

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(1)C
Corporation Tax
TSB-A-08(6)S
Sales Tax
February 6, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z070904A

On September 4, 2007, a Petition for Advisory Opinion was received from Hero Group, Inc., 13 British American Boulevard, Latham, NY 12110.

The issues raised by Petitioner, Hero Group, Inc., are:

1. Whether Petitioner may qualify as a Qualified Empire Zone Enterprise (QEZE).
2. Whether Petitioner will be entitled to receive the benefits of the QEZE real property tax credit under the Empire Zone Program for eligible real property taxes amounting to \$25 million, notwithstanding its ownership of the assets of Beech-Nut Nutrition Corporation.
3. Whether Petitioner will be entitled to receive the full benefits of the Empire Zone (EZ) wage tax credit under the Empire Zone Program, notwithstanding its ownership of the assets of Beech-Nut Nutrition Corporation.
4. Whether Petitioner will be entitled to receive the full benefits of the Empire Zone investment tax credit (EZ-ITC) under the Empire Zone Program, notwithstanding its ownership of the assets of Beech-Nut Nutrition Corporation.
5. Whether Petitioner's purchases of materials used in the construction of the new manufacturing facility described below will qualify for the QEZE exemption from sales and use tax under section 1115(z) of the Tax Law.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner was incorporated on June 6, 2007, as a Delaware corporation with headquarters formerly located in St. Louis, Missouri, but presently located in Latham (Albany County), New York. It is wholly owned by Hero, Inc., a Delaware corporation (Hero). Hero also owns all of the shares of Milnot Holding Corporation, a Delaware corporation which in turn owns all of the stock of Beech-Nut Nutrition Corporation (Beech-Nut), a Nevada corporation. It is proposed that, through appropriate intercorporate transactions, Petitioner will acquire all of the assets of Beech-Nut and will continue to use the Beech-Nut name while operating in Montgomery County, New York. Petitioner is a calendar-year taxpayer.

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Beech-Nut operates a plant that has been manufacturing baby food products in Canajoharie, Montgomery County, since 1891. A second plant in Fort Plain, Montgomery County, has been manufacturing cereal products since 1979. The two plants presently employ 356 full-time permanent employees.

Beech-Nut is a QEZE and has been receiving QEZE real property tax credits under the Empire Zone Program since 2001. The credits relate to real property taxes paid with respect to the Canajoharie facility.

The flooding of the Mohawk River in June 2006 led Beech-Nut to explore alternative sites for its manufacturing operations. As a result of the efforts of local economic development and governmental officials, Beech-Nut was introduced to a potential site in the Town of Florida, Montgomery County. The site is located near the New York State Thruway in the Amsterdam Empire Zone (EZ). Beech-Nut has received economic incentive proposals from both the Empire State Development Corporation (ESD) and the Montgomery County Industrial Development Agency (IDA) to relocate its operations to the Town of Florida site.

The new site (Florida Industrial Park) will contain approximately 140 acres on which a 635,000-square-foot facility will be constructed. The new facility will house all of Beech-Nut's baby food manufacturing and packaging operations and Petitioner's new corporate headquarters. It is estimated that the project will be completed in 2009, at which time the existing 356 full-time permanent employees of the Canajoharie and Fort Plain operations will be relocated to the new facility.

Petitioner has moved its corporate headquarters from St. Louis, Missouri, to Latham, New York. As part of that move, Petitioner transferred two employees from St. Louis to Latham and hired 29 new employees. None of the transferred employees were employed in New York State prior to the transfer. None of the newly hired employees were employed by Beech-Nut prior to being employed by Petitioner.

When the new facility is completed, Petitioner will move from Latham to the new facility and transfer all of its present office employees to the new headquarters, resulting in approximately 37 new full-time permanent jobs in the EZ. In addition, Petitioner will add approximately 98 new full-time employees by January 1, 2013. The 135 new positions represent an increase of almost 38 percent over the present Beech-Nut workforce. Petitioner anticipates it will become certified under Article 18-B of the General Municipal Law in the EZ.

The project will cost approximately \$125 million, which will be disbursed over the construction period. As part of the incentive to Petitioner to locate the new facility in the Town of Florida, the IDA has offered Petitioner a payments in lieu of taxes (PILOT) agreement, whereby Petitioner would make PILOT payments of \$2.5 million a year for 13 years to the IDA.

ESD will make working capital grant payments to Petitioner of \$2.5 million a year for the first 10 years, a supplemental \$5 million working capital grant payment to Petitioner upon start of construction of the new manufacturing facility at the Florida Industrial Park, and a supplemental working capital grant payment to Petitioner in the amount of \$2.5 million in year 10.

Applicable law and regulations

Section 465(b)(3)(C) of the Internal Revenue Code provides:

Related person.— For purposes of this subsection, a person (hereinafter in this paragraph referred to as the “related person”) is related to any person if—

(i) the related person bears a relationship to such person specified in section 267(b) or section 707(b)(1), or

(ii) the related person and such person are engaged in trades or business under common control (within the meaning of subsections (a) and (b) of section 52).

For purposes of clause (i), in applying section 267(b) or 707(b)(1), “10 percent” shall be substituted for “50 percent”.

Section 14 of the Tax Law contains the provisions for the QEZE program and provides, in part:

(a) Qualified empire zone enterprise. A business enterprise which is certified under article eighteen-B of the general municipal law and meets the employment test shall be a “qualified empire zone enterprise”:

(1) ... for purposes of ... articles nine-A, twenty-two, thirty-two and thirty-three of this chapter, for each of the taxable years within the “business tax benefit period,” which period shall consist of ... (C) in the case of a business enterprise which is first certified under article 18-B of the general municipal law on or after April first, two thousand five, the ten taxable years starting with the taxable year in which the business enterprise’s first date of certification under article 18-B of the general municipal law occurs, but only with respect to each of such business tax benefit period years for which the employment test is met,

* * *

(2) for purposes of articles twenty-eight and twenty-nine of this chapter, during the “sales and use tax benefit period.” Such period shall consist of one hundred twenty

consecutive months beginning on the later of (A) March first, two thousand one, or (B) the first day of the month next following the date of issuance of a qualified empire zone enterprise certification by the commissioner under subdivision (h) of this section. Provided however, such period shall not include any month falling within a taxable year immediately preceded by a taxable year with respect to which the business enterprise did not meet the employment test.

(b) Employment test.

* * *

(4) In the case of a business enterprise which is first certified under article eighteen-B of the general municipal law on or after April first, two thousand five ... the employment test shall be met with respect to a taxable year if the business enterprise's employment number in the state and the empire zones for such taxable year exceeds its employment number in the state and the empire zones, respectively, for the base period. If the base period is zero years or the base period employment is zero and the enterprise has an employment number in such zone of greater than zero with respect to a taxable year, then the employment test will be met only if the enterprise qualifies as a new business under subdivision (j) of this section.

* * *

(c) Base period.

* * *

(2) In the case of a business enterprise which is first certified under article eighteen-B of the general municipal law on or after April first, two thousand five, the term "base period" means the four taxable years immediately preceding the taxable year in which the business enterprise was first certified under article eighteen-B of the general municipal law. If the business enterprise has fewer than four such years, then the term "base period" means such smaller set of years.

(3) For purposes of the sales and use tax benefit period, in the case of a business enterprise which is first certified under article eighteen-B of the general municipal law on or after April first, two thousand five, the term "base period" means the three taxable years immediately preceding the business enterprise's test year. For this purpose, the definitions set forth in subdivisions (d) and (e) of this section shall apply....

(d) Test year. The term "test year" means the last taxable year of the business enterprise ending before the test date. If a business enterprise does not have a taxable year that ends on or before the test date, such enterprise shall be deemed to have a test year which shall be either the last calendar year ending on or before its test date, or if the enterprise has as its taxable year a fiscal year, the last such fiscal year ending on or before its test date (whether or not the enterprise in fact had a taxable year during that period).

(e) Test date. The term "test date" means the later of July first, two thousand or the date prior to July first, two thousand eleven on which the business enterprise was first certified under article eighteen-B of the general municipal law.

(f) Taxable year. The term "taxable year" means the taxable year of the business enterprise under ... article nine-A ... of this chapter....

(g) Employment number. (1) The term "employment number" shall mean the average number of individuals, excluding general executive officers (in the case of a corporation), employed full-time by the enterprise for at least one-half of the taxable year. Such number shall be computed by determining 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 the applicable taxable year, adding together the number of such individuals determined to be so employed on each of such dates and dividing the sum so obtained by the number of such dates occurring within such applicable taxable year. Such number shall not include individuals employed within the state within the immediately preceding sixty months by a related person to the QEZE, as such term "related person" is defined in subparagraph (c) of paragraph three of subsection (b) of section four hundred sixty-five of the internal revenue code. For this purpose, a "related person" shall include an entity which would have qualified as a "related person" to the QEZE if it had not been dissolved, liquidated, merged with another entity or otherwise ceased to exist or operate.

* * *

(h) Sales and use tax. (1) In addition to the other requirements of this section, in order for the exemptions described in subdivision (z) of section eleven hundred fifteen of this chapter or any like exemptions from taxes imposed pursuant to the authority of article twenty-nine of this chapter to apply with respect to a qualified empire zone enterprise, such enterprise shall apply to the commissioner of taxation and finance for the issuance of a qualified empire zone enterprise certification, in the manner prescribed by such commissioner. If such commissioner grants such certification, such certification shall be subject to conditions specified by such commissioner. An enterprise to which the commissioner issues such certification may furnish a qualified empire zone enterprise

exempt purchase certificate to a person required to collect sales and compensating use taxes imposed under or pursuant to the authority of article twenty-eight or twenty-nine of this chapter, which certificate shall be deemed to be an exemption certificate under subdivision (c) of section eleven hundred thirty-two of this chapter. Nothing herein or in any other law shall be construed to prohibit the disclosure, in such manner as the commissioner of taxation and finance deems appropriate, of the names and other appropriate identifying information of those persons holding qualified empire zone enterprise certifications pursuant to this subdivision, those persons whose qualified empire zone enterprise certifications have been revoked or those persons whose qualified empire zone enterprise certifications have expired.

(2) During the period that a business enterprise is eligible to apply, or is qualified, for exemptions from sales and compensating use taxes under this section, the commissioner of economic development shall, at the time such commissioner certifies or decertifies a business enterprise under article eighteen-B of the general municipal law, notify the commissioner of taxation and finance of such certification or decertification, which notification shall include the full legal name, address and federal employer identification number of such enterprise. The commissioner of economic development shall, at the time of any such certification, also advise such enterprise of the requirements in paragraph one of this subdivision.

* * *

(j) New business. (1) A new business shall include any corporation, except a corporation which is substantially similar in operation and in ownership to a business entity (or entities) taxable, or previously taxable, under ... article nine-A ... of this chapter;...

Section 15 of the Tax Law contains the provisions for the QEZE credit for real property taxes and provides, in part:

(a) Allowance of credit. A taxpayer which is a ... (QEZE)... and which is subject to tax under article 9-A ... of this chapter, shall be allowed a credit against such tax, pursuant to the provisions referenced in subdivision (h) of this section, for eligible real property taxes.

* * *

(e) Eligible real property taxes. The term "eligible real property taxes" means taxes imposed on real property which is owned by the QEZE and located in an empire zone with respect to which the QEZE is certified pursuant to article eighteen-B of the

general municipal law, provided such taxes are paid by the QEZE which is the owner of the real property ... and such taxes become a lien on the real property during a taxable year in which the owner of the real property is both certified pursuant to article eighteen-B of the general municipal law and a qualified empire zone enterprise.... In addition, the term "eligible real property taxes" includes payments in lieu of taxes made by the QEZE to the state, a municipal corporation or a public benefit corporation pursuant to a written agreement entered into between the QEZE and the state, municipal corporation, or public benefit corporation. Provided, however, a payment in lieu of taxes made by the QEZE pursuant to a written agreement executed or amended on or after January first, two thousand one, shall not constitute eligible real property taxes in any taxable year to the extent that such payment exceeds the product of (A) the greater of (i) the basis for federal income tax purposes, calculated without regard to depreciation, determined as of the effective date of the QEZE's certification pursuant to article eighteen-B of the general municipal law of real property, including buildings and structural components of buildings, owned by the QEZE and located in empire zones with respect to which the QEZE is certified pursuant to such article eighteen-B of the general municipal law, and provided that if such basis is further adjusted or reduced pursuant to any provision of the internal revenue code, the QEZE may petition the department, the department of economic development and the office of real property services to disregard such reduction or adjustment for the purpose of this subdivision or (ii) the basis for federal income tax purposes of such real property described in clause (i) of this subparagraph, calculated without regard to depreciation, on the last day of the taxable year, and provided that if such basis is further adjusted or reduced pursuant to any provision of the internal revenue code, the QEZE may petition the department, the department of economic development and the office of real property services to disregard such reduction or adjustment for the purpose of this subdivision; and (B) the estimated effective full value tax rate within the county in which such property is located, as most recently reported to the commissioner by the secretary of the state board of real property services, or his or her designee....

* * *

(f-1) In the case of a business enterprise which is first certified under article eighteen-B of the general municipal law on or after April first, two thousand five, the credit shall be the greater of the credit amount as determined pursuant to paragraph two of subdivision (b) of this section, or the capital investment amount determined under this subdivision. Provided however, that in no case shall the amount of the credit exceed the amount of the taxpayer's eligible real property taxes for the taxable year.

* * *

(h) Definitions and cross-references. For definitions of terms used in this section see section fourteen of this article. For application of the credit provided for in this section, see the following provisions of this chapter:

* * *

(2) Article 9-A: Section 210: subdivision 27.

Section 210.12(j) of the Tax Law provides, in part:

a new business shall include 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

(2) is substantially similar in operation and in ownership to a business entity (or entities) taxable, or previously taxable, under this article... or

(3) has been subject to tax under this article for more than five taxable years (excluding short taxable years).

Section 210.12-B of the Tax Law contains the provisions for the Empire zone investment tax credit (EZ-ITC) and provides, in part:

(a) A taxpayer shall be allowed a credit, to be computed as herein provided, against the tax imposed by this article if the taxpayer has been certified pursuant to article eighteen-B of the general municipal law. The amount of the credit shall be ten percent of the cost or other basis for federal income tax purposes of tangible personal property and other tangible property, including buildings and structural components of buildings, described in paragraph (b) of this subdivision, which is located within an empire zone designated as such pursuant to article eighteen-B of such law,...

(b) A credit shall be allowed under this subdivision with respect to tangible personal property and other tangible property, including buildings and structural components of buildings, which (i) are depreciable pursuant to section one hundred sixty-seven of the internal revenue code, (ii) have a useful life of four years or more, (iii) are acquired by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code, (iv) have a situs in an empire zone designated as such pursuant to article eighteen-B of the general municipal law, and (v) are (A) principally used by the taxpayer in the production of goods by manufacturing, processing, assembling, refining, mining,

extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing,...

* * *

(d) The credit allowed under this subdivision for any taxable year shall not reduce the tax due for such year to less than the higher of the amounts prescribed in paragraphs (c) and (d) of subdivision one of this section. Provided, however, that if the amount of credit allowed under this subdivision for any taxable year reduces the tax to such amount, any amount of credit not deductible in such taxable year may be carried over to the following year or years and may be deducted from the taxpayer's tax for such year or years. In lieu of such carryover, any such taxpayer which qualifies as a new business under paragraph (j) of subdivision twelve of this section may elect, on its report for its taxable year with respect to which such credit is allowed, to treat fifty percent of the amount of such carryover as an overpayment of tax to be credited or refunded in accordance with the provisions of section ten hundred eighty-six of this chapter....

Section 210.19 of the Tax Law contains the provisions for the EZ wage tax credit and provides, in part:

(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:

(1) "Empire zone wages" means wages paid by the taxpayer for full-time employment, other than to general executive officers, during the taxable year in an area designated or previously designated as an empire zone or zone equivalent area pursuant to article eighteen-B of the general municipal law, where such employment is in a job created in the area (i) during the period of its designation as an empire zone, (ii) within four years of the expiration of such designation, or (iii) during the ten year period immediately following the date of designation as a zone equivalent area, provided, however, that if the taxpayer's certification under article eighteen-B of the general municipal law is revoked with respect to an empire zone or zone equivalent area, any wages paid by the taxpayer, on or after the effective date of such decertification, for employment in such zone shall not constitute empire zone wages.

(2) "Targeted employee" means a New York resident who receives empire zone wages and who is (A) an eligible individual under the provisions of the targeted jobs tax credit (section fifty-one of the internal revenue code), (B) eligible for benefits under the provisions of the workforce investment act as a dislocated worker or low-income individual (P.L. 105-220, as amended), (C) a recipient of public assistance benefits, (D) an individual whose income is below the most recently established poverty rate promulgated by the United States department of commerce, or a member of a family whose family income is below the most recently established poverty rate promulgated by the appropriate federal agency or (E) an honorably discharged member of any branch of the armed forces of the United States.

An individual who satisfies the criteria set forth in clause (A), (B) or (D) at the time of initial employment in the job with respect to which the credit is claimed, or who satisfies the criterion set forth in clause (C) at such time or at any time within the previous two years, shall be a targeted employee so long as such individual continues to receive empire zone wages.

(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.

(c) The credit provided for herein shall be allowed only where the average number of individuals, excluding general executive officers, employed full-time by the taxpayer in (A) the state and (B) the empire zone or area previously constituting such zone or zone equivalent area, during the taxable year exceeds the average number of such individuals employed full-time by the taxpayer in (A) the state and (B) such zone or area subsequently or previously constituting such zone or such zone equivalent area, respectively, during the four years immediately preceding the first taxable year in which the credit is claimed with respect to such zone or area. Where the taxpayer provided full-time employment within (A) the state or (B) such zone or area during only a portion of such four-year period, then for purposes of this paragraph the term "four years" shall be deemed to refer instead to such portion, if any.

The credit shall be allowed only with respect to the first taxable year during which payments of empire zone wages are made and the conditions set forth in this paragraph are satisfied, and with respect to each of the four taxable years next following (but only, with respect to each of such years, if such conditions are satisfied), in accordance with

paragraph (d) of this subdivision. Subsequent certifications of the taxpayer pursuant to article eighteen-B of the general municipal law, at the same or a different location in the same empire zone or zone equivalent area or at a location in a different empire zone or zone equivalent area, shall not extend the five taxable year time limitation on the allowance of the credit set forth in the preceding sentence. Provided, further, however, that no credit shall be allowed with respect to any taxable year beginning more than four years following the taxable year in which designation as an empire zone expired or more than ten years after the designation as a zone equivalent area.

(d) The amount of the credit shall equal the sum of (1) the product of three thousand dollars and the average number of individuals (excluding general executive officers) employed full-time by the taxpayer, computed pursuant to the provisions of subparagraph three of paragraph (b) of this subdivision, who

(A) received empire zone wages for more than half of the taxable year,

(B) received, with respect to more than half of the period of employment by the taxpayer during the taxable year, an hourly wage which was at least one hundred thirty-five percent of the minimum wage specified in section six hundred fifty-two of the labor law, and

(C) are targeted employees; and

(2) the product of fifteen hundred dollars and the average number of individuals (excluding general executive officers and individuals described in subparagraph one of this paragraph) employed full-time by the taxpayer, computed pursuant to the provisions of subparagraph three of paragraph (b) of this subdivision, who received empire zone wages for more than half of the taxable year.

Provided, further, however, that the credit provided for herein with respect to the taxable year, and carryovers of such credit to the taxable year, deducted from the tax otherwise due, may not, in the aggregate, exceed fifty percent of the tax imposed under section two hundred nine computed without regard to any credit provided for by this article.

(3) For purposes of calculating the amount of the credit, individuals employed within an empire zone or zone equivalent area within the immediately preceding sixty months by a related person, as such term is defined in subparagraph (c) of paragraph three of subsection (b) of section four hundred sixty-five of the internal revenue code, shall not be included in the average number of individuals described in subparagraph one or subparagraph two of this paragraph, unless such related person was never allowed a

credit under this subdivision with respect to such employees. For the purposes of this subparagraph, a "related person" shall include an entity which would have qualified as a "related person" to the taxpayer if it had not been dissolved, liquidated, merged with another entity or otherwise ceased to exist or operate.

* * *

(e) The credit and carryovers of such credit allowed under this subdivision for any taxable year shall not, in the aggregate, reduce the tax due for such year to less than the higher of the amounts prescribed in paragraphs (c) and (d) of subdivision one of this section. However, if the amount of credit or carryovers of such credit, or both, allowed under this subdivision for any taxable year reduces the tax to such amount, or if any part of the credit or carryovers of such credit may not be deducted from the tax otherwise due by reason of the final sentence of paragraph (d) hereof, any amount of credit or carryovers of such credit thus not deductible in such taxable year may be carried over to the following year or years and may be deducted from the tax for such year or years. In lieu of such carryover, any such taxpayer which qualifies as a new business under paragraph (j) of subdivision twelve of this section ... may elect, on its report for its taxable year with respect to which such credit is allowed, to treat fifty percent of the amount of such carryover as an overpayment of tax to be credited or refunded in accordance with the provisions of section ten hundred eighty-six of this chapter.... Provided, further, however, the provisions of subsection (c) of section ten hundred eighty-eight of this chapter notwithstanding, no interest shall be paid thereon.

Section 210.27 of the Tax Law provides:

QEZE credit for real property taxes. (a) Allowance of credit. A taxpayer which is a qualified empire zone enterprise shall be allowed a credit for eligible real property taxes, to be computed as provided in section fifteen of this chapter, against the tax imposed by this article.

(b) Application of credit. The credit allowed under this subdivision for any taxable year shall not reduce the tax due for such year to less the higher of the amounts prescribed in paragraphs (c) and (d) of subdivision one of this section. However, if the amount of credit allowed under this subdivision for any taxable year reduces the tax to such amount, any amount of credit thus not deductible in such taxable year shall be treated as an overpayment of tax to be credited or refunded in accordance with the provisions of section ten hundred eighty-six of this chapter. Provided, however, the provisions of subsection (c) of section ten hundred eighty-eight of this chapter notwithstanding, no interest shall be paid thereon.

Section 1115(z) of the Tax Law provides:

(1) Receipts from the retail sale of tangible personal property described in subdivision (a) of section eleven hundred five of this article, receipts from every sale of services described in subdivisions (b) and (c) of such section eleven hundred five and consideration given or contracted to be given for, or for the use of, such tangible personal property or services shall be exempt from the taxes imposed by this article where such tangible personal property or services are sold to a qualified empire zone enterprise, provided that (i) such property or property upon which such a service has been performed or such service (other than a service described in subdivision (b) of section eleven hundred five) is directly and predominantly, or such a service described in clause (A) or (D) of paragraph one of such subdivision (b) of section eleven hundred five is directly and exclusively, used or consumed by such enterprise in an area designated as an empire zone pursuant to article eighteen-B of the general municipal law with respect to which such enterprise is certified pursuant to such article eighteen-B, or (ii) such a service described in clause (B) or (C) of paragraph one of such subdivision (b) of section eleven hundred five is delivered and billed to such enterprise at an address in such empire zone; provided, further, that, in order for a motor vehicle, as defined in subdivision (c) of section eleven hundred seventeen of this article, or tangible personal property related to such a motor vehicle to be found to be used predominantly in such a zone, at least fifty percent of such motor vehicle's use shall be exclusively within such zone or at least fifty percent of such motor vehicle's use shall be in activities originating or terminating in such zone, or both; and either or both such usages shall be computed either on the basis of mileage or hours of use, at the discretion of such enterprise. For purposes of this subdivision, tangible personal property related to such a motor vehicle shall include a battery, diesel motor fuel, an engine, engine components, motor fuel, a muffler, tires and similar tangible personal property used in or on such a motor vehicle.

(2) Receipts from the retail sale of, and consideration given or contracted to be given for, or for the use of, tangible personal property sold to a contractor, subcontractor or repairman for use in (i) erecting a structure or building of a qualified empire zone enterprise, (ii) adding to, altering or improving real property, property or land of such an enterprise or (iii) maintaining, servicing or repairing real property, property or land of such an enterprise, as the terms real property, property or land are defined in the real property tax law, shall be exempt from the taxes imposed by this article; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building, real property, property or land located in an area designated as an empire zone pursuant to article eighteen-B of the general municipal law in, and with respect to which such enterprise is certified pursuant to such article eighteen-B.

(3) Except as otherwise provided by law, the exemptions provided in this subdivision shall not apply to taxes imposed by section eleven hundred seven of this article or to taxes imposed pursuant to the authority of article twenty- nine of this chapter.

Section 1119(a) of the Tax Law provides, in part:

Subject to the conditions and limitations provided for herein, a refund or credit shall be allowed for a tax paid pursuant to subdivision (a) of section eleven hundred five or section eleven hundred ten ... (6) on the sale of tangible personal property purchased for use in constructing, expanding or rehabilitating industrial or commercial real property (other than property used or to be used exclusively by one or more registered vendors primarily engaged in the retail sale of tangible personal property) located in an area designated as an empire zone pursuant to article eighteen-B of the general municipal law, but only to the extent that such property becomes an integral component part of the real property....

Section 1210(a)(1)(i) of the Tax Law authorizes any city or county in the State, except county wholly within a city, to impose local sales and use taxes, in relevant part as follows:

Either, all of the taxes described in article twenty-eight of this chapter, at the same uniform rate, as to which taxes all provisions of the local laws, ordinances or resolutions imposing such taxes shall be identical, except as to rate and except as otherwise provided herein, with the corresponding provisions in such article twenty-eight, including the definition and exemption provisions of such article, so far as the provisions of such article twenty-eight can be made applicable to the taxes imposed by such city or county and with such limitations and special provisions as are set forth in this article....The taxes authorized under this subdivision may not be imposed by a city or county unless the local law, ordinance or resolution imposes such taxes so as to include all portions and all types of receipts, charges or rents, subject to state tax under sections eleven hundred five and eleven hundred ten, except as provided in the following sentence. Any local law, ordinance or resolution enacted by any city of less than one million or by any county or school district, imposing the taxes authorized by this subdivision, shall, notwithstanding any provision of law to the contrary, exclude from the operation of such local taxes all sales of tangible personal property for use or consumption directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration or steam, for sale, by manufacturing, processing, generating, assembly, refining, mining or extracting; and all sales of tangible personal property for use or consumption predominantly either in the production of tangible personal property, for sale, by farming or in a commercial horse boarding operation, or in both; and, unless such city, county or school district elects otherwise, shall omit the provision for credit or refund contained in clause six of subdivision (a) of section eleven hundred nineteen. Any local law, ordinance or

resolution enacted by any city, county or school district, imposing the taxes authorized by this subdivision, shall omit the residential solar energy systems equipment exemption provided for in subdivision (ee), the clothing and footwear exemption provided for in paragraph thirty of subdivision (a) and the qualified empire zone enterprise exemptions provided for in subdivision (z) of section eleven hundred fifteen, unless such city, county or school district elects otherwise as to either such residential solar energy systems equipment exemption or such clothing and footwear exemption or such qualified empire zone enterprise exemptions;...

Opinion

With respect to Issue 1, in order for Petitioner to qualify for Empire Zone benefits, including the QEZE real property tax credit under section 15 of the Tax Law, the EZ-ITC under section 210.12-B of the Tax Law, and the EZ wage tax credit under section 210.19 of the Tax Law, Petitioner must be certified under Article 18-B of the General Municipal Law. This certification is made jointly by the Commissioner of Economic Development, the Commissioner of Labor, and the local Empire Zone certification officer. See General Municipal Law §963(a). Thus, the Tax Department is not involved in this certification process. Accordingly, it is not within the scope of this Opinion to determine whether Petitioner is a business enterprise that can be certified under Article 18-B of the General Municipal Law. However, since Petitioner anticipates receiving such certification, for purposes of this Opinion it will be assumed that Petitioner will be certified under Article 18-B of the General Municipal Law.

In order for Petitioner to qualify as a QEZE and qualify for the QEZE real property tax credit under section 15 of the Tax Law, Petitioner must meet the requirements under section 14(b)(4) of the Tax Law. Pursuant to that section, an employment test must be met, and, if applicable, the enterprise must qualify as a *new business* as defined in section 14(j) of the Tax Law. The employment test is met with respect to a taxable year if the business enterprise's employment number in the State and the Empire Zones for such taxable year exceeds its employment number in the State and the Empire Zones, respectively, for the base period as defined in section 14(c) of the Tax Law. The employment number must be computed using the provisions of section 14(g) of the Tax Law as discussed below. In addition, section 14(b)(4) also requires that if the base period is zero years or the base period employment is zero and the enterprise has an employment number in such zones of greater than zero with respect to a taxable year, then the employment test will be met only if the enterprise qualifies as a new business under section 14(j) of the Tax Law. In the case of a business enterprise first certified on or after April 1, 2005, the base period is the four taxable years immediately preceding the taxable year the business was first certified, or if the business has fewer than four such taxable years, then the base period is such smaller set of years. See section 14(c)(2) of the Tax Law.

Petitioner is a calendar-year taxpayer incorporated in Delaware on June 6, 2007, and had employees in New York State in 2007. If Petitioner becomes certified during 2008, its base period will be the short taxable year that began in 2007. (If Petitioner becomes certified in 2009, its base period will include the short taxable year that began in 2007 and calendar year 2008). If Petitioner's employment number in New York State and in the Empire Zones during a taxable year exceeds its employment number in New York State and the Empire Zones during its base period, then Petitioner will qualify as a QEZE, and for the QEZE real property tax credit, if that taxable year falls within Petitioner's business tax benefit period. Under section 14(a)(1) of the Tax Law, the "business tax benefit period" consists of the 10 taxable years starting with the taxable year in which Petitioner is first certified under Article 18-B of the General Municipal Law, but only with respect to each of such business tax benefit period years for which the employment test is met. In addition, if Petitioner becomes certified during 2008 or 2009, Petitioner will not have a base period of zero years. If the base period employment is greater than zero, Petitioner will not be subject to the "new business" requirement defined in section 14(j) of the Tax Law. For purposes of computing the base period employment, only individuals, excluding general executive officers, employed full-time by Petitioner for at least one-half of the taxable year are included, as provided in section 14(g) of the Tax Law.

Pursuant to section 14(g) of the Tax Law, the employment number used in the computation of the employment test required to qualify as a QEZE does not include individuals employed within the State in the immediately preceding 60 months by a *related person*, as that term is defined in Internal Revenue Code section 465(b)(3)(C). Under the IRC definition, Petitioner and Beech-Nut are related persons. Therefore, if any of Petitioner's employees were employed within the State in the immediately preceding 60 months by Beech-Nut, such employees are not included in Petitioner's employment number calculation for the base period or the current taxable year.

With respect to Issue 2, pursuant to section 15 of the Tax Law, a taxpayer must be a QEZE as provided in section 14 of the Tax Law before it is eligible to claim the QEZE credit for real property taxes. The QEZE credit for real property taxes is allowed against the tax under Article 9-A of the Tax Law for eligible real property taxes. Pursuant to section 14(a)(1) of the Tax Law, such credit may be claimed for each of the taxable years within the business tax benefit period, i.e., the 10 taxable years starting with the taxable year in which the taxpayer is first certified, in which the taxpayer meets the employment test under section 14 of the Tax Law. The amount of the credit may not exceed the credit amount set forth in section 15(f-1) of the Tax Law. Section 15(f-1) provides that the credit is the greater of the credit amount as determined pursuant to section 15(b)(2) of the Tax Law or the capital investment amount determined pursuant to section 15(f-1) of the Tax Law and that in no case shall the amount of the credit exceed the amount of the taxpayer's eligible real property taxes for the taxable year. Section 15(e) of the Tax Law defines *eligible real property taxes* to include payments in lieu of taxes (PILOT payments) made by a QEZE to New York State, a municipal corporation, or a public

benefit corporation pursuant to a written agreement between the two parties. However, for any PILOT agreement executed or amended on or after January 1, 2001, the amount of the PILOT payment that qualifies as *eligible real property taxes* may not exceed the limitation set forth in section 15(e). Pursuant to section 15(e), the limitation is the product of (1) the basis for federal income tax purposes (as determined on certain dates) of real property owned by the QEZE and located in empire zones with respect to which the QEZE is certified pursuant to Article 18-B of the General Municipal Law, and (2) the estimated effective full value tax rate in the county in which the property is located. Therefore, the QEZE that makes the PILOT payments must have a basis in the property, as determined for federal income tax purposes, in order for the payments to qualify as eligible real property taxes for QEZE purposes, and such payments will qualify only to the extent of the limitation calculated under section 15(e). If the basis is required to be adjusted or reduced pursuant to any provision of the Internal Revenue Code, the QEZE may petition the Tax Department, the Department of Economic Development and the Office of Real Property Services to disregard such adjustment or reduction for the purpose of this limitation.

Accordingly, assuming: Petitioner is a QEZE pursuant to section 14 of the Tax Law, Petitioner makes PILOT payments of \$2.5 million a year for 13 years, such payments qualify as eligible real property taxes pursuant to section 15(e) of the Tax Law, and the credit amounts as determined under sections 15(b)(2) and 15(f-1) of the Tax Law equal or exceed the amount of Petitioner's PILOT payments, then Petitioner will be entitled to receive the benefit of the QEZE credit for real property taxes in the amount of \$2.5 million a year for each of the 10 taxable years within the business tax benefit period. Petitioner will be entitled to receive the QEZE credit for real property taxes under section 15 of the Tax Law, notwithstanding its ownership of the assets of Beech-Nut and receipt of working capital grant payments from ESD as described in this Opinion, as long as Petitioner qualifies as a QEZE and otherwise meets the requirements for claiming such credit.

With respect to Issue 3, Petitioner will qualify for the EZ wage tax credit under section 210.19 of the Tax Law if Petitioner is certified under Article 18-B of the General Municipal Law and meets the requirements contained in section 210.19 of the Tax Law, notwithstanding its ownership of the assets of Beech-Nut. The EZ wage tax credit will be allowed only if the average number of individuals, excluding general executive officers, employed full-time by Petitioner in New York State and in the Amsterdam Empire Zone (EZ) during the taxable year exceeds the average number of such individuals employed full-time by Petitioner in New York State and in the EZ during the four years immediately preceding the first taxable year in which the credit is claimed with respect to such EZ. If Petitioner provided full-time employment within the State or EZ during only a portion of such four year period, then for purposes of the EZ wage tax credit the term "four years" shall be deemed to refer instead to such portion, if any. The EZ wage tax credit is allowed for up to five consecutive taxable years beginning in the first taxable year in which the eligibility requirements are met. If Petitioner is eligible to claim an EZ wage tax credit, the credit will be allowed only with respect to the average number of individuals, excluding

general executive officers, employed full-time by Petitioner, computed pursuant to section 210.19(b)(3) of the Tax Law, who received Empire Zone wages for more than half of the taxable year. See sections 210.19(c) and (d) of the Tax Law.

Pursuant to section 210.19(d)(3) of the Tax Law, if any of Petitioner's employees were employed in the State within the immediately preceding 60 months by a related person, as defined in IRC section 465(b)(3)(C)(i), such employees are not included in Petitioner's computation of the amount of the EZ wage tax credit for the taxable year unless an EZ wage tax credit was never allowed to the related entity with respect to such employees. Under IRC section 465(b)(3)(C)(i), Petitioner and Beech-Nut are related persons. Therefore, Petitioner may not include in the computation of the amount of EZ wage tax credit any employees employed in the State by Beech-Nut within the preceding 60 months for which Beech-Nut claimed the EZ wage tax credit. Such employees will, however, be included in the computation of the employment test for purposes of the EZ wage tax credit as required in section 210.19(c) of the Tax Law.

The EZ wage tax credit is not refundable unless Petitioner qualifies as a new business under section 210.12(j) of the Tax Law. The definition of *new business* under 210.12(j) of the Tax Law is similar to the definition of a *new business* under section 14(j) of the Tax Law. Specifically, section 210.12(j) provides, in part, that a new business is any corporation except a corporation that is substantially similar in operation and ownership to a business entity (or entities) taxable, or previously taxable, under Article 9-A. Hero, Inc. directly owns 100% of the stock of Petitioner. Hero, Inc. also directly owns 100% of the stock of Milnot Holding Company, which directly owns 100% of Beech-Nut. Therefore, Hero, Inc. directly owns 100% of the stock of Petitioner and indirectly owns 100% of the stock of Beech-Nut, an Article 9-A taxpayer that manufactures baby food products. Petitioner plans to continue the manufacturing operations currently conducted by Beech-Nut. As such, Petitioner is substantially similar in operation and ownership to Beech-Nut and is not a new business as defined under section 210.12(j) of the Tax Law. Accordingly, Petitioner will not be eligible for a refund of the EZ wage tax credit.

With respect to Issue 4, section 210.12-B(a) of the Tax Law provides that a taxpayer shall be allowed an EZ-ITC against the tax imposed by Article 9-A of the Tax Law if the taxpayer has been certified pursuant to Article 18-B of the General Municipal Law and places in service qualified property in an Empire Zone.

Accordingly, assuming Petitioner is certified under Article 18-B of the General Municipal Law, the EZ-ITC will be allowed if the tangible property meets the requirements under section 210.12-B(b) of the Tax Law, notwithstanding Petitioner's ownership of the assets of Beech-Nut. It should be noted that in order for property to qualify for the EZ-ITC, the property must be acquired by the taxpayer by purchase as defined in IRC section 179(d). The EZ-ITC is refundable for any business that qualifies as a new business under section 210.12(j) of

the Tax Law, as defined above. As determined above, Petitioner is substantially similar in operation and in ownership to Beech-Nut, a business entity taxable or previously taxable under Article 9-A of the Tax Law. Accordingly, since Petitioner will not qualify as a new business under section 210.12(j), Petitioner will not be eligible for a refund of the EZ-ITC.

With respect to Issue 5, section 1115(z)(1) of the Tax Law provides an exemption from sales and use tax for tangible personal property purchased by a QEZE for use or consumption directly and predominantly in an Empire Zone with respect to which the QEZE is certified pursuant to Article 18-B of the General Municipal Law. Section 1115(z)(2) provides an exemption for tangible personal property purchased by a contractor, subcontractor, or repairman for use in erecting a structure or building of a QEZE, or adding to, altering, or improving real property, property, or land of a QEZE; provided that the tangible personal property becomes an integral component part of such structure, building, or property located in an Empire Zone with respect to which the QEZE is certified pursuant to Article 18-B of the General Municipal Law. See Technical Services Division Memorandum entitled *Qualified Empire Zone Enterprise (QEZE) Exemptions (Articles 28 and 29)*, July 24, 2002, TSB-M-02(5)S. Accordingly, if Petitioner becomes certified in the EZ and qualifies as a QEZE for purposes of section 1115(z), Petitioner and its contractors may purchase exempt from sales and use tax building materials that become an integral component part of Petitioner's new facility located in the EZ. It should be noted that there is no QEZE exemption from the local sales tax imposed by a city, county, or school district unless the locality has so provided in its local enactment. See section 1210(a)(1)(i) of the Tax Law.

In order for Petitioner to qualify for exemption from sales and use tax under section 1115(z) of the Tax Law, it must be certified under Article 18-B of the General Municipal Law and apply to the Tax Department for the issuance of a *Qualified Empire Zone Enterprise (QEZE) Sales Tax Certification* (Form DTF-81). See section 14(h) of the Tax Law. An enterprise that receives such Form DTF-81 may furnish vendors with a *QEZE Exempt Purchase Certificate* (Form ST-121.6) to make exempt purchases under section 1115(z). The *sales and use tax benefit period* for making exempt purchases under section 1115(z) consists of 120 consecutive months beginning on the first day of the month following the date of issuance of the DTF-81. Such period will not include any month falling within a taxable year immediately preceded by a taxable year with respect to which the business enterprise did not meet the employment test. See section 14(a)(2) of the Tax Law.

As part of the certification process with the Tax Department, a business enterprise must meet the employment test under section 14(b)(4) of the Tax Law, as discussed above. For purposes of the sales and use tax, the *base period* for a business enterprise that is first certified under Article 18-B on or after April 1, 2005, is defined as the three taxable years immediately preceding the business enterprise's test year. The *test year* is the last taxable year of the business enterprise ending before the test date. The *test date* for Petitioner will be the date prior to

July 1, 2011, on which Petitioner is first certified under Article 18-B. See sections 14(c)(3), (d), and (e) of the Tax Law.

If Petitioner becomes certified under Article 18-B of the General Municipal Law in 2008, Petitioner's test year will be 2007. Petitioner will have zero years in its base period and will be subject to the new business test under section 14(j) of the Tax Law. Pursuant to section 14(j), a *new business* is any corporation, except a corporation that is substantially similar in operation and ownership to a corporation subject to tax under Article 9-A, or previously subject to tax under Article 9-A. Accordingly, as determined above, since Petitioner is substantially similar in operation and in ownership to Beech-Nut, an Article 9-A taxpayer, Petitioner will not qualify as a new business under section 14(j) of the Tax Law. Therefore, Petitioner will not be eligible for exemption from sales and use tax under section 1115(z) of the Tax Law if it becomes certified in 2008.

If Petitioner becomes certified under Article 18-B of the General Municipal Law in 2009, Petitioner's test year will be 2008. Its base period will be the short taxable year that began in 2007. Accordingly, Petitioner will not have a base period of zero years. If the base period employment is greater than zero, Petitioner will not be subject to the "new business" requirement defined in section 14(j) of the Tax Law. For purposes of computing the base period employment, only individuals, excluding general executive officers, employed full-time by Petitioner for at least one-half of the taxable year are included, as provided in section 14(g) of the Tax Law. Provided that the base period employment is greater than zero Petitioner will be eligible for exemption from sales and use tax under section 1115(z) of the Tax Law if it becomes certified in 2009, and if Petitioner meets the employment test under section 14(b)4) of the Tax Law and receives Form DTF-81 from the Tax Department.

Section 1119(a)(6) of the Tax Law allows a refund or credit for the sales and compensating use tax paid "on the sale of tangible personal property purchased for use in constructing, expanding or rehabilitating industrial or commercial real property (other than property used or to be used exclusively by one or more registered vendors primarily engaged in the retail sale of tangible personal property) located in an area designated as an empire zone pursuant to article eighteen-B of the general municipal law, but only to the extent that such property becomes an integral component part of the real property." Petitioner's new facility in Montgomery County will be industrial real property and will be located in an Empire Zone. Accordingly, if Petitioner's purchases of the building materials for the facility are not otherwise exempt from tax, a refund or credit of sales or use tax paid on building materials that become an integral component part of the facility will be allowed under section 1119(a)(6). The refund or credit may only be claimed by the person who is liable for the tax due on the purchase of the qualifying tangible personal property. Generally, the contractor or subcontractors hired to construct the facility will purchase the qualifying tangible personal property and be entitled to claim the refund or credit. See *A Guide to Sales and Use Tax Incentives within Empire Zones*,

TSB-A-08(1)C
Corporation Tax
TSB-A-08(6)S
Sales Tax
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Publication 30 (2/01). It should be noted that the local sales tax imposed by a city, county or school district is not refundable pursuant to section 1119(a)(6) unless the locality has so provided in its local enactment. See section 1210(a)(1)(i) of the Tax Law; and *Empire Zones Sales and Use Tax Refund Rates*, Publication 718-EZ (2/07).

DATED: February 6, 2008

/s/
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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.