

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

TSB-A-09(6)C
Corporation Tax
April 20, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C090126A

On January 26, 2009, the Department of Taxation and Finance received a Petition for Advisory Opinion from Petitioner asking several questions regarding availability of Empire Zone(EZ) tax benefits for itself and its wholly-owned subsidiary, (Subsidiary).

Facts

Petitioner has nexus in New York, and it files a combined New York franchise tax return with its affiliates, including Subsidiary. Subsidiary, a wholly owned subsidiary of Petitioner, was formed in New York in 1998. Subsidiary has employees in New York. Subsidiary has not yet been certified as an EZ business under Article 18-B of the General Municipal Law.

Petitioner previously owned various single-member limited liability companies (SMLLCs) that held New York retail stores. Those SMLLCs were treated as disregarded entities (DE) for federal income tax and New York State franchise tax purposes. Some of those SMLLCs were independently certified as EZ businesses at various EZ sites around New York State. The earliest EZ certification date of those certified was December 27, 2001. In December 2006, Petitioner merged several of those SMLLCs into LLC, which survived. Petitioner is the single member of LLC. At the time of the merger, and now, LLC was and is taxed as a disregarded entity, but it has never been certified. Petitioner has also never been certified in its own right.

Analysis

Question 1 - If Subsidiary becomes a qualified EZ enterprise (QEZE), what will be its tax benefit period? Answer - A business enterprise that is first certified under Article 18-B of the General Municipal Law (GML) on or after April 1, 2005 and meets the employment test to qualify as a QEZE, will have a benefit period of ten taxable years, starting with the taxable year in which the enterprise is first certified, but only with respect to each of those years for which the employment test is met. Tax Law §14(a). As a subsidiary of Petitioner, Subsidiary would have its own benefit period if it becomes certified. Its benefit period will be ten taxable years, starting with the taxable year in which it is certified, but only with respect to each of those years for which the employment test is met.

Question 2 – How will the QEZE franchise tax credits be applied for a taxpayer included in a combined franchise tax return? Answer - If Subsidiary is included in a combined return with Petitioner, Subsidiary will calculate the QEZE tax credits based on its own eligibility for the credits, using its own benefit period, employment numbers, and information necessary to calculate the credit, such as the property taxes it paid. Any credit allowed to Subsidiary will be applied against the combined tax on the combined return. In computing the QEZE tax reduction credit (TRC), Subsidiary's tax factor would be equal to a percentage of the combined group's tax. That percentage would be determined by multiplying the combined tax by a fraction, the numerator of which is Subsidiary's income allocated to New York and the denominator of which is the combined group's income allocated to New York State. The percentage is determined without regard to any member's losses included in the group's calculation of income.

Question 3 – Does Petitioner have a business tax benefit period that begins on December 27, 2001?

Answer – Petitioner’s tax benefit period begins on January 1, 2001. A SMLLC that is a DE and its single member, for purposes of the QEZE tax credits, are regarded as the same taxpayer, and the certification of one will be imputed to the other. If an entity was a member of more than one certified SMLLC/DE, the certification date for the single member and all the SMLLC/DEs will be the earliest certification date of the single member and all the DEs. In this case, the earliest certification date in the group was December 27, 2001. However, for a business enterprise with a test date (i.e., certification date) on or before December 31, 2001, the benefit period is the first 15 taxable years beginning on or after January 1, 2001.¹ Thus, Petitioner’s business tax benefit period will begin on January 1, 2001. The fact that several of Petitioner’s SMLLC/DEs were merged into a non-certified SMLLC/DE, LLC, and legally dissolved, does not affect the continuing imputation of certification to Petitioner or alter its benefit period.

Question 4 – If, after being certified and qualifying as a QEZE, Subsidiary were to merge into

Petitioner, what would be the QEZE’s business tax benefit period after the merger? Answer – If this were a merger that resulted in the complete liquidation of Subsidiary as a subsidiary of Petitioner, this merger would not alter Petitioner’s benefit period. Immediately after the merger, Petitioner would in essence have two benefit periods: its own that started on January 1, 2001, and the benefit period of Subsidiary that it assumes. Because the statute does not contemplate that a taxpayer may have more than one benefit period for business tax purposes, the benefit period applicable to Subsidiary’s operations when it was a separate certified entity would be lost when Subsidiary merges into Petitioner. Petitioner’s own benefit period, because it start started earlier than the benefit period of Subsidiary, would control. The benefit period for that business, after the merger of Subsidiary into Petitioner, will be Petitioner’s benefit period, i.e. the first 15 taxable years beginning on January 1, 2001.

Question 5 – If the QEZE’s business tax benefit period obtained by Subsidiary prior to the merger were

to be reduced as a result of the merger in Question #4, would Petitioner be required to repay any benefits received by Subsidiary under the QEZE RPTC, QEZE TRC, or EZ wage tax credit (WTC)? Answer – No. There are no recapture requirements in the QEZE TRC and EZ WTC. The only recapture requirement in the QEZE RPTC is the requirement that the credit be recaptured to the extent of any reduction resulting under a final order in a judicial proceeding in the real property taxes used to calculate the QEZE RPTC claimed.

DATED: April 20, 2009

/S/

Jonathan Pessen
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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.

¹ §14(a)(1) of the Tax Law.