

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CPI BUSINESS GROUPS, INC.	:	DETERMINATION
	:	DTA NO. 820672
for Revision of a Deficiency or for Refund of New	:	
York State Corporation Franchise Tax under	:	
Article 9-A of the Tax Law for the Period	:	
October 1, 2001 through September 30, 2002.	:	

Petitioner, CPI Business Groups, Inc., c/o 171 Sully's Trail, Pittsford, New York 14534, filed a petition for revision of a deficiency or for refund of New York State corporation franchise tax under Article 9-A of the Tax Law for the period October 1, 2001 through September 30, 2002.

On May 5, 2006 and May 30, 2006, the Division of Taxation by Daniel Smirlock, Esq. (Andrew S. Haber, Esq.), and petitioner, appearing by Bonadio & Company (Paul J. Henry, CPA), respectively, waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by January 15, 2007, which commenced the six-month period for the issuance of this determination.

After review of the evidence and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly reduced the Empire Zone Wage Tax Credit claimed by petitioner for the company's fiscal year ending September 30, 2002.

FINDINGS OF FACT

1. CPI Business Groups, Inc., ("petitioner"), was formed as a corporation on September 21, 2001, and chose as its fiscal operating period October 1 through September 30. Petitioner started its business operations on March 31, 2002, when it acquired the business assets and much of the workforce of another business, Chili Plastics, Inc. Petitioner had no assets, employees or activities until such time.

2. Petitioner was certified pursuant to Article 18-B of the General Municipal Law by the Rochester City Empire Zone effective November 6, 2001.

3. Petitioner filed a Federal income tax return, Form 1120, and its New York State franchise tax return, Form CT-3, for the fiscal year October 1, 2001 through September 30, 2002. Petitioner claimed various business credits on the CT-3, including the Empire Zone Wage Tax Credit under Tax Law § 210(19), part of which was claimed as a refundable credit by filing Form CT-601 attached to Form CT-3.

On its Form CT-601, petitioner claimed it had no employees during the past four years and had the following employees for the tax year ended September 30, 2002:

	March 31	June 30	Sept. 30	Dec. 31	Total	Average
# of full time employees in NYS (Line 2 Part II, Schedule A)	241	241	236	n/a	718	239
# of full time employees in EZ (Line 4 Part III, Schedule A)	241	241	236	n/a	718	239

# of Tax Law § 210(19)(d)(1) qualified employees (Line 6 Part I, Schedule B)	71	71	71	n/a	213	71
# of Tax Law § 210(19)(d)(2) qualified employees (Line 6 Part II, Schedule B)	170	170	165	n/a	505	168

4. On Form CT-601, petitioner computed the average number of employees by using the number of full-time employees on March 31, 2002, June 30, 2002, and September 30, 2002 during the fiscal year rather than December 31, 2001, March 31, 2002, June 30, 2002, and September 30, 2002.

5. A desk audit of the return was performed by the Division of Taxation (“Division”) based upon a review of the return and the documents submitted. Petitioner provided information regarding its eligibility for various credits including the Empire Zone Wage Credit.

6. The Division determined that petitioner qualified for the Empire Zone Wage Tax Credit; however, it found that, in addition to not using the number of full-time employees on December 31, 2001, petitioner had miscalculated the number of full-time employees for the other three periods, and included as full-time employees five that did not work for half the taxable year. The Division adjusted the number of employees to the following:

	March 31	June 30	Sept. 30	Dec. 31	Total	Average
# of full time employees in NYS (Line 2 Part II, Schedule A)	225	221	223	0	669	167.25
# of full time employees in EZ (Line 4 Part III, Schedule A)	225	221	223	0	669	167.25
# of Tax Law § 210(19)(d)(1) qualified employees (Line 6 Part I, Schedule B)	70	66	63	0	199	49.75

# of Tax Law § 210(19)(d)(2) qualified employees (Line 6 Part II, Schedule B)	155	155	160	0	470	117.5
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The audit also found that petitioner claimed its business credits in the wrong order, and accordingly, the Division adjusted the refundable credits. Petitioner does not dispute that it miscalculated the number of full-time employees and concedes that portion of the Division's adjustment on audit. Additionally, petitioner presumably concedes to an accurate order of credit calculations, since the parties agree that the only issue in dispute is whether the number of employees in the "average number of employees" calculation should be divided by three quarters or four quarters, thereby including December 31, 2001 with zero employees as part of the calculation.

7. The Division issued a Statement of Tax Reduction or Overpayment dated May 12, 2004, reducing the amount of Empire Zone Wage Tax Credit claimed for the fiscal year ended September 30, 2002 to \$325,500.00 from \$460,335.00, and reduced the refundable portion to \$162,750.00 from \$230,167.50, as claimed on petitioner's Form CT-601.

SUMMARY OF THE PARTIES' POSITIONS

8. Petitioner maintains that the applicable period concept of Tax Law § 210(19)(b)(3) should apply in petitioner's situation because petitioner had no full-time employees, assets, or business operations until the second quarter of its taxable year, which should result in petitioner's dividing its average qualifying employees by three quarters rather than four as maintained by the Division.

9. The Division asserts that petitioner must include the number of individuals, excluding general executive officers, employed full time on December 31, 2001 in computing the average number of individuals used to determine the amount of the Empire Zone Wage Tax Credit under

Tax Law § 210(19)(d) for fiscal year October 1, 2001 through September 30, 2002. This requires that the average qualifying employees be divided by four quarters rather than three as asserted by petitioner.

CONCLUSIONS OF LAW

A. It is important to first note that petitioner in this case 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 bears 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, 572)” (*Matter of Golub Service Station v. Tax Appeals Tribunal* 181 AD2d 216, 219, 585 NYS2d 864, 865). Petitioner thus has the burden of proof herein (*see also*, Tax Law § 1089[e]; 20 NYCRR 3000.15[d][5]).

B. The Empire Zone Wage Tax Credit is provided for by Tax Law § 210(19) which was originally enacted in 1986 as part of the Economic Development Zone program. A corporation qualifies for the Empire Zone Wage Tax Credit if it pays empire zone wages for the first taxable year it has empire zone wages, and the next four taxable years if it has empire zone wages, and also meets certain criteria, 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.

(b) For the purposes of this subdivision, the following terms shall have the following meanings:

* * *

(3) "Average number of individuals, excluding general executive officers, employed full-time" shall be computed by ascertaining the number of such individuals employed by the taxpayer on the thirty-first day of March, the thirtieth day of June, the thirtieth day of September and the thirty-first day of December

during each taxable year *or other applicable period*, by adding together the number of such individuals ascertained on each of such dates and dividing the sum so obtained by the number of such dates occurring within such taxable year *or other applicable period* (Tax Law § 210(19)(a), (b)(3)).

C. This is a case of statutory interpretation. Petitioner filed its State and Federal tax returns for the taxable year October 1, 2001 through September 30, 2002, electing that same period as petitioner's "taxable year" (20 NYCRR 1-2.7). The Division maintains that petitioner's taxable year controls the computation of the empire zone wage tax credits. Petitioner argues that the phrase "other applicable period" in Tax Law § 210(19)(b)(3) should instead apply and be interpreted as a period that represents less than a taxable year. Under these facts, petitioner believes that the phrase would refer to when a company actually had some activity. But that is not the period petitioner chose to represent its first tax year. Petitioner argues that it only needs to include the dates during the taxable year that it was in business to compute the average number of qualifying employees, which would then eliminate counting employees on December 31, 2001. The resulting average would be divided by three quarters, not four. Petitioner is, in effect, asking the Division to overlook its choice of a fiscal period, which encompassed a full taxable year, and fictitiously create a short year.

There is no dispute that petitioner had no employees or business activity prior to March 31, 2002 when it purchased the assets of Chili Plastics, Inc. However, petitioner's choice of a taxable year, regardless of the level of its business activity, dictated the computation herein. Had petitioner chosen a partial tax year for its first operating year, after December 31, 2001 but before March 31, 2002 it may have had a successful argument that the average employees should be calculated on the basis of another applicable period, i.e., a period less than a full tax year, and the number of quarters used to compute such division would then be three, not four. Petitioner

had the opportunity to choose a different tax year that may have permitted the computation as asserted, but that was not the case here. Petitioner has not carried its burden of proving that the Division erroneously reduced its Empire Zone Wage Tax Credit.

D. Accordingly, petitioner's claim for an additional refund is denied, and the Division's adjustment to petitioner's credits for tax year ended September 30, 2002 is upheld.

DATED: Troy, New York
July 5, 2007

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE