STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FRANK J. AND KATHLEEN CAMPAGNA	:	DETERMINATION DTA NO. 818567
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1997.	:	

Petitioners, Frank J. and Kathleen Campagna, 180 Mill Road, Red Hook, New York 12571, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1997.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on February 12, 2002 at 9:30 A.M., with all briefs submitted by May 14, 2002, which date began the six-month period for the issuance of this determination. Petitioner appeared by Jeremiah F. Manning, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Margaret T. Neri, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation had a rational basis for the issuance of the subject Notice of Deficiency and whether, under the instant circumstances, the Division had the burden of proof.

II. Whether petitioners have shown entitlement to a refund of economic development zone wage tax credits and economic development zone investment tax credits as claimed on their 1997 personal income tax return.

III. Whether petitioners are entitled to an award of costs for administrative and litigation expenses pursuant to Tax Law § 3030.

FINDINGS OF FACT

1. On September 25, 2000, the Division of Taxation ("Division") issued to petitioners, Frank J. and Kathleen Campagna,[1] a Notice of Deficiency which asserted $17,973.00 in additional tax due, plus interest, for the year 1997.

2. On his timely filed 1997 New York resident income tax return, petitioner claimed a refund of $1,473.00 in economic development zone ("EDZ") investment tax credits and $16,500.00 in EDZ wage tax credits as his pro rata share of the credit base of Tri-State Associated Services, Inc. ("the corporation"), an S corporation wholly owned by Mr. Campagna.

3. The Division initially paid the refund claimed in petitioner's 1997 return. Later, the return was audited and the Division concluded that, while petitioner was entitled to claim EDZ investment tax and wage credits, he was not eligible to receive a refund of those credits in lieu of carrying the credits forward to the next taxable year. Accordingly, the Division issued the September 25, 2000 Notice of Deficiency, asserting that petitioner was not entitled to the previously refunded $17,973.00 in EDZ tax credits.

4. Tri-State Associated Services, Inc., formerly known as Tri-State Copyland, Inc., was incorporated in New York in 1981 and was originally owned and operated by Mr. Campagna's mother. Mr. Campagna became the sole shareholder of the corporation by 1987.

5. Effective January 1, 1988, the corporation elected S corporation status for both Federal and New York State tax purposes. Such status remained in effect at all times relevant herein.

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[1] Kathleen Campagna is a petitioner in this matter solely because she filed a joint return with her spouse, Frank J. Campagna, for the year at issue. Accordingly, all references to "petitioner" in this determination shall refer to Frank J. Campagna unless otherwise indicated.

6. Tri-State Copyland, Inc. was a retail copy shop located at 608 Broadway, Kingston, New York. Its business was retail and included high-speed copying, color copying, and the sale of paper and office supplies. Its customer base was local.

7. In or about 1992, the corporation acquired property located at 71-81 Tenbroeck Avenue, Kingston, New York. This property was located in a manufacturing section of Kingston and the building located on the property required substantial investment to renovate and make suitable for the corporation's use.

8. In 1995, the corporation changed its name to Tri-State Associated Services, Inc.

9. Petitioner had a long-term plan for the corporation to change from a retail copy shop operation to a wholesale business of printing and binding short-run books. In or around 1995, petitioner began moving the corporation in that direction. In or about 1996 and in later years, the corporation invested in equipment which was installed in the Tenbroeck Avenue location. The corporation's largest equipment purchase was a Sakurai two-color press purchased for approximately $350,000.00 in 1996. The corporation made other substantial purchases of equipment for use in the short-run book printing and binding operation. The corporation's employees received training to operate the new equipment.

10. The corporation's short-run book printing and binding business advertises nationally in trade publications. The customer base for this business consists of publishers, authors, and printers and is also nationally based.

11. In 1997, the corporation had employees in the Tenbroeck Avenue location involved in the printing of books.

12. During 1997 and 1998, the copy shop operation was ongoing at the 608 Broadway location. The corporation used the income from the copy shop operation to build the book printing and binding business.

13. The corporation obtained a Certificate of Eligibility for the New York State Economic Development Zones Program effective September 11, 1997. This certification made the corporation eligible to receive certain benefits, including EDZ tax credits, in connection with the facilities located at 608 Broadway and 71-81 Tenbroeck Avenue.

14. In 1998 the corporation completed a 3,500 square foot addition to the Tenbroeck Avenue premises for office space and storage. The corporation moved its offices from the 608 Broadway location to the Tenbroeck Avenue location during that year.

15. In 2000, petitioner unsuccessfully attempted to sell the retail copy shop at 608 Broadway by contacting other copy shop owners and placing a classified advertisement in the Poughkeepsie Journal. In 2001, the corporation sold the real property located at 608 Broadway.

16. Throughout the period at issue, the corporation had one set of books and records for both its retail copy shop and book publishing ventures. The corporation had one corporate identification number, one payroll and filed one tax return.

17. For worker's compensation purposes, in 1997 and 1998 the corporation had payroll totaling approximately $145,000.00 classified under the copy shop category of "Printing: photostatic production." In 2000 and 2001, the corporation had payroll of about $21,000.00 under this worker's compensation classification and about $262,000.00 under the category for its book publishing business ("quick printing").

18. The corporation implemented a more complex computer and accounting system in 1997 or 1998.

19. For the first nine months of 2001, sales income from the short-run book printing and binding operation was 89 percent of the corporation's total sales.

CONCLUSIONS OF LAW

A. Preliminarily, petitioner contends that the Division lacked a rational basis to issue the assessment at issue. Petitioner further contends that the Division of Taxation has the burden of proof under the instant circumstances. These contentions are without merit. Considering that the corporation had been in business in New York since its 1981 incorporation, the Division clearly had a rational basis for the issuance of the subject notice (***see***, Conclusion of Law "D"). As to the burden of proof, petitioner seeks a refund of certain tax credits. "A tax credit is 'a particularized species of exemption from taxation'(***Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193, 197, 371 NYS2d 715) and, therefore, petitioner bore the burden of showing 'a clear-cut entitlement' to the statutory benefit (***Matter of Luther Forest Corp. v. McGuiness***, 164 AD2d 629, 632, 565 NYS2d 570)" (***Golub Service Station v. Tax Appeals Tribunal*** 181 AD2d 216, 585 NYS2d 864). Petitioner thus had the burden of proof herein (***see also***, Tax Law § 689[e]; 20 NYCRR 3000.15[d][5]).

B. Tax Law § 606 provides for various credits against personal income tax, including the EDZ investment tax credit (subsection [j]) and the EDZ wage tax credit (subsection [k]). Pursuant to Tax Law § 606(i), New York S corporation shareholders may claim a credit against personal income tax with respect to the credits enumerated in that subsection in an amount equal to the shareholder's pro rata share of the S corporation's credit base. The EDZ wage and investment tax credits are among the credits listed in subsection (i). There is no dispute in this matter that the corporation was eligible to claim the EDZ credits at issue and there is no dispute that petitioner properly computed the corporation's credit base (and his pro rata share of that

base) with respect to the credits at issue. What is in dispute is whether the credits claimed by petitioner are refundable. Generally, if the EDZ credits exceed the taxpayer's tax for a given year the excess may be carried over to the following year or years and may be used to reduce the taxpayer's tax for such year or years (***see***, Tax Law § 606[j][4]; [k][5]). However, if the taxpayer qualifies as "an owner of a new business" such taxpayer may at his or her option claim a refund of such credit (***see***, Tax Law § 606[j][4]; [k][5]). The issue in this matter is thus whether petitioner qualifies as the owner of a new business and is therefore entitled to a refund of the subject credits.

C. Tax Law § 606(i)(1)(B) provides that, for purposes of determining the application of the credit provisions of that section, S corporation shareholders shall be treated as "the owner of a new business" with respect to his or her share of the corporation's credit base "if the corporation qualifies as a new business pursuant to [Tax Law § 210(12)(j)]."

Tax Law § 210(12)(j) defines "new business" in relevant part as 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
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> (2) is substantially similar in operation and in ownership to a business entity (or entities) taxable, or previously taxable, under this article . . . or the income (or losses) of which is (or was) includable under article twenty-two of this chapter whereby the intent and purpose of this paragraph and paragraph (e) of this subdivision with respect to refunding of credit to new business would be evaded; or
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> (3) has been subject to tax under this article for more than four taxable years (excluding short taxable years) prior to the taxable year during which the taxpayer first becomes eligible for the investment tax credit.

D. In the instant matter, the corporation was incorporated in New York in 1981 and has been engaged in business in New York since that time. The corporation was thus subject to tax

under Article 9-A for more than four taxable years prior to 1997 and therefore was not a "new business" as defined in Tax Law § 210(12)(j)(3). Pursuant to Tax Law § 606(i)(1)(B), then, petitioner may not be treated as "an owner of a new business" and therefore may not claim a refund of the EDZ wage tax credits and EDZ investment tax credits at issue (***see***, Tax Law § 606[j][4]; [k][5]).[2]

Because the conditions listed in Tax Law § 210(12)(j) disqualifying a corporation from "new business" status are linked by the disjunctive "or," if a corporation meets any one of these conditions it is not a new business as defined under that paragraph. Accordingly, it is not necessary to determine whether the corporation was "substantially similar in operation . . . to a business entity (or entities) taxable . . . under [Article 9-A]" (***see***, Tax Law § 210[12][j][2]).

E. Petitioner asserts that, given the corporation's subchapter S election, the definition of "new business" as contained in Tax Law § 210(12)(j) does not apply. Rather, petitioner asserts, because such an election treats the corporation as a pass-through entity and thus similar to a partnership, the definition of "an owner of a new business" as contained in Tax Law § 606(a)(10) is applicable.

Petitioner's contention is rejected. Tax Law § 606(a)(10) defines an "owner of a new business" with respect to "an individual who is either a sole proprietor or a member of a partnership." Petitioner is the sole shareholder of an S corporation and is neither a sole proprietor nor a partner in a partnership. While the tax treatment of partnerships and S corporations share certain characteristics, S corporations and partnerships are distinct business entities. Furthermore, the express statutory language of Tax Law § 606(i)(1)(B) unambiguously

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[2] The corporation's 1995 name change does not affect this conclusion. Such a change does not terminate a corporation's existence or alter its legal identity (***see***, ***Department of Justice, F.B.I. v. Calspan Corp.***, 578 F2d 295).

provides that, in order for S corporation shareholders to be treated as the owners of a new business, the corporation must qualify as a new business under Tax Law § 210(12)(j). As discussed, the corporation does not qualify under this definition.

Petitioner's position not only ignores the clear language of Tax Law § 606(i)(1)(B), but would also render this entire subparagraph a nullity. Why would the Legislature have enacted a provision specifically defining the circumstances under which an S corporation shareholder is to be treated as the owner of a new business, if, as petitioner suggests, such a determination is properly made under a provision which defines this same phrase for a sole proprietor and a member of a partnership? The Legislature could not have intended such a result.

F. Petitioner also claims administrative and litigation costs pursuant to Tax Law § 3030. This claim is premature. An award for costs may be made only after a final administrative determination (***see***, Tax Law § 3030[c][5][a][ii]). The instant determination becomes final only if neither party files a timely exception with the Tax Appeals Tribunal (***see***, Tax Law § 2010[4]). Moreover, even if not premature, the claim must fail because petitioners have not "substantially prevailed" in this matter (***see***, Tax Law § 3030[c][5][A][i]). Also, petitioners have not claimed a specific amount of costs and have not submitted any itemized statements of costs (***see***, Tax Law § 3030[c][5][A][ii]). Petitioner's claim for costs is therefore dismissed.

G. The petition of Frank J. and Kathleen Campagna is denied and the Notice of Deficiency dated September 25, 2000 is sustained.

DATED: Troy, New York
October 17, 2002

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE