of gross receipts from all business operations during a reporting period are attributable to sales of 10 cents or less through vending machines.").

Applying the usual connotation of the word "primarily" to the facts presented in the Petition, and using other provisions or Tax Department regulations as guidance, we conclude that if 50,000 square feet of an 80,000 square foot building are used for manufacturing activities, the building would be used primarily for manufacturing activities. Therefore, the tangible property credit component limitation or cap for manufacturing sites (the lesser of $45 million and six times the sum of the costs included in the calculation of the site preparation credit component and the on-site groundwater remediation credit) would apply.

DATED: June 16, 2020

/S/
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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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.