New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-04(1)I
Income Tax
April 1, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I040129A

On January 29, 2004, a Petition for Advisory Opinion was received from Frederick Elghanayan, H. Henry Elghanayan and Kamran T. Elghanayan, c/o Jack Mandel, Bryan Cave, LLP, 1290 Avenue of the Americas, New York, New York 10104.

The issues raised by Petitioners, Frederick Elghanayan, H. Henry Elghanayan and Kamran T. Elghanayan, are:

1. Whether for purposes of the brownfield redevelopment tax credit under section 21 of the Tax Law, relating to the Brownfield Cleanup Program (Title 14 of Article 27 of the Environmental Conservation Law, as added by Chapter 1 of the Laws of 2003), the costs of constructing new buildings and structural components of buildings on a qualified site are included in the tangible property credit component.

2. Whether the tax credit components contained in section 21 of the Tax Law relating to the Brownfield Cleanup Program and applicable to the cleanup and redevelopment of a qualified site by a partnership, can be allocated to the partners of such partnership for use against the partners' New York personal income tax liabilities.

3. Whether the costs incurred in the cleanup and redevelopment of a qualified site after a *Brownfield Site Agreement* has been entered into, but before the first taxable year beginning after April 1, 2005 (the effective date of the tax credit provisions), are included in determining the tax credit components contained in section 21 of the Tax Law.

Petitioners submit the following facts as the basis for this Advisory Opinion.

Master HTF, LLC (Master) is a New York limited liability company (LLC) that is treated as a partnership for federal and New York State income tax purposes. The three principal owners of Master are Petitioners. Each Petitioner is an individual taxpayer under Article 22 of the Tax Law.

Master, indirectly through one or more entities that are treated as partnerships or disregarded entities for federal and New York State tax purposes, owns, or will own, some or all of the membership interests in East Coast 1 LLC, East Coast 2 LLC, East Coast 3 LLC, East Coast 4 LLC, East Coast 5 LLC, East Coast 6 LLC and East Coast 7 LLC (each a New York LLC and collectively the "East Coast LLCs".)

Each of the East Coast LLCs is the lessee of land located in the City of New York ("Land") pursuant to a 99 year land lease from Queens West Development Corporation, a New York corporation and a subsidiary of the New York State Urban Development Corporation d/b/a the Empire State Development Corporation, a New York public benefit corporation.

The Land is a former industrial site which is contaminated with certain hazardous substances, commonly known as a *brownfield*. The East Coast LLCs currently plan to clean up and remediate the Land, and they currently plan to construct new buildings on the Land. The East Coast LLCs are currently participants in a Voluntary Cleanup Program administered by the New York State Department of Environmental Conservation ("DEC").

Master will own the membership interests in the East Coast LLCs at the time a *Certificate of Completion* (Remediation Certificate) is obtained from DEC by each of the East Coast LLCs with respect to the remediated property of each of the respective East Coast LLCs.

For purposes of this Advisory Opinion, it is assumed that the improvements or property placed in service with respect to the remediation of the Land will not be placed in service before the first taxable year beginning after April 1, 2005.

Applicable law

Section 2.6 of the Tax Law provides that *partnership and partner* "unless the context requires otherwise, shall include, but shall not be limited to, a limited liability company and a member thereof, respectively."

Section 21 of the Tax Law, as added by Chapter 1 of the Laws of 2003, provides for a brownfield redevelopment tax credit, in part, as follows:

> (a) Allowance of credit. (1) General. A taxpayer subject to tax under article nine, nine-A, twenty-two, thirty-two or thirty-three of this chapter shall be allowed a credit against such tax, pursuant to the provisions referenced in subdivision (f) of this section. Such credit shall be allowed with respect to a qualified site, as such term is defined in paragraph one of subdivision (b) of this section. The amount of the credit in a taxable year shall be the sum of the credit components specified in paragraphs two, three and four of this subdivision applicable in such year.
>
> (2) Site preparation credit component. The site preparation credit component shall be equal to the applicable percentage of the site preparation costs paid or incurred by the taxpayer with respect to a qualified site. The credit component amount so determined with respect to a site's qualification for a remediation certificate shall be allowed for the taxable year in which the effective date of the remediation certificate occurs. The credit component amount determined other than with respect to such qualification shall be allowed for the taxable year in which the improvement to which the applicable costs apply is placed in service for up to five taxable years after the issuance of such remediation certificate.
>
> (3) Tangible property credit component. The tangible property credit component shall be equal to the applicable percentage of the cost or other basis for federal income tax purposes of tangible personal property and other tangible property, including buildings and structural components of buildings, which constitute qualified tangible property. The credit

component amount so determined shall be allowed for the taxable year in which such qualified tangible property is placed in service on a qualified site with respect to which a remediation certificate has been issued to the taxpayer for up to ten taxable years after the date of the issuance of such remediation certificate. The tangible property credit component shall be allowed with respect to property leased to a second party only if such second party is either (i) not a party responsible for the disposal of hazardous waste or the discharge of petroleum at the site according to applicable principles of statutory or common law liability, or (ii) a party responsible according to applicable principles of statutory or common law liability if such party's liability arises solely from operation of the site subsequent to the disposal of hazardous waste or the discharge of petroleum, and is so certified by the commissioner of environmental conservation at the request of the taxpayer, pursuant to section 27-1419 of the environmental conservation law. Notwithstanding any other provision of law to the contrary, in the case of allowance of credit under this section to such a lessor, the commissioner shall have the authority to reveal to such lessor any information, with respect to the issue of qualified use of property by the lessee, which is the basis for the denial in whole or in part, or for the recapture, of the credit claimed by such lessor.

(4) On-site groundwater remediation credit component. The on-site groundwater remediation credit component shall be equal to the applicable percentage of the on-site groundwater remediation costs paid or incurred by the taxpayer with respect to a qualified site (to the extent that such groundwater remediation costs are not included in the determination of the site preparation credit or the cost or other basis included in the determination of the tangible property credit). The credit component so determined for costs incurred and paid with respect to and prior to the issuance of a remediation certificate shall be allowed for the taxable year in which the effective date of the issuance of a remediation certificate occurs. The credit component amount determined in taxable years after the effective date of the issuance of a remediation certificate shall be allowed in the taxable year such qualified costs are incurred and paid for up to five taxable years after the issuance of such remediation certificate.

* * *

(6) Site preparation costs and on-site groundwater remediation costs paid or incurred by the taxpayer with respect to a qualified site and the cost or other basis for federal income tax purposes of tangible personal property and other tangible property, including buildings and structural components of buildings, which constitute qualified tangible property shall only include costs paid or incurred by the taxpayer on or after the date of the brownfield site agreement executed by the taxpayer and the department of environmental conservation pursuant to section 27-1422 [*sic*] [section 27-1409] of the environmental conservation law.

* * *

(b) Definitions. As used in this section, the following terms shall have the following meanings:

(1) Qualified site. A "qualified site" is a site with respect to which a certification of completion has been issued to the taxpayer by the commissioner of environmental conservation pursuant to section 27-1419 of the environmental conservation law.

* * *

(5) Remediation certificate. A "remediation certificate" is a certification of completion issued by the commissioner of environmental conservation pursuant to section 27-1419 of the environmental conservation law.

* * *

(c) Qualifying property. Property which qualifies for the credit provided for under this section and also for a credit provided for ... (2) [under either] subsection (a) or subsection (j) of section six hundred six of this chapter, or both, ... may be the basis for either the credit provided for under this section or one of the credits enumerated in paragraph ... two ... of this subdivision, but not both.

* * *

(f) Cross-references. For application of the credit provided for in this section, see the following provisions of this chapter:

* * *

(3) Article 22: Section 606, subsections (i) and (dd)....

Section 606(dd) of the Tax Law was relettered (yy) and a new (dd) was added by Chapter 1 of the Laws of 2003, and provides as follows:

Brownfield redevelopment tax credit. (1) Allowance of credit. A taxpayer shall be allowed a credit, to be computed as provided in section twenty-one of this chapter, against the tax imposed by this article.

(2) Application of credit. If the amount of the credit allowed under this subsection for any taxable year shall exceed the taxpayer's tax for such year, the excess shall be treated as an overpayment of tax to be credited or refunded in accordance with the provisions of

section six hundred eighty-six of this article, provided, however, that no interest shall be paid thereon.

Opinion

Issue 1.

The tangible property credit component of the brownfield redevelopment tax credit under section 21(a)(3) of the Tax Law provides that such component is based on the cost or other basis determined for federal income tax purposes of tangible personal property and other tangible property, including buildings and structural components of buildings, which constitute qualified tangible property. Tangible personal property and other tangible property, including buildings and structural components of buildings, will be treated as *qualified tangible property* if the property meets the conditions contained in section 21(b)(3) of the Tax Law.

In this case, each East Coast LLC plans to clean up and remediate the Land, and obtain a *Certificate of Completion* (Remediation Certificate). Each East Coast LLC also plans to construct new buildings on the remediated Land. If the new buildings, including structural components of the buildings, constructed on the remediated Land of each East Coast LLC meet the conditions of section 21(b)(3) of the Tax Law, then each building will be treated as *qualified tangible property* for purposes of computing the tangible property credit component of the brownfield redevelopment tax credit under section 21 of the Tax Law.

Issue 2.

With respect to LLCs, the classification accorded an LLC for federal income tax purposes will be followed for purposes of Article 22 of the Tax Law. (See Department of Taxation and Finance Memorandum, TSB-M-94(6)I and (8)C, October 25, 1994.) An LLC that is treated as a partnership for federal income tax purposes is treated as a partnership for purposes of Article 22 of the Tax Law. Where a single member LLC is not classified as an entity separate from its owner for federal income tax purposes (a disregarded entity), it is considered a branch or division of its owner for federal income tax purposes, and for purposes of Article 22 of the Tax Law.

A partnership is not a taxable entity for New York State tax purposes, but the partnership's activities are reflected in the New York State tax imposed on individual partners pursuant to Article 22 of the Tax Law.

In *John J. Eagan, Norris, McLaughlin & Marcus*, Adv Op St Tax Commn, April 29, 1987, TSB-A-87(9)C, it was held that where a partnership purchases tangible personal property that is principally used by the partnership and meets all of the requirements for qualifying for the investment tax credit, a corporate partner of the partnership is allowed an investment tax credit,

pursuant to section 210.12(a) of the Tax Law, for its allocable share of the cost or other basis of such qualifying tangible personal property. Likewise, an individual partner of a partnership would be allowed an investment tax credit pursuant to section 606(a) of the Tax Law for the individual's allocable share of the cost or other basis of the qualifying tangible personal property purchased and principally used by the partnership.

In *Bruce Nadell*, Adv Op Comm T&F, May 2, 1996, TSB-A-96(12)C, it was held that where a corporate partner of a partnership is allowed to claim an investment tax credit on qualifying property that is principally used by the partnership, a corporate member of an LLC that is treated as a partnership is allowed to claim an investment tax credit on qualifying property that is principally used by the LLC.

In *Sutherland Asbill & Brennan*, Adv Op Comm T&F, January 9, 2001, TSB-A-01(1)C, it was held that where an LLC that is treated as a partnership has been certified pursuant to Article 18-B of the General Municipal Law, and it purchases tangible property that is principally used by the LLC and meets all of the requirements under section 210.12-B of the Tax Law for qualifying for the empire zone investment tax credit, a corporate member of the LLC is allowed an empire zone investment tax credit pursuant to such section 210.12-B of the Tax Law, for its allocable share of the cost or other basis of such qualifying tangible property.

Following *John Eagan*, *supra*, *Bruce Nadell*, *supra*, and *Sutherland Asbill*, *supra*, an individual partner of a partnership would be allowed a brownfield redevelopment tax credit pursuant to section 606(dd) of the Tax Law for the individual's allocable share of (a) the site preparation costs paid or incurred by the partnership with respect to a qualified site, (b) the cost or other basis of the qualifying tangible property purchased and principally used by the partnership and (c) the on-site groundwater remediation costs paid or incurred by the partnership with respect to a qualified site (to the extent that such groundwater remediation costs are not included in the determination of the site preparation credit component or the cost or other basis included in the determination of the tangible property credit component), as determined under section 21 of the Tax Law.

In this case, since each Petitioner is a partner of Master, each Petitioner would be allowed to claim the Brownfield Cleanup Program tax credits under section 606(dd) of the Tax Law for his allocable share of such tax credits determined pursuant to section 21 of the Tax Law.

Issue 3.

Under section 21(a)(6) of the Tax Law, site preparation costs and on-site groundwater remediation costs paid or incurred by the taxpayer with respect to a qualified site and the cost or other basis for federal income tax purposes of tangible personal property and other tangible property, including buildings and structural components of buildings, which constitute qualified tangible property shall only include costs paid or incurred by the taxpayer on or after the date of the

brownfield site agreement executed by the taxpayer and the Department of Environmental Conservation pursuant to section 27-1422 of the Environmental Conservation Law.

Accordingly, the costs paid or incurred by each East Coast LLC for site preparation and on-site groundwater remediation with respect to a qualified site after a brownfield site agreement has been executed, but before the first taxable year beginning after April 1, 2005, may be included in determining the site preparation and on-site groundwater remediation credit components contained in section 21 of the Tax Law for the credit that is allowable under section 606(dd) of the Tax Law.

Further, the cost or other basis for federal income tax purposes of tangible personal property and other tangible property, including buildings and structural components of buildings, owned by each East Coast LLC, which constitute qualified tangible property of a qualified site, paid or incurred after a brownfield site agreement has been executed but before the first taxable year beginning after April 1, 2005, may be included in determining the tangible property credit component contained in section 21 of the Tax Law for the credit that is allowable under section 606(dd) of the Tax Law.

This Advisory Opinion does not address whether the brownfield redevelopment tax credit may be claimed by a taxpayer with respect to a qualified site if the effective date of the Certificate of Completion, or the date property is placed in service, occurs before the first taxable year beginning after April 1, 2005.

DATED: April 1, 2004

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.