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

TSB-A-13(10)C
Corporation Tax
September 10, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C130607A

The Department of Taxation and Finance (DTF) received a Petition for Advisory Opinion from [redacted]. Petitioner asked a series of questions about the applicability of the brownfield redevelopment tax credit if a portion of a parcel of real property at [redacted] that was entered into the Brownfield Cleanup Program in 2006 is purchased.

First, Petitioner asked whether DTF would permit a taxpayer that purchases property for which a certificate of completion ("COC") has been issued to claim the site preparation credit component under § 21 of the Tax Law if the taxpayer incurs additional remediation expenditures in order to prepare the qualified site for construction of an industrial manufacturing facility. We conclude that the taxpayer cannot claim the site preparation credit component because more than five years has passed since the COC was issued.

Second, Petitioner asked whether DTF will permit the use of certain allocation formulas to determine the tangible property credit component under § 21 of the Tax Law for property located only partially on a qualified site under the Brownfield Cleanup Program. We conclude that such allocations are appropriate for fixed property, but that a principal use test should be used for unfixed property that is used both on and off the qualified site.

Facts

Petitioner, [redacted]., is the sole owner of 100% of the stock of [redacted] ("[redacted]" or the "taxpayer"). [redacted] owns [redacted] ("LLC"), a single-member limited liability company that is treated as a disregarded entity of [redacted] for federal income tax and New York State corporate franchise tax purposes. Petitioner and [redacted] are corporations for federal income and New York State corporate franchise tax purposes. [redacted] would be subject to taxation under Article 9-A of the Tax Law if it undertakes the activities described herein.

LLC is considering purchasing a portion of a parcel of real property located at [redacted]. LLC will be purchasing approximately 15 acres of currently vacant land (the "Property"). The Property was entered into the Brownfield Cleanup Program when the current owner of the Property entered into a Brownfield Cleanup Agreement ("BCA") with the New York Department of Environmental Conservations (DEC). The current owner's application to enter the Brownfield Cleanup Program was approved in August, 2006. Thereafter, DEC issued a COC on [redacted] to the current owner. The COC applies to real property at [redacted], including the portion that LLC will be purchasing. In connection with any acquisition

of the Property, LLC and [redacted] will enter into an amendment to the BCA to become parties to the agreement and will take the appropriate steps to have the COC transferred to them. In addition, LLC may purchase adjacent real property that is not covered by the COC ("the Parcel").

If LLC acquires the Property, LLC will construct a manufacturing facility on that site and lease that facility to [redacted] where it will conduct its manufacturing activities. The manufacturing facility will be depreciable under § 167 of the Internal Revenue Code, have a useful life of at least four years, be acquired by purchase from an unrelated party, be placed in service in either 2014 or 2015, and have a situs on a qualified site. Depending upon the ultimate manufacturing facility design, a portion of the facility may extend onto the Parcel. In addition, LLC may construct a storage building or other outbuilding located on the Parcel.

In connection with the foregoing, [redacted] will purchase from unrelated parties various equipment, machinery, forklifts, and other similar items, most of which will be placed in service in 2014 or 2015, will be depreciable under § 167 of the Internal Revenue Code, and will have a useful life of at least four years. Some equipment or machinery will be located entirely on that portion of the manufacturing facility that is located on the Property. However, a small portion of the equipment or machinery may intrude upon that portion of the manufacturing facility that is located on the Parcel. [redacted] intends to store its forklifts on the Property; however, forklifts will be used to transport raw materials from the outbuilding located on the Parcel to the manufacturing facility located on the Property.

It is currently expected that the tax years involved with respect to this petition will include 2013, 2014, and 2015. However, subsequent tax years may be involved depending upon changing circumstances.

Analysis

The Tax Law provides a brownfield redevelopment tax credit to taxpayers subject to tax under Articles 9, 9-A, 22, 32 and 33 of the Tax Law. (Tax Law § 21). A qualified site is a "site with respect to which a certificate of completion has been issued to the taxpayer by the Commissioner of Environmental Conservation pursuant to § 27-1419 of the Environmental Conservation Law." (Tax Law § 21[b][1]). For any taxable year, the amount of the credit will be the sum of the relevant credit components. In this situation, Petitioner is asking about the site preparation and tangible property credit components. (Tax Law § 21[a][1]-[3]).

Petitioner asserts that [redacted] will be subject to taxation under Article 9-A of the Tax Law. The property at [redacted] being considered for purchase is currently listed on the DEC website as being in the Brownfield Cleanup Program and a COC was issued for this property on [redacted]. As the result of the purchase, [redacted] asserts that it will be a party to a BCA under Environmental Conservation Law (ECL) § 27-1409, and will have a COC (issued before March 31, 2015) as a result of a transfer or sale of the qualified site by the person who originally received the COC. [redacted] will have to follow any rules and

regulations of DEC to successfully ensure that it is named on the BCA and the COC has been transferred to [redacted]. Provided the COC is transferred to [redacted], the Property will be a "qualified site" for purposes of this credit.

The site preparation credit component would be equal to twelve percent[1] of the site preparation costs paid or incurred by the taxpayer with respect to a qualified site if the taxpayer is claiming the credit under Article 9-A of the Tax Law. (Tax Law §§ 21[a][2] and 21[a][5]). This credit component can be first claimed in the taxable year in which the effective date of the COC occurs and it is available for up to five taxable years after the issuance of the COC.

The COC was issued on [redacted] for the qualified site. More than five years have passed since the COC was issued, so the taxpayer is not allowed to claim the site preparation credit component.

The tangible property credit component is the product of the cost (or other basis of the property, as computed for federal income tax purposes) of qualified tangible property placed in service on a qualified site multiplied by twelve percent[2] if the taxpayer is claiming the credit under Article 9-A of the Tax Law. (Tax Law § 21[a][3]). In determining the cost or other basis of the qualified property, the taxpayer must exclude the acquisition cost of any item of property for which a brownfield redevelopment tax credit was allowable to another taxpayer.[3] No credit is allowed for any costs paid or incurred before the execution of the BCA.

A taxpayer who received a COC may transfer the benefits and burdens of the COC that run with the land by assigning those benefits and burdens upon transfer or sale of all or any portion of an interest in the qualified site. However, the taxpayer to whom the COC's benefits and burdens are transferred cannot include as eligible costs (1) the cost of acquiring all or any portions of any interest in the site, and (2) amounts included in the cost or other basis for federal income tax purposes of the qualified tangible property already claimed by another taxpayer.[4]

As relevant here, qualified tangible property is tangible personal property, and other tangible property, including building and structural components of buildings, which meets all of the following conditions:[5]

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[1] The statute increases the percentage if the property is in an environmental zone or has been remediated to track 1. These conditions are not relevant to this opinion.

[2] The statute increases the percentage if the property is in an environmental zone or has been remediated to track 1. These conditions are not relevant to this opinion.

[3] For purposes of the Petition, we are assuming that the taxpayer is not acquiring from the current owner any qualified tangible property in this transaction.

[4] For purposes of the Petition, we are assuming that the taxpayer is not acquiring from the current owner any qualified tangible property in this transaction.

[5] Certain other tangible personal property may qualify under Tax § 21(b)(3)(B).

The property:

- is depreciable under the Internal Revenue Code (IRC) §167;
- has a useful life of four or more years;
- is acquired by purchased as defined in IRC § 179(d);
- has a situs on a qualified site in New York State; and
- is principally used by the taxpayer for industrial, commercial, recreational, or environmental conservation purposes (including the commercial development of residential housing). (Tax § 21[b][3][A].

The tangible property component may be claimed for qualified tangible personal property placed in service on the qualified site for up to 10 tax years after the year the COC is issued.

Presuming that [redacted] takes all necessary steps required by DEC with regards to the BCA and COC, which was issued less than 10 years ago, the tangible property credit component should be available for qualified tangible property placed in service on the qualified site through the [redacted] tax year.

If [redacted] commences its business operations on the qualified site, [redacted] claims that the tangible property it acquires or constructs will fully satisfy the requirements specified above with the possible exception of the siting requirement. As long as the tangible property meets all of these requirements in full, it is qualified tangible property as required by the tangible property credit component. (Tax Law § 21[b][3]).

[redacted] expects that 90% of the building and components will be located on the qualified site and the balance of the building will extend onto the Parcel. [redacted] requests that the Department permit [redacted] to allocate the cost basis of the building structure located on the qualified site by multiplying the cost basis of the building by a fraction, the numerator of which is the amount of the square footage of the building on the qualified site and the denominator of which is the square footage of the entire building. Using this formula to allocate the cost basis of a building to the qualified site is a reasonable approach for allocation.

Petitioner requests that the Department permit [redacted] to use 100% of the cost basis of the tangible property components of or in the building that are separately depreciable, such as furnaces, boilers, manufacturing equipment, and are entirely located on the qualified site, for purposes of determining the amount of the tangible property credit component. If one of these items is completely located on the qualified site, it would be appropriate to allocate 100% of the cost basis of that item to the qualified site. If the item is partially located on the qualified site and partially located off the qualified site, it would be appropriate to use the same square footage formula used above to allocate the building costs.

For equipment and other tangible property that are fixed into place and are located partially on the qualified site and located partially on the Parcel, such as large pieces of equipment used in the manufacturing process, Petitioner requests that the Department allow [redacted] to determine the amount of the tangible property credit component of that

equipment and tangible property allocable to the qualified site by multiplying the cost basis of the equipment or tangible property by a fraction, the numerator of which is the amount of square footage of the equipment or tangible property located on the qualified site and the denominator of which is the square footage of the entire piece of equipment or tangible property. Using this formula to allocate the cost basis of large pieces of equipment or tangible property that are fixed into place is a reasonable approach for allocation.

For forklifts and other tangible property that are stored on the qualified site but move between the qualified site and the Parcel, Petitioner requests that the Department permit [redacted] to determine the amount of the tangible property credit component by allocating 100% of the cost basis of such tangible property to the qualified site because the property will be stored overnight on the qualified site and the activities of the property will originate and terminate on the qualified site. Petitioner contends that this demonstrates that the property will have a situs on the qualified site. We do not agree that the origination and termination location on a qualified site is sufficient to establish that property has a situs on a qualified site. Instead, we conclude that it would be appropriate to use a "principally used" test to determine whether the tangible property has situs on the qualified site. In calculating principal use, the taxpayer should compare the time the tangible property is actually used on the qualified site to the total time used on both the qualified site and outside the qualified site. However, no consideration should be given to the storage time of the property. If the property is used more than 50% of the time on the qualified site, we conclude that the property has a situs on the qualified site and 100% of the cost basis could be used to calculate the tangible property credit component.

DATED: September 10, 2013

/S/
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Deputy 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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.