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

TSB-A-03(14)C
Corporation Tax
TSB-A-03(43)S
Sales Tax
December 24, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. Z030625A

On June 25, 2003, a Petition for Advisory Opinion was received from Mark H. Levin, CPA & Ken Meissner, Esq., H.J. Behrman & Company, LLP, Two Penn Plaza, Suite 1970, New York, New York 10121.

The issues raised by Petitioners, Mark H. Levin, CPA & Ken Meissner, Esq., are:

1. Whether MNT corporation (MNT), as described below, is treated as a newly formed corporation and business enterprise or is treated as a successor to P corporation (P), as described below, for purposes of qualifying for the empire zone (EZ) wage tax credit under section 210.19 of the Tax Law and being eligible to become a qualified empire zone enterprise (QEZE) under section 14 of the Tax Law.

2. Whether MNT, as described below, is required to obtain its own certification under Article 18-B of the General Municipal Law to be eligible to claim the EZ wage tax credit and to be eligible to become a QEZE for purposes of qualifying for the QEZE benefits under Articles 9-A, 28 and 29 of the Tax Law.

3. Whether MNT, as described below, is required to count P's employees, as described below, for purposes of the employment test for qualifying for the EZ wage tax credit under section 210.19 of the Tax Law.

4. Whether MNT, as described below, is required to count the average number of P's employees as its base period employees for purposes of the employment test for qualifying for QEZE benefits under section 14 of the Tax Law.

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

P, a domestic corporation, was comprised of four divisions:

1. Management 1, which managed certain residential rental real estate,

2. Management 2, which managed other residential rental real estate,

3. Maintenance, which provided maintenance and repair services for both Management 1 properties and various other properties, and

4. Administrative, which provided corporate and administrative services to the other three divisions.

Petitioner states that the Maintenance division was located in the Hunts Point, Bronx EZ, and that Hunts Point has been an EZ since 1994. Petitioner also states that the properties managed by Management 1 and Management 2 differed from each other in various ways, including geographical location, ownership structure, etc. For federal, New York State and New York City income and corporate franchise tax purposes, all the divisions were included in the tax returns of P.

On April 15, 2002, P was certified under Article 18-B of the General Municipal Law, effective December 31, 2001.

Effective January 1, 2003, P spun off two of its divisions, Management 2 and Maintenance, as separate corporations in a tax-deferred transaction under Internal Revenue Code (IRC) section 355. Maintenance was spun off as MNT, and Management 2 was spun off as MGT corporation (MGT). The shareholders of both MNT and MGT are identical to the shareholders of P. Both MNT and MGT have received their own federal employer identification numbers. Both Management 1 and Administrative remain divisions of P.

The offices of MNT are physically located in the Hunts Point, Bronx EZ. As of June 25, 2003, MNT employs substantially all of the persons who were employees of Maintenance. The employees of MNT provide maintenance and repair services to residential real estate both within and without the Hunts Point, Bronx EZ.

Petitioner states that if necessary, MNT would acquire its own certification under Article 18-B of the General Municipal Law in either the 2003 or 2004 taxable year.

Applicable law

Section 14 of the Tax Law contains the provisions for the EZ program and provides, in part:

> (a) Qualified empire zone enterprise. A business enterprise which is certified under article eighteen-B of the general municipal law prior to July first, two thousand five shall be a "qualified empire zone enterprise":
>
> > (1) for purposes of article nine-A ... of this chapter, for each of the taxable years within the "business tax benefit period," which period shall consist of (A) in the case of a business enterprise with a test date occurring on or before December thirty-first, two thousand one, the first fifteen taxable years beginning on or after January first, two thousand one, and (B) in the case of a business enterprise with a test date occurring on or after January first, two thousand two, the fifteen taxable

years next following the business enterprise's test year, but only with respect to each of such fifteen years for which the employment test is met, and

(2) for purposes of articles twenty-eight and twenty-nine of this chapter, during the "sales and use tax benefit period." Such period shall consist of one hundred twenty consecutive months beginning on the later of (A) March first, two thousand one, or (B) the first day of the month next following the date of issuance of a qualified empire zone enterprise certification by the commissioner under subdivision (h) of this section. Provided however, such period shall not include any month falling within a taxable year immediately preceded by a taxable year with respect to which the business enterprise did not meet the employment test.

(b) Employment test. (1) General. The employment test shall be met with respect to a taxable year if the business enterprise's employment number in empire zones for such taxable year equals or exceeds its employment number in such zones for the base period, and its employment number in the state outside of such zones for such taxable year equals or exceeds its employment number in the state outside of such zones for the base period. If the base period is zero years and the enterprise 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 subdivision (j) of this section.

* * *

(c) Base period. The term "base period" means the five taxable years immediately preceding the test year. If the business enterprise has fewer than five such years, then the term "base period" means such smaller set of years.

(d) Test year. The term "test year" means the last taxable year of the business enterprise ending before the test date. If a business enterprise does not have a taxable year that ends on or before the test date, such enterprise shall be deemed to have a test year which shall be either the last calendar year ending on or before its test date, or if the enterprise has as its taxable year a fiscal year, the last such fiscal year ending on or before its test date (whether or not the enterprise in fact had a taxable year during that period).

(e) Test date. The term "test date" means the later of July first, two thousand or the date prior to July first, two thousand five on which the business enterprise was first certified under article eighteen-B of the general municipal law.

(f) Taxable year. The term "taxable year" means the taxable year of the business enterprise under section one hundred eighty-three, one hundred eight-four, one hundred

eighty-five or former section one hundred eighty-six of article nine, or under article nine-A, twenty-two, thirty-two or thirty-three of this chapter....

(g) Employment number. The term "employment number" shall mean the average number of individuals, excluding general executive officers (in the case of a corporation), employed full-time by the enterprise for at least one-half of the taxable year. Such number shall be computed by determining the number of such individuals employed by the taxpayer on the thirty-first day of March, the thirtieth day of June, the thirtieth day of September and the thirty-first day of December during the applicable taxable year, adding together the number of such individuals determined to be so employed on each of such dates and dividing the sum so obtained by the number of such dates occurring within such applicable taxable year. Such number shall not include individuals employed within the immediately preceding sixty months by a related person to the QEZE, as such term "related person" is defined in subparagraph (c) of paragraph three of subsection (b) of section four hundred sixty-five of the internal revenue code.

(h) Sales and use tax. (1) In addition to the other requirements of this section, in order for the exemptions described in subdivision (z) of section eleven hundred fifteen of this chapter or any like exemptions from taxes imposed pursuant to the authority of article twenty-nine of this chapter to apply with respect to a qualified empire zone enterprise, such enterprise shall apply to the commissioner of taxation and finance for the issuance of a qualified empire zone enterprise certification, in the manner prescribed by such commissioner. If such commissioner grants such certification, such certification shall be subject to conditions specified by such commissioner. An enterprise to which the commissioner issues such certification may furnish a qualified empire zone enterprise exempt purchase certificate to a person required to collect sales and compensating use taxes imposed under or pursuant to the authority of article twenty-eight or twenty-nine of this chapter, which certificate shall be deemed to be an exemption certificate under subdivision (c) of section eleven hundred thirty-two of this chapter. Nothing herein or in any other law shall be construed to prohibit the disclosure, in such manner as the commissioner of taxation and finance deems appropriate, of the names and other appropriate identifying information of those persons holding qualified empire zone enterprise certifications pursuant to this subdivision, those persons whose qualified empire zone enterprise certifications have been revoked or those persons whose qualified empire zone enterprise certifications have expired.

(2) During the period that a business enterprise is eligible to apply, or is qualified, for exemptions from sales and compensating use taxes under this section, the commissioner of economic development shall, at the time such commissioner certifies or decertifies a business enterprise under article eighteen-B of the general municipal law, notify the commissioner of taxation and finance of such certification or decertification, which notification shall include the full legal name, address and federal employer identification

number of such enterprise. The commissioner of economic development shall, at the time of any such certification, also advise such enterprise of the requirements in paragraph one of this subdivision.

* * *

(j) New business. (1) A new business shall include any corporation, except a corporation which is substantially similar in operation and in ownership to a business entity (or entities) taxable, or previously taxable, under ... article nine-A ... of this chapter; ...

Section 210.19 of the Tax Law provides for an EZ wage tax credit as follows:

(a) 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 eighteen-B of the general municipal law. The amount of such credit shall be as prescribed by paragraph (d) hereof.

(b) For the purposes of this subdivision, the following terms shall have the following meanings: (1) "Empire zone wages" means wages paid by the taxpayer for full-time employment, other than to general executive officers, 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 eighteen-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.

(2) "Targeted employee" means a New York resident who receives empire zone wages and who is (A) an eligible individual under the provisions of the targeted jobs tax credit (section fifty-one of the internal revenue code), (B) eligible for benefits under the provisions of the job training partnership act ... (C) a recipient of public assistance benefits or (D) 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.

* * *

(c) The credit provided for herein shall be allowed only where the average number of individuals, excluding general executive officers, employed full-time by the taxpayer in (A) the state and (B) 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 (A) the state and (B) 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 (A) the state or (B) 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.

* * *

(d) The amount of the credit shall equal the sum of (1) the product of three thousand dollars and the average number of individuals (excluding general executive officers) employed full-time by the taxpayer, computed pursuant to the provisions of subparagraph three of paragraph (b) of this subdivision, who

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

(B) 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

(C) are targeted employees; and

(2) the product of fifteen hundred dollars and the average number of individuals (excluding general executive officers and individuals described in subparagraph one of this paragraph) employed full-time by the taxpayer, computed pursuant to the provisions of subparagraph three of paragraph (b) of this subdivision, who received empire zone wages for more than half of the taxable year.

* * *

(3) For purposes of calculating the amount of the credit, individuals employed within an empire zone or zone equivalent area within the immediately preceding sixty months by a related person, as such term is defined in subparagraph (c) of paragraph three of subsection (b) of section four hundred sixty-five of the internal revenue code, shall not be included in the average number of individuals described in subparagraph one or subparagraph two of this

paragraph, unless such related person was never allowed a credit under this subdivision with respect to such employees.

Section 210.12(j) of the Tax Law provides, in part:

> a new business shall include any corporation, except a corporation which:
>
> (1) over fifty percent of the number of shares of stock entitling the holders thereof to vote for the election of directors or trustees is owned or controlled, either directly or indirectly, by a taxpayer subject to tax under this article; ... or
>
> (2) is substantially similar in operation and ownership to a business entity (or entities) taxable, or previously taxable, under this article; ... or
>
> (3) has been subject to tax under this article for more than five taxable years (excluding short taxable years).

IRC section 351 contains rules for a transfer to a corporation controlled by the transferor, and provides, in part:

> (a) General Rule. – No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock in such corporation and immediately after the exchange such person or persons are in control (as defined in section 368(c)) of the corporation.

IRC section 355 discusses the distribution of stock of a controlled corporation, and provides, in part:

> (a) Effect on Distributees. –
>
> (1) General Rule. – If –
>
> (A) a corporation (referred to in this section as the "distributing corporation")
>
> (i) distributes to a shareholder, with respect to its stock, or
>
> (ii) distributes to a security holder, in exchange for its securities, solely stock ... of a corporation (referred to in this section as "controlled corporation") which it controls immediately before the distribution,

(B) the transaction was not used principally as a device for the distribution of the earnings and profits of the distributing corporation or the controlled corporation or both ...

(C) the requirements of subsection (b) (relating to active businesses) are satisfied, and

(D) as part of the distribution, the distributing corporation distributes –

(i) all of the stock and securities in the controlled corporation held by it immediately before the distribution ...

* * *

then no gain or loss shall be recognized to (and no amount shall be includible in the income of) such shareholder or security holder on the receipt of such stock or securities.

IRC section 368 contains definitions relating to corporation reorganizations, and provides, in part:

(a) Reorganization. --

(1) In general. – For purposes of parts I and II and this part, the term "reorganization" means –

* * *

(D) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor ... is in control of the corporation to which the assets are transferred; but only if, in pursuance of the plan, stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under section 354, 355, or 356;...

Section 1.381(a)-1 of the Treasury Regulations contains the general rules relating to carryovers in certain corporate acquisitions, and provides in part:

(a) Allowance of carryovers. Section 381 provides that a corporation which acquires the assets of another corporation in certain liquidations and reorganizations shall succeed to, and take into account, as of the close of the date of distribution or transfer, the items

described in section 381(c) of the distributor or transferor corporation. These items shall be taken into account by the acquiring corporation subject to the conditions and limitations specified in sections 381, 382(b) and 383 and the regulations thereunder.

(b) Determination of transactions and items to which section 381 applies.

* * *

(3) Transactions and items not covered by section 381. (i) Section 381 does not apply to partial liquidations, divisive reorganizations, or other transactions not described in subparagraph (1) of this paragraph. Moreover, section 381 does not apply to the carryover of an item or tax attribute not specified in subsection (c) thereof. In a case where section 381 does not apply to a transaction, item, or tax attribute by reason of either of the preceding sentences, no inference is to be drawn from the provisions of section 381 as to whether any item or tax attribute shall be taken into account by the successor corporation.

IRC section 465(b)(3)(C) provides:

Related person. – For purposes of this subsection, a person (hereinafter in this paragraph referred to as the "related person") is related to any person if –

(i) the related person bears a relationship to such person specified in section 267(b) or section 707(b)(1), or

(ii) the related person and such person are engaged in trades or business under common control (within the meaning of subsections (a) and (b) of section 52).

For purposes of clause (i), in applying section 267(b) or 707(b)(1), "10 percent" shall be substituted for "50 percent".

Opinion

Issue 1

In this case, Petitioner states that P spun off MNT as a separate corporation in a tax-deferred transaction under IRC section 355. To accomplish this, it is assumed for purposes of this Advisory Opinion that when MNT was formed, P transferred the property of its Maintenance division in exchange for MNT's stock, whereby MNT became a controlled subsidiary of P. Then, under IRC section 355, P distributed the stock of MNT to P's shareholders without the shareholders surrendering any of their stock in P, in a corporate separation described as a *spin-off*. It appears that the transfer of P's Maintenance division to MNT and the subsequent spin-off of MNT's stock to P's

shareholders is treated as a divisive reorganization that would qualify as a reorganization under IRC section 368(a)(1)(D).

Treasury Regulation section 1.381(a)-1(a) provides that a corporation which acquires the assets of another corporation in certain liquidations and reorganizations shall succeed to, and take into account, as of the close of the date of distribution or transfer, the items described in IRC section 381(c) of the distributor or transferor corporation. However, pursuant to Treasury Regulation section 1.381(a)-1(b)(3)(i), the provisions of IRC section 381 relating to the carryover to the acquiring corporation of certain tax items of the transferor corporation's tax benefits, privileges, elective rights, and obligations do not apply to a divisive reorganization under IRC section 368(a)(1)(D).

Assuming the spin-off of P's Maintenance division, as described above, is treated as a divisive reorganization under IRC section 368(a)(1)(D), MNT will not succeed to, or take into account, P's tax benefits, privileges, elective rights or obligations pursuant to IRC section 381. Assuming MNT does not succeed to or take into account any item or tax attribute of P for purposes of federal income taxation, or based on general laws of corporate succession, MNT will not be treated as a successor corporation of P for purposes of claiming the EZ wage tax credit under section 210.19 of the Tax Law, or qualifying for QEZE tax benefits under Articles 9-A, 28 and 29 of the Tax Law. Accordingly, MNT, as a newly formed corporation effective January 1, 2003, will be treated as a new corporation and business enterprise taxable under Article 9-A of the Tax Law, and will be an entity separate from P.

Issue 2

Pursuant to section 210.19(a) of the Tax Law, a taxpayer must be certified under Article 18-B of the General Municipal Law before it can be eligible to claim the EZ wage tax credit. Therefore, MNT itself would have to become certified under Article 18-B of the General Municipal Law before it could qualify for an EZ wage tax credit. If MNT is certified under Article 18-B of the General Municipal Law, and it meets the requirements contained in section 210.19 of the Tax Law, it would be eligible to claim an EZ wage tax credit.

Likewise, before a business enterprise can qualify to be a QEZE under section 14 of the Tax Law, it must be certified under Article 18-B of the General Municipal Law. Therefore, MNT would have to become certified under Article 18-B of the General Municipal Law before it could qualify as a QEZE under section 14 of the Tax Law. If MNT is certified under Article 18-B of the General Municipal Law prior to July 1, 2005, and it meets the requirements contained in section 14(a) of the Tax Law, it would be a QEZE.

If MNT becomes a QEZE under section 14(a) of the Tax Law, it must also apply to the Commissioner of Taxation and Finance for the issuance of a QEZE certification, pursuant to section 14(h) of the Tax Law, in order to be eligible for sales and use tax exemptions.

Issue 3

If MNT is eligible to claim an EZ wage tax credit under section 210.19 of the Tax Law, the credit would be allowed only with respect to empire zone wages paid by MNT for full-time employment, excluding general executive officers, during the taxable year in the Hunts Point EZ where such employment is in a job created in the area since it became an EZ in 1994. Under the spin-off of MNT as described above and assuming that MNT is not treated as a successor to P, a new employment relationship was established with respect to MNT's employees. Accordingly, for purposes of section 210.19 of the Tax Law, MNT has created jobs in the EZ, and only MNT's employees are included in the computation of the credit. The EZ wage tax credit would be allowed only where the average number of individuals, excluding general executive officers, employed full-time by MNT in New York State and in the EZ during the taxable year exceeds the average number of such individuals employed full-time by MNT in New York State and in the EZ during the four years immediately preceding the first taxable year in which the credit is claimed with respect to such EZ.

Pursuant to section 210.19(d)(3) of the Tax Law, the individuals employed in the Hunts Point EZ within the immediately preceding 60 months by a related person, as defined in IRC section 465(b)(3)(C)(i), shall not be included in the computation of the amount of the EZ wage tax credit for the taxable year unless a credit under section 210.19 was never allowed with respect to such employees. Under IRC section 465(b)(3)(C)(i), P is a related person to MNT because MNT and P have the same ownership. Based on the facts submitted, substantially all of the Maintenance division employees of P became employees of MNT. However, there are not enough facts presented to determine whether P was allowed an EZ wage tax credit with respect to such employees. Therefore, the determination of which employees of MNT may be included in the computation of the EZ wage tax credit allowable under section 210.19(d) of the Tax Law would depend on whether P was allowed an EZ wage tax credit with respect to such employees.

When computing the average number of employees under section 210.19(c) of the Tax Law, if MNT has not provided full-time employment for such four year period, then such section 210.19(c) provides that the term *four years* shall be deemed to refer instead to such portion, if any, of the four year period during which MNT provided full-time employment. If MNT is a calendar year taxpayer and is certified under Article 18-B of the General Municipal Law during 2003, the credit would be allowed only where the average number of individuals, excluding general executive officers, employed full-time by MNT in New York State and in the EZ during taxable year 2003 exceeds zero (there are no preceding years). If MNT is a fiscal year taxpayer and has a taxable year prior to the taxable year it becomes certified, the credit would be allowed only where the average

number of individuals, excluding general executive officers, employed full-time by MNT in New York State and in the EZ during the taxable year it becomes certified exceeds the average number of such individuals employed full-time by MNT in New York State and in the EZ during its preceding taxable year (the only preceding year).

If MNT is a calendar year taxpayer and is certified under Article 18-B of the General Municipal Law during 2004, the credit would be allowed only where the average number of individuals, excluding general executive officers, employed full-time by MNT in New York State and in the EZ during 2004 exceeds the average number of such individuals employed full-time by MNT in New York State and in the EZ during taxable year 2003 (the only preceding year). If MNT is a fiscal year taxpayer, the credit would be allowed only where the average number of individuals, excluding general executive officers, employed full-time by MNT in New York State and in the EZ during the taxable year it becomes certified exceeds the average number of such individuals employed full-time by MNT in New York State and in the EZ during its preceding taxable year or years.

The EZ wage tax credit is not refundable under section 210.19(e) of the Tax Law unless MNT qualifies as a new business under section 210.12(j)(2) of the Tax Law. MNT would not be a *new business* if it was substantially similar in ownership and operation to a business entity taxable or previously taxable in New York. Petitioner states that the shareholders of MNT are identical to the shareholders of P. Thus, MNT is substantially similar in ownership to a business entity operating in New York State. Further, the operations of MNT in the provision of maintenance and repair services to residential real estate are similar to the operations of the Maintenance division of P in the provision of maintenance and repair services for Management 1 and various other properties. Thus, MNT is substantially similar in operation to a business entity operating in New York State. Accordingly, MNT is substantially similar in operation and ownership to P. Therefore, MNT does not qualify as a *new business* as defined in section 210.12(j) of the Tax Law for purposes of section 210.19(e) with respect to the refundability of any EZ wage tax credit allowed under section 210.19.

Issue 4

For purposes of qualifying as a QEZE under section 14(a) of the Tax Law, a business enterprise must be certified under Article 18-B of the General Municipal Law and must meet the employment test under section 14(b) of the Tax Law. Under the spin-off of MNT as described above, a new employment relationship was established with respect to MNT's employees. Therefore, the employment number would be determined using only MNT's employees for its taxable years.

However, for purposes of the employment test under section 14(b) of the Tax Law, MNT's test date would be the date, prior to July 1, 2005, on which it first becomes certified under

Article 18-B of the General Municipal Law, and the test year would be the last taxable year of MNT ending before the test date. MNT's base period would be the five taxable years immediately preceding the test year. Therefore, if MNT becomes certified under Article 18-B of the General Municipal Law during 2003, MNT's test date would be in 2003. It would have a test year, if it had a taxable year ending before the test date in 2003, but its base period would be zero years since MNT was organized January 1, 2003. Therefore, MNT would meet the employment test only if it qualifies as a new business under section 14(j) of the Tax Law.

Pursuant to section 14(j) of the Tax Law, MNT would be a *new business* if it was not substantially similar in ownership and operation to a business entity taxable or previously taxable in New York. This condition is similar to the condition contained in section 210.12(j)(2) of the Tax Law. As determined in Issue 3 above, MNT is substantially similar in ownership to P, a business entity operating in New York State, and substantially similar in operation to P, a business entity operating in New York State. Accordingly, MNT does not qualify as a *new business,* as defined in section 14(j) of the Tax Law, for purposes of qualifying as a QEZE under section 14(a) of the Tax Law. If MNT becomes certified during taxable year 2003, it will not meet the employment test for any taxable year, and it would not be a QEZE pursuant to section 14 of the Tax Law. Therefore, MNT would not be entitled to any QEZE tax benefits under Articles 9-A, 28 or 29 of the Tax Law.

If MNT becomes certified under Article 18-B of the General Municipal Law during 2004, and MNT is a calendar year taxpayer, its test date would be in 2004, its test year would be 2003 and it would have a base period of zero years. Therefore, since MNT is not a new business under section 14(j) of the Tax Law, it would not meet the employment test for any taxable year, it would not be a QEZE pursuant to section 14 of the Tax Law, and it would not be entitled to any QEZE tax benefits under Articles 9-A, 28 or 29 of the Tax Law.

However, if MNT is a fiscal year taxpayer and it becomes certified under Article 18-B of the General Municipal Law during 2004, it would have a base period of at least one year if it has a taxable year prior to the test year. In that case, MNT would meet the employment test if MNT's employment number in the EZ for taxable year 2004 equals or exceed its employment number in the EZ for the base period, and its employment number in New York State outside of the EZ for taxable year 2004 equals or exceeds its employment number in New York State outside of the EZ for the base period. Pursuant to section 14(g) of the Tax Law, the employment number used in such computations shall not include individuals employed within the immediately preceding 60 months by a related person.

Pursuant to IRC section 465(b)(3)(C)(i), P is a related person to MNT because MNT and P have the same ownership. Based on the facts submitted, substantially all of the Maintenance division employees of P became employees of MNT. Therefore, MNT's employees who were employed by P in the immediately preceding 60 months may not be included in the employment

number computations for the taxable year. If MNT meets the employment test, it could qualify as a QEZE and be eligible for QEZE tax benefits under Articles 9-A, 28 and 29 of the Tax Law.

DATED: December 24, 2003

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