

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(3)C
Corporation Tax
March 2, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C081121A

On November 21, 2008, the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED], asking whether Petitioner will qualify as a “new business” under §14(j), §210.12(j), and §210.19(c) of the Tax Law. Petitioner will qualify as a new business under §14(j)(1) and §210.12(j), but it will not qualify as a new business under §210.19(c), which references §14(j)(5).

Facts

Petitioner, incorporated in Delaware on August 8, 2008 and authorized to do business in New York State on August 22, 2008, is a wholly-owned subsidiary of Advanced Micro Devices (AMD), which entered into a Grant Disbursement Agreement (GDA) with Empire State Development Corporation (ESDC) in 2006. AMD is a New York taxpayer, employing approximately 65 persons in Fishkill, New York, in research and development, but has not been certified as an Empire Zone (EZ) business in Fishkill. In December 2007, AMD was designated a regionally significant project at the Luther Forest Technology Campus in Saratoga County, designated a qualified investment project (QIP), and certified as an EZ business in Saratoga County.

In early 2009, Petitioner, which has been assigned the rights of AMD pursuant to the GDA, is expected to become an indirect United States subsidiary of a new company, temporarily named The Foundry Company (Foundry), organized and headquartered in the Cayman Islands. Foundry is not and will not be a New York taxpayer. AMD and the Advanced Technology Investment Company (ATIC) of Abu Dhabi plan to execute a joint venture agreement in 2009 to fund Foundry, which will take over and expand AMD’s current wafer fabrication business, including the manufacturing operations in Dresden, Germany, and the research and development of process technology now being handled jointly with IBM in Fishkill. Both AMD and ATIC will transfer assets and/or cash into Foundry in exchange for ownership interests. AMD will also contribute 100% of the stock of Petitioner to Foundry at the time of the closing. When the transactions are complete, ATIC, which will have contributed assets worth substantially more than those contributed by AMD, will own more than 50% of the stock of Foundry.

Petitioner, as an indirect subsidiary of Foundry, will house the domestic operations of Foundry, hold assets, and assume all liabilities of completing the project in Saratoga County. Although it was authorized to do business in New York in August, 2008, Petitioner will not have any assets or employees in New York until the joint venture closes. Thus, Petitioner’s first taxable year will be 2009. Petitioner is in the process of becoming certified under the General Municipal Law as an EZ business and designated

as both a regionally significant project and a qualified investment project (QIP). It is anticipated that the certifications will become effective in 2008.

Analysis

You have asked whether Petitioner, once certified, will qualify as a “new business” pursuant to §14(j) of the Tax Law. If Petitioner is certified in 2008, it will have a base period of zero years.¹ As such, if it has an employee in 2009, its first taxable year, it will meet the qualified EZ enterprise (QEZE) employment test only if it qualifies as a new business under §14(j).² Under §14(j)(1), a new business includes any corporation except a corporation that is substantially similar in operation and in ownership to a business entity (or entities) taxable or previously taxable under §§183, 184, 185, or 186 of article 9; articles 9-A, 32, or 33; article 23; or that would have been subject to tax under such article 23 as it existed on January 1, 1980; or the income (or losses) of which is (or was) includable under article 22 of the Tax Law. Because Petitioner, in its first taxable year, will not be substantially similar in ownership to another corporation taxable or previously taxable in New York, it will pass the new business test under §14(j)(1). It is not necessary to evaluate whether Petitioner is substantially similar in operation to another New York business taxpayer.

Additionally, you have asked whether Petitioner is a new business pursuant to §210.12(j) and §210.19(c) of the Tax Law. For purposes of §210.12(j), a new business is any corporation except a corporation (i) of which over 50% of the number of shares of voting stock is owned or controlled, either directly or indirectly, by a taxpayer subject to tax under Article 9-A; sections 183, 184, or 185 of Article 9; or Article 32 or 33 of the Tax Law; or (ii) that is substantially similar in operation and in ownership to a business entity taxable, or previously taxable, in New York; or (iii) has been subject to tax under Article 9-A for more than five taxable years (excluding short taxable years). Since none of the above exceptions apply to Petitioner, it will be a new business for purposes of §210.12(j).

Section 210.19(c) provides that a company that qualifies as a new business under §14(j)(5) of the Tax Law may defer the beginning of its 5-year tax benefit period for claiming the EZ wage tax credit (WTC), as determined under §14(a)(1-a). This provision allows a business enterprise to begin its WTC benefit period later than enterprises not meeting the §14(j)(5) test. The general rule is that a business enterprise’s WTC benefit period begins in the first taxable year in which EZ wages are paid and the other requirements of the statute are met. However, in order to be deemed a new business under §14(j)(5), a company must have received its certification as the owner of a QIP by December 31, 2007. Since

¹ For companies certified on or after April 1, 2005, the term “base period” means the 4 taxable years immediately preceding the taxable year in which the business enterprise is first certified. Tax Law §14(c)(2). In this case, Petitioner was certified in 2008, before it had a taxable year. Consequently, its base period must be zero years.

² §14(b)(4) of the Tax Law.

Petitioner will not be certified until 2008, it will not be deemed a new business under §14(j)(5) and is not eligible to defer the start of its 5-year wage tax credit benefit period under §210.19(c).

DATED: March 2, 2009

/S/
Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

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.