STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CONTRACT PHARMACEUTICALS LIMITED NIAGARA	:	DETERMINATION
	:	DTA NO. 822511
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Year Ended October 31, 2005.	:	
	:	

Petitioner, Contract Pharmaceuticals Limited Niagara, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal year ended October 31, 2005.

A hearing was held before Timothy Alston, Administrative Law Judge, at 183 East Main Street, Rochester, New York, on July 23, 2009 with all briefs submitted by November 30, 2009, which date began the six-month period for the issuance of this determination. Petitioner appeared by Kevin S. Cooman, Esq., and Edward C. Daniel, III, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Clifford Peterson, Esq., of counsel).

ISSUES

I. Whether petitioner, a foreign corporation, began doing business in New York State on August 26, 2005 as claimed, thereby establishing entitlement to the QEZE credit for real property taxes, QEZE tax reduction credit and Empire Zone wage tax credit as claimed on its amended franchise tax return for the tax year at issue.

II. Whether, even if petitioner began doing business in New York as claimed on August 26, 2005, Tax Law § 210(19)(b)(3) requires petitioner to include March 31, 2005 and June 30, 2005 as dates occurring within the relevant period for purposes of calculating its Empire Zone wage tax credit pursuant to Tax Law § 210(19)(d), thereby lowering the amount of such credit.

FINDINGS OF FACT

1. Contract Pharmaceuticals Limited (CPL) is a Delaware corporation with an office for the transaction of business in Mississauga, Ontario, Canada. CPL is the parent and sole shareholder of petitioner, Contract Pharmaceuticals Limited Niagara.

2. In early 2004, CPL renewed two-year-old discussions with Bristol-Meyers Squibb (BMS) concerning the purchase of BMS's pharmaceutical manufacturing facility at 100 Forest Avenue, Buffalo, New York (the Facility).

3. In December 2004, CPL contacted the Buffalo Economic Renaissance Corporation (BERC). BERC supervises the administration of the Buffalo Empire Zone.

4. As part of those discussions with BERC, the New York State Department of Economic Development, doing business as Empire State Development (ESD), informed CPL of certain incentives for which CPL might be eligible under the Empire Zone program (Program).

5. By letter and six-page Incentive Proposal dated February 24, 2005, ESD offered the Empire Zone program and the credits available thereunder to CPL as an inducement for CPL to acquire BMS's pharmaceutical facility in Buffalo. As indicated in the Incentive Proposal, CPL's entitlement to the incentives was subject to "the availability of funds, completion of any applicable environmental . . . requirements, successful completion of the application process, approval by ESD Board of Directors, applicable statutes, and compliance with program requirements." The Incentive Proposal also indicated that CPL's continued entitlement to the

incentives was contingent on its employing "30 new full-time permanent employees [at the Buffalo Facility] by January 1, 2009" while retaining the "200 existing full-time permanent employees."

6. Among the incentives listed in the Incentive Proposal was an ESD grant in the amount of $600,000.00, $500,000.00 of which would be distributed to CPL following its purchase of the Buffalo Facility. The Incentive Proposal indicated that CPL might be required to return all or part of the grant if it did not meet the employment number conditions.

7. The Incentive Proposal also indicated that CPL might be eligible to receive an estimated $4,250,000.00 in tax credits under the Empire Zone Program, with the caveat that such credit estimates did "not represent a commitment but are provided as an indication of the type and level of benefits that may be available depending on . . . conformity with eligibility requirements." The Incentive Proposal further advised that the New York State Department of Taxation and Finance and the relevant local taxing jurisdiction have "final authority" over the tax credits.

8. CPL needed to be certified in the Empire Zone to be able to claim Program tax credits. A few days before March 1, 2005, CPL was advised by ESD that the Program was going to expire on March 31, 2005. ESD recommended to CPL that it file for certification for eligibility to receive Empire Zone benefits as soon as possible. At that time, ESD considered the purchase of the Buffalo Facility as one that was "going to happen" and not "speculative."

9. In a March 1, 2005 e-mail, ESD again advised that the program was to expire on March 31, 2005 and recommended that CPL get its application in to ESD "as soon as possible." The email further indicated that ESD would "try and expedite approval prior to [March 31, 2005] as long as the commitment on the property is there."

10. As of March 1, 2005 CPL was not aware that the Empire Zone Program would subsequently be changed by legislation enacted on April 12, 2005 to reduce the tax credits available to businesses that were certified under the Program after March 31, 2005.

11. On March 1, 2005, CPL formed petitioner as a Delaware corporation in order to create an entity that could apply (1) for authority to do business in New York State and which would ultimately purchase and operate the Buffalo Facility and (2) for certification in the Program.

12. On March 3, 2005, CPL applied for and obtained authority from the New York State Department of State for petitioner, as a Delaware corporation, to conduct business in New York.

13. On behalf of petitioner, CPL submitted an Application for Joint Certification of an Empire Zone Enterprise dated March 4, 2005.

14. Soon after it received the Empire Zone application, BERC informed CPL that the location of the BMS Facility in Buffalo was no longer within the Buffalo Empire Zone. For petitioner to receive the full benefits of the Program, the Facility needed to be designated within the Buffalo Empire Zone. CPL requested the zone change. On March 18, 2005 the Buffalo Empire Zone coordinator notified CPL that a resolution to this issue was going forward. By letter dated May 25, 2005 and addressed to ESD, the Buffalo Zone Administration Board (BZAB) requested that the Buffalo Empire Zone be expanded to include the location of the Facility.

15. On April 14, 2005, petitioner and CPL signed a purchase and sale agreement (Agreement) with BMS pursuant to which petitioner would acquire and operate the Buffalo Facility after closing on the purchase.

16. Under the Agreement the anticipated closing date was August 26, 2005. Prior to that date, and as a condition of closing, three preparatory activities had to be completed: (1) the

obtaining of a series of licenses and permits that would actually allow petitioner to operate a pharmaceutical facility in New York State and be in compliance with New York and federal law; (2) the confirmation and satisfaction of various representations and warranties made by BMS; and (3) the pursuit of certain financial incentives, principally the Empire Zone tax incentives.

17. The specific language in the Agreement with respect to the third condition listed above was that petitioner "shall have been offered financial incentives in connection with the Acquisition from the Empire State Development Corporation, the Buffalo Economic Renaissance Corporation . . . that are reasonably acceptable to [petitioner]."

18. CPL relied on ESD's information regarding the availability of Empire Zone benefits when deciding to acquire the Buffalo Facility.

19. Prior to the closing on August 26, 2005 petitioner had no right to conduct operations at the Buffalo Facility.

20. Between the signing of the Agreement on April 14, 2005 and the closing on August 26, 2005, representatives from BMS and petitioner worked together to prepare for a transition of ownership of the Buffalo Facility at closing.

21. Beginning May 2, 2005, separate integration teams from BMS and petitioner took responsibility for various functional areas, including information management systems, quality management systems, human resources, finance and operations. Countdown-to-closing time lines and task lists were prepared.

22. Before petitioner could own and operate the Buffalo Facility, it had to obtain more than 25 permits, licenses and approvals from federal, state and local authorities.

23. Between the time the Agreement was entered into on April 14, 2005 and the closing on August 26, 2005, petitioner's representatives secured permits, licenses, and approvals needed

as prerequisites to doing business at the Buffalo Facility from the New York State Tax Department, the United States Food and Drug Administration, the New York State Liquor Authority, the United States Department of Transportation, the New York State Board of Pharmacy, the Buffalo Sewer Authority, and the New York State Department of Environmental Conservation.

24. By letter dated June 8, 2005, ESD responded to BZAB's letter of May 25, 2005 (***see*** Finding of Fact 14). ESD advised BZAB that its request met new Empire Zone requirements that allowed for a boundary revision if BZAB was working in conjunction with the business (i.e., petitioner) before the effective date of the new laws. ESD instructed BZAB to proceed as it normally would for the revision of a zone boundary.

25. On June 22, 2005, the BZAB formally resolved to adopt, among other items, CPL's request for the Buffalo Facility to be included in the Empire Zone under General Municipal Law § 969.

26. On July 8, 2005, the City of Buffalo approved a resolution to request from ESD a change to a zone boundary that would include the Buffalo Facility.

27. A public hearing was held in Buffalo on July 19, 2005 concerning the proposed boundary modification to the Zone. It was formally resolved to request that the Commissioner of ESD revise the boundaries of the Zone so as to include the Buffalo Facility.

28. The Buffalo Empire Zone Administrator issued a declaration, dated August 17, 2005, concerning the proposed expansion of the Buffalo Empire Zone to include the Buffalo Facility advising that it had been examined under the criteria outlined in the State Environmental Quality Review Short Environmental Assessment Form and that it was determined that the inclusion of the Facility would not result in any significant environmental impact.

29. The Buffalo Empire Zone certification officer granted final local approval of petitioner's March 4, 2005 Application (***see*** Finding of Fact 13) on August 19, 2005.

30. On August 26, 2005, petitioner closed on its acquisition of the Buffalo Facility. Petitioner waived the condition precedent in the Agreement related to Empire Zone tax incentives because it was satisfied that the incentives offered by ESD to CPL were in place.

31. On August 26, 2005, petitioner hired onto its payroll the employees that were then engaged at the Buffalo Facility and commenced its operation of the Buffalo Facility.

32. Until August 26, 2005, petitioner had not drawn on its credit facility to make the capital investment in the Buffalo Facility, did not have a location in New York at which to do business, and had no employees.

33. Petitioner neither manufactured product nor sold product from the Buffalo Facility until the closing. Following the closing, petitioner began to manufacture product and invoice shipments to customers in its own name.

34. On October 31, 2005, petitioner ended its first taxable year.

35. By letter dated December 20, 2005, ESD informed BZAB that the boundaries of the Buffalo Empire Zone had been revised to include the Buffalo Facility. The approval was made effective as of January 1, 2005.

36. The Commissioners of the Departments of Labor and Economic Development signed petitioner's March 4, 2005 Application on April 12, 2006 and April 21, 2006, respectively.

37. On May 4, 2006, the Buffalo Empire Zone certification officer issued a Certificate of Eligibility for Empire Zone Benefits to petitioner for its ownership of the Buffalo Facility. Petitioner's eligibility was made effective as of January 1, 2005.

38. On July 17, 2006, petitioner filed its corporation franchise tax return, Form CT-3, with respect to its first taxable year ending on October 31, 2005. Petitioner did not claim any credits on this CT-3 and paid its tax due based on its entire net income. On the initial page of this return petitioner indicated that it was incorporated on March 1, 2005 and that it was a foreign corporation that started doing business in New York on August 26, 2005.

39. Petitioner attached a federal Form 1120 to its first CT-3, which indicates that it was filed for the period March 1, 2005 through October 31, 2005. Petitioner reported wages and salaries of $810,595.00. Schedule M-3 attached to the Form 1120 indicates that petitioner's income statement period was March 1, 2005 through October 31, 2005. In a statement attached to its Form 1120, petitioner elected "under Code Sec. 195(b) to amortize its start-up expenditures . . . beginning in March 1, 2005, the month in which the active conduct of the taxpayer's business began." It also elected "[p]ursuant to Code Sec. 248(a) . . . to amortize its organizational expenses . . . starting in March 1, 2005, the month that business began." In March 2008, as part of a federal audit, petitioner amended these elections to have an effective date of August 26, 2005.

40. On its first CT-3, petitioner calculated a fixed dollar minimum tax base of $319.00. By statute, that amount was based in part on petitioner's total gross payroll. To arrive at a total gross payroll of $1,215,893.00, petitioner multiplied its reported wages and salaries of $810,595.00 by 150 percent. Petitioner initially determined its fixed dollar minimum was $425.00, but reduced that amount by 25 percent to arrive at $319.00.

41. On April 19, 1997, petitioner filed an amended Form CT-3 for its first taxable year ended October 31, 2005. On its amended return petitioner paid tax based on its entire net income and claimed the following credits under the Empire Zone program which are at issue herein:

a. the QEZE tax reduction credit in the amount of $57,100.00;

b. the Empire Zone wage tax credit in the amount of $564,000.00; and

c. the QEZE credit for real property taxes in the amount of $62,257.00.

42. The total of petitioner's claimed credits at issue in this proceeding is thus $683,357.00. On its amended return petitioner used the $57,100.00 in QEZE tax reduction credit to reduce its tax liability. With respect to the Empire Zone wage tax credit, it sought a refund of $282,000.00 and planned to carry forward $282,000.00. It claimed a refund of the QEZE real property tax credits.

43. As with its original CT-3, petitioner's amended CT-3 indicated it was for the period March 1, 2005 through October 31, 2005. Also like the original return, the amended CT-3 reported petitioner's March 1, 2005 date of incorporation and August 26, 2005 as the date petitioner, as a foreign corporation, began doing business in New York.

44. CT-3 instructions indicate that, generally, a reporting period should be the same as the taxpayer's federal tax year. The same instructions also indicate a franchise tax return for a foreign corporation is due for the period in which it is doing business in New York State.

45. Form CT-601, by which petitioner claimed its Empire Zone wage tax credit, required petitioner to compute its average number of full-time employees in New York and in the relevant Empire Zone for the current tax year and for a four-year base period. The form provided petitioner with the opportunity to indicate its number of such employees at the end of March 31, June 30, September 30, and December 31 of the current tax year. Petitioner computed its average number of full-time employees in New York and in the Empire Zone by using only the September 30, 2005 date and the number of employees (203) that it employed as of that date.

46. Petitioner did not alter its computation of its tax under the fixed minimum base on its amended CT-3.

47. The Division of Taxation (Division) reviewed petitioner's tax credits as claimed on its amended CT-3. The Division determined that petitioner's taxable year began on March 1, 2005 and ended on October 31, 2005, a period of 35 weeks. The Division further determined that petitioner first hired employees on August 26, 2005 and that such employees worked from August 26, 2005 through October 31, 2005 during the tax year at issue, a period of 9½ weeks. The Division thus determined that petitioner's employees worked less than half of petitioner's taxable year and therefore denied the QEZE tax reduction credit, the EZ wage tax credit, and the QEZE credit for real property taxes at issue herein.

48. On October 16, 2007, the Division issued to petitioner a Notice of Disallowance denying petitioner's claim for the tax credits at issue. The Notice of Disallowance outlined the Division's rationale for the disallowance as noted above.

49. Petitioner submitted proposed findings of fact numbered 1 through 32, which have been generally accepted and incorporated herein except for proposed finding of fact 26, which has been modified to better reflect the record.

50. The Division submitted proposed findings of fact numbered 1 through 38. Such proposed findings of fact have been generally accepted and incorporated herein except for proposed findings of fact 10, 32, and 35 through 38, which are rejected as irrelevant.

SUMMARY OF THE PARTIES' POSITIONS

51. Petitioner contends that activities it undertook from the time of its incorporation on March 1, 2005 until the closing on August 26, 2005 were "make-ready activities" that did not constitute doing business in New York. According to petitioner, such activities were necessary

prerequisites for its actual commencement of business operations in New York. Petitioner asserts that doing business under the relevant statute and regulations means systematic commercial activity and not the sort of pre-operational activities it was engaged in prior to August 26, 2005. Petitioner notes that lacking any facility or employees, it was physically incapable of commencing business operations prior to the closing on August 26, 2006. Petitioner also notes that it was legally prohibited from operating the a pharmaceutical facility until it obtained the various governmental licenses and permits necessary to do so. Petitioner also takes issue with the Division's contention that its interpretation of the statute is entitled to deference and asserts that a simple substantial evidence standard with petitioner having the burden of proof is applicable in this matter.

52. The Division notes that tax credits, including those at issue herein, are a form of tax exemption and that, therefore, the well-established rule of statutory construction pertaining to exemptions should apply. Turning to the substantive matter at hand, the Division contends that petitioner began doing business, and thus its first taxable year began, in March 2005. The Division cites petitioner's actions and CPL's actions on petitioner's behalf in connection with petitioner's application for certification in the Empire Zone program as evidence of "doing business" in New York within the meaning of the relevant statute and regulations. The Division concludes that its position in this matter is reasonable and that petitioner has thereby failed to show that petitioner's position is the only reasonable one.

53. Even if petitioner prevails on Issue I, the Division contends that petitioner's claimed Empire Zone wage tax credit must be reduced because, under the instant circumstances, Tax Law § 210(19)(b)(3) requires petitioner to include March 31, 2005 and June 30, 2005 as dates occurring within the relevant period for purposes of calculating its Empire Zone wage tax credit

pursuant to Tax Law § 210(19)(d). The basis for the Division's position is the phrase "other applicable period" as it appears in Tax Law § 210(19)(b)(3).

54. Petitioner asserts that the phrase "other applicable period" as it appears in Tax Law § 210(19)(b)(3) does not apply to its calculation of its average number of employees during the taxable year at issue and that it properly computed its wage tax credit on its amended return.

CONCLUSIONS OF LAW

Issue I

A. Petitioner claims the Qualified Empire Zone Enterprise (QEZE) credit for real property taxes under Tax Law § 15, QEZE tax reduction credit under Tax Law § 16, and Empire Zone wage tax credit under Tax Law § 210(19). In order to qualify for these credits it was necessary for petitioner to have employed qualified individuals for "at least one-half of the taxable year" with respect to the QEZE real property tax and tax reduction credits and "for more than half of the taxable year" with respect to the Empire Zone wage tax credit (***see*** Tax Law § 14[b][1]; [g]; §§ 15, 16, 210[19][d]).[1] Whether petitioner met this employment requirement depends upon when its first taxable year began. When petitioner's first taxable year began depends, in turn, on when petitioner began doing business in New York State. The Division asserts that petitioner's first taxable year began in March 2005. Petitioner asserts that its first taxable year began on

[1] To review the statutory scheme in more detail, as a certified New York State Empire Zone Enterprise in the City of Buffalo Empire Zone under Article 18-B of the General Municipal Law, petitioner was eligible to claim the QEZE real property tax credit under Tax Law § 15 and QEZE tax reduction credit under Tax Law § 16 if it met the "employment test" as defined in Tax Law § 14(b)(1). Whether petitioner met the "employment test" under Tax Law § 14(b)(1) depends on its "employment number" as defined in Tax Law § 14(g). As referenced above and as relevant herein, employment number means the average number of qualified individuals employed full time for at least one-half of the taxable year. The Empire Zone wage tax credit is contained in Tax Law § 210(19). As an enterprise certified under Article 18-B of the Tax Law, petitioner was entitled to claim the wage tax credit "as hereinafter provided." As relevant herein and as also noted above, such credit may be claimed with respect to qualified employees who received empire zone wages for more than half of the taxable year (Tax Law § 210[19][d]).

August 26, 2005, the date it closed on its acquisition of the Buffalo Facility. It is undisputed that petitioner first hired employees on August 26, 2005 and that its first taxable year ended on October 31, 2005. If the Division is correct, then petitioner will have failed the employment tests for the credits at issue because it would have employed qualified individuals for less than half of the taxable year, i.e., about 9½ weeks of an asserted 35-week taxable year. If petitioner is correct, it will have met the employment tests because it would have employed qualified individuals for the entirety of its short (9½ week) first taxable year.

B. As a foreign corporation, petitioner's first taxable year began when it began to do business, employ capital, own or lease property or maintain an office in New York State (20 NYCRR 2-1.1[b]; ***see also*** Tax Law § 209[1]; 20 NYCRR1-3.2). Here, the Division concedes and the record clearly shows that petitioner did not employ capital, own or lease property or maintain an office in New York before August 26, 2005. Accordingly resolution of the instant matter turns on when petitioner began "doing business" in New York State within the meaning of Tax Law § 209(1) and the regulations promulgated thereunder.

C. The Division's regulations provide the following framework for determining whether a foreign corporation is doing business in New York:

> (1) The term doing business is used in a comprehensive sense and includes all activities which occupy the time or labor of people for profit. Regardless of the nature of its activities, every corporation organized for profit and carrying out any of the purposes of its organization is deemed to be doing business for the purposes of the tax. In determining whether a corporation is doing business, it is immaterial whether its activities actually result in a profit or a loss.
>
> (2) Whether a corporation is doing business in New York State is determined by the facts in each case. Consideration is given to such factors as:
>
> (i) the nature, continuity, frequency, and regularity of the activities of the corporation in New York State;

(ii) the purposes for which the corporation was organized;

(iii) the location of its offices and other places of business;

(iv) the employment in New York State of agents, officers, and employees; and

(v) the location of the actual seat of management or control of the corporation. (20 NYCRR 1-3.2[b].)

D. Preliminarily, it is necessary to discuss the appropriate standard of construction of Tax Law § 209(1) and 20 NYCRR 1-3.2(b) in the present matter. As noted, the Division contends that, as petitioner is seeking tax credits, the well-established rule requiring that petitioner show a clear-cut entitlement to the statutory benefit must be followed. (***see Matter of Golub Service Station v. Tax Appeals Tribunal*** 181 AD2d 216, 585 NYS2d 864 [3d Dept 1992]). This standard also requires that petitioner show that its interpretation of the relevant statute and regulations is the only reasonable interpretation (***see Matter of Brooklyn Navy Yard Cogeneration Partners, L.P.***, Tax Appeals Tribunal, May 9, 2006).

While petitioner claims tax credits, its eligibility for such credits and the resolution of this case depends upon an interpretation and application of Tax Law § 209(1) and 20 NYCRR 1-3.2(b). These are not exemption provisions, but address whether a corporation is subject to tax under Article 9-A at all. As such, these provisions are properly construed most strongly against the Division and in favor of petitioner (***see Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193, 196 371 NYS2d 715, 718 [1975], ***lv denied*** 37 NY2d 708, 375 NYS2d 1027 [1975]).

E. A review of the facts in this case in light of the regulation cited above makes clear that petitioner has met its burden to show that it was not doing business in New York State prior to its acquisition of the Buffalo Facility on August 26, 2005.

There is no dispute that three of the five factors listed in the regulation above support petitioner's position. That is, prior to August 26, 2005, petitioner had no office or place of business in New York; did not employ any agents, officers, or employees in New York; and management and control of petitioner was undertaken through its three directors, all of whom had offices at CPL's headquarters in Mississauga, Ontario (***see*** 20 NYCRR 1-3.2[b][iii], [iv], [v]). Petitioner's activities from the time of its incorporation to the closing, in light of the remaining two factors, necessitate further discussion (***see*** 20 NYCRR 1-3.2[b][I], [ii]). Such activities involve obtaining various licenses and permits necessary to operate the Buffalo Facility; confirming and satisfying various representations and warranties made by BMS in the Agreement as well as preparing for a transition of ownership of the Buffalo Facility; and the application for certification in the Empire Zone program.

The Division does not specifically assert that petitioner's actions in obtaining the various licenses and permits to enable it to legally manufacture and sell pharmaceuticals at the Facility constituted doing business in New York. Clearly such activity did not. Obtaining such licenses and permits was necessary for petitioner to become operational; that is, to fulfill its primary purpose of manufacturing pharmaceuticals, but was not part of such operations. Further, obtaining licenses and permits was not, in the language of the regulation, a continuous, frequent or regular activity of petitioner and thus does not support a finding of doing business (***see*** 20 NYCRR 1-3.2[b][ii]).

This conclusion is consistent with the Division's position in an advisory opinion where it found that authorization to do business in New York "does not of itself make a foreign corporation subject to franchise tax under Article 9-A" and also that obtaining a license from the New York State Insurance Department was "not relevant" in determining whether a corporation

was subject to franchise tax under Article 9-A (***see Ernst & Whinney***, Advisory Opinion, September 29, 1988, TSB-A-88[22]C).[2] Petitioner's application for licenses and permits is analogous to the authorization to do business and the Insurance Department license in the advisory opinion. In both instances, corporations sought permission or authority from the government to engage in certain regulated activity. The act of requesting such permission or authority to do business is not properly considered doing business.

Petitioner's activities in confirming and satisfying various representations and warranties made by BMS in the Agreement and the work to prepare for a transition of ownership of the Buffalo Facility also does not constitute doing business in New York within the meaning of the regulation. Similar to the application for licenses and permits, this activity is a necessary prerequisite to becoming operational. Obviously, upon its acquisition of the Facility, petitioner no longer engaged in this activity. This activity thus lacks the elements of continuity, frequency and regularity characteristic of doing business (***see*** 20 NYCRR 1-3.2[b][ii]). It is noted that the Division also did not specifically assert that this activity constituted doing business in New York

In its brief the Division takes specific issue only with petitioner's actions with respect to its application for Empire Zone certification. The Division asserts that the nature and continuity of petitioner's activity in this regard and CPL's activity on petitioner's behalf, along with CPL's business purpose for petitioner, reasonably support the conclusion that such activity constituted doing business in New York under the statute and regulations.

The Division's contention is rejected. For purposes of determining whether a corporation is doing business, an application for Empire Zone certification is no different from any of

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[2] Advisory opinions are not precedential and are in no way binding in this matter (***see*** Tax Law § 171; 20 NYCRR 2376.4).

petitioner's license applications. That is, both of these kinds of applications request that a governmental entity confer some right or authority upon the applicant. Accordingly, as with the various licenses and applications discussed above, petitioner's application for Empire Zone certification does not constitute doing business in New York. That petitioner was motivated by the incentives to be gained from Empire Zone certification or that successful certification under the Program was a condition precedent to the closing does not transform the application process into "doing business." Furthermore, if the Division's position is correct, then petitioner's successful application for certification under the Empire Zone program and its resulting eligibility for QEZE tax credits would result in the denial of at least some of those same credits. Such an outcome seems particularly unreasonable given ESD's encouragement of CPL to apply for certification by March 31, a direct consequence of which was petitioner's incorporation on March 1, 2005. Such an outcome is also inconsistent with the Empire Zone program's stated purpose of promoting economic development (***see*** General Municipal Law § 956).

F. The Division argues that, for purposes of determining whether a corporation is doing business in New York, there is no prohibition in the Tax Law or regulations against considering a foreign corporation's activities in New York before the corporation owns real property, its workers start producing, or it begins to manufacture product. The Division notes that a corporation's activities are not required under the regulations to produce a profit or loss for it to be found to be doing business (20 NYCRR 1-3.2[b][1]). The Division thus asserts that doing business does not mean "systematic commercial activity" as asserted by petitioner in its brief. The Division's contention, however, overlooks the first of the five factors to be considered in 20 NYCRR 1-3.2(b)(2). Pursuant to that factor activities which are frequent, continuous and regular are indicative of doing business. Such activities are consistent with a corporation which

has commenced business operations. Pre-operational activities, such as petitioner's actions between its incorporation and the closing, tend not to be frequent, continuous and regular and thus would not, as in the present matter, be indicative of doing business.

G. The Division also notes that petitioner did not amend its computation of the fixed dollar minimum tax on its amended CT-3. The Division asserts that this fact supports the reasonableness of its position herein. Although petitioner could have amended its computation of its fixed dollar minimum base on its amended return (***see*** Tax Law 210[1][d][3]), considering that petitioner paid its Article 9-A tax based on its entire net income (***see*** Findings of Fact 38 and 41), the lack of any change to its fixed dollar minimum computation is insignificant.

H. The Division also notes that federal documents attached to petitioner's original CT-3 indicate that petitioner began doing business on March 1, 2005 (***see*** Findings of Fact 39). However, as petitioner subsequently amended its elections under Internal Revenue Code § 195(b) and § 248(a) to reflect an August 26, 2005 effective date, this point, too, is of little significance.

Issue II

I. For purposes of the empire zone wage tax credit, "average number of individuals, excluding general executive officers, employed full-time" is 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)(b)(3); emphasis added.)

J. Even if, as determined above, petitioner began to do business in New York and hence its first taxable year began on August 26, 2005, the Division contends that petitioner must nevertheless include the number of workers employed by petitioner on March 31, 2005 and June

30, 2005 in its calculation of its "average number of individuals . . . employed full time" for purposes of calculating its wage tax credit. Since petitioner had zero employees on March 31 and June 30, and since this change would increase the number of dates occurring within this so-called "applicable period," the net result of the Division's proposed interpretation would be to reduce petitioner's average number of employees for wage tax credit purposes, and the amount of allowable wage tax credit, by about two-thirds.[3]

As authority for this proposed interpretation, the Division cites the phrase "or other applicable period" as used in Tax Law § 210(19)(b)(3) and asserts that petitioner's computation of its "average number of individuals . . . employed full-time" for the tax year at issue must include workers employed on March 31 and June 30 because the period March 1 through August 26 is, in the instant matter, "applicable." The Division offers no definition of "other applicable period," apparently leaving the meaning of that phrase to the Division's discretion. In this case the Division asserts that the same factors it relied on to conclude that petitioner's taxable year began in March 2005 reasonably require the inclusion of the period March 1 through August 26, 2005 in the calculation of petitioner's "average number of individuals . . . employed full time" under Tax Law § 210(19)(b)(3). The Division asserts that its statutory construction is entitled to great weight and that, in order to prevail, petitioner must show that its interpretation of the Tax Law is the only reasonable one or that the Division's interpretation is unreasonable.

K. Preliminarily, it is observed that the proper interpretation of Tax Law § 210(19)(b)(3) is a matter of "pure statutory construction" (***Matter of Debevoise & Plimpton v. New York State***

[3] The Division calculated petitioner's wage tax credit under this proposed interpretation of Tax Law § 210(19)(b)(3) to be $188,010.00. Petitioner claimed a credit of $564,000.00 on its amended CT-3 for the year at issue. Although petitioner contests the statutory interpretation which led to this lower amount, it has not contested the Division's arithmetic.

Department of Taxation & Fin., 80 NY2d 657, 664, 593 NYS2d 974, 977 [1993]). Accordingly, "there is little basis to rely on any special competence or expertise of the administrative agency" (***Kurcsics v. Merchants Mut. Ins. Co.***, 49 NY2d 458, 459, 426 NYS2d 454, 458 [1980]). The Division's interpretation of this provision is therefore not entitled to deference.

L. Upon review of Tax Law § 210(19) it is concluded that the Division's position is unreasonable and inconsistent with the plain statutory language and is therefore rejected.

Tax Law § 210(19)(c) sets forth an eligibility requirement for the wage tax credit utilizing the "average number of individuals . . . employed full time" definition in Tax Law § 210(19)(b)(3). Pursuant to that requirement, the taxpayer must show that the "average number of individuals . . . employed full time" in the state and in the empire zone "during the *taxable year* (emphasis added)" exceeds the "average number of individuals . . . employed full time" in the state and the empire zone, respectively, "during the four year immediately preceding the first *taxable year* in which credit is claimed with respect to such zone." With respect to this latter period, if the taxpayer provided full-time employment within the state or the empire zone during only a portion of such four-year period, then "four years" as used above refers to such portion, if any.

Accordingly, to determine eligibility under paragraph (c), the taxpayer must make "average number" calculations for the taxable year and "average number" calculations for the preceding four years or portion thereof, if any. As the phrase "if any" indicates, this preceding period may range from zero to four years. It is this zero to four year period to which the phrase "other applicable period" as used in Tax Law § 210(19)(b)(3) applies. That is, the phrase "other applicable period" is part of the definition explaining how to calculate "average number of

individuals . . . employed full-time" during the period preceding the taxable year. As this period may range from zero to four years, the broad language ("other applicable period") is appropriate.

That the language of Tax Law § 210(19)(b)(3) does not allow for an expansion of the taxpayer's taxable year for purposes of calculating taxable year average numbers may be reasonably inferred by observing that Tax Law § 210(19) allows for credit with respect to a *taxable year*, determines eligibility for that credit with reference to average number calculations for a *taxable year* (Tax Law § 210[19][c]) and also calculates the amount of credit based on the *taxable year* empire zone average number (Tax Law § 210[19][d]). In the absence of any express language to the contrary, it would be illogical and inconsistent with this statutory scheme to calculate a taxpayer's average number for a taxable year based on some period other than a taxable year.

That the taxable year at issue is a fractional taxable year also does not justify the expansion of that year via the "other applicable period" phrase. The short taxable year at issue is a "taxable year" under the Division's regulations. "In the case of a report made for a fractional part of a year, taxable year means the period for which the report is made" (20 NYCRR 1-2.7). Additionally, a foreign corporation's "first taxable year begins on the date it begins to do business . . . in New York and ends on the last day of [its] fiscal . . . year" (20 NYCRR 2-1.1[b]). Since the short taxable year at issue falls within the definition of taxable year it must be treated as such under the wage tax credit provisions. Indeed, the language of Tax Law § 210(19)(b)(3) acknowledges the applicability of the wage tax credit to short taxable years by its direction to divide the sum obtained by adding the number of individuals employed full time on the four specified quarterly dates "by the number of such dates occurring with the taxable year." Obviously, in a short taxable year, "the number of such dates" could be less than four.

In its arguments the Division emphasizes the brevity of the taxable year at issue. While some apportionment of the available credit in respect of a short taxable year might be reasonable, the statute at issue makes no such provision. The Division may not use the "other applicable period" language, which, as discussed, refers to the period preceding the taxable year, to effectively apportion the credit for a short taxable year.

Finally, it is observed that the Division's proposed interpretation of Tax Law § 210(19)(b)(3) is contradicted by the current instructions to Form CT-601 (Claim for EZ Wage Tax Credit) which provide, in respect of Part II, line 2 ("Average number of full-time employees in New York State for current tax year"), the following:

> Enter the number of full-time employees . . . employed on March 31, June 30, September 30 and December 31 of your tax year. Add these amounts and enter in the total column. Divide the total by four (*or the number of these dates that occurred during your tax year*). (Emphasis added.)

In respect of Part III, line 4 ("Average number of full-time employees in the EZ for current tax year") the instructions state:

> Enter for each date specified of the current tax year the total number of full-time employees . . . in the EZ. *Compute the average number of full-time employees . . . for the current tax year in the same manner as line 2*.

Consistent with the language of Tax Law § 210(19)(b)(3) as discussed above, the Division's instructions expressly allow for the calculation of "average number of full-time employees" for a short taxable year by dividing the total of such employees on the specific quarterly dates by the number of such dates that occurred during the year. Petitioner's calculation of its claimed wage tax credit for its short taxable year on its amended CT-3 is consistent with these instructions. While the Division's instructions "in themselves have no legal

effect," it is noteworthy that, according to the relevant regulation itself, such instructions "directly reflect the provisions of the underlying laws" (***see*** 20 NYCRR 2375.8[c]).

M. The petition of Contract Pharmaceuticals Limited Niagara is granted, and the Division of Taxation is directed to apply and refund the QEZE tax reduction credit, QEZE credit for real property taxes and Empire Zone wage tax credit as indicated on petitioner's amended CT-3 for the year at issue (***see*** Findings of Fact 41 and 42).

DATED: Troy, New York
May 20, 2010

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE