

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
LISA A. WEBER : DETERMINATION
for Redetermination of a Deficiency or for Refund : DTA NO. 825857
of New York State Personal Income Tax under :
Article 22 of the Tax Law for the Years 2008 and 2010. :

Petitioner, Lisa A. Weber, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 2008 and 2010.

A hearing was held before Arthur S. Bray, Administrative Law Judge, in Albany, New York, on October 1, 2014 at 10:00 A.M., with all briefs due by March 20, 2015, which date began the six-month period for the issuance of this determination. Petitioner appeared by Hiscock & Barclay, LLP (David G. Burch, Jr., Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly disallowed petitioner's Empire Zone credits on the basis that each firm was a single member disregarded entity with the same single member and, as a result, the earliest certification date of any of the entities would be the certification date of all of the entities.

FINDINGS OF FACT

1. During the years in issue, petitioner, Lisa A. Weber, was the sole member of Timeless Décor, LLC (Timeless Décor). Timeless Décor was formed on May 19, 2004 and produced custom frames that were used to preserve art. Its customers included independent retailers, hotels, hospitals, nursing homes, restaurants, museum shops and independent framers. Timeless Décor employed a technologically trained and skilled labor force.

2. Timeless Décor was certified as an Empire Zone enterprise under Article 18-B of the General Municipal Law by the City of Watertown Empire Zone and the New York State Department of Economic Development as of October 7, 2008.

3. Petitioner was also the sole member of LCO Destiny, LLC d/b/a Timeless Frames (Timeless Frames). Timeless Frames was formed on November 4, 1999 and, through the employment of unskilled labor, engaged in the mass production of picture frames. It was approved as a certified business enterprise under the Empire Zone Program with an effective date of November 29, 1999.

4. For income tax purposes, petitioner chose to treat both Timeless Décor and Timeless Frames as entities that are disregarded as separate from their owner.

5. Petitioner filed a 2008 Amended Resident Income Tax Return (Form IT-201-X). On this return, petitioner claimed through Timeless Décor an EZ Wage Tax Credit in the amount of \$145,625.00 and an EZ Investment Tax Credit with \$1,139.00, being refundable in the current year.

6. Petitioner filed a 2010 Amended Resident Income Tax Return (Form IT-201-X) wherein she similarly claimed EZ Wage Tax credits on her personal income tax return that flowed through to her from Timeless Décor. Petitioner also claimed an EZ Investment Tax

Credit and a QEZE Tax Reduction Credit claimed through Timeless Décor utilizing a benefit period factor of 1.0.

7. On December 14, 2010, the Division issued a Notice of Disallowance with respect to petitioner's claim for an additional EZ Wage Tax Credit and EZ Investment Tax Credit from Timeless Décor for the year 2008. The notice explained that

“A single member LLC (SMLLC) that is a disregarded entity and its single member, for purposes of the empire zone tax credits, are regarded as the same taxpayer, and the certification of one will be imputed to the other. If an entity is a member of more than one certified SMLLC/disregarded entity, the certification date for the single member and all SMLLCs and disregarded entities will be the earliest certification date of the single member and all the disregarded entities. Additional SMLLCs subsequently created or acquired by the single member would all use the same base period, test year, test date and employment increase factors.”

8. The Division then noted that Timeless Frames, was an SMLLC that became eligible to receive empire zone benefits on November 22, 1999 and the single member was petitioner. It also pointed out that Timeless Décor, was also an SMLLC that became eligible to receive empire zone benefits on October 7, 2008 and that petitioner was its single member. On the basis of the forgoing, the Division concluded that the certification date of any member of the group was November 22, 1999 and that Timeless Frames' fifth year of claiming the EZ Wage Tax Credit was 2004. Since the EZ Wage Tax Credit and the refundable portion of the EZ Investment Tax Credit is allowed for only five taxable years, the EZ Wage Tax Credit in the amount of \$145,25.00 and the refundable portion of the EZ Investment Tax Credit in the amount of \$1,139.00 was denied. The adjustments resulted in the denial of a refund of \$73,952.00 and the denial of \$72,812.00 in carry forward wage tax credits.

9. On August 29, 2011, the Division issued a Notice of Disallowance to petitioner with respect to the year 2010. The notice explained that petitioner's income tax return was selected

for review of the Empire Zone credits claimed through Timeless Frames and Timeless Décor. Following the same reasoning as that utilized for 2008, the Division concluded that the effective date of certification for Timeless Frames applied to Timeless Décor since petitioner owned 100 percent of the membership interests of both firms and both firms are disregarded entities for tax purposes. Consequently, the Division denied the EZ Wage Tax Credit for Timeless Décor. In addition, the Division recalculated the QEZE Tax Reduction Credit attributable to Timeless Décor as if Timeless Décor was in the eleventh year of its benefit period under the Empire Zone Program instead of the third year of its benefit period pursuant to its 2008 certification date. As a result of the adjustments, petitioner was denied a refund of \$67,813.00 in EZ Wage Tax Credits, denied \$67,812.00 in carry-forward EZ Wage Tax Credits and denied a \$6,300.00 QEZE Tax Reduction Credit.

CONCLUSIONS OF LAW

A. As noted above, the Division denied the Empire Zone credits claimed by petitioner as a single member of Timeless Décor, because the tax credits were previously claimed by her as a single member of Timeless Frames.

B. The Empire Zone program was created in order to promote economic growth and encourage job creation (*see* General Municipal Law § 956). A Qualified Empire Zone Enterprise (QEZE) is defined in Tax Law § 14(a) as “[a] business enterprise which is certified under article eighteen-B of the general municipal law and meets the employment test. . . .” Tax Law § 606(k)(1) states that a taxpayer shall be allowed an Empire Zone Wage Tax Credit against the tax imposed by Article 22 of the Tax Law where the taxpayer has been certified pursuant to Article eighteen-B of the General Municipal Law. The credit is only allowed with respect to the first taxable year in which there are payments of empire zone wages and with respect to the following

four taxable years. Subsequent certifications of the taxpayer do not extend the five-taxable-year time limitation on the allowance of the credit (Tax Law § 606[3]).

C. Timeless Frames and Timeless Décor, are disregarded entities. If an entity is disregarded, it is treated in the same manner as a sole proprietorship, branch or division of the owner (26 CFR 301.7701-2[a]). On the basis of this provision, the Division contends that if the businesses are disregarded and treated as a branch or division of the owner, it is logical to use the certification date of the first business for each of the disregarded businesses owned by the same person. Accordingly, the Division submits that based upon the filing of Timeless Frames, the business benefit period began in 2001 and the additional certification of Timeless Décor did not begin a new business tax benefit period.

D. Petitioner objects to the Division's position on the basis of 26 CFR 301.7701-2(c)(2)(iii), which provides as follows:

“Tax liabilities of certain disregarded entities

(A) In general. An entity that is disregarded as separate from its owner for any purpose under this section is treated as an entity separate from its owner for purposes of-

* * *

(3) Refunds or credits of Federal tax.”

E. Relying upon this regulation, petitioner contends that the Division erred by denying the Empire Zone credits because Timeless Frames and Timeless Decor were disregarded entities. The difficulty with petitioner's position is that it focuses on one portion of the regulation apart from the context of the entire regulation. As pointed out by the Division, the portion of the regulation that petitioner relies upon pertains to situations where the SMLLC may have a refund

or credit of employment or excise taxes and therefore it has no bearing on this matter.¹ This conclusion is evident from portions of the regulation that follow the section relied upon by petitioner. With respect to employment tax, 26 CFR § 301.7701.(c)(2) states, in pertinent part:

“(iv) Special rules for employment tax purposes

* * *

(B) Treatment of entity. . . . [A]n entity that is disregarded as an entity separate from its owner for any purpose under this section is treated as a corporation with respect to taxes imposed under Subtitle C- Employment Taxes and Collection of Income Tax. . . .”

Similarly, with respect to excise taxes, 26 CFR 301.7701-2(c)(v)(B) provides:

“(B) Treatment of entity.- An entity that is disregarded as an entity separate from its owner for any purpose under this section is treated as a corporation with respect to items described in paragraph (c)(2)(v)(A).”

F. In this case, since petitioner chose to treat Timeless Décor and Timeless Frames as disregarded entities, they report on schedules that are a part of the owner’s income tax return. Only the owner has an income tax liability and it would be incongruous to conclude that one of the disregarded entities could have a credit independent of the disregarded firm’s owner. It follows that the certification date for the disregarded entities will be the earliest certification date of any of the disregarded entities. Hence, the second certification of Timeless Décor does not result in granting the credits petitioner seeks.

G. Petitioner’s argument that the Tax Law does not contain any limitation as to how a business enterprise is structured is rejected because it distorts the basis of the Division’s

¹ It appears that this construction of the Internal Revenue Code was adopted by the Internal Revenue Service in Publication 3402 (Rev. November 2014). For example, the third page of this publication provides:

“Employment tax and certain excise taxes.

A single-member LLC disregarded for income tax purposes is considered a corporation for employment tax and collection of income tax and certain excise taxes purposes and must use its own name and identification number for those purposes.”

adjustment. Petitioner was not prohibited from treating the two firms as disregarded entities. Similarly, petitioner's focus upon the difference in the nature of the operations of the two businesses entities is irrelevant. Petitioner's filing of separate business annual reports also has no bearing on the outcome of this matter.

H. Petitioner argues that the Division's treatment of Lisa Weber unfairly penalizes a disregarded entity by treating it in a manner that is dissimilar to other pass-through entities such as a limited liability company taxed as a partnership or a subchapter S corporation. According to petitioner, this position violates the Equal Protection clauses of the United States and New York State constitutions. This argument also lacks merit. A taxpayer is bound by the form of business organization chosen (*Matter of 107 Delaware Associates v. State Tax Commn.*, 64 NY2d 935 [1985]). Having decided to treat Timeless Frames and Timeless Décor as disregarded entities, petitioner is bound by the outcome.

I. The petition of Lisa Weber is denied and the notices of disallowance, dated December 14, 2010 and August 29, 2011 are sustained.

DATED: Albany, New York
August 13, 2015

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE