New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(2)C
Corporation Tax
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STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C070815A

On August 15, 2007, a Petition for Advisory Opinion was received from Citigroup, Inc., c/o George Kohn, 909 Third Avenue, 15th Floor, New York, NY 10022.

The issues raised by Petitioner, Citigroup, Inc., are:

1. Whether jobs created for an Empire Zone location but temporarily assigned to a non-Empire Zone location pending the construction and completion of the Empire Zone location will qualify for the Empire Zone wage tax credit (EZ wage tax credit).

2. Whether the employees hired to work in the Empire Zone location but temporarily assigned to work in a non-Empire Zone location will qualify for the EZ wage tax credit when these employees are relocated to the new Empire Zone location.

3. Whether the EZ wage tax credit may be taken for the relocated employees for five taxable years.

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

Petitioner owns a building, Cross Point 1 ("CP 1"), located at 540 Cross Point Parkway within a New York Empire Zone as designated by Article 18-B of the General Municipal Law. Petitioner is in the process of constructing a building ("CP 2") at 580 Cross Point Parkway in Amherst, New York, that will be completed in 2009 and located within the same Empire Zone. Two subsidiaries of Petitioner have hired, or will hire, in the near term, approximately 860 employees that will be employed at CP 2 upon its completion. At the present time, it is estimated that 383 of these employees will be temporarily working at CP 1 and 477 of these employees will be temporarily working at a facility located at 4224 Ridge Lea Road that is leased to Petitioner under a short term lease. The Ridge Lea Road facility is within a few blocks from the Cross Point facilities but is not located within an Empire Zone. All these employees were hired subsequent to the CP 2 project being designated as regionally significant and will be employed at CP 2 when construction is completed and a certificate of occupancy issued. For purposes of computing the EZ wage tax credit under section 210.19 of the Tax Law, it may be assumed for purposes of this Opinion that there are no targeted employees. Petitioner's two subsidiaries were certified in 2006. For purposes of this Opinion, it is assumed that the facility located at 4224 Ridge Lea Road is in the same municipality as the CP 2 facility.

Applicable law and regulations

Section 210.19 of the Tax Law provides, in part:

Empire zone wage tax credit. (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 fours 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 workforce investment act as a dislocated worker or low-income individual (P.L. 105-220, as amended), (C) a recipient of public assistance benefits, (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 or (E) an honorably discharged member of any branch of the armed forces of the United States.

Any individual who satisfies the criteria set forth in clause (A), (B) or (D) at the time of initial employment in the job with respect to which the credit

is claimed, or who satisfies the criterion set forth in clause (C) at such time or at any time within the previous two years, shall be a targeted employee so long as such individual continues to receive empire zone wages.

(3) "Average number of individuals, excluding general executive officers, employed full-time" shall be computed by ascertaining 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 each taxable year or other applicable period, by adding together the number of such individuals ascertained on each of such dates and dividing the sum so obtained by the number of such dates occurring within such taxable year or other applicable period.

(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.

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

(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. For the purposes of this subparagraph, a "related person" shall include an entity which would have qualified as a "related person" to the taxpayer if it had not been dissolved, liquidated, merged with another entity or otherwise ceased to exist or operate.

(4) If a taxpayer is certified in an empire zone designated under subdivision (a) or (d) of section nine hundred fifty-eight of the general municipal law, the dollar amounts specified under subparagraph one or two of this paragraph shall be increased by five hundred dollars for each qualifying individual under such subparagraph who received, during the taxable year, wages in excess of forty thousand dollars.

Section 959 of the General Municipal Law provides, in part:

The commissioner [of the Department of Economic Development] shall:

(a) After consultation with the director of the budget, the commissioner of labor, and the commissioner of taxation and finance, promulgate regulations governing (i) criteria of eligibility for empire zone designation, provided, however, that such criteria be approved by the director of the budget; (ii) the application process; (iii) the joint certification by the commissioner, the commissioner of labor, and, in the case of an empire zone, the local empire zone certification officer, as to the eligibility of business enterprises for benefits referred to in section nine hundred sixty-six of this article, provided, however, that a business enterprise that has shifted its operations, or some portions thereof, from an area within New York state not designated as an empire zone or zone equivalent area to an area so designated shall not be certified to receive such benefits except where such shift is entirely within a municipality and has been approved by the local governing body of such municipality or in situations where it has been established, after a public hearing, that extraordinary circumstances exist which warrant the relocation of a business, in whole or part, into an empire zone or a zone equivalent area from another municipality and the municipality from which the business is relocating approves of such relocation; or where such shift in operations is from a business incubator facility operated by a municipality or by a public or private not-for-profit entity which provides space and business support services to newly established firms;…

Section 465(b)(3)(C) of the Internal Revenue Code 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

(iii) 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

With regard to Issue 1, a taxpayer that is located in an Empire Zone and is certified under Article 18-B of the General Municipal Law may claim an Empire Zone wage tax credit (EZ wage tax credit) for jobs created in an area designated or previously designated as an Empire Zone, provided that the taxpayer meets all the eligibility requirements of the credit. See section 210.19(b)(1) of the Tax Law. When Petitioner's certified subsidiaries hire 383 employees and place the employees in jobs at the Cross Point 1 (CP 1) location which is in an area designated as an Empire Zone, those jobs are created in an area designated as an Empire Zone.

When Petitioner's certified subsidiaries hire 477 employees and place the employees in jobs at the Ridge Lea Road facility, in an area that is not designated and was not previously designated as an Empire Zone, those 477 employees are not employed in jobs created in an area designated as an Empire Zone. Therefore, the certified subsidiaries may not claim the EZ wage tax credit for any of those employees during the period in which those employees are employed in the area that is not a designated Empire Zone.

With regard to Issue 2, Petitioner's subsidiaries intend to shift employees from the Ridge Lea Road facility to the Cross Point 2 (CP 2) location upon completion of the construction of the CP 2 facility, which is located in an area designated as an Empire Zone. Petitioner inquires whether this shift of employment from the Ridge Lea Road facility to the CP 2 facility will constitute jobs created in an area designated as an Empire Zone as contemplated in section 210.19 of the Tax Law.

In its statement of legislative findings pursuant to the creation of the EZ program, the Legislature provided in section 956 of Article 18-B of the General Municipal Law, in relevant part, that "It 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." Thus, Article 18-B provides that a business which has shifted its operations, or some portions thereof, from an area within New York State not designated as an Empire Zone to an area so designated shall not be certified to receive Empire Zone 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 Empire Zone from another municipality and the municipality from which the business is relocating approves of such relocation; or

- such shift in operations is from a business incubator facility operated by a municipality.

(See section 959(a) of the General Municipal Law)

Therefore, it is consistent with the intent of section 210.19 of the Tax Law to interpret the statute to mean that "job created in the area [Empire Zone]" applies to jobs that did not exist in the Empire Zone before, i.e., to jobs that are shifted from outside the Empire Zone to within the zone, only when the business conforms to the principles outlined in section 959 of the General Municipal Law, as discussed above, and the jobs are created in the Empire Zone during its period of designation as an Empire Zone. In the present case, the Ridge Lea Road facility and CP 2 will be located in the same municipality. Accordingly, when Petitioner's certified subsidiaries shift the employees currently located at the Ridge Lea Road facility to the CP 2 location, those jobs that are shifted will be treated as jobs "created in the area" for purposes of the EZ wage tax credit, provided that the shift has been approved by the local governing body of the municipality.

With regard to Issue 3, the EZ wage tax credit is allowed to a taxpayer that is certified under Article 18-B of the General Municipal Law in the first year that payments of Empire Zone wages are made and the employment test for such credit is met, and for the next four succeeding taxable years. Subsequent certifications at the same or a different location in the same Empire Zone will not extend the five-year period of eligibility for the EZ wage tax credit. See section 210.19(c) of the Tax Law. Petitioner's subsidiaries were certified in 2006 in the Empire Zone where the CP 1 facility is located. If the subsidiaries met the employment test under section 210.19(c) of the Tax Law in 2006 and made payments of Empire Zone wages in 2006, the five-year period of eligibility would have begun in 2006 and would continue for the next four succeeding taxable years.

The Ridge Lea Road employees may not be included in the calculation of the EZ wage tax credit until such time as they are relocated to the CP 2 location and receive Empire Zone wages for more than half of the taxable year. If the Ridge Lea Road employees are relocated to the CP 2 facility after half the taxable year has passed, the EZ wage tax credit may not be claimed on those employees until the first taxable year that those employees receive Empire Zone wages for more than half of the taxable year. Petitioner's subsidiaries may claim the EZ wage tax credit on these employees for any years remaining in the five-year eligibility period. The relocation of the employees does not extend the five-year period of eligibility for claiming the credit.

In no event may Petitioner's subsidiaries claim an EZ wage tax credit for individuals employed within an Empire Zone within the immediately preceding 60 months by a related person, as such term is defined in section 465(b)(3)(C) of the Internal Revenue Code, unless such

related person was never allowed an EZ wage tax credit with respect to such employees. See section 210.19(d)(3) of the Tax Law.

DATED: March 19, 2008

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Taxpayer Guidance Division

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.