

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

TSB-A-04(13)C
Corporation Tax
July 22, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C040319A

On March 19, 2004, a Petition for Advisory Opinion was received from Definity Health, Attn. Timothy Godzich, 1600 Utica Avenue Ste 900, St Louis Park, Minnesota 55416.

The issue raised by Petitioner, Definity Health, is whether its subsidiary, Newco, will be a new business under section 210.12(j) of the Tax Law for purposes of claiming a refund of the empire zone (EZ) wage tax credit under section 210.19 of the Tax Law, and a new business under section 14(j) of the Tax Law for purposes of meeting the employment test under section 14(b) of the Tax Law to become eligible for the qualified empire zone enterprise (QEZE) benefits.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner was incorporated in Delaware in 1998, and is headquartered in St. Louis Park, Minnesota. Petitioner is owned by individuals and is not owned over 50 percent, directly or indirectly, by a taxpayer subject to tax under Article 9-A; sections 183, 184, 185 or 186 of Article 9; Article 32 or Article 33 of the Tax Law.

Petitioner began doing business in New York in 2001. The sole business activity of Petitioner in New York, for years 2001 through 2003, was the sale of consumer-driven healthcare benefit programs. Sales in New York are solicited by two salespersons. Petitioner's business activities in New York, and otherwise, are limited to sales of the healthcare benefit programs. That is, Petitioner does not do any processing of the healthcare benefit programs that it sells. Processing operations have been purchased by Petitioner from unrelated third-party administrators. For tax years ending December 31, 2001, through December 31, 2003, Petitioner was subject to tax under Article 9-A of the Tax Law.

Newco will be organized in 2004, and will be a wholly owned subsidiary of Petitioner. Newco's primary business activities will be unrelated to the activities conducted by Petitioner in New York. The primary activities of Newco will consist of processing operations related to healthcare claims. Newco will initially lease approximately 30,000 square feet of space in Amherst, New York on a temporary basis during 2004. Newco plans to construct a new 50,000 square foot facility in the Tonawanda, New York EZ by February 5, 2005, and expand employment at this facility to 600 jobs within 3 years.

It is anticipated that Petitioner will no longer be subject to New York franchise tax after creation of Newco during 2004. The two salesperson employees of Petitioner employed in New York in the solicitation of sales of the healthcare benefits programs will become employees of Newco as of its first day of existence in 2004. Therefore, upon the creation of Newco sometime

during 2004, Petitioner will not have any employees conducting business operations on its behalf in New York, and will not have any other operations in New York. The two salespersons employed in New York by Newco will be soliciting business for Newco's healthcare claims processing operations that will be conducted in New York, and will not be soliciting business for Petitioner for the sale of the healthcare benefits programs.

Applicable law

Section 14 of the Tax Law contains the provisions for the QEZE program and provides, in part:

(a) Qualified empire zone enterprise. A business enterprise which is certified under article eighteen-B of the general municipal law prior to July first, two thousand five shall be a "qualified empire zone enterprise":

(1) for purposes of articles nine-A ... of this chapter, for each of the taxable years within the "business tax benefit period," which period shall consist of ... (B) in the case of a business enterprise with a test date occurring on or after January first, two thousand two, the fifteen taxable years next following the business enterprise's test year, but only with respect to each of such fifteen years for which the employment test is met, and

(2) for purposes of articles twenty-eight and twenty-nine of this chapter, during the "sales and use tax benefit period." Such period shall consist of one hundred twenty consecutive months beginning on the later of (A) March first, two thousand one, or (B) the first day of the month next following the date of issuance of a qualified empire zone enterprise certification by the commissioner under subdivision (h) of this section. Provided however, such period shall not include any month falling within a taxable year immediately preceded by a taxable year with respect to which the business enterprise did not meet the employment test.

(b) Employment test. (1) General. The employment test shall be met with respect to a taxable year if the business enterprise's employment number in empire zones for such taxable year equals or exceeds its employment number in such zones for the base period, and its employment number in the state outside of such zones for such taxable year equals or exceeds its employment number in the state outside of such zones for the base period. If the base period is zero years and the enterprise has an employment number in such zone of greater than zero with respect to a taxable year, then the employment test will be met only if the enterprise qualifies as a new business under subdivision (j) of this section.

(c) Base period. The term “base period” means the five taxable years immediately preceding the test year. If the business enterprise has fewer than five such years, then the term “base period” means such smaller set of years.

* * *

(f) Taxable year. The term “taxable year” means the taxable year of the business enterprise under ... article nine-A ... of this chapter....

* * *

(j) New business. (1) A new business shall include any corporation, except a corporation which is substantially similar in operation and in ownership to a business entity (or entities) taxable, or previously taxable, under ... article nine-A ... of this chapter

Section 210.19 of the Tax Law provides for an EZ wage tax credit, in part, as follows:

(a) A taxpayer shall be allowed a credit, to be computed as hereinafter provided, against the tax imposed by this article where the taxpayer has been certified pursuant to article eighteen-B of the general municipal law. The amount of such credit shall be as prescribed by paragraph (d) hereof.

* * *

(c) The credit provided for herein shall be allowed only where the average number of individuals, excluding general executive officers, employed full-time by the taxpayer in (A) the state and (B) the empire zone or area previously constituting such zone or zone equivalent area, during the taxable year exceeds the average number of such individuals employed full-time by the taxpayer in (A) the state and (B) such zone or area subsequently or previously constituting such zone or such zone equivalent area, respectively, during the four years immediately preceding the first taxable year in which the credit is claimed with respect to such zone or area....

The credit shall be allowed only with respect to the first taxable year during which payments of empire zone wages are made and the conditions set forth in this paragraph are satisfied, and with respect to each of the four taxable years next following (but only, with respect to each of such years, if such conditions are satisfied), in accordance with paragraph (d) of this subdivision....

* * *

(e) The credit and carryovers of such credit allowed under this subdivision for any taxable year shall not, in the aggregate, reduce the tax due for such year to less than the higher of the amounts prescribed in paragraphs (c) and (d) of subdivision one of this section. However, if the amount of credit or carryovers of such credit, or both, allowed under this subdivision for any taxable year reduces the tax to such amount, or if any part of the credit or carryovers of such credit may not be deducted from the tax otherwise due by reason of the final sentence of paragraph (d) hereof, any amount of credit or carryovers of such credit thus not deductible in such taxable year may be carried over to the following year or years and may be deducted from the tax for such year or years. In lieu of such carryover, any such taxpayer which qualifies as a new business under paragraph (j) of subdivision twelve of this section may elect, on its report for its taxable year with respect to which such credit is allowed, to treat fifty percent of the amount of such carryover as an overpayment of tax to be credited or refunded in accordance with the provisions of section ten hundred eighty-six of this chapter. Provided, however, the provisions of subsection (c) of section ten hundred eighty-eight of this chapter notwithstanding, no interest shall be paid thereon.

Section 210.12(j) of the Tax Law provides, in part:

a new business shall include any corporation, except a corporation which:

(1) over fifty percent of the number of shares of stock entitling the holders thereof to vote for the election of directors or trustees is owned or controlled, either directly or indirectly, by a taxpayer subject to tax under this article; ... or

(2) is substantially similar in operation and in ownership to a business entity (or entities) taxable, or previously taxable, under this article; ... or

(3) has been subject to tax under this article for more than five taxable years (excluding short taxable years).

Opinion

Petitioner began doing business in New York State in 2001 when two employees of Petitioner began soliciting the sale of the healthcare benefit programs in New York. However, Petitioner did not do any processing of the healthcare benefit programs it sold. Such processing operations were conducted by unrelated third-party administrators that were retained by Petitioner. Petitioner states that its owners are individuals, and that it is not owned over 50 percent, directly or indirectly, by a taxpayer subject to tax under section 183, 184, 185 or 186 of Article 9, or Article 9-A, 32 or 33 of the Tax Law.

During 2004, Petitioner will form Newco as a wholly owned subsidiary, and Newco's activities in New York will consist of healthcare claims processing operations. Newco will hire, on

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the day that it is organized, Petitioner's two salespersons who are working in New York. As employees of Newco, the two salespersons will solicit business for Newco's healthcare claims processing operations. These employees will no longer solicit the sale of the healthcare benefit programs. Newco will initially lease approximately 30,000 square feet of space in Amherst, New York on a temporary basis during 2004. Newco will construct a new 50,000 square foot facility in the Tonawanda, New York EZ by February 5, 2005, for its healthcare claims processing operations. Newco anticipates that its employment at the new facility will expand to 600 jobs within 3 years.

With respect to the question of whether Newco would be considered to be a new business under section 210.12(j) of the Tax Law for purposes of being eligible for a refund, in lieu of a carryover, of an EZ wage tax credit under section 210.19 (e) of the Tax Law, Newco will be a new business if it does not meet any of the three exceptions contained in section 210.12(j) of the Tax Law, which defines a *new business*.

First, Newco must not be a corporation in which over 50 percent of the number of shares of stock entitling their holders to vote for the election of directors or trustees is owned or controlled, either directly or indirectly, by a taxpayer subject to tax under Article 9-A of the Tax Law. Newco will be a wholly owned subsidiary of Petitioner which is currently subject to tax under Article 9-A of the Tax Law. However, Petitioner anticipates that the day that Newco is organized, Newco will hire Petitioner's two New York salespersons, and Petitioner will cease to be a New York taxpayer. Assuming that Petitioner, in fact, ceases to be a New York taxpayer, Newco will not be owned or controlled by a taxpayer under Article 9-A of the Tax Law.

Second, Newco must not be a corporation that is substantially similar in operation and in ownership to a business entity or entities taxable, or previously taxable, under Article 9-A of the Tax Law. Newco and Petitioner will not be substantially similar in operation. Petitioner's only activity in New York is the solicitation of the sale of healthcare benefit programs in New York State through two salespersons, but it does not perform claims processing for the benefit programs that it sells. Petitioner is headquartered in Minnesota, and the claims processing operations are purchased from unrelated third-party administrators. Newco will perform a healthcare claims processing operation in New York State and plans to construct a new 50,000 square foot facility in the Tonawanda EZ, and expand employment at the facility to 600 jobs in 3 years. In addition, Newco will have two salespersons soliciting business in New York for such operations, but will not solicit sales of the healthcare benefit programs.

Third, Newco must not be a corporation that has been subject to tax under Article 9-A of the Tax Law for more than five taxable years (excluding short taxable years) before each tax year during which the taxpayer becomes eligible for the empire zone wage tax credit. Newco will be a newly created entity in 2004.

Accordingly, Newco will not meet any of the three exceptions contained in section 210.12(j) of the Tax Law that would exclude it from being a *new business*. Therefore, under the facts

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described in this Advisory Opinion, Newco will be considered a *new business* pursuant to sections 210.12(j) and 210.19(e) of the Tax Law, for purposes of the refundable EZ wage tax credit, for those taxable years that it meets the requirements of section 210.12(j) of the Tax Law.

With respect to the question of whether Newco would be considered to be a new business under section 14(j) of the Tax Law, Newco would be a *new business* if it is not substantially similar in ownership and operation to a business entity taxable or previously taxable in New York. This condition is similar to the condition contained in section 210.12(j)(2) of the Tax Law. As determined above, Newco would not be similar in operation to its parent (Petitioner), a business entity that operated in New York prior to the organization of Newco. Accordingly, Newco would also qualify as a *new business*, as defined in section 14(j) of the Tax Law, for purposes of qualifying for QEZE benefits.

Note that this Advisory Opinion does not address the issue of whether Newco will, in fact, qualify for the EZ wage tax credit under section 210.19 of the Tax Law, or qualify to be a QEZE under section 14 of the Tax Law.

DATED: July 22, 2004

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