

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

TSB-A-10(3)C
Corporation Tax
April 30, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C100409A

A petition received April 9, 2010 requests an advisory opinion concerning Governor's Program Bill #228 relating to the application of the credit for the rehabilitation of historic properties under the Article 32 bank franchise tax. Specifically, [REDACTED], ("Petitioner") requests an opinion that states that Petitioner will be entitled to claim a historic property credit under the facts below if Governor's Program Bill #228 is signed into law. We conclude that petitioner will be able to claim the historic property credit.

Facts

The redevelopment project consists of the redevelopment of a historic building located in Buffalo, New York ("historic building") that, upon its completion, will accommodate forty-eight loft-style apartments, fifteen thousand square feet of ground floor commercial space, and associated parking. The project is located within a census tract that is at or below 100 percent of New York's median family income, based on the most recent federal census. It is estimated the project will incur \$9,900,000.00 of qualified rehabilitation expenditures.

The project developer is a New York limited liability company. The project developer will lease the project, including the historic building, to a New York limited liability company ("master tenant") under a triple-net master lease agreement ("master lease") for a term of thirty-two years. The master tenant is treated as a partnership for federal and New York State tax purposes. Pursuant to the master lease agreement, the project developer and the master tenant will agree to make an election to pass through to the master tenant the federal historic tax credits allowed with respect to the historic building. Petitioner, a calendar year taxpayer, intends to acquire a ninety-nine and ninety-nine hundredths percent interest in the master tenant, and master tenant will acquire a ten percent interest in the project developer.

Petitioner states that former Internal Revenue Code ("IRC") § 48(d), which was repealed by the Revenue Reconciliation Act of 1990, authorized the lessor of property that qualified for the federal rehabilitation credit for historic properties to elect to pass the credit through to a lessee of the property under certain circumstances that are applicable in this case. Petitioner also states that, although IRC § 48(d) has been repealed, the pass-through election remains in effect pursuant to current IRC § 50(d), which provides, among other things, that rules similar to the rules repealed in 1990, including IRC § 48(d), continue to apply to the rehabilitation of historic properties tax credit, despite such repeal. Also, Petitioner states that the project and historic building qualify for the federal tax credit under IRC § 47 and the project developer has received approval from the National Parks Service of the project's part I application and part II application. Finally, Petitioner anticipates that the historic building will be placed in service for federal and NY historic tax credit purposes on or before May 1, 2010.

Proposed Governor's Program Bill

Governor's Program Bill No. 228, which has been introduced in the New York State Legislature as Senate Bill No. 7556/Assembly Bill No. 10839, makes a number of amendments to the tax credit for the rehabilitation of historic properties under the Tax Law. Section 5 of Governor's Program Bill No. 228 would

add new subsection (u) to section 1456 of the Tax Law to provide for a credit for the rehabilitation of historic properties against a taxpayer's banking corporation franchise tax. The pertinent parts of this bill are as follows:

Proposed Tax Law § 1456(u)(1)

(A) For taxable years beginning on or after January first, two thousand ten and before January first, two thousand fifteen, a taxpayer will be allowed a credit as hereinafter provided, against the tax imposed by this article, in an amount equal to one hundred percent of the amount of credit allowed the taxpayer with respect to a certified historic structure under subsection (a)(2) of section 47 of the federal internal revenue code with respect to a certified historic structure, located within the State. Provided, however, the credit shall not exceed five million dollars.

(B) If the taxpayer is a partner in a partnership or a shareholder of a New York S corporation, then the credit caps imposed in subparagraph (A) of this paragraph shall be applied at the entity level, so that the aggregate credit allowed to all the partners or shareholders of each such entity in the taxable year does not exceed the credit cap that is applicable in that taxable year.

(2) Tax credits allowed pursuant to this subsection shall be allowed in the taxable year that the qualified rehabilitation is placed in service under section 167 of the federal internal revenue code.

(3) If the credit allowed the taxpayer pursuant to section 47 of the internal revenue code with respect to a qualified rehabilitation is recaptured pursuant to subsection (a) of section 50 of the internal revenue code, a portion of the credit allowed under this subsection must be added back in the same taxable year and in the same proportion as the federal recapture.

(4) The credit allowed under this subsection for any taxable year shall not reduce the tax to less than the dollar amount fixed as a minimum tax by subsection (b) of section fourteen hundred fifty-five. If the amount of credit allowable under this subsection for any taxable year reduces the tax to such amount, the excess may be carried over to the following year or years, and may be deducted from the taxpayer's tax for such year or years.

(5) To be eligible for the credit allowable under this subsection the rehabilitation project shall be in whole or in part a targeted area residence within the meaning of section 143(j) of the internal revenue code or located within a census tract which is identified as being at or below one hundred percent of the state median family income in the most recent federal census.

The language in Governor's Program Bill #228 also appears in The Assembly's Revenue Bill A.9710-B, Part X.

Analysis

For purposes of this Advisory Opinion, it is presumed that the project qualifies as a certified historic structure under IRC § 47(a)(3) and the rehabilitation of the project is a certified rehabilitation within the meaning of the applicable rehabilitation credit provisions under IRC § 47. Also, it is presumed that the project developer will be able to pass through its rehabilitation credits to the master tenant, of which petitioner is a 99.99 percent owner pursuant to IRC § 50(d), by application of the rules under former IRC § 48(d) which were in effect on the day before the date of enactment of the Revenue Reconciliation Act of 1990. This Opinion expresses no conclusion with regard to these assumptions.

In accordance with the requirements of the proposed legislation, the historic structure is located in New York and is identified as being in a qualifying area that is at or below one hundred percent of the State median family income in the most recent federal census. Therefore, if Petitioner is allowed to claim a federal rehabilitation credit under IRC § 47(a)(2) for the qualified rehabilitation expenses of the certified historic structure, Petitioner will be allowed to claim a tax credit against its banking corporation franchise tax for up to one hundred percent of that federal credit amount. Also, if the certified historic structure is placed in service in 2010, the credit allowed under the Governor's Program Bill will be allowed in Petitioner's 2010 taxable year. Finally, the credit claimed by all owners of the master tenant LLC cannot exceed five million dollars.

DATED: April 30, 2010

/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.