

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-02(19)C
Corporation Tax
TSB-A-02(8)I
Income Tax
November 7, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z020328A

On March 28, 2002, a Petition for Advisory Opinion was received from Amper, Politziner & Mattia, PC, 6 East 43rd Street, 24th Floor, New York, New York 10017.

The issues raised by Petitioner, Amper, Politziner & Mattia, PC, regarding the applicability of the industrial or manufacturing business (“IMB”) tax credit under Articles 9-A and 22 of the Tax Law are:

1. Whether there is a “pass through” of the IMB credit to an otherwise eligible IMB when that IMB is a tenant and the utility taxes are collected from the IMB under the terms of its lease agreement with the landlord.
2. If the answer to Issue 1 is yes, and the landlord is the “customer” of the utility, then what is the mechanism by which a tenant can either directly obtain the “information required to claim the credit”, or alternatively, indirectly obtain the information through the landlord’s request of the utility.
3. How does the answer to Issue 2 change where the otherwise eligible IMB’s utility charges are (a) submetered, (b) allocated by the landlord and separately stated to the tenant, and (c) included in the rent (e.g., at a stated rate per square foot).

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

Transaction 1. Company A is an otherwise eligible IMB. Company A leases its manufacturing plant from a third party. The utility charges are billed by the utility to the third party owner of the plant. Under the terms of the plant lease, the owner of the plant passes through to Company A the utility charges in full. The utility charges are paid to the plant owner, who in turn pays the utility provider.

Transaction 2. Company A is an otherwise eligible IMB. Company A leases a floor in a loft building from a third party landlord and operates its manufacturing facility there. Other manufacturers lease other floors of the same building. The utility charges are billed by the utility to the owner of the building. Under the terms of the lease, the owner of the building submeters Company A for the utility charges for its manufacturing space as a separate charge in addition to the rent for the space. In addition, the landlord may also charge Company A for a portion of the utility services attributable to “common areas” of the building such as hallways and lobby.

Transaction 3. Same as Transaction 2, except that the landlord does not submeter the utility charges. Under the terms of the lease, the utility charges by the landlord are included in Company A's rent, i.e., the utility charges are not separately stated. Instead, an additional amount per square foot is agreed on, by the landlord and Company A, for utility service.

Applicable Law

Section 14-a of the Tax Law provides for an IMB credit for energy taxes as follows:

(a) Allowance of credit. A taxpayer which is an industrial or manufacturing business (IMB), or which is a sole proprietor of an IMB or a member of a partnership which is an IMB, and which is subject to tax under article nine-A or twenty-two of this chapter, shall be allowed a credit against such tax, pursuant to the provisions referenced in subdivision (d) of this section. Such credit shall be equal to the sum (or pro rata share of the sum, in the case of a member of a partnership) of the taxes imposed under sections one hundred eighty-six-a, one hundred eighty-six-c, one hundred eighty-nine and one hundred eighty-nine-a of this chapter which during the taxable year were either paid by, or passed through to, the IMB, on or after January first, two thousand, but only with regard to gas, electricity, steam, water or refrigeration, or gas, electric, steam, water or refrigeration services, consumed or used by the IMB in this state.

(b) Definitions. The term "industrial or manufacturing business" shall mean a business which during the taxable year is principally engaged in activities described in clause (A), (B), or (C), or any combination thereof, of subparagraph (i) of paragraph (b) of subdivision twelve of section two hundred ten of this chapter.

(c) Any person who collects from, or passes through to, the IMB, any tax as described in subdivision (a) of this section, shall provide the IMB with the information with respect to such tax passed through which may be required to enable the taxpayer to correctly compute the credit provided for in this section.

(d) Cross-references. For application of the credit provided for in this section, see the following provisions of this chapter:

- (1) Article 9-A: section 210.26-a.
- (2) Article 22: sections 606(i) and (t-1).

Section 210.26-a(a) of the Tax Law provides:

Allowance of credit. A taxpayer which is an industrial or manufacturing business (IMB) shall be allowed a credit for energy taxes, to be computed as provided in section fourteen-a of this chapter, against the tax imposed by this article.

Section 606(i) of the Tax Law provides for S corporation credits and provides, in part:

(1) For purposes of determining the application under this section of the credit provisions enumerated in the following table, a shareholder of a New York S corporation:

(A) shall be treated as the taxpayer with respect to his or her pro rata share of the corresponding credit base of such corporation, determined for the corporation's taxable year ending with or within the shareholder's taxable year and

(B) shall be treated as the owner of a new business with respect to such share if the corporation qualifies as a new business pursuant to paragraph (j) of subdivision twelve of section two hundred ten of this chapter.

With respect to the following credit under this section:

The corporation's credit base under section two hundred ten or section fourteen hundred fifty-six of this chapter is:

* * * * *

IMB credit for energy taxes under subsection (t-1)

Amount of credit under subdivision twenty-six-a of section two hundred ten

Section 606(t-1)(1) of the Tax Law provides for an IMB credit for energy taxes as follows:

Allowance of credit. A taxpayer which is a sole proprietor of an industrial or manufacturing business (IMB), or a member of a partnership which is an IMB, shall be allowed a credit for energy taxes, to be computed as provided in section fourteen-a of this chapter, against the tax imposed by this article.

Opinion

The IMB credit for energy taxes under section 14-a of the Tax Law provides a credit to an IMB against the tax imposed under Article 9-A or 22 of the Tax Law. The credit is equal to the sum (or pro rata share of the sum) of the taxes imposed under sections 186-a, 186-c, 189, and 189-a of

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the Tax Law which during the taxable year were either paid by, or passed through to, the IMB, but only with regard to gas, electricity, steam, water or refrigeration, or gas, electric, steam, water or refrigeration services, consumed or used by the IMB in New York State.

If an amount representing New York tax appears on a bill rendered by a utility to its customer, such amount may not solely represent the taxes imposed by sections 186-a and 186-c of the Tax Law or collected under sections 189 or 189-a of the Tax Law and qualifying for the credit. Therefore, pursuant to section 14-a(c) of the Tax Law, the IMB should obtain a separate statement from its utility that identifies the amount of tax liability under sections 186-a, 186-c, 189 and 189-a that qualifies for the credit.

Where an IMB is a lessee, it is possible that the taxes imposed on the lessor under sections 186-a, 186-c, 189 and 189-a of the Tax Law may be “passed through” to the IMB as such term is contemplated under section 14-a of the Tax Law. For such taxes to be considered to be “passed through” to the IMB, the amount charged to the lessee must be a definitive representation of the amount of gas, electricity, steam, water or refrigeration, or gas, electric, steam, water or refrigeration services actually consumed or used by the IMB and on which the tax was imposed as, for example, submetered charges. Where such definitive representation cannot be made, as, for example, when a lessor includes a charge for such energy or energy services based on a stated rate per square foot, the tax will not be considered to be “passed through” to the IMB under section 14-a of the Tax Law and no credit will be allowed pursuant to section 14-a of the Tax Law.

The determination of whether an amount charged is a definitive representation of the amount of gas, electricity, steam, water or refrigeration, or gas, electric, steam, water or refrigeration services on which the tax was imposed that was actually consumed or used by the IMB, and therefore qualifies for the credit under section 14-a of the Tax Law, is a question of fact not susceptible of determination within the context of an advisory opinion. An advisory opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to “a specified set of facts.” Tax Law, § 171, subd. twenty-fourth; 20 NYCRR 2376.1(a).

With respect to Issue 1, an IMB may be allowed to claim a credit equal to the sum (or pro rata share of the sum) of the liability for taxes imposed under sections 186-a, 186-c, 189 and 189-a of the Tax Law that are paid directly by the IMB to the utility, and that are paid by the IMB’s lessor and passed through to the IMB pursuant to a lease agreement. However, as discussed above, the liability for taxes imposed under sections 186-a, 186-c, 189 and 189-a of the Tax Law is considered to be “passed through” by the lessor to the IMB only where the amount charged by the lessor is a definitive representation of the amount of gas, electricity, steam, water or refrigeration, or gas, electric, steam, water or refrigeration services actually consumed or used by the IMB and on which the tax was imposed. Otherwise, such tax liability is not considered to be “passed through” to the IMB by the lessor.

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With respect to Issue 2, pursuant to section 14-a(c) of the Tax Law the IMB should obtain the information required to claim the credit allowed under section 14-a of the Tax Law from either the utility providing the energy or energy service where the IMB pays the tax liability directly to such provider, or from its lessor (who would obtain the required information from its utility) where the IMB pays the liability for taxes that are passed through by the lessor. Since the lessor is only considered to “pass through” the liability for taxes qualifying for the credit where the amount charged is a definitive representation of the amount of gas, electricity, steam, water or refrigeration, or gas, electric, steam, water or refrigeration services actually consumed or used by the IMB and on which the tax was imposed, the lessor should obtain from its utility the amount of the tax liability that the lessor passed through to the IMB. The lessor must give such information to the IMB to enable the IMB to claim the credit under section 14-a of the Tax Law.

With respect to Issue 3, the separate metering or submetering of the IMB by the lessor under Transaction 1 would be an acceptable method for purposes of ascertaining the amount of each tax liability that reflects the amount of gas, electricity, steam, water or refrigeration, or gas, electric, steam, water or refrigeration services actually consumed or used by the IMB and on which the tax was imposed. Accordingly, in this case, the IMB could claim a credit under section 14-a of the Tax Law. The amount of such tax liability could also be ascertained under Transaction 2 with respect to the actual space leased by the IMB, but not with respect to any “common areas” because the energy or energy services provided in those areas are not consumed or used directly by the IMB. In addition to submetering, another method may be used by the lessor to pass through utility charges if such method is a definitive representation of the amount of gas, electricity, steam, water or refrigeration, or gas, electric, steam, water or refrigeration services actually consumed or used by the IMB and on which the tax was imposed, and such amount is separately stated to the IMB. However, including the charge for such energy or energy service in the IMB’s rent payment through some type of arbitrary allocation of the total amount paid by the lessor, such as a stated rate per square foot as provided in Transaction 3, whether or not separately stated would not be an acceptable method of passing through utility charges for purposes of claiming a credit under section 14-a of the Tax Law. As discussed above, such charge is not a definitive representation of the amount of such energy or energy service actually consumed or used by the IMB.

DATED: November 7, 2002

/s/
Jonathan Pessen
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Technical Services Division

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