

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

TSB-A-13(7)C
Corporation Tax
TSB-A-13(6)I
Income Tax
May 20, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z120709A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether the payments made by members to fund research and development costs will qualify for the Qualified Emerging Technology Company (QETC) capital tax credit.

We conclude that the payments will not qualify for the credit.

Facts

Petitioner, a Delaware limited liability company (Company), is a start-up company taxed as a partnership. The Petition states: “The Company was formed in 2010 whereupon the members were granted their ownership percentages subject to further capital commitments.” Although there are five members altogether, two members, a corporate member (“A”) and an individual member (“B”) (“the funding members”), agreed to fund all of the phase one research and development costs in equal amounts. The Operating Agreement, signed on September 12, 2011, provides that A and B will receive 25% and 45% respectively of the distributions (the “Distribution Percentage”). In addition to A and B, three other individual members were not obligated to make monetary contributions to capital but were designated to receive distributions of 20%, 5%, and 5%. Article II Capital Contributions, § 2.1 provides that “As of the Effective Date of the Agreement, the Members have heretofore made their respective capital contributions to the Company as reflected on Schedule 2.1....” Schedule 2.1 showed no capital contributions as having been made.

The Company began its operations in 2011 and, as a result, started requiring the funding members to pay the bills as agreed. The Company did not have a checking account of its own, so all the money that was billed by the vendors was paid by A with the corporate member’s funds. B reimbursed A for 50% of A’s payments. The Company’s General Ledger showed entries for dozens of payments as “member equity” for each of the funding members, beginning on January 10, 2011 through December 16, 2012.

Analysis

A taxpayer may be eligible for a tax credit for each “qualified investment” in a QETC as defined in § 3102-e of the Public Authorities Law.¹ See Tax Law § 606(r). “Qualified investment”

¹ For purposes of this Advisory Opinion, we have assumed, without examining the facts, that the Company satisfies the requirements to be a QETC.

means the contribution of property to a corporation in exchange for original issue capital stock or other ownership interest, the contribution of property to a partnership in exchange for an interest in the partnership, and similar contributions in the case of a business entity not in corporate or partnership form in exchange for an ownership interest in such entity. *See* Tax Law § 606(r). The amount of the credit is a certain percentage of qualified investments in QETCs, “except for investments made by or on behalf of an owner of the business, including, but not limited to, a stockholder, member or sole proprietor or any related person” as defined in Internal Revenue Code § 465(b)(3)(C).

The Department has long interpreted “owner of a QETC” for purposes of the capital tax credit to mean “an entity that owns more than a 10% interest in a qualified emerging technology company.”² This interpretation of “owner” for purposes of the QETC is consistent with the definition of “owner of a business” under 20 NYCRR § 5-8.2(b) pertaining to the economic development zone capital tax credit, which reads, “...*owner of the business* means an entity or individual that owns more than a 10 percent interest in a certified zone business.”

The Petition states that the members of the Company were granted their ownership percentages when the Company was formed in 2010, subject to further capital commitments. Thus, we conclude that the funding members, who were entitled to distribution percentages of 25% and 45% respectively, met the QETC definition of “owners” from the inception. As owners, they are ineligible for the credit.

DATED: May 20, 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.

² TSB-M-99(2.1)C. Originally, the QETC capital tax credit was available only to Article 9-A taxpayers under Tax Law §210.12-F for taxable years beginning on or after January 1, 1999. The credit was extended to Article 22 taxpayers the following year.