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

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Corporation Tax
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Sales Tax
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STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. Z031103A

On November 3, 2003, a Petition for Advisory Opinion was received from Imperial Optical, Inc., One Lincoln Boulevard, Rouses Point, New York 12979.

The issues raised by Petitioner, Imperial Optical, Inc., are:

1. Whether there are any franchise tax exemptions available to SLIC, as described below, under Article 9-A of the Tax Law.

2. Whether SLIC, as described below, can be certified within the Champlain empire zone (EZ).

3. Whether SLIC, as described below, will be eligible for the EZ wage tax credit under section 210.19 of the Tax Law, and eligible to become a qualified empire zone enterprise (QEZE) under section 14 of the Tax Law for purposes of qualifying for the QEZE benefits provided under sections 14, 15, and 16 of the Tax Law.

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

Petitioner is a New York State corporation, organized in May 1989. Its corporate offices are located in Rouses Point, New York. Petitioner is owned by 2745-3083 Quebec Inc., a holding company incorporated in the Province of Quebec. Petitioner's business focus is the distribution of brand name contact lens and related optical products to eye care practitioners, optical wholesalers, and optical distributors worldwide. Sales are achieved by telephone, Internet, fax and e-mail order processing. Petitioner's activities include direct to patient services for any of the above listed client base, fulfillment services to mail order contact lens replacement companies, and the occasional sale of contact lens solutions. No manufacturing is conducted on the premises.

Visus, LLC, (Visus) is a Florida LLC created in 2000. Visus is treated as a corporation for federal income tax purposes. Visus is currently owned 43 percent by Petitioner, 43 percent by Mr. Neil Glachman and 14 percent by Dr. Ronald Snyder. Mr. Glachman and Dr. Snyder are both Florida residents. Visus's business focus is the marketing of its own Visus 2 proprietary lens product. Visus's fulfilment and inventory management have been contracted to Petitioner since incorporation. However, in order to improve management capabilities and reduce unnecessary overhead in the Florida offices, Visus agreed to move all financial and operational matters to Rouses

Point starting September 2003. Currently Petitioner is contracted by Visus to conduct tasks relating to Visus's financial and operational matters.

Strategic Lens Innovations Corp. – USA (SLIC) is a New York State corporation incorporated on August 28, 2003. SLIC is owned by Strategic Lens Innovations Corp. (SLI), a company incorporated in Canada. SLI is owned 49 percent by 2745-3083 Quebec Inc., 49 percent by PNL Consult Inc., and 2 percent by Mr. Jacques Matte. SLIC's business focus is the development of a private label contact lens business using the manufacturing capabilities of world renowned contact lens manufacturers.

Unlike Petitioner's business where distribution of well established and renowned branded product occurs, SLIC will only be distributing either its own branded product worldwide or distributing private label product for the specific use of its customers and their customer network. Medium to smaller potential private label contact lens customers worldwide will be afforded the ability to create their own private label brand, have SLIC manufacture branded product for them and/or label proprietary outer boxes and bright stock blister lens packaging with their proprietary brand. SLIC can fulfill and distribute the product anywhere their customers wish.

SLIC's customer services and fulfillment services will be provided at Petitioner's place of business by Petitioner. Customer services will be billed out on a fee for service basis. Fulfillment services will be executed by Petitioner and will be billed out on a fee for service basis. All accounting, information technology, operational services and inventory planning and storage will be the responsibility of Petitioner. The only manufacturing related work will be the labeling or re-labeling of blistered lenses as well as outer box packages.

SLIC plans to purchase 6.5 acres of land on which a facility will be constructed. The property is located in the Champlain EZ. SLIC will hire at least one new employee. SLIC has not yet been certified under Article 18-B of the General Municipal Law. SLIC will lease commercial space to Petitioner and Visus, as well as any other entity wishing to rent available space. No retail space will be offered for lease. Petitioner will be moving from its current facility to SLIC's EZ facility and will not keep any employees or operations outside of the new facility.

Applicable law

Section 209 of the Tax Law contains the imposition of the franchise tax under Article 9-A of the Tax Law, and provides, in part:

> 1. For the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or maintaining an office in this state, for all or any part of each of its fiscal or

calendar years, every domestic or foreign corporation, except corporations specified in subdivision four of this section, shall annually pay a franchise tax....

2. A foreign corporation shall not be deemed to be doing business, employing capital, owning or leasing property, or maintaining an office in this state, for the purposes of this article, by reason of (a) the maintenance of cash balances with banks or trust companies in this state, or (b) the ownership of shares of stock or securities kept in this state, if kept in a safe deposit box, safe, vault or other receptacle rented for the purpose, or if pledged as collateral security, or if deposited with one or more banks or trust companies, or brokers who are members of a recognized security exchange, in safekeeping or custody accounts, or (c) the taking of any action by any such bank or trust company or broker, which is incidental to the rendering of safekeeping or custodian service to such corporation, or (d) the maintenance of an office in this state by one or more officers or directors of the corporation who are not employees of the corporation if the corporation otherwise is not doing business in this state, and does not employ capital or own or lease property in this state, or (e) the keeping of books or records of a corporation in this state if such books or records are not kept by employees of such corporation and such corporation does not otherwise do business, employ capital, own or lease property or maintain an office in this state, or (f) the use of fulfillment services of a person other than an affiliated person and the ownership of property stored on the premises of such person in conjunction with such services, or (g) any combination of the foregoing activities. For purposes of this subdivision, persons are affiliated persons with respect to each other where one of such persons has an ownership interest of more than five percent, whether direct or indirect, in the other, or where an ownership interest of more than five percent, whether direct or indirect, is held in each of such persons by another person or by a group of other persons which are affiliated persons with respect to each other. The term "person" in the preceding sentence and in paragraph (f) of this subdivision shall have the meaning ascribed thereto by subdivision (a) of section eleven hundred one of this chapter.

Section 1-2.5(a) of the Business Corporation Franchise Tax Regulations (Regulations), provides, in part:

(1) The term *domestic corporation* means a corporation incorporated by or under the laws of the State or colony of New York State.

(2) The term *foreign corporation* means a corporation which is not a domestic corporation.

Section 2-3.1(a) of the Regulations provides, in part, "every taxpayer is required to pay a tax measured by entire net income (or other applicable basis) up to the date on which it ceases to possess

a franchise if a domestic corporation, or ceases to do business, employ capital, own or lease property in a corporate or organized capacity or maintain an office in New York if a foreign corporation."

Section 14 of the Tax Law contains the provisions for the QEZE 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 ... (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
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> (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.
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> (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.
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> (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 ... article nine-A ... 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.

(e) The credit and carryovers of such credit allowed under this subdivision for any taxable year shall not, in the aggregate, reduce the tax due for such year to less than the higher of the amounts prescribed in paragraphs (c) and (d) of subdivision one of this section. However, if the amount of credit or carryovers of such credit, or both, allowed under this subdivision for any taxable year reduces the tax to such amount, or if any part of the credit or carryovers of such credit may not be deducted from the tax otherwise due by reason of the final sentence of paragraph (d) hereof, any amount of credit or carryovers of such credit thus not deductible in such taxable year may be carried over to the following year or years and may be deducted from the tax for such year or years. In lieu of such carryover, any such taxpayer which qualifies as a new business under paragraph (j) of subdivision twelve of this section may elect, on its report for its taxable year with respect to which such credit is allowed, to treat fifty percent of the amount of such carryover as an overpayment of tax to be credited or refunded in accordance with the provisions of section ten hundred eighty-six of this chapter. Provided, however, the provisions of subsection (c) of section ten hundred eighty-eight of this chapter notwithstanding, no interest shall be paid thereon.

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 in 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 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

Under section 209.1 of the Tax Law, the business corporation franchise tax is imposed annually on a domestic or foreign corporation for the privilege of exercising its corporate franchise, or of doing business, employing capital or owning or leasing property in New York State, or maintaining an office in New York. A domestic corporation is subject to tax for the period that it exercises its franchise; that is, from the date of its incorporation until the date it dissolves.

The exemptions under section 209.2 of the Tax Law apply only to foreign corporations. Under section 209.2(f) of the Tax Law, a foreign corporation will not be deemed to be doing business, employing capital, owning or leasing property or maintaining an office in New York because it uses the fulfillment services of a person that is not an affiliated person and it has inventory stored on that person's premises in conjunction with the fulfillment services.

In this case, SLIC is organized in New York State. Therefore, the exemptions from taxation under section 209.2 of the Tax Law with respect to foreign corporations would not apply to SLIC. Accordingly, SLIC is subject to tax under Article 9-A of the Tax Law from August 28, 2003, until the date that it is dissolved.

Issue 2

Certification under Article 18-B of the General Municipal Law is made jointly by the Commissioner of Economic Development, the Commissioner of Labor and the local empire zone certification officer. (See General Municipal Law §963(a)) Thus, the Tax Department is not involved in this certification process. However, a business enterprise needs such certification to be eligible to claim the EZ wage tax credit under section 210.19 of the Tax Law, and such certification is one of the requirements to become a QEZE under section 14 of the Tax Law for eligibility to receive the QEZE benefits provided under sections 14, 15 and 16 of the Tax Law.

Accordingly, it is not within the scope of this Advisory Opinion to determine whether SLIC is a business enterprise that can be certified under Article 18-B of the General Municipal Law.

Issue 3

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, SLIC would have to become certified under Article 18-B of the General Municipal Law before it could qualify for an EZ wage tax credit. The EZ wage tax credit would be allowed only where the average number of individuals, excluding general executive officers, employed full-time by SLIC in New York State and in the EZ during the taxable year exceeds the average number of such individuals employed full-time by SLIC 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.

When computing the average number of employees under section 210.19(c) of the Tax Law, if SLIC 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 SLIC provided full-time employment. SLIC was incorporated August 28, 2003, and if it 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 SLIC in New York State and in the EZ during taxable year 2004 exceeds the average number of such individuals employed full-time by SLIC in New York State and in the EZ during taxable year 2003 (the only preceding year.) If SLIC is a fiscal year taxpayer and has a taxable year or years prior to the taxable year it becomes certified under Article 18-B of the General Municipal Law, the credit would be allowed only where the average number of individuals, excluding general executive officers, employed full-time by SLIC 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 SLIC in New York State and in the EZ during the previous taxable year or years.

If SLIC 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. If SLIC 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 SLIC for full-time employment, excluding general executive officers, during the taxable year in the Champlain EZ where such employment is in a job created in the area since it became an EZ.

In construing the phrase *jobs created in the area*, as used in section 210.19(b)(1) of the Tax Law, it is instructive to look to the General Municipal Law, which established the EZ program.

In the statement of legislative findings pursuant to the creation of the EZ program, the legislature declared:

> [i]t is the public policy of the state to offer special incentives and assistance that will promote the development of new businesses, the expansion of existing businesses and the development of human resources within these economically impoverished areas *and to do so without encouraging the relocation of business investment from other areas of the state*. (General Municipal Law, section 956, emphasis added.)

Thus, the statute provides that a business which has shifted its operations, or some portions thereof, from an area within New York State not designated as an EZ to an area so designated shall not be certified to receive such benefits, except where

- the shift is entirely within a municipality and has been approved by the local governing body of the municipality,
- it has been established after a public hearing that extraordinary circumstances exist which warrant the relocation of the business, in whole or in part, into an EZ from another municipality and the municipality from which the business is relocating approves of such relocation, or
- such shift in operation is from a business incubator facility operated by a municipality or by a public or private not-for-profit entity. (General Municipal Law, section 959(a))

In light of the above, SLIC will have jobs that are created in the Champlain EZ, for purposes of determining *empire zone wages* under section 210.19(b)(1) of the Tax Law, if they did not exist previously elsewhere in New York State, or if they did, the jobs conform to the principles in the General Municipal Law.

Pursuant to section 210.19(d)(3) of the Tax Law, if any of SLIC's employees were employed in the Champlain EZ within the immediately preceding 60 months by a related person, as defined in IRC section 465(b)(3)(C)(i), such employees shall not be included in SLIC's 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) SLIC and Petitioner would be related persons.

The EZ wage tax credit is not refundable under section 210.19(e) of the Tax Law unless SLIC qualifies as a new business under section 210.12(j) of the Tax Law. SLIC is directly owned by SLI, which, in turn, is 49 percent directly owned by 2745-3083 Quebec Inc., 49 percent directly owned by PNL Consult Inc., and 2 percent directly owned by Mr. Matte. Petitioner is 100 percent directly owned by 2745-3083 Quebec Inc. Visus is 43 percent directly owned by Petitioner, 43 percent directly owned by Mr. Glachman and 14 percent directly owned by Dr. Snyder. Accordingly, 2745-3083 Quebec Inc., indirectly owns 49 percent of SLIC, indirectly owns 43 percent of Visus and directly owns 100 percent of Petitioner. PNL Consult Inc. and Mr. Matte do not have any direct or indirect ownership interest in 2745-3083 Quebec Inc., Petitioner or Visus. Mr. Glachman and Dr. Snyder do not have any direct or indirect ownership interest in SLIC, 2745-3083 Quebec Inc. or Petitioner. It is assumed for purposes of this Advisory Opinion that the owner of PNL Consult Inc. does not have any direct or indirect ownership interest in 2745-3083 Quebec Inc., Petitioner, or Visus.

Since 2745-3083 Quebec Inc. through its 49 percent ownership interest in SLI, owns indirectly 49 percent of SLIC, and PNL Consult Inc., through its 49 percent ownership interest in SLI, owns indirectly 49 percent of SLIC, over fifty percent of the number of shares of stock entitling the holders thereof to vote for the election of directors or trustees of SLIC is not owned or controlled, either directly or indirectly, by Petitioner or Visus, taxpayers under Article 9-A of the Tax Law. Further, since there is no indication that 2745-3083 Quebec Inc., through its 49 percent indirect ownership in SLIC, in fact controls SLIC, SLIC is not substantially similar in ownership to Petitioner or Visus. Also, SLIC has not been subject to tax under Article 9-A of the Tax Law for more than five taxable years. Accordingly, SLIC will meet the three conditions to be a *new business* under section 210.12(j) of the Tax Law.

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, SLIC 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 SLIC 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 of the Tax Law, it would be a QEZE.

If SLIC becomes a QEZE under section 14 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.

Under section 14(b) of the Tax Law, 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.

For purposes of the employment test under section 14(b) of the Tax Law, SLIC'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 SLIC ending before the test date. SLIC's base period would be the five taxable years immediately preceding the test year. SLIC was incorporated August 28, 2003. Therefore, if SLIC becomes certified under Article 18-B of the General Municipal Law during 2004, SLIC's test date would be in 2004. If SLIC is a calendar year taxpayer, 2003 would be the test year, but its base period would be zero years since SLIC was organized in 2003. If SLIC is a fiscal year taxpayer and has a taxable year ending before the test date in 2004, it would have a test year, but it would have a base period only if it had a taxable year prior to the test year. If SLIC does not have a base period, it 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, SLIC 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 above, SLIC is not substantially similar in ownership to Petitioner or Visus. Accordingly, SLIC would 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 SLIC becomes certified under Article 18-B of the General Municipal Law during 2004, and SLIC 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. However, SLIC would be a new business under section 14(j) of the Tax Law with respect to taxable year 2004, and it would meet the employment test if it hires at least one employee. Accordingly it would be a QEZE pursuant to section 14 of the Tax Law, and it would be entitled to QEZE tax benefits under sections 14, 15 and 16 of the Tax Law as applied under Articles 9-A, 28 and 29 of the Tax Law.

If SLIC 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 only if it has a taxable year prior to the test year. In that case, SLIC would meet the employment test if SLIC'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. If SLIC meets the employment test it would be a QEZE pursuant to section 14 of the Tax Law, and it would be entitled to QEZE tax benefits under sections 14, 15 and 16 of the Tax Law as applied under Articles 9-A, 28 and 29 of the Tax Law.

DATED: April 2, 2004

/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.