

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

TSB-A-10(33)S
Sales Tax
July 29, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S100506A

Petitioner, [REDACTED] an entity certified pursuant to the provisions of Article 18-B of the General Municipal Law as an Empire Zone business asks whether it was eligible to claim exemptions from the sales and use tax under section 1115(z) of the Tax Law on purchases it made from March 2006 through February 2009 prior to applying for and receiving a Qualified Empire Zone Enterprise (QEZE) Certification from the Department of Taxation and Finance.

We conclude that a business, though certified as an Empire Zone business pursuant to the provisions of the General Municipal Law, was not entitled to exemptions from the sales and use tax until it had applied for and received from the Department of Taxation and Finance a QEZE sales tax certification pursuant to the Tax Law.

Facts

Petitioner was certified as an Empire Zone business pursuant to Article 18-B of the General Municipal Law effective June 15, 2002. It also appears that sometime in 2009, pursuant to amendments to the law requiring the Department of Economic Development to review the status of businesses participating in the Empire Zones Program, Petitioner was deemed eligible to continue as an Empire Zone business and received an Empire Zone Retention Certificate (EZRC). Petitioner has not shown that it had complied with the requirements of Tax Law section 14(h) and filed for and received a certification as a QEZE from the Department of Taxation and Finance so as to be eligible to claim the exemptions from sales tax provided in section 1115(z) of the Tax Law on purchases it made during 2006-2009. Petitioner asserts that it was not aware that it was required to file for and receive a QEZE sales tax certification from the Department of Taxation and Finance prior to its being entitled to the benefits of the sales tax exemptions provided in Tax Law section 1115(z).

Analysis

Effective March 1, 2001, the Empire Zone program provided exemptions (*see* Tax Law section 1115(z)) from sales taxes for businesses that were certified under Article 18-B of the General Municipal Law as Empire Zone businesses. The sales tax exemption provided in Tax Law section 1115(z) applied to purchases of certain property and services used or consumed by the business within a zone in which it is certified. The exemptions authorized in section 1115(z) could be obtained at the time of purchase. However, Tax Law section 14(h) and section 1115(z) required that before an entity which had been certified as an Empire Zone business pursuant to Article 18-B of the General Municipal Law could avail itself of the sales tax exemptions, it was required to additionally file for and obtain a QEZE sales tax certification (Form DTF-81) from the Department of Taxation and Finance. (*See* TSB-M-01(1)S, *Qualified Empire Zone Enterprise (QEZE) Exemptions (Articles 28 and 29)*, January 16, 2001 and TSB-M-02(5)S, *Qualified Empire Zone Enterprise (QEZE) Exemptions (Articles 28 and 29)*, July 24, 2002). To confirm the exempt status of its purchases, the QEZE purchaser was required to present its sellers with an

exemption certificate. The applicable exemption certificate has always required that the QEZE purchaser include its QEZE certification number issued by the Department of Taxation and Finance.

Effective September 1, 2009, the up-front exemption from sales and use taxes (Tax Law section 1115(z)) was repealed and replaced with a provision (Tax Law section 1119(d)) authorizing a refund or credit of the sales tax paid on purchases of goods and services by the QEZE. Thus, all QEZEs must (commencing September 1, 2009) pay the tax at the time of purchase and subsequently file claims for refund or credit of taxes paid on qualified purchases.

TSB-M-09(12)S, *Changes to Qualified Empire Zone Enterprise (QEZE) Program (Articles 28 and 29)- Effective September 1, 2009*, July 23, 2009, in explaining the provisions of Tax Law section 14(a)(2) as amended by Chapter 57 of the Laws of 2009, in pertinent part provides:

- A business enterprise's eligibility for the refund or credit provided by new section 1119(d) depends on when the business enterprise is certified by ESD and whether or not it has been issued Form DTF-81, *Qualified Empire Zone Enterprise (QEZE) Sales Tax Certification*, by the Tax Department:
- A business enterprise certified by ESD before April 1, 2009, that has already been issued Form DTF-81 is eligible for a refund or credit of tax paid on or after September 1, 2009, on qualifying purchases after it receives its EZRC from ESD. The sales tax benefit period for the business is unaffected and continues to run for 120 months from the effective date on Form DTF-81. The business must pass the employment test for the tax year in which a refund or credit is claimed.
- A business enterprise certified by ESD before April 1, 2009, that has received an EZRC but has not yet applied for Form DTF-81 is eligible for a refund or credit after it has filed the appropriate QEZE application (*see* Forms DTF-82, DTF-83, and DTF-84) and received Form DTF-81 from the Tax Department. QEZE sales tax benefits are not retroactive; the benefit period is 120 months from the effective date on Form DTF-81. The business must pass the employment test for the tax year in which a refund or credit is claimed.

Thus, as noted, the sales tax QEZE benefit is not retroactive and the 120-month tax benefit period for which it may be applicable (subject to certain limitations and qualifications) commences with the period in which the certification by the Department of Taxation and Finance is granted. (*See* Tax Law section 14(a)(2) and TSB-M-09(12)S, *supra*.)

The requirement that Petitioner file for and obtain a certificate from the Department of Taxation and Finance was not a mere ministerial act but rather was a condition precedent to Petitioner's entitlement to the exemptions from sales tax for QEZEs provided pursuant to section 1115(z) of the Tax Law.

This is demonstrated by the following:

- The statutory requirement to file for a separate certificate from the Department of Taxation and Finance, which filing and the certificate's issuance dictate the commencement and running of the statutorily designated 120 consecutive months for the sales tax benefit period.

- The Department's administrative requirements (*see* TSB-M-02(5)S, *supra*) that the ID number as provided on the certificate was required for the purchaser's issuance of the QEZE exemption document to sellers.
- Tax Law section 14(a)(2), as amended by Ch. 57 of the Laws of 2009, provided that the sales tax benefit period for business enterprises certified pursuant to Article 18-B of the General Municipal Law prior to April 1, 2009 remained based upon the date of the issuance of the Department of Taxation and Finance QEZE sales tax certification, while providing that the benefit periods for newly certified businesses (April 1, 2009, and later) are determined by the effective date of their certification pursuant to the General Municipal Law alone.

Accordingly, any QEZE exemption documents provided by Petitioner to vendors would not have been properly issued. No purchases by Petitioner prior to the establishment of the commencement of its sales tax benefit period as determined by the date of its certification (DTF-81) issued by the Department of Taxation and Finance are eligible for the exemptions formerly provided in Tax Law section 1115(z) or the refunds and credits currently provided in Tax Law section 1119(d). Regardless of whether Petitioner provided QEZE exemption documents to vendors or knew that it needed a Department QEZE sales tax certification, Petitioner is liable for sales taxes Petitioner failed to pay on its purchases prior to the commencement of its sales tax benefit period as established by statute.

DATED: July 29, 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.